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# Animus in the Closet: Outing the Addiction Parallels in Anti-Gay Legal Rhetoric

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# Animus in the Closet: Outing the Addiction Parallels in Anti-Gay Legal Rhetoric

Elizabeth J. Levy\*

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## INTRODUCTION

The fundamental tragedy of addiction is that it fuses the human drive for pleasure with the capacity for self-annihilation.<sup>1</sup> Normally, pleasurable sensations encourage behavior that is essential for survival.<sup>2</sup> Addictive substances, in contrast, stimulate pleasure in the absence of corresponding survival cues.<sup>3</sup>

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1. Steven E. Hyman et al., *Neural Mechanisms of Addiction: The Role of Reward-Related Learning and Memory*, 29 ANN. REV. NEUROSCIENCE 565 (2006).

2. *Id.* at 570–71.

3. *Id.* at 571.

Addiction results when a substance user's urges to recapture these sensations becomes compelling enough to override her judgment.<sup>4</sup> As the substance's pleasurable effects begin to dominate a user's brain, she will disassociate from her survival instincts and become effectively enslaved to her cravings.<sup>5</sup> Like a malignancy, an addiction spreads through the user's life; in its most severe manifestations, an addict will give up everything, including ultimately herself, for it.<sup>6</sup>

In the courtroom, anti-gay advocates craft arguments against gay and lesbian civil rights by insinuating that homosexuality is essentially an addiction.<sup>7</sup> Like addicts, they say, gays and lesbians are controlled by their abnormal sexual cravings, and will engage in risky behavior in order to get high.<sup>8</sup> Courts should treat gays and lesbians like psychopaths, anti-gay advocates conclude, and should address homosexuality as a profound social threat.<sup>9</sup>

Anti-gay advocates suggest that, like an addiction, homosexuality consists of compulsive cravings for same-sex sexual intimacy—an antisocial and valueless type of sexual gratification. In a healthy individual, they say, sexual cravings facilitate mating with members of the opposite sex for the purpose of procreation.<sup>10</sup> Homosexuality is a pathology like an addiction, anti-gay advocates claim, because it entails a biological compulsion to engage exclusively in non-procreative, and therefore empty, sexual pleasure-seeking.<sup>11</sup> Just like anti-drug laws, they suggest, laws that create sanctions against sodomy serve the legitimate purpose of safeguarding the public from a scourge.<sup>12</sup>

Anti-gay advocates also argue that homosexuality is an acquired and socially transmissible condition, like drug addiction, and that gay and lesbian role models set damaging examples for children. Homosexuality is not a normal manifestation of sexuality, they assert.<sup>13</sup> Instead, individuals acquire same-sex sexual cravings by engaging in homosexual intimacy.<sup>14</sup> Children, they say, are likelier to become gay if they are exposed to role models who engage in same-sex sexual activity.<sup>15</sup> Just like children are at higher risk of developing drug addictions if exposed to role models who use illicit substances, this reasoning insinuates, children who are exposed to openly gay and lesbian role models are at higher risk of normalizing

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4. *Id.* at 570.

5. *Id.* at 576.

6. *See id.* at 566.

7. *See infra* Part I.C.

8. *See infra* Part I.C.

9. *See infra* Part I.C.

10. *See infra* Part I.C.1.

11. *See infra* Part I.C.1.

12. *See infra* Part I.C.1.

13. *See infra* Part I.C.2.

14. *See infra* Part I.C.2.

15. *See infra* Part I.C.2.

homosexuality, experimenting with it, and developing abnormal same-sex cravings.<sup>16</sup>

Anti-gay advocates additionally argue that the high rate of HIV among gay men demonstrates that homosexual sexual activity, like drug abuse, is a public health threat.<sup>17</sup> Like intravenous drug abusers, they claim, gay men compulsively engage in behavior that puts them at risk of contracting HIV.<sup>18</sup> Homosexuality is like an addiction, they conclude, because it entails pleasure-seeking behaviors that are self-destructive or deadly.<sup>19</sup>

Finally, anti-gay advocates say homosexuality is treatable<sup>20</sup> and is therefore a mutable trait. Just like addicts can learn to manage their cravings with therapy, they argue, gays and lesbians can ultimately overcome their homosexual urges and can develop healthy heterosexual attractions.<sup>21</sup> Society should encourage gays and lesbians to form these relationships by refusing to provide benefits to gay couples, such as the right to marry, they say.<sup>22</sup>

A cleverly packaged parallel is a timeless accessory for any argument. An analogy, drawn either implicitly or explicitly, functions as an intuitive stepping stone from an assumption to a conclusion. The analogy between homosexuality and substance abuse transmits several impressions: it suggests that same-sex sexual intimacy is addictive, it stereotypes gays and lesbians as mentally disturbed, and it characterizes homosexuality as a treatable pathology from which an individual can recover. In these respects, anti-gay advocates encourage us to instinctively view gays and lesbians through the lens of fear and disapprobation reserved for methamphetamine dealers, intoxicated drivers, homeless crack cocaine addicts, and others whose lives are defined by addiction.

This Note analyzes how the pathology, etiology, morbidity, and treatment frameworks of addiction are used in arguments against gay and lesbian civil rights and argues that the insinuation that homosexuality is like an addiction is hateful. Part I discusses arguments that justify discrimination against gays and lesbians by analogizing homosexuality to addiction. Part II explores how these arguments incorporate and distort scientific research. Part III explains why homosexuality-addiction analogies are baseless and how they perpetuate a stereotype of gays and lesbians as psychopaths, and contends that arguments applying this analogy are rooted in animus and should be rejected by courts.

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16. See *infra* Part I.C.2.

17. See *infra* Part I.C.3.

18. See *infra* Part I.C.3.

19. See *infra* Part I.C.3. Many of the addiction analogies discussed in this paper refer exclusively to men, but nonetheless are applicable to homosexuality more generally.

20. See *infra* Part I.C.4.

21. See *infra* Part I.C.4.

22. See *infra* Part I.C.4.

## I. HOMOSEXUALITY-ADDICTION ANALOGIES

*A. Addiction*

Addiction can be loosely defined as a chronic impairment of self-control over a reward-seeking behavior.<sup>23</sup> Neurochemically, addiction consists of a synchronous disturbance of the circuits governing reward, motivation, memory, and decision making.<sup>24</sup> In normal individuals, these neural circuits facilitate behaviors that work towards self-preservation.<sup>25</sup> In an addict, these drives become “hijacked by a user’s drug (or drugs) of choice.”<sup>26</sup> Addictive substances and behaviors stimulate an abnormal reward “high” that is perceived subjectively by the individual, as one heroin user described it, as a “surge of astonishing pleasure.”<sup>27</sup> Whether an individual ultimately becomes addicted to a substance depends on the substance’s habit-forming properties and the user’s susceptibility.<sup>28</sup>

Researchers theorize that an addiction develops when impulses to engage in a pleasure-seeking behavior, called cravings, override the desire to pursue other survival objectives, such as mating or obtaining food.<sup>29</sup> Cravings are the result of interplay between memory, reward circuits, and higher-order executive function.<sup>30</sup> The initial uses of a drug create pleasurable memories that outweigh pleasure experienced from non-drug use activity.<sup>31</sup> In an effort to recreate the pleasurable experience, the user will seek to consume more of the drug.<sup>32</sup> Users may progressively require higher amounts of the drug in order to achieve the desired sensation.<sup>33</sup> Conversely, quitting the drug may induce unpleasant symptoms.<sup>34</sup>

An addict will often continue to use a substance despite the potential for catastrophic outcomes.<sup>35</sup> Some researchers maintain that an addiction comprises a neurochemical impairment of impulse control and self-regulation such that drug-seeking behavior becomes essentially involuntary.<sup>36</sup> As an addiction progresses,

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23. Hyman et al., *supra* note 1, at 567. The inclusion of behaviors under the umbrella of addictions is controversial. See Grant et al., *The Neurobiology of Substance and Behavioral Addictions*, 11 CNS SPECTRUMS 924 (2006) (discussing the exclusion of behavioral addictions from substance addictions, and the neurobiological links).

24. Hyman et al., *supra* note 1, at 570–88.

25. *Id.* at 570.

26. Nora D. Volkow et al., *Addiction: Pulling at the Neural Threads of Social Behaviors*, 69 NEURON 599, 599 (2011).

27. GENE M. HEYMAN, ADDICTION: A DISORDER OF CHOICE 28, 47 (2009), (citing BILL HANSON, LIFE WITH HEROIN: VOICES FROM THE INNER CITY 22–23 (1985)).

28. Hyman et al., *supra* note 1, at 567–68, 570.

29. *Id.* at 567.

30. *Id.* at 569–70.

31. *Id.* at 566, 571.

32. *Id.* at 571.

33. *Id.* at 567–68.

34. *Id.*

35. *Id.* at 566.

36. See, e.g., Todd F. Heatherton & Dylan D. Wagner, *Cognitive Neuroscience of Self-Regulation*

the user becomes increasingly desensitized to the medical, financial, and social repercussions of using the drug.<sup>37</sup> Ultimately, an addict may be unable to stop the drug even if faced with the catastrophic consequences of continuing to use it.<sup>38</sup>

Addiction imposes a tremendous social burden.<sup>39</sup> Addiction-related expenses are believed to total around \$500 billion each year, including costs of medical care, productivity losses, and the drain on social welfare programs.<sup>40</sup> Still, even this estimate fails to accurately represent the breadth of addiction's social devastation, as it is impossible to calculate the cost of abandoned educations, estranged familial relationships, and lives lost.

Due to the profoundly damaging effects of addiction, substance use is treated as a strange duality: it is both medicalized and punished.<sup>41</sup> Like other disorders, addiction is characterized as a deviation from normal functioning with a set of distinguishing physiological characteristics, underlying causes, associated illnesses, and treatments.<sup>42</sup> Additionally, it is illegal for an individual "to use, possess, manufacture, or distribute drugs classified as having a potential for abuse," even in the absence of other criminal activity.<sup>43</sup>

### *B. Homosexuals as Psychopathic Criminals*

Like substance abuse, homosexuality has historically been condemned as both a mental illness and a crime.<sup>44</sup> In the first edition of the Diagnostic and Statistical Manual (DSM) published in 1952, homosexuality was formally defined as a form of psychopathy.<sup>45</sup> Like an addict, a homosexual was thought to represent "irresistible impulse incarnate."<sup>46</sup> Gays and lesbians were consequently deemed to be incapable of behaving rationally due to their pathological sexual impulses.<sup>47</sup> At this time, all states had "sexual psychopath" laws criminalizing same-sex sexual activity.<sup>48</sup>

*Failure*, 15 TRENDS COGNITIVE SCI. 132, 135 (2011) (describing addiction as a self-regulatory failure).

37. See Volkow et al., *supra* note 26, at 600.

38. See *id.*

39. See *id.*

40. *Id.* at 599.

41. HEYMAN, *supra* note 27, at 1–2.

42. See, e.g., Hyman et al., *supra* note 1.

43. *Drugs and Crime*, U.S. BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=35> (last visited Dec. 26, 2012).

44. Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 170 (2008) (discussing the use of the psychiatric concept of psychopathy in criminalization of homosexuality).

45. See HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS 57 (1997). Specifically, homosexuality was defined as a form of "Sexual Deviation." *Id.*

46. Schmeiser, *supra* note 44, at 170.

47. *Id.*

48. See, e.g., *History of Sodomy Laws*, GAY & LESBIAN ARCHIVES PAC. NW., <http://www.glapn.org/sodomylaws/history/history.htm> (last updated Apr. 15, 2007).

In the 1970s, an internal dispute within the psychiatric profession over the content of the DSM collided with the burgeoning gay and lesbian civil rights movement.<sup>49</sup> Gay-rights advocates seeking to remove homosexuality from the DSM successfully argued that homosexuality was an “alternative lifestyle” rather than a psychiatric disorder.<sup>50</sup> However, this strategy backfired: anti-gay activists portrayed the homosexual “lifestyle” as a decision to participate in immoral sexual activity.<sup>51</sup> In the landmark 1986 case *Bowers v. Hardwick*, the Supreme Court supported the view that engaging in homosexual activity is essentially a “moral choice” and upheld a Georgia statute criminalizing homosexual sodomy.<sup>52</sup>

In the 1990s, the debate over the nature of homosexuality was framed for the first time in the light of genetic predetermination.<sup>53</sup> For gay and lesbian civil rights advocates, evidence of inherited origins provided a foundation for arguing that homosexual attraction was not something that a person could choose to change, and that same-sex orientations actually constituted a natural biological variant of human sexuality.<sup>54</sup> As a result, the “lifestyle” rhetoric that had come into vogue during the 1970s fell out of favor, and anti-gay advocates needed to reinvent the language for condemning homosexuality.<sup>55</sup> By arguing that homosexuality is like an addiction, anti-gay advocates could affirm a biological origin for same-sex sexual orientation while preserving behavior-based rationales for arguments against gay and lesbian civil rights. The homosexuality-addiction analogy, described in Part I.C below, has consequentially become a centerpiece of recent anti-gay legal rhetoric.

### C. The Homosexuality-Addiction Analogy

The psychopath-criminal model of homosexuality survives today in anti-gay arguments, rhetorically closeted in addiction language by activists seeking to safeguard it from the withering stare of social progress. Instead of calling homosexuals psychopaths, opponents of gay rights wildly gesticulate toward psychopathy by equating homosexuals with a modern-day version of disturbed,

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49. See KUTCHINS & KIRK, *supra* note 45, at 60–76.

50. See *id.* at 65–70, 77; see also Larry Mutz, *A Fairy Tale: The Myth of the Homosexual Lifestyle in Anti-Gay-and-Lesbian Rhetoric*, 27 WOMEN’S RTS. L. REP. 69, 72 (2006).

51. Mutz, *supra* note 50, at 72–73.

52. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

53. See Dean Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321, 321 (1993). See generally DEAN HAMER & PETER COPELAND, *THE SCIENCE OF DESIRE: THE SEARCH FOR THE GAY GENE AND THE BIOLOGY OF BEHAVIOR* (1994) (detailing Hamer’s research into the genetic origins of male homosexuality through a first-hand account).

54. See Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1520 (2009) (“[T]he main-streaming of LGBT politics evident in *Lawrence* and the marriage litigation has mobilized the argument that gays are just like straights, only (benignly) different.”).

55. *Id.*

antisocial degenerates: druggies.<sup>56</sup> They insinuate that to the extent that the pathology, developmental origins, associated illnesses, and treatments of addiction can be retrofitted to homosexuality, it is logical for the law to treat gays and lesbians like it treats addicts—as brain-diseased criminals.<sup>57</sup>

First, anti-gay advocates suggest that homosexual sexual activity induces pathological highs. The compulsive and self-destructive nature of same-sex sexual behavior, they claim, justifies sodomy laws.<sup>58</sup> More recently, the argument that sexual encounters between people of the same sex are a fundamentally antisocial form of pleasure seeking has been used to justify denying gay and lesbian couples the right to marry.<sup>59</sup>

Second, anti-gay advocates have claimed that same-sex compulsions are abnormally acquired. More specifically, they suggest that homosexual sexual activity, like drug use, can be encouraged through role-modeled behavior.<sup>60</sup> It is therefore dangerous, they say, to permit gays and lesbians to have custody of children.<sup>61</sup>

Third, anti-gay advocates argue that homosexuality and addiction pose health and social risks. Just as the law may seek to prevent drug use, they argue, the law may also discourage homosexual sexual gratification.<sup>62</sup>

Finally, anti-gay advocates argue that homosexuality is a mutable trait and ought not be regarded as a protected class. Like an addiction, they say, homosexuality is a “treatable” condition of compulsive, pathological pleasure seeking.<sup>63</sup>

In the following sections, this Note will explore the reasoning underlying each of these arguments and will analyze examples of their inclusion in modern anti-gay legal rhetoric.

### 1. “It’s a Pleasure”: Pathology

Pathology is the study of the nature of disease, particularly the structural and functional aberrations that distinguish a disease as an abnormal condition.<sup>64</sup> In justification of laws prohibiting sodomy, anti-gay advocates argue that non-

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56. See Nancy J. Knauer, *Science, Identity, and the Construction of the Gay Political Narrative*, 12 L. & SEXUALITY 1, 49–50 (2003).

57. Legislative approaches to addiction and drug addicts are often medically inappropriate and unjust, and have led to an untenable situation. See André Douglas Pond Cummings, “All Eyes on Me”: *America’s War on Drugs and the Prison-Industrial Complex*, 15 J. GENDER RACE & JUST. 417, 448 (2012).

58. See *infra* Part I.C.1.

59. See *infra* Part I.C.1.

60. See *infra* Part I.C.2.

61. See *infra* Part I.C.2.

62. See *infra* Part I.C.3.

63. See *infra* Part I.C.4.

64. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1336 (29th ed. 2000) [hereinafter MEDICAL DICTIONARY].



heteronormative sexual intimacy is comparable to addictive substance use and that homosexuals exhibit pathological cravings and out-of-control behavior.

This argument was applied in the now-overruled *Bowers v. Hardwick*.<sup>65</sup> As the Georgia Attorney General argued in a petitioner's brief, it was rational for Georgia to punish sodomites to discourage individuals from engaging in abnormal forms of sexual gratification.<sup>66</sup> As the brief explained, "homosexual sodomy as an act of sexual deviancy expresses no ideas. It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong."<sup>67</sup> The petitioner strongly suggested that homosexual sexual intimacy is like a drug. By arguing that sodomy is an "unnatural means of satisfying an unnatural lust," the petitioner claimed that an act of sodomy functions like a mind-altering substance by abnormally satiating ("unnatural means of satisfying") an abnormal neurochemical drive for sexual pleasure ("an unnatural lust").<sup>68</sup>

Echoing these justifications for anti-drug laws, the Supreme Court held in favor of the petitioner.<sup>69</sup> Explaining that the right to privacy did not extend to criminal activity, the Court explicitly analogized homosexual sexual acts to drugs.<sup>70</sup> The Court reasoned that, like sodomy, "crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home."<sup>71</sup> Just as the law may legitimately punish individuals who use addictive substances, the Court implied, the law may also punish individuals who engage in habit-forming, antisocial acts of homosexual sexual intimacy.

In a brief on behalf of Texas in *Lawrence v. Texas*, the Center for Arizona Policy (CAP) and the Pro-Family Network (PFN) argued that Texas may ban sodomy based on the presumption that homosexuals, like addicts, have incessant cravings and poor impulse control.<sup>72</sup> In their brief, CAP and PFN addressed the scientific validity of an opposing brief by the American Psychological Association, (APA) denying that homosexuality had any "inherent association with psychopathological conditions."<sup>73</sup>

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65. See Brief of Petitioner Michael J. Bowers, Attorney Gen. of Ga., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), 1985 WL 667939, at \*27 [hereinafter Brief of Petitioner Michael J. Bowers].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Bowers*, 478 U.S. at 195–96.

70. *Id.* at 195.

71. *Id.*

72. See Brief for Center for Arizona Policy and Pro-Family Network as Amici Curiae Supporting Respondents, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 367560, at \*6–7 [hereinafter Brief of CAP & PFN].

73. *Id.* at \*2 (discussing Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners, *Lawrence*, 539 U.S. 558 (No. 02-102), 2003 WL 152338.

Gay men are sexually obsessed, CAP and PFN countered.<sup>74</sup> CAP and PFN criticized the APA's reliance on a well-known 1957 study by Evelyn Hooker demonstrating that gay men have psychopathological profiles indistinguishable from comparably situated straight men.<sup>75</sup> Properly analyzed, they said, Hooker's test actually showed "a highly significant statistical association between homosexuality and obsessive sexual fantasy," and that gay men are "unable to control their homosexual fantasies even in 'non-erotic situations.'"<sup>76</sup> Like addicts, CAP and PFN implied, homosexuals are incapable of imagining anything but the next high.

In a brief filed on behalf of the Boy Scouts of America in *Boy Scouts of America v. Dale*, the Family Research Council (FRC) argued that the Scouts' ban on openly gay men was reasonable because homosexuals, like addicts, will commit depraved acts to satisfy their uncontrollable urges.<sup>77</sup> In this case, a Scout leader sued the Boy Scouts of America after being expelled from the Scouts following his disclosure of his orientation in an interview with a local newspaper.<sup>78</sup>

The Scouts' policy banning homosexuals, the FRC argued, merely reflected the reality that gay men engage in antisocial behavior to satisfy their urges. In particular, they will prey upon children, the FRC argued: "The [Boy Scouts of America]'s policy," the FRC argued, "is not arbitrary 'invidious discrimination.' It is based on significant credible evidence that the intimate association that exists between Scouts and Scout leaders has been exploited by hundreds of homosexual pedophiles to sexually abuse thousands of boys."<sup>79</sup> Although the FRC denied equating homosexuality with pedophilia, they nonetheless argued that child predators are typically homosexual.<sup>80</sup> The FRC argued that "although homosexuals account for less than two percent of the population, they constitute about a third of child molesters," and "[t]eachers who practice homosexual acts are between 90 to 100 times more likely to involve themselves sexually with pupils than teachers who confine themselves to heterosexual acts."<sup>81</sup>

The FRC warned that some gay men would seek to enter the Scouts for the very purpose of molesting children in pursuit of sexual gratification.<sup>82</sup> They claimed that homosexual men who would choose to take positions of leadership

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74. *Id.* at \*6–7.

75. *Id.* (citing Thomas Landess, *The Evelyn Hooker Study and the Normalization of Homosexuality*, 5 NARTH BULL. 8 (1997), and discussing Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 19 (1957)).

76. *Id.*; Brief of CAP & PFN is discussed *infra* Part II.

77. See Brief of Family Research Council as Amicus Curiae in Support of Petitioners, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (No. 99-699), 2000 WL 228552 [hereinafter Brief of Family Research Council].

78. *Boy Scouts of America*, 530 U.S. at 645.

79. Brief of Family Research Council, *supra* note 77, at 25–26.

80. *Id.* at 23.

81. *Id.*

82. *Id.* at 26.

over boys are deliberately situating themselves in proximity to the object of their cravings.<sup>83</sup> The inevitable conclusion, the FRC said, is that “[i]f the [Boy Scouts of America] is forced to include as members, men whose sexual preference is for other men, it is inevitable that more men whose sexual preference is for boys will enter through the same door.”<sup>84</sup> Homosexuals are mentally disturbed, the FRC suggested, in such a way that renders them willing to commit unconscionable acts for the purpose of achieving a high.

In *Perry v. Brown*, the defendant-intervenors had sought to justify a California law excluding gay and lesbian couples from the benefits of marriage by arguing that heterosexual intimacy is survival driven, and that same-sex sexual intimacy consists of corrupted pleasure-seeking.<sup>85</sup> Like recreational substance abuse, the *Perry* defendant-intervenors suggested, gay sexual encounters are socially worthless and biologically dangerous.<sup>86</sup> First, the defendant-intervenors asserted that marriage has existed for millennia as a socially protected conduit for bearing and raising children.<sup>87</sup> Heterosexual vaginal intercourse, they said, is a socially valuable form of sexual stimulation because it often results in insemination and potential pregnancy of the female partner.<sup>88</sup> Gay and lesbian sexual encounters, the defendant-intervenors protested, are valueless; they consist of orgasms without the possibility of impregnation.<sup>89</sup> Legalizing same-sex marriage, they said, would shift “the focus of marriage from serving vital societal needs . . . to facilitating the personal fulfillment of individuals.”<sup>90</sup>

The defendant-intervenors argued that homosexual activity represents a corrupted and destructive survival mechanism. The function of marriage, the defendant-intervenors said, “is, and has always been, in the words of the California Supreme Court, to ‘channel biological drives that might otherwise become socially destructive’ into enduring family units.”<sup>91</sup> For this reason, the defendant-intervenors said, permitting same-sex marriage would threaten the survival of the human race.<sup>92</sup> Marriage, they explained, “serves a vital and universal societal purpose—a purpose, indeed, that makes marriage, as the Supreme Court has repeatedly emphasized, *‘fundamental to the very existence and*

83. *Id.*

84. *Id.* at 22.

85. See Brief for Defendant-Intervenors-Appellants, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696), 2010 WL 3762119, at \*69.

86. See *id.* at \*93–104.

87. *Id.* at \*1–4.

88. See, e.g., *id.* at \*86 (noting “the unique potential for relationships between men and women to produce children ‘by accident’”).

89. See, e.g., *id.* at \*8. Homosexual relationships are not “potentially procreative sexual relationships.” *Id.*

90. *Id.* at \*98.

91. *Id.* at \*2 (citing *De Burgh v. De Burgh*, 250 P.2d 598, 601 (Cal. 1952)).

92. *Id.* at \*1–8. For example, the defendant-intervenors argue that the purpose of marriage is “to channel potentially procreative sexual relationships into enduring, stable unions.” *Id.* at \*8.

*survival of the [human] race.*”<sup>93</sup> Like an addiction, the defendant-intervenors implied, cravings for homosexual sexual intimacy represent destructive drives for pleasure. Just like laws penalizing drug use, they suggested, laws restricting marriage to heterosexual relationships protect society from the hedonistic scourge of same-sex sexual activity.

## 2. “Try It, You’ll Like It”: Etiology

Etiology is the study of the causes of disease, including both how diseases develop and how they are transmitted.<sup>94</sup> Addiction is regarded as a socially transmissible disorder, such that the risk of substance abuse rises with exposure to peers and role models who use drugs.<sup>95</sup> Anti-gay advocates argue that homosexuality is not a normal, healthy manifestation of human sexual expression. Instead, they say, it is *acquired*. More specifically, they portray homosexuality, like drug addiction, as a socially transmissible pathology of habitual sexual pleasure seeking.

First of all, anti-gay advocates suggest, gay individuals were not born homosexual; they developed homosexuality in association with choices to engage in same-sex sexual intimacy. As ChristianLibrary.org author Mark Copeland writes, the “Formula for Producing a Homosexual” is as follows:

A Predisposition  
Toward Homosexuality  
**Plus**  
That First  
Homosexual Experience  
**Multiplied By**  
Pleasurable and Positive  
Homosexual Thoughts  
**To Which Is Added**  
More Homosexual  
Experiences  
**Multiplied By**  
More Pleasurable  
Thoughts  
-----  
A Homosexual<sup>96</sup>

In this formula, Copeland suggests that homosexuality consists of progressive disturbance of neurocircuitry: the pleasurable memories of same-sex

93. *Id.* at \*1–2 (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

94. MEDICAL DICTIONARY, *supra* note 64, at 626.

95. See, e.g., Andrew E. Clark & Youenn Lohéac, “*It Wasn’t Me, It Was Them!*” *Social Influence in Risky Behavior by Adolescents*, 26 J. HEALTH ECON. 763, 764 (2007).

96. MARK COPELAND, *HOMOSEXUALITY: A CHRISTIAN PERSPECTIVE* 14–15 (2001), available at [http://www.christianlibrary.org/authors/Mark\\_A\\_Copeland/hom/hom.pdf](http://www.christianlibrary.org/authors/Mark_A_Copeland/hom/hom.pdf).

encounters create the consequential desire to seek additional homosexual experiences, just as addiction consists of the compulsion to acquire and use an addictive substance that is driven by memories of attaining reward.<sup>97</sup>

The view that homosexuality is behavioral in origin has been echoed in the political arena. In a 2010 interview, then-senate hopeful Ken Buck explained that “birth has an influence over [homosexuality], like alcoholism and some other things, but I think that basically you have a choice.”<sup>98</sup> By drawing a comparison to alcoholism, Buck suggests that a homosexual orientation results in predisposed individuals who then choose to engage in same-sex sexual activity. The “choice” to engage in homosexual activity results in part due to the alleged inherent addictiveness of homosexual behavior. Commenting on Ken Buck’s analogy of homosexuality to alcoholism, a social policy analyst from the conservative organization Focus on the Family explained in a newspaper interview that “[a]lcohol affects your whole body, and so does sexual behavior. The highly addictive (aspect of both) is an apt comparison.”<sup>99</sup>

More critically, the view that homosexuality is abnormal and inducible, specifically through role modeling, has been supported by the Supreme Court. In *Boy Scouts of America v. Dale*, the Supreme Court’s opinion in favor of the Scouts was based in part on the assumption that homosexuality is an abnormal behavior that can be encouraged through role modeling.<sup>100</sup> To justify their exclusion of homosexuals, the Scouts argued that their opposition to homosexuality constituted a component of their expressive message, specifically that homosexual behavior is neither “morally straight” nor “clean.”<sup>101</sup> The Scouts explained that permitting openly gay men to be members would “promote homosexual conduct as a legitimate form of behavior” to young boys.<sup>102</sup> In other words, the Scouts argued, exposure to gay Scout leaders as role models might cause boys to develop homosexual orientations.

Underlying the Court’s ruling in favor of the Scouts is the idea that homosexuality is not a normal developmental variant, but is instead an acquired condition. Noting that the Scouts’ purpose was to “instill values in young people,” the Court explained that “the Boy Scouts seeks to instill these values by having its

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97. *Id.* at 16.

98. Kristin Wyatt, *Colorado GOP Senate Hopeful Stands by Gay Remark*, BOSTON GLOBE (Oct. 17, 2010), [http://www.boston.com/news/politics/articles/2010/10/17/colo\\_senate\\_hopeful\\_fires\\_back\\_at\\_flip\\_flop\\_claim](http://www.boston.com/news/politics/articles/2010/10/17/colo_senate_hopeful_fires_back_at_flip_flop_claim); see also Mark Barna, *Buck’s Gay Comments Not Uncommon Among Springs Ministry Leaders*, GAZETTE (Colo.) (Oct. 18, 2010, 7:40 PM), <http://www.gazette.com/articles/comments-106578-bennet-buck.html> (“But Buck’s views are closer to the mainstream in Colorado Springs. For years conservative Springs ministry leaders have compared alcoholism to homosexuality.”).

99. Barna, *supra* note 98.

100. See *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000).

101. *Id.* at 641, 645.

102. *Id.* at 641.

adult leaders spend time with the youth members.”<sup>103</sup> In noting this, the Court suggested that boys who spend time with gay leaders may receive the expressed message that homosexuality is an acceptable value. Specifically, the Court said that “during the time spent with the youth members, the scoutmasters and assistant scoutmasters inculcate them with the Boy Scouts’ values—both expressly and by example.”<sup>104</sup> The danger of exposing boys to gay role models and instilling the value that homosexuality is normal, the Court implied, is that susceptible boys may begin to act on this value by engaging in homosexual sexual activity and eventually becoming gay. Homosexuality is not a healthy manifestation of sexuality, the Court suggested, but is instead an acquired desire for an abnormal sexual pleasure.<sup>105</sup> Just like substance addictions are associated with exposure to drug-abusing role models,<sup>106</sup> the Court hinted, boys who are taught to emulate gay men may normalize, experiment with, and develop cravings for homosexual sex.

Finally, the claim that exposure to homosexuality is an acquired and destructive form of sexual pleasure seeking has also been used to object to the adoption of children by gay and lesbian couples. In *Lofton v. Secretary of the Department of Children and Family Services*, the Eleventh Circuit upheld a Florida ban on gay adoption based in part on the notion that being raised by a gay or lesbian couple would be hazardous to a child’s sexual development.<sup>107</sup> Deferring to the Florida legislature’s rationale for the ban, the Court concurred that it would be rational for the legislature to surmise that even a single heterosexual individual would likely provide better sexual developmental guidance to children than a homosexual couple, saying that “the legislature could rationally act on the theory that heterosexual singles . . . are better positioned than homosexual individuals to provide adopted children with education and guidance relative to their sexual development throughout pubescence and adolescence.”<sup>108</sup>

In a brief, the Florida state legislature detailed its specific concern that children exposed to what the court referred to as “education and guidance” by gays and lesbians are more likely to develop a homosexual orientation.<sup>109</sup> Specifically, the legislature refuted data that children raised by gay or lesbian parents fare as well psychologically as their counterparts raised by heterosexuals. Rather, they argued, a child raised by gay or lesbian parents has an “increased likelihood of the child’s developing a homosexual sexual orientation.” As a result

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103. *Id.* at 649.

104. *Id.* at 649–50.

105. *Id.*

106. See, e.g., Hein de Vries et al., *Parents’ and Friends’ Smoking Status as Predictors of Smoking Onset: Findings From Six European Countries*, 18 HEALTH EDUC. RES. 627, 630–31 (2003).

107. *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F. 3d 804, 822 (11th Cir. 2004).

108. *Id.*

109. Brief for the Honorable R.J. Ball et al., *Twenty-One Members of the Legislature of the State of Florida as Amici Curiae Supporting Appellees* at 16–19, *Lofton*, 358 F.3d 804 (No. 01-16723), 2002 WL 32868746.

of this likelihood, the legislature said, children must be safeguarded from exposure to gays and lesbians, “[g]iven the unfortunate correlation of homosexual sexual behavior with increased rates of depression, substance abuse, and even suicidal ideation.”<sup>110</sup> The legislature implied that homosexuality is neither natural nor benign. Rather, it said, like an addiction, a homosexual orientation constitutes an abnormal, acquired appetite for self-destructive pleasurable stimulation.

### 3. “Heroin Users and Homosexuals”: Comorbidity<sup>111</sup>

“Morbidity” is a broad term used to reference one or more unhealthy conditions.<sup>112</sup> Addiction is associated with numerous comorbidities (compromises in health associated with a particular condition), especially due to the risks of infectious disease transmission posed by needle sharing.<sup>113</sup> In particular, addiction is correlated with HIV.<sup>114</sup> In 1982, during the inception of the HIV pandemic, the CDC identified the “4H’s” then believed to be at highest risk for contracting and spreading the deadly immune disorder, including Haitians, hemophiliacs, homosexuals, and heroin addicts.<sup>115</sup> In the United States today, the prevalence of HIV among both intravenous drug abusers and gay men remain starkly elevated above that of the general population.<sup>116</sup>

Homosexuality poses a health threat, anti-gay advocates say, because of its associated morbidity. They argue that the higher rate of HIV and other disorders among gay men demonstrates that men who engage in physical intimacy with other men are like addicts: they willingly self-destruct in the course of getting high. Homosexual relationships, they conclude, are deadly. Just as the law may punish drug users for the purpose of protecting public health, anti-gay advocates say, so may the law punish individuals who engage in homosexual sexual intimacy.

For example, in their brief on behalf of Texas in *Lawrence v. Texas*, Amici CAP and PFN implied that the high rate of HIV among gay men means that homosexual sexual intimacy is a dangerous form of pleasure seeking.<sup>117</sup> Specifically, they suggested that men who are attracted to other men invariably engage in anal sexual intercourse, a particularly efficient means of HIV

110. *Id.* at 2.

111. Robert C. Gallo, *A Reflection on HIV/AIDS Research After 25 Years*, 3 RETROVIROLOGY 72, 72 (2006).

112. MEDICAL DICTIONARY, *supra* note 64, at 383.

113. NAT’L INST. ON DRUG ABUSE, NIDA DRUGFACTS: HIV/AIDS AND DRUG USE: INTERTWINED EPIDEMICS 1 (May 2012), available at [http://www.drugabuse.gov/sites/default/files/drugfacts\\_hiv\\_aids\\_0.pdf](http://www.drugabuse.gov/sites/default/files/drugfacts_hiv_aids_0.pdf).

114. Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982, at C1.

115. Gallo, *supra* note 111.

116. *HIV in the United States: At a Glance*, CENTERS FOR DISEASE CONTROL & PREVENTION (Dec. 19, 2012), <http://www.cdc.gov/hiv/resources/factsheets/us.htm>.

117. See Brief of CAP & PFN, *supra* note 72, at 18.

transmission.<sup>118</sup> The Amici explained that Texas could therefore seek to ban *all* homosexual sexual intimacy because lawmakers could “contemplate the higher rates of sexually transmitted diseases which are related to certain sexual behaviors.”<sup>119</sup>

In his *Lawrence* dissent, Justice Scalia acknowledged the Amici’s argument that individuals who engage in homosexual sexual acts are dangerous.<sup>120</sup> Scalia explained that “many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home.”<sup>121</sup> Scalia noted that “they view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.”<sup>122</sup> Like addicts, Scalia implied, gays and lesbians engage in pleasure-seeking behavior that is antisocial and harmful. Consequently, he suggested, they are ill equipped to function in social roles requiring integrity, responsibility, and safety.

Scalia more explicitly analogized homosexuality to addiction in his dissent in *Romer v. Evans*.<sup>123</sup> In *Romer*, the Supreme Court held that a Colorado state constitutional amendment making it difficult for gays and lesbians to secure additional public protection against discrimination was federally unconstitutional.<sup>124</sup> In his dissent, Justice Scalia equated the standard of review for a law discriminating against gays and lesbians as a class to the standard that would be appropriate for a law discriminating against recovering addicts for purposes of public safety.<sup>125</sup> A sexual orientation-based classification does not violate the Equal Protection Clause, Scalia argued “[j]ust as a policy barring the hiring of methadone users as transit employees does not violate equal protection simply because *some* methadone users pose no threat to passenger safety.”<sup>126</sup> Underlying Scalia’s analogy is the implication that gays and lesbians also pose safety risks, and that it is reasonable for legislators to discriminate against them accordingly.

In *Kansas v. Limon*, the State of Kansas claimed in a supplemental brief that laws discriminating against homosexuality are justifiable because they protect society from the risk of fatal disease posed by homosexual sexual intimacy.<sup>127</sup> In this statutory rape case, a teenage boy who had been sexually active with another male adolescent sought the benefit of a law intended to reduce the legal penalty

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118. *Id.* at 18–19.

119. *Id.*

120. *Lawrence v. Texas* 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

121. *Id.*

122. *Id.*

123. *See Romer v. Evans*, 517 U.S. 620, 637–53 (1996) (Scalia, J., dissenting).

124. *Id.* at 637.

125. *Id.* at 642.

126. *Id.* (citing *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568 (1979)).

127. Supplemental Brief of Appellee at 11–12, *Kansas v. Limon*, 122 P.3d 22 (Kan. 2005) (No. 00-85898-S), 2004 WL 1646974, at \*8.



imposed on teenagers who engage in consensual sexual activity.<sup>128</sup> Asserting that the defendant should not receive the benefit of the law, the appellee argued that applying this benefit to homosexual intimacy would encourage deadly pleasure-seeking behavior.

The appellee urged the Court to consider that the state has “a heightened interest in allowing greater proscription of homosexual conduct in light of the potential, and routinely deadly, consequences of engaging in such a relationship.”<sup>129</sup> The appellee stated that “[t]he contemporary plague of AIDS alone supports the legitimate exercise of governmental police power to not extend this benefit to homosexual teens.”<sup>130</sup> By arguing that the risk of HIV suffices as a justification for denying gay teenagers a benefit afforded to straight teenagers who engage in comparably risky behavior, the appellee suggested that heterosexuality generally leads to beneficial forms of pleasure seeking, whereas homosexuality leads to acts that are pathological. More specifically, the appellee implied that homosexual intimacy can be analogized to intravenous drug abuse: a means of getting high that has deadly risks.

#### 4. “In Recovery”: Treatment and Mutability

“Treatments” are defined as interventions that are performed for the purpose of resolving disease processes or for symptomatic management.<sup>131</sup> In general, addiction treatment modalities seek to address the complex biological, psychological, and social factors that encourage compulsive drug use. Standards of care for addiction management emphasize cognitive-behavioral as well as pharmaceutical approaches.<sup>132</sup> “Twelve-step” group programs developed from the Alcoholics Anonymous (AA) model are particularly popular.<sup>133</sup>

Addictions are notoriously difficult to overcome, even with motivation and professional care.<sup>134</sup> Some individuals are successful in achieving long-term remission in the absence of formal treatment.<sup>135</sup> Individuals who achieve sobriety and remain abstinent are described as being “in recovery” rather than as having been “cured,” and individuals in recovery may relapse.<sup>136</sup>

The public discourse over the nature of homosexuality has frequently focused on the nature of sexual orientation itself, particularly whether it is

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128. *Id.* at \*1, \*4.

129. *Id.* at \*11–12.

130. *Id.* at \*12–13.

131. MEDICAL DICTIONARY, *supra* note 64, at 1868.

132. NANCY C. ANDREASEN & DONALD W. BLACK, INTRODUCTORY TEXTBOOK OF PSYCHIATRY 418 (3d ed. 2001).

133. *Id.*

134. Volkow et al., *supra* note 26, at 600.

135. HEYMAN, *supra* note 27, at 56–63.

136. *See, e.g.*, Volkow et al., *supra* note 26, at 602.

something that can be changed through willpower.<sup>137</sup> In recent years, the debate over legal equality for gays and lesbians has likewise centered on the question of whether or not sexual orientation is mutable, and consequentially whether or not gays and lesbians ought to be regarded as a suspect class.<sup>138</sup> Anti-gay advocates have suggested that, like substance addicts, gays and lesbians can choose to overcome their same-sex attractions, and therefore laws discriminating against homosexuals are not deserving of strict scrutiny.

Laws discriminating against groups of individuals according to suspect classifications, such as race and national origin, are evaluated under strict scrutiny, the most stringent standard of judicial review.<sup>139</sup> Strict scrutiny requires that a governmental action be justified by a compelling interest, be narrowly tailored to achieve that interest, and implement the least restrictive means possible.<sup>140</sup> Although the definitive criteria for identifying suspect classifications have never been enumerated, under *Lyng v. Castillo*, laws discriminating against classes defined according to traits that are immutable are appropriately judged according to a standard of strict scrutiny.<sup>141</sup>

Gay-rights advocates have historically argued that sexual orientation is immutable and should be regarded as a suspect classification, and that laws discriminating against gays and lesbians merit review under a standard of strict scrutiny.<sup>142</sup> Notably, the position that homosexuality is immutable was articulated over twenty years ago in a 9th Circuit concurrence by Judge William Norris in *Watkins v. United States Army*; Norris explained that “[a]lthough 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.”<sup>143</sup>

Currently, circuit and state courts are split over whether sexual orientation constitutes a suspect classification or whether laws discriminating against gays and lesbians should be analyzed only under rational basis review.<sup>144</sup> Rational basis

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137. See, e.g., Neil Swidey, *What Makes People Gay?*, BOSTON GLOBE (Aug. 14, 2005), [http://www.boston.com/news/globe/magazine/articles/2005/08/14/what\\_makes\\_people\\_gay](http://www.boston.com/news/globe/magazine/articles/2005/08/14/what_makes_people_gay).

138. See Schmeiser, *supra* note 54 (describing the history of applying immutability as an argument strategy).

139. See *id.* at 1508.

140. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (holding 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” with regard to the scrutiny of laws).

141. *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

142. See, e.g., Schmeiser, *supra* note 54.

143. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring).

144. Compare *Romer v. Evans*, 517 U.S. 620, 633 (1996) (analyzing laws discriminating against gays and lesbians under rational basis review), and *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (finding that sexual orientation is not a suspect classification), with *Varnum v. Brien*, 763 N.W.2d 862, 885–86 (Iowa 2009) (holding that sexual

review is a comparatively lax standard, requiring only that a governmental action be rationally related to a legitimate government interest.<sup>145</sup> The Supreme Court has remained silent with regard to the appropriate standard of review for laws that discriminate against gays and lesbians.<sup>146</sup> In *Romer*, the Supreme Court applied rational basis review to strike down a Colorado constitutional amendment prohibiting local governments from enacting antidiscrimination laws for the benefit of gays and lesbians without discussing the review standard.<sup>147</sup> Following *Romer*, some courts have held that sexual orientation is not a suspect classification,<sup>148</sup> while others have held that sexual orientation is a suspect<sup>149</sup> or quasi-suspect classification.<sup>150</sup> As a result, the mutability of same-sex attractions remains a subject of debate in legal arguments concerning gay and lesbian civil rights.<sup>151</sup>

Anti-gay advocates have compared homosexuality to drug addiction for the purpose of suggesting that homosexuality is mutable, and that gays and lesbians therefore do not constitute a protected class. Consequentially, they argue, laws discriminating against gays and lesbians do not merit strict scrutiny. Just as substance addicts can enter into recovery, anti-gay advocates suggest, motivated gays and lesbians can choose to overcome their same-sex attractions with the proper support. Specifically, in justification of laws banning gay marriage, anti-gay advocates argue that gays and lesbians are not banned from marrying—they must simply develop healthy, nonpathological sexual relationships with members of the opposite sex in order to do so.<sup>152</sup>

In a brief in support of *Perry*, the National Association for Research & Therapy of Homosexuality (NARTH) claimed that successful “treatment” of homosexuality will result in amelioration of unwanted same-sex cravings and “a shift toward opposite-sex sexual attractions.”<sup>153</sup> NARTH describes a study in which individuals subject to a therapeutic intervention successfully “began to lose

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orientation is a suspect classification), and *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (finding that sexual orientation is a quasi-suspect classification).

145. See *Romer*, 517 U.S. at 621, 631.

146. See *id.*

147. *Id.*

148. See, e.g., *Loflon*, 358 F.2d at 818.

149. *Varnum*, 763 N.W.2d at 885–86.

150. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (2008).

151. See, e.g., Brief for Liberty Counsel et al. as Amici Curiae Supporting Defendant-Intervenors-Appellants, *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) (No. 10-16696), 2010 WL 4075736, at \*5–7 [hereinafter Brief of Liberty Counsel et al.]; Brief for Paul McHugh, M.D., Johns Hopkins University Distinguished Service Professor of Psychiatry as Amicus Curiae Supporting Defendant-Intervenors-Appellants Urging Reversal, *Perry*, 628 F.3d 1191 (No. 10-16696), 2010 WL 4075751 at \*18–28.

152. Brief of Amicus Curiae, National Ass’n for Research & Therapy of Homosexuality (NARTH), in Support of the Intervening Defendants-Appellants, *Perry*, 628 F.3d 1191 (No. 10-16696), 2010 WL 4075741, at \*7, \*12.

153. *Id.* at \*20.

their fears of the other sex, to enjoy effective heterosexual relations, and to lose their obsessive thoughts about, or compulsive, homosexual activity.”<sup>154</sup> However, NARTH notes that, like recovering from an addiction, altering one’s sexuality is immensely difficult, saying

*Amicus* acknowledges that change in sexual orientation may be difficult to attain. As with any psychological treatment, the client’s motivation and determination to comply with treatment predicts the greatest positive response . . . there is a substantial therapeutic failure rate, as well as a need for ongoing maintenance of any success that is attained.<sup>155</sup>

In another brief in support of Texas in *Perry*, Amici Liberty Counsel suggested that evidence exists that homosexuality is mutable, arguing that sexual preference does not deserve suspect classification and that “there are innumerable reported cases of individuals who have changed their sexual orientation.”<sup>156</sup> In illustrative support, the Amici cited to memoirs and self-help books that describe homosexuality as an addiction. For example, in the opening chapter of *Growth into Manhood: Resuming the Journey*, cited by the Liberty Counsel, Alan P. Medinger discusses the obstacles to overcoming homosexuality.<sup>157</sup> He explains that

[t]he first obstacle has to do with the *nature of addictive-type sins*. . . . For many of us, homosexual acting out was for years and years our way of coping with life, a way of escape, of self-comforting, of finding temporary relief from the terrible pain or emptiness we felt inside.<sup>158</sup>

In *Healing Homosexuality: Case Studies of Reparative Therapy*, another book cited by the Amici, Joseph Nicolosi explains that homosexuals who abstain from same-sex sexual fantasies and activities are appropriately described, like addicts, as being “in recovery.”<sup>159</sup> He explains that “[i]f the use of the word *change* rather than *cure* sounds pessimistic, we should consider *cure* as it applies to other psychiatric conditions. . . . Alcoholics are never cured, but are referred to in the transitional state as *in recovery*.”<sup>160</sup>

A third memoir by Jeff Konrad, called *You Don’t Have to Be Gay: Hope and Freedom for Males Struggling with Homosexuality, or for Those Who Know of Someone Who Is*, characterizes homosexuality as a surmountable compulsion to self-medicate.<sup>161</sup> In a letter to a male friend who had recently had sex with an ex-boyfriend, Konrad

154. *Id.* at \*8.

155. *Id.* at \*22.

156. Brief of Counsel et al., *supra* note 151, at \*2–6.

157. ALAN P. MEDINGER, *GROWTH INTO MANHOOD: RESUMING THE JOURNEY* 11 (2000) (cited in Brief of Liberty Counsel et al., *supra* note 151, at \*6 n.1).

158. *Id.*

159. JOSEPH NICOLOSI, *HEALING HOMOSEXUALITY: CASE STUDIES OF REPARATIVE THERAPY* 173 (1993).

160. *Id.*

161. JEFF KONRAD, *YOU DON’T HAVE TO BE GAY: HOPE AND FREEDOM FOR MALES STRUGGLING WITH HOMOSEXUALITY OR FOR THOSE WHO KNOW OF SOMEONE WHO IS* 61–63 (1987).

explains that homosexuality is an abnormal attempt to satisfy unfulfilled “homo-emotional” needs.<sup>162</sup> However, Konrad argues, homosexual behavior ultimately leads to escalating cravings for additional homosexual sexual activity.<sup>163</sup> “It should be clear by now that homosexual behavior will never satisfy your emotional needs,” he says. “Instead, it only increases and intensifies them.”<sup>164</sup> Konrad also urges his friend to remain consistent in his efforts to overcome homosexuality, saying “[t]he more you learn, Mike, the more motivated you’ll become, mainly because of your growing recognition that you’re not destined to be a victim of circumstances beyond your control . . . .”<sup>165</sup>

## II. THE PSEUDOSCIENCE OF HOMOSEXUALITY AND IMPAIRED SELF-CONTROL

Arguments that justify discrimination against gays and lesbians by extending the addiction framework to homosexuality are pseudoscientific. The process of scientific inquiry emphasizes observation, experimentation, peer-review, and other practices that aim to ensure accuracy and authenticity.<sup>166</sup> By comparing homosexuality to the pathology of addiction, anti-gay advocates falsely imply that a credible body of neuroscientific evidence supports the claim that same-sex sexual activity is linked to impaired executive function, craving, and out of control behavior.

Like other claims of fact in legal arguments, arguments claiming that homosexuality can be likened to compulsive pleasure-seeking ought to be assessed based on the evidence they cite. The brief by amici CAP and PFN on behalf of Texas in *Lawrence v. Texas* affords an example of an addiction analogy as an evidence-based scientific claim.<sup>167</sup> Examining the sources cited by CAP and PFN and their treatment of these sources reveals the pseudoscience underlying their argument.

Under the guise of “an accurate and comprehensive look at the available scientific research,”<sup>168</sup> Amici CAP and PFN sought to associate homosexuality with the pathology and morbidity typically associated with drug addiction, and argued from this basis that it is reasonable to regard homosexuality as fundamentally dangerous to society. First, they argued, gay men pose a public health threat because they are promiscuous and engage in a deadly form of sexual intercourse. Second, rebutting the APA’s claim that homosexuality is not associated with psychopathology, CAP and PFN argued that homosexuality is

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162. *Id.* at 63.

163. *Id.*

164. *Id.*

165. *Id.* at 61.

166. *See generally* KENNETH R. FOSTER & PETER W. HUBER, *JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS* (1997) (discussing the reliability and perceived reliability of scientific evidence).

167. *See* Brief of CAP & PFN, *supra* note 72.

168. *Id.* at 3.

defined by obsessive sexual fantasy and uninhibited pleasure-seeking behavior.<sup>169</sup> Like drug addicts, they implied, gays and lesbians are out of control.

To support their claims that gay men are a threat to public health, CAP and PFN cited a study by F.C.I. Hickson and P.M. Davies on relationships among gay men.<sup>170</sup> The study consisted of a cross-sectional survey of 387 gay men; 252 were sexually active at the time of the interview, and, of these, 142 (56.3%) were in “open relationships, that is, either the respondent or his partner or both were having sex with other people.”<sup>171</sup> The findings, the Amici argued, demonstrate that “homosexuals have a much greater number of partners, as compared to heterosexuals, and engage in sexually riskier activity.”<sup>172</sup> The Amici argued that Texas could therefore regulate all forms of sodomy given the “serious health considerations implicated in same-sex sexual activity.”<sup>173</sup>

Based on the study, CAP and PFN argued that Texas could seek to ban homosexual activity because gay men spread HIV.<sup>174</sup> First, they argued that male homosexuality is strongly linked with anal intercourse,<sup>175</sup> a form of sexual activity that is a particularly efficient means of HIV transmission.<sup>176</sup> CAP and PFN argued that based on the study’s results, gay men are also more likely to be in open relationships.<sup>177</sup> The state therefore had an interest in banning homosexual sexual acts, they reasoned.<sup>178</sup> From the conclusion that gay men uncontrollably engage in dangerous sexual behavior, CAP and PFN implied that homosexuality is like an addiction, and poses a similar social threat.

The amici’s argument is flawed given the limited scope and context of the study, the inapplicability of the study to women, and the researcher’s own conclusions. First, the study was an inappropriate foundation for making claims about the behavior of gay men in the United States in the early 2000s; it was conducted during the late 1980s and early 1990s in England and Wales.<sup>179</sup> Second, the study focused exclusively on “out” gay men, and the results therefore reflect a selection bias. It is possible, for example, that gay men who are “out” and actively

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169. *Id.*

170. *Id.* at 15 (citing F.C.I. Hickson & P.M. Davies, *Maintenance of Open Gay Relationships: Some Strategies for Protection Against HIV*, 4 AIDS CARE 409, 412 (1992)).

171. Hickson & Davies, *supra* note 170, at 412.

172. *See* Brief of CAP & PFN, *supra* note 72, at 19.

173. *Id.* at 18–19.

174. *Id.* at 15–19 (applying generalizations, for example, “homosexuals have a much greater number of sexual partners, as compared to heterosexuals,” that they are in “open relationships,” that they primarily engage in anal and oral sex, and that “the higher rates of sexually transmitted diseases . . . are related to certain sexual behaviors.”).

175. *See id.* at 19.

176. *See* Daniel T. Halperin, *Heterosexual Anal Intercourse: Prevalence, Cultural Factors, and HIV Infection and Other Health Risks*, 13 AIDS PATIENT CARE & STDs 717, 718 (1999).

177. Brief of CAP & PFN, *supra* note 72, at 15.

178. *See id.* at 18–19.

179. *See id.*

seeking romantic or sexual relationships are likelier to engage in sexual activity with more partners than closeted or sexually inactive gay men.<sup>180</sup> In addition, the amici reached broad conclusions on homosexuality in general, even though the study did not reference women at all. Finally, the researchers themselves cautioned that their results demonstrating a slight preference for open relationships reflected cultural norms rather than a tendency to fail at monogamy, and also that gay men were not fundamentally inclined toward risky sexual behavior.<sup>181</sup> Gay men tended to engage in anal intercourse selectively, the researchers explained, only with partners with whom they were in committed relationships.<sup>182</sup>

CAP and PFN also argued that homosexuality is associated with psychopathy. To provide support for this claim, CAP and PFN criticized the APA's discussion of the well-known study by psychologist Evelyn Hooker.<sup>183</sup> Hooker's landmark study had demonstrated that gay men were psychopathologically indistinguishable from their heterosexual counterparts.<sup>184</sup>

In Hooker's study, sixty gay and straight male subjects were given a battery of tests, including an IQ test, the Rorschach inkblot test,<sup>185</sup> the Thematic Apperception Test (TAT),<sup>186</sup> and the Make-A-Picture-Story (MAPS)<sup>187</sup> test. The tests were then submitted to psychologists for review in order to determine whether the subjects' psychopathological profiles reflected their sexual orientation.<sup>188</sup> Hooker found that the psychologists' rate of success of identifying the orientations of the subjects based on their profiles was no better than randomly guessing, and she concluded that homosexuality is not clinically correlated with psychopathology.<sup>189</sup>

Despite Hooker's conclusions, the amici argued that the test actually demonstrated that gay men universally suffer from a distinctive pathology: a lack of control over their rabid sexuality.<sup>190</sup> The amici insisted that Hooker had deliberately distorted the findings by removing the TAT and MAPS tests from her assessment. The amici concluded that "unaltered, the study confirms precisely the

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180. See Hooker, *supra* note 75, at 18.

181. See Hickson & Davies, *supra* note 170, at 410.

182. *Id.*

183. Brief of CAP & PFN, *supra* note 72, at 6; Hooker, *supra* note 75.

184. Brief of CAP & PFN, *supra* note 72, at 6.

185. Peter Reilly, *Rorschach Inkblot Test*, WORLD PSYCH. (Jan. 8, 2007), <http://www.rorschachinkblottest.com>.

186. Subjects are shown pictures and asked to imagine and recite stories about what they see. W.G. Morgan, *Origin and History of the Earliest Thematic Apperception Test Pictures*, 79 J. PERSONALITY ASSESS. 422, 423 (2010).

187. Subjects are given a backdrop and asked to assemble humanoid figures in a variety of situations. See L.R. Heuvelman, *Assessment of Children's Fantasies with the Make a Picture Story: Validity and Norms*, 55 J. PERSONALITY ASSESS. 578, 578 (1990).

188. Hooker, *supra* note 75, at 21.

189. *Id.* at 23.

190. Brief of CAP & PFN, *supra* note 72, at 7.

opposite” of Hooker’s findings.<sup>191</sup> Namely, CAP and PFN argued that the study would have revealed a statistically significant association between homosexuality and “obsessive” sexual fantasizing, and evidence that homosexuals are incapable of controlling their fantasies even outside of erotic contexts.

The amici’s claims about Hooker’s analysis are wrong. First, the amici misleadingly allege that Hooker deliberately concealed TAT and MAPS test results that would have been damaging to her conclusions. In fact, the evaluation of the tests was only qualified in cases where a subject’s orientation was revealed directly by the content of his stories and scenes (e.g., if during a narrative of what happens in the bedroom of a house the subject was to depict a homosexual sexual encounter).<sup>192</sup> The question Hooker sought to answer was *not* whether psychologists could deduce that a subject was homosexual from the subject’s referring to himself engaging in sexual activity with another man.<sup>193</sup> Rather, it was whether psychologists could accurately correlate sexual orientation with personality and functional psychological profiling that made no reference to the subject’s orientation. The TAT and MAPS tests were reviewed by Hooker’s psychologists to the extent that doing so was productive to this end.<sup>194</sup> In her published report, Hooker explained that

[t]he problem of identifying the homosexual protocol from the heterosexual was essentially a much easier one than that encountered with the Rorschach, since few homosexuals failed to give open homosexual stories on at least one picture. The second task given the Rorschach judges, of distinguishing the homosexual from the heterosexual records when they were presented in matched pairs, was therefore omitted [from the tests given to the TAT-MAPS judges]. In every other respect, however, both with respect to task and procedure and including the recording, the TAT-MAPS judge proceeded as had the Rorschach judges. . . . The results are essentially the same as for the Rorschach. The homosexuals and the heterosexuals do not differ significantly in their ratings . . . .<sup>195</sup>

Ultimately, the amici alleged that even a single open homosexual reference demonstrates a pathological compulsion for sexual pleasure.<sup>196</sup> The amici cited this conclusion to a 1997 article by NARTH researcher Thomas Landess, who similarly suggested that

[d]espite the fact that they knew the purpose of this test was to prove their own stability, normalcy, and lack of differentiation from heterosexuals, they still did not refrain from indulging themselves in

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191. *Id.*

192. Hooker, *supra* note 75, at 25.

193. A study addressing this question would not have been nearly as controversial or famous.

194. Hooker, *supra* note 75, at 25.

195. *Id.*

196. See Brief of CAP & PFN, *supra* note 72, at 7.



homosexual fantasies, thereby exposing their sexual appetites. It is difficult not to conclude that in verbalizing such fantasies, they were exhibiting the obsessive nature of homosexuality, the difficulty of homosexuals to control their desire, even when their reputation in the psychiatric community is at stake.<sup>197</sup>

In this claim, Landess asserts that same-sex orientation itself demonstrates an abnormal sexual drive so profoundly compulsive that it interferes with executive function, preventing gay men from acting voluntarily in their own interests.<sup>198</sup> To ever openly reveal one's self as gay, the amici thereby suggest, is itself a demonstration that one is out of control.

The amici's treatment of Hooker's findings conveys that homosexuality is like an addiction in a clinical sense. An obsession is clinically understood to mean an overwhelming preoccupation with an idea or desire that interferes with other cognitive functions.<sup>199</sup> By suggesting that even a single homosexual thought implies that a gay man is obsessed with sex, CAP and PFN imply that homosexual attractions inherently interfere with judgment and reason. All homosexual activity, they suggest, arises from pathology. By using language suggestive of addiction, CAP and PFN seek to paint with a veneer of scientific rigor the view that homosexuality is "an unnatural lust."<sup>200</sup>

### III. WHY HOMOSEXUALITY-ADDICTION ANALOGIES SHOULD BE REJECTED

Courts ought to reject arguments against gay and lesbian civil rights that rest on the implication that homosexuality is comparable to an addiction. Critically, homosexuality is *not* consistent with the disorder of addiction. By suggesting that it is, anti-gay advocates imply that gays and lesbians are mentally ill, lacking in self-control, and fundamentally at odds with social norms. These arguments are rooted in animus, and ought to be identified as such and rejected.

#### *A. Animus in Anti-Gay Arguments*

"Animus" refers to a hateful state of mind characterized by irrational beliefs, unfounded stereotypes, or other illegitimate rationalizations.<sup>201</sup> More specifically, "animus" refers to the "invidiously discriminatory" motivation to deprive individuals "of the equal enjoyment of rights secured by the law to all."<sup>202</sup> In civil

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197. Landess, *supra* note 75.

198. *Id.* (suggesting that if the men had not been so compromised, they would have had the fortitude to be dishonest).

199. ANDREASEN & BLACK, *supra* note 132, at 348.

200. Brief of Petitioner Michael J. Bowers, *supra* note 65, at 27.

201. *Santiago v. City of Phila.*, 435 F. Supp. 136, 156 (E.D. Pa. 1977). For a comprehensive discussion of the jurisprudence of animus, see Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

202. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (discussing the Civil Rights Act of 1871 and 42 U.S.C. § 1985); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

rights cases, plaintiffs may be required to demonstrate that an actor's conduct was motivated by animus in order to prove that a contested action was illegal.<sup>203</sup>

A court will likely find animus where actions are justified with stereotypes.<sup>204</sup> The Supreme Court has defined a stereotype as "a frame of mind resulting from irrational or uncritical analysis" in reference to a particular group.<sup>205</sup> In a case regarding disparities in the treatment of mentally disabled patients, Justice Kennedy described animus and stereotypes as highly interconnected, saying that "animus can lead to false and unjustified stereotypes, and vice versa. . . . [T]he line between animus and stereotype is often indistinct, and it is not always necessary to distinguish between them."<sup>206</sup>

A court will also likely find animus where discriminatory initiatives lack coherent rationales.<sup>207</sup> In *Romer v. Evans*, the Supreme Court overturned a Colorado amendment barring local governments from enacting legislation protective of gay and lesbian rights.<sup>208</sup> The Court explained that Colorado's justifications for "imposing a broad and undifferentiated disability on a single named group" were so absurd that the amendment "raise[d] the inevitable inference that it is born of animosity toward the class it affects."<sup>209</sup>

In the context of gay and lesbian civil rights cases, courts have found that messages incorporating stereotypes about homosexual sexual activity demonstrate animus.<sup>210</sup> In *Citizens for Responsible Behavior v. Superior Court*,<sup>211</sup> a California appeals court denied a petition to compel a city council to place an anti-gay measure on the ballot in part because the measure was motivated by animus.<sup>212</sup> In its holding, the court described the sexual stereotypes contained in a notice of intent to circulate relating to the measure.<sup>213</sup> The notice, the court said, alleged that homosexuals are typified by sexual behaviors such as "'fisting, rimming, bestiality, and ingesting urine and feces and gerbling."<sup>214</sup> In addition, the court called attention to the notice's characterization of gay men as "a 'public health disaster'"

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203. See, e.g., *Griffin*, 403 U.S. at 102.

204. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring).

205. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 68 (2001).

206. *Olmstead*, 527 U.S. at 611. In this case, Georgia had denied mentally disabled patients community-based treatment. *Id.* at 593. Kennedy explained that the law "can be understood to deem as irrational . . . distinctions by which a class of disabled persons . . . are, by reason of their disability and without adequate justification, exposed by a state entity to more onerous treatment than a comparison group . . ." *Id.* at 611.

207. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

208. *Id.* at 635.

209. *Id.* at 632, 635.

210. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 149–50, 159 (2010).

211. *Citizens for Responsible Behavior v. Super. Ct.*, 1 Cal. App. 4th 1013, 1029–31, 1036 (1991).

212. *Id.* at 1029–30.

213. *Id.* at 1030.

214. *Id.* at 1029–30.

uniquely prone to disease.<sup>215</sup> The court concluded that the notice's stereotyped and alarmist assertions "blatantly demonstrate[d] . . . animus."<sup>216</sup>

In recent years, anti-gay advocacy remains fueled by similar warnings about the supposed social and health risks posed by individuals who engage in same-sex sexual activity. In *Perry v. Brown*, for example, the Ninth Circuit affirmed a lower court's ruling that a voter-approved measure banning same-sex marriage was unconstitutional. Like previous efforts to ban gay marriage, the court suggested, the proposition was advertised "to voters in terms designed to appeal to stereotypes of gays and lesbians as predators, threats to children, and practitioners of a deviant 'lifestyle.'"<sup>217</sup>

### *B. Homosexuality-Addiction Analogies Are Rooted in Animus*

Homosexual sexual activity is not addictive, and being gay or lesbian is not synonymous with having an addiction. Arguments characterizing homosexuality as an addiction imply that homosexual sexual intimacy is abnormal and suggest that gays and lesbians are out of control and dangerous. These insinuations are scientifically baseless and irrational and depict gays and lesbians with stigmatizing stereotypes. Ultimately, arguments analogizing homosexuality to addiction are rooted in animus, and should be rejected.

#### *1. Homosexuality-Addiction Analogies Are Baseless*

Homosexuality is neuropsychologically inconsistent with an addiction because it entails neither craving nor compulsion. To begin with, a homosexual orientation does not imply uncontrollable sexual activity any more than a heterosexual orientation does. Homosexuality, or sexual attraction to individuals of the same sex, is readily distinguishable from a "sexual addiction," or a pleasure-driven compulsion to engage in sexual behavior.<sup>218</sup> Unlike addictive cravings, homosexual attractions do not escalate in intensity or lead to tolerance. As a result, homosexuality is not a ticking time bomb of "remorselessly progressive"<sup>219</sup> personal destruction.

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215. *Id.*

216. *Id.* at 1029.

217. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012).

218. *Homosexuality & Addiction*, SOC'Y ADVANCEMENT SEXUAL HEALTH, <http://www.sash.net/homosexuality-addiction> (last visited Dec. 26, 2012) ("Sexual activities and relationships with members of one's own sex, whether casual or intimate, are not considered signs or symptoms of sexual addiction. Sexual addiction is not defined by the type of sexual act or the gender of sexual partner. Out-of-control sexual behavior is defined as sexual behavior that is acted out compulsively, often with preoccupation (before and after the act), and often without regard for the consequences.").

219. *Lexicon of Alcohol and Drug Terms Published by the World Health Organization*, WORLD HEALTH ORG., [http://www.who.int/substance\\_abuse/terminology/who\\_lexicon/en](http://www.who.int/substance_abuse/terminology/who_lexicon/en) (last visited Dec. 26, 2012).

More precisely, homosexual sexual acts are no more addictive than heterosexual sexual acts. All pleasurable stimuli, including sexual stimuli, create highs by acting on reward circuits.<sup>220</sup> In general, the pleasurable nature of a sexual act is highly specific to the capacities of the individual.<sup>221</sup> The notion that homosexual sexual acts are specifically addictive relative to heterosexual sexual acts assumes, rather than demonstrates, that same-sex sexual intimacy is pathological. It also falsely assumes that a diagnosis of addiction can be arbitrarily assigned on the basis of gender, such that a woman with a history of several male partners is healthy, but a man with the same number of male partners is an addict.

There is also no evidence of any common genetic association between the development of homosexuality and addiction.<sup>222</sup> Fetal sexual differentiation is well known to derive largely from expression of genes on sex chromosomes X and Y;<sup>223</sup> males have an X chromosome and a Y chromosome, while females have two X chromosomes.<sup>224</sup> Twin studies, epigenetics (gene expression) studies, and other research suggest that sexual preferences are strongly influenced before birth.<sup>225</sup> Notably, a well-known study by Dean Hamer et al. suggests that the development of male homosexuality is X-linked.<sup>226</sup> In contrast, twin studies implicate non-X-linked dopamine receptor alleles in the development of compulsive and addictive behaviors, including drug addiction, pathological gambling, compulsive eating, and other disorders.<sup>227</sup> Therefore, although it is true that both addiction and sexual orientation are thought to be in part genetically determined, it is highly unlikely that the *same* genetic and intrauterine influences are linked with both same-sex sexual orientation and compulsive sexual pleasure-seeking behavior.

Although gays and lesbians do have discernible neurobiological differences relative to their heterosexual gender counterparts, these differences are inconsistent with the neuropathology that characterizes addiction. Instead, the

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220. See Hyman et al., *supra* note 1 at 570–71.

221. See, e.g., Charles Moser & Peggy J. Kleinplatz, *DSM-IV-TR and the Paraphilias: An Argument for Removal*, 17 J. PSYCH & HUMAN SEXUALITY 91 (2005) (discussing the diversity of sexual preferences and arguing that clinically distinguishing between groups of individuals according to sexual preferences according to the DSM-IV-TR poses scientific and ethical problems).

222. See, e.g., Chad Epps & Lynn Holt, *The Genetic Basis of Addiction and Relevant Cellular Mechanisms*, 49 INT'L ANESTHESIOLOGY CLINICS 3 (2011) (detailing the genetic basis of addiction without reference to homosexuality); Ian Maze & Eric J. Nestler, *The Epigenetic Landscape of Addiction*, 1216 ANN. N.Y. ACAD. SCI. 99 (2011) (same).

223. See SIMON LEVAY, GAY, STRAIGHT AND THE REASON WHY 49–50 (2011); *Syndromes of Abnormal Sex Differentiation*, JOHNS HOPKINS CHILDREN'S CTR., <http://www.hopkinschildrens.org/intersex/sd3.html> (last visited Dec. 26, 2012).

224. LEVAY, *supra* note 223.

225. See Dean Hamer et al., *supra* note 53, at 321–27.

226. *Id.*

227. See Grant et al., *supra* note 23, at 928.

differences are likely to reflect differences in sexual development.<sup>228</sup> For example, the amygdalas—neural structures that modulate memory and emotion—of gay men are more like those of heterosexual women than straight men; conversely amygdalas of lesbian women resemble the amygdalas of heterosexual men.<sup>229</sup>

Suggestions by anti-gay advocates that homosexuality is like an addiction, given the elevated prevalence of HIV/AIDS among both gay men and addict populations, are also flawed.<sup>230</sup> The mere fact that morbidity is associated with a certain condition is not evidence that the condition is itself pathological. For example, fair skin is associated with a higher risk of deadly skin cancers.<sup>231</sup> However, fair skin is not a pathology, but instead is part of the normal spectrum of human skin coloration. Additionally, researchers have attributed higher rates of HIV/AIDS and other sexually transmitted illnesses among gay men to cultural and economic influences, rather than physiological differences.<sup>232</sup> For example, African-American men are also disproportionately affected by HIV/AIDS—although it does not follow that black men biologically function like addicts.<sup>233</sup>

Finally, the argument that homosexuality is linked to addiction because gays and lesbians have higher rates of substance abuse disorders than the general population is likewise specious. The causes of health disparities in homosexual populations cannot be disentangled from the social stressors that accompany being a sexual minority.<sup>234</sup> High rates of addiction have been attributed to familial and societal rejection.<sup>235</sup> Other discrete populations, such as lawyers, also have higher rates of substance abuse disorders, mood disorders, and suicide.<sup>236</sup> It would

228. See, e.g., Ivanka Savic & Per Lindström, *PET and MRI Show Differences in Cerebral Asymmetry and Functional Connectivity Between Homo- and Heterosexual Subjects*, 105 PROC. NAT'L ACAD. SCI. USA 9403, 9407 (2008).

229. *Id.*

230. See Susan D. Cochran & Vickie M. Mays, *Physical Health Complaints Among Lesbians, Gay Men, and Bisexually Experienced Heterosexual Individuals: Results from the California Quality of Life Survey*, 97 AM. J. PUB. HEALTH 2048, 2053 (2007).

231. See *Melanoma*, MEDLINEPLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/000850.htm> (last visited Dec. 26, 2012).

232. See, e.g., Cochran & Mays, *supra* note 231. Historically, gay men have gravitated toward brief, anonymous sexual encounters due to fears over the negative social consequences of being “outed.” The unfortunate story of Tyler Clementi, a college student who committed suicide after his roommate publicized a video of him engaging in sexual activity with another man, illustrates this problem. See Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES, Sept. 30, 2010, at A1, available at <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html>.

233. *HIV Among African Americans*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 2011), <http://www.cdc.gov/hiv/topics/aa/PDF/aa.pdf>.

234. See, e.g., Ninez A. Ponce et al., *The Effects of Unequal Access to Health Insurance for Same-Sex Couples in California*, 29 HEALTH AFFS. 1539–40 (2010) (recognizing that inequities in spousal benefits have implications for health coverage).

235. See Michael E. Newcomb & Brian Mustanski, *Internalized Homophobia and Internalizing Mental Health Problems: A Meta-Analytic Review*, 30 CLINICAL PSYCHOL. REV. 1019, 1027 (2010).

236. See, e.g., Laura Rothstein, *Law Students and Lawyers with Mental Health and Substance Abuse Problems: Protecting the Public and the Individual*, 69 U. PITT L. REV. 531, 532 (2008); *Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools*, 44 J. LEGAL EDUC. 35, 38–39 (1994).

be just as illogical to conclude, based on the higher rate of addiction among lawyers, that the practice or study of law entails compulsive pleasure seeking.

## 2. *Homosexuality-Addiction Analogies Stereotype Gays and Lesbians as Psychopaths*

By suggesting that homosexuality can be analogized to an addiction, anti-gay advocates convey the idea that homosexuality ought to be *stigmatized* like an addiction. The stigma surrounding addiction is profound.<sup>237</sup> Addictions can derail educations, break apart families, and collapse businesses.<sup>238</sup> They encourage crime and cost lives.<sup>239</sup> In these respects, substance addiction is widely regarded as a social malignancy. So, too, is homosexuality, anti-gay advocates claim; arguments implying that homosexual intimacy is habit-forming, that gays and lesbians behave dangerously, or that individuals can “enter into recovery” from homosexuality seek to borrow from the wellspring of fear, hostility, and shame that our society reserves for drug addicts. Homosexuality-addiction analogies thus portray homosexual intimacy as profoundly antisocial and suggest that our society ought to be at “war” with homosexuality.<sup>240</sup>

More specifically, the homosexuality-addiction analogy perpetuates the stereotype of gays and lesbians as “psychopaths” incapable of participating as members of society.<sup>241</sup> Gays and lesbians, anti-gay advocates imply, are the ultimate junkies: they exclusively and compulsively engage in a worthless, perverted version of acts meant for the creation of new life.<sup>242</sup> This habit also invariably places gays and lesbians on a relentless path toward self-destruction, anti-gay advocates suggest.<sup>243</sup> These arguments also suggest that gays and lesbians

237. As a result of the perception that the terms “addict” and “addiction” carry pejorative connotations, the phrase “substance dependence” is often used as a neutral substitute, such as in the DSM-IV-TR. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 302.9, 303.90–304.90 (4th ed., text revision 2000).

238. The total cost of lost productivity attributable to substance abuse in the United States is believed to be in the hundreds of billions of dollars. NAT’L INST. ON DRUG ABUSE, NIDA INFOFACTS: UNDERSTANDING DRUG ABUSE AND ADDICTION 1 (Mar. 2011), <http://www.drugabuse.gov/sites/default/files/understanding.pdf>.

239. *See id.*

240. This references the “war on drugs.” *See* U.S. BUREAU JUST. STAT., *supra* note 43; *Just Say No*, RONALD REAGAN PRESIDENTIAL FOUND. & LIBR., <http://www.reaganfoundation.org/her-causes.aspx> (last visited Dec. 26, 2011).

241. For a discussion about the history of gays and lesbians as “psychopaths,” see Schmeiser, *supra* note 44, at 170 (discussing the use of the psychiatric concept of psychopathy in criminalization of homosexuality).

242. Schmeiser, *supra* note 44, at 170.

243. This stereotype also persists in social anti-gay rhetoric. For example, John McArthur, pastor of the “Grace to You” radio fellowship, writes that homosexuals “habitually seek happiness by following after destructive pleasures. . . . [H]omosexual desire . . . is a lust that destroys the physical body, ruins relationships, and brings perpetual suffering to the soul—and its ultimate end is death.” John McArthur, *God’s Plan for the Gay Agenda*, AMS. FOR TRUTH ABOUT HOMOSEXUALITY (Jul. 27, 2008, 4:16 PM), <http://americansfortruth.com/2008/07/27/gods-plan-for-the-gay-agenda-john-mcarthur>.

pose a threat to minors, and furthermore that children should be encouraged to “just say no” to same-sex intimacy.<sup>244</sup>

It is critical to recognize that subtle legal arguments conveying the notion that gays and lesbians are out of control actually imply that the law ought to punish same-sex sexual intimacy.<sup>245</sup> The thematic connection between subtle insinuations and more extreme rhetoric is best illustrated by example. For instance, in a February 2010 website post titled “Why Homosexual Behavior Should Be Against the Law,” Bryan Fischer of the American Family Association demonstrates the extended implications of Scalia’s dissenting argument in *Romer* comparing the validity of laws that discriminate on the basis of sexual orientation with laws that discriminate against recovering opiate addicts<sup>246</sup> In this post, Fischer argues that “our public policy toward homosexual conduct should be the same as our public policy toward intravenous drug abuse. My position is that homosexual behavior represents a severe threat to public health, and is even more dangerous to human health than intravenous drug abuse.”<sup>247</sup> In an extension of Scalia’s association of homosexuality with drug abuse for the purpose of arguing that the law can circumscribe the rights of homosexuals, Fischer alleges that similarities between homosexuality and addiction mean that homosexual behavior should be against the law.<sup>248</sup>

Legal arguments propagating dubious insinuations that homosexuality is like an addiction have no rightful place in our jurisprudence. In the 2008 case *Kerrigan v. Commissioner of Public Health*, the Supreme Court of Connecticut overturned a statute barring gay and lesbian couples from marrying.<sup>249</sup> Citing to *Romer*, the court held that discrimination against homosexuals cannot be justified purely by moral disapproval.<sup>250</sup> Laws banning gay marriage, the court suggested, rely on “virulent homophobia that rests on nothing more than feelings of revulsion toward gay persons and the intimate sexual conduct with which they are associated.”<sup>251</sup> At its core, the homosexuality-addiction analogy is hateful; it dehumanizes gays and

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244. First Lady Nancy Reagan waged the “Just Say No” campaign during the 1980s as part of a national effort to prevent drug use among children. *See generally* RONALD REAGAN PRESIDENTIAL FOUND. & LIBR., *supra* note 240.

245. U.S. BUREAU JUST. STAT., *supra* note 43.

246. Bryan Fischer, *Why Homosexual Behavior Should Be Against the Law*, RIGHTLY CONCERNED (Feb. 3, 2011, 11:46 AM), <http://www.afa.net/Blogs/BlogPost.aspx?id=2147491647>; *see supra* notes 123–26 and accompanying text.

247. Fischer, *supra* note 246.

248. *Id.*

249. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 445–46 (Conn. 2008). For additional discussion of this case, *see* NUSSBAUM, *supra* note 211, at 149–50.

250. *Kerrigan*, 957 A.2d at 409 (citing *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

251. *Id.* at 445–46.

lesbians by urging us to view them as animals, “biologically programmed to seek nothing but sexual satisfaction.”<sup>252</sup>

#### CONCLUSION

Anti-gay arguments that justify discrimination against gays and lesbians by comparing homosexuality to an addiction imply that gays and lesbians are compulsive, self-destructive, pleasure-seeking junkies. Simultaneously, these arguments suggest that gays and lesbians are antisocial criminals, and that same-sex relationships are dangerous to society. In legal contexts, these insinuations are used to justify the criminalization of sodomy, to argue that gays and lesbians should not be permitted to marry or have custody of children, and to claim that homosexuality is mutable and undeserving of the heightened protections afforded by strict scrutiny.

The art of transforming homosexuality into an addiction is a rhetorical magic trick, a sleight of hand executed with pseudoscience and prejudice. Same-sex attractions and intimacy are inherently neither compulsive nor destructive, but in fact are normal variants of sexual expression.<sup>253</sup> When evaluating anti-gay rhetoric, courts ought to identify lines of reasoning that imply that homosexuality is like an addiction, and recognize that such claims manifest animus. The medical community must also take greater pains to acknowledge the role of medical language in the infliction of poisonous stigma and to advocate against it. Lawyers must continue to scrutinize anti-gay claims in order to understand precisely what these arguments are alleging. Although homophobic rhetoric will continue to evolve, homophobia will forever be hateful.

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252. See, e.g., RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* 165–66 (1986) (“In his reminiscences, Hoess observed that ‘even if they were in poor physical shape, they always had to indulge their vice.’ It wasn’t only Hoess and the other SS rulers who presumed that homosexuals always had sex on their minds . . . . The inmates themselves also tended to regard gays as men for whom nothing was more important than their genitalia. After all, that was why they were jailed, that was what distinguished them from all other prisoners. . . . Both Nazi overseers and their prisoners took it for granted that the men with the pink triangles were somehow biologically programmed to seek nothing but sexual satisfaction. . . . They were suspect as a class.”).

253. See ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 43–44, 189–205 (1996) (discussing homosexuality as a normal variant of sexual expression).