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Immutability and Innateness Arguments About Lesbian, Gay, And Bisexual Rights

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IMMUTABILITY AND INNATENESS ARGUMENTS ABOUT LESBIAN, GAY, AND BISEXUAL RIGHTS

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INTRODUCTION

A popular and intuitively plausible argument for the rights of lesbians, gay men and bisexuals (LGB people[1]) focuses on the claim that sexual orientations are inborn and/or unchangeable. This argument draws on three sources: ethical, scientific, and legal. The scientific source is the widely held observation that people generally (and LGB people particularly) do not choose their sexual orientation. This observation is buttressed by claims about the causes and character of human sexuality. The ethical source is the general intuition that people should not be punished for something that they did not choose. Together, these ethical and scientific beliefs lead to the conclusion that LGB people should not be subject to discrimination, their sexual behaviors should not be criminalized, they should have the option for their relationships to be publicly sanctioned, and, more generally, they should not be treated differently from heterosexuals. Simply put, if a person is "born gay" or if his or her sexual orientation was not a choice, it is wrong to punish or discriminate against a person for this reason. The legal principle underlying this argument for LGB rights is the so-called immutability factor in equal protection jurisprudence.[2] The idea is that this factor plays a significant role in justifying the legal protections afforded race and sex classifications and courts are especially protective of discrimination on the basis of race and sex because people do not chose these traits. The argu-

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1. I do not in this article generally address the broader group of sexual minorities that includes transgender people. The arguments I consider herein focus specifically on sexual orientation rather than gender identity, so I will generally use the LGB acronym. While I am fully supportive of transgender rights and see arguments for the rights of transgender people as central to LGBT rights generally, this paper does not consider arguments for transgender rights. When I am talking about sexual minorities generally, rather than just LGB people, I will use the LGBT acronym so as to signal the inclusion of transgender people.

2. *See infra* text accompanying notes 65-69 and Part IV.

ment for LGB rights draws an analogy between these classifications and sexual orientations.

Arguments based on the immutability and innateness of sexual orientation have been around for about a one hundred and fifty years.[3] In the 1860's, Karl Heinrich Ulrichs, a German jurist and scholar, offered a theory of how same-sex sexual desires developed. He thought a person's sexual instinct resided in his or her soul and that lesbians and gay men (who he termed *uringins* and *urings*, respectively) were suffering from "hermaphroditism of the soul." Ulrichs used his theory to argue vociferously and single-handedly—and, as it turns out, quixotically—for the repeal of all laws criminalizing same-sex sexual activity.[4] Today, versions of this general "argument from etiology" for LGB rights—what I call the "born that way" and "not a choice" arguments—are so popular that dissent from the idea that LGB people's sexual orientations are innate and immutable is, in many contexts, treated as tantamount to opposing LGB rights.

Consider two examples. First, on August 9, 2007, an LGB cable television network held a "town hall" event for Democratic presidential candidates. Pop singer Melissa Etheridge, one of the panelists for the event, asked New Mexico Governor Bill Richardson, at the time a candidate for the Democratic presidential nomination, the following question: "Do you think homosexuality is a choice, or is it biological?"[5] Richardson began his reply by saying, "It's a choice."[6] After the debate, Richardson was lambasted for his answer and he immediately tried to explain away what he said.[7] Among the excuses Richardson offered were: that he had flown all night to get to the event; that he thought Etheridge was asking him "a tricky science question"; and that he uses the word "choice" so much because he is "so committed to . . . a women's right to choose" that he thought "choice" was the appropriate answer.[8] Despite Richardson's otherwise pro-

3. SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY 39-58 (1996).

4. HUBERT KENNEDY, ULRICHS: THE LIFE AND WORKS OF KARL HEINRICH ULRICHS, PIONEER OF THE MODERN GAY MOVEMENT 45-46, 89 (1988).

5. Governor Bill Richardson, New Mexico, "Visible Vote '08" Presidential Candidates Forum Sponsored by the Human Rights Campaign and the Logo Network (Aug. 9, 2007) *in* FEDERAL NEWS SERVICE (transcript also on file with Chicago-Kent Law Review).

6. *Id.*

7. *See* Andrew Belonsky, *Richardson's Gay Choice*, QUEERTY (Aug. 10, 2007), http://www.queerty.com/ news/richardsons-gay-choice-20070810; *Richardson Asks to Speak with Advocate to Clarify His Positions*, THE ADVOCATE (Aug. 11, 2007), http://www.advocate.com/news/2007/08/11/richardson-asks-speak-with%C2%A0-advocate-clarify-his-positions.

8. *See* Belonsky, *supra* note 7.

gay political statements before and during the debate, his comment that sexual orientations were chosen was seen as homophobic.

Second, and more recently, actress Cynthia Nixon, widely-known for her role as Miranda in the television show *Sex in the City*, gave an interview in *The New York Times Magazine*, which was reported as follows:

> "I gave a speech recently, an empowerment speech to a gay audience, and it included the line 'I've been straight and I've been gay, and gay is better.' And they tried to get me to change it, because they said it implies that homosexuality can be a choice. And for me, it is a choice. I understand that for many people it's not, but for me it's a choice, and you don't get to define my gayness for me. A certain section of our community is very concerned that it not be seen as a choice, because if it's a choice, then we could opt out. I say it doesn't matter if we flew here or we swam here, it matters that we are here and we are one group and let us stop trying to make a litmus test for who is considered gay and who is not." [Nixon's] face was red and her arms were waving. "As you can tell," she said, "I am very annoyed about this issue. Why can't it be a choice? Why is that any less legitimate? It seems we're just ceding this point to bigots who are demanding it, and I don't think that they should define the terms of the debate. I also feel like people think I was walking around in a cloud and didn't realize I was gay, which I find really offensive. I find it offensive to me, but I also find it offensive to all the men I've been out with."[9]

The gay community's reaction was described as "outrage."[10] One gay rights activist described Nixon's comments as "irresponsible and flippant," suggesting she was unintentionally fueling abuse of gay children.[11] A gay blogger criticized Nixon for "sloppy language[] and thinking" that "did some real damage to [LGBT] civil rights."[12] Within a week, Nixon released the following clarifying statement:

> "My recent comments in *The New York Times* were about me and my personal story of being gay. I believe we all have different ways we came to the gay community and we can't and shouldn't be pigeon-holed into one cultural narrative which can be uninclusive and disempowering. However, to the extent that anyone wishes to interpret my words in a strictly legal context I would like to clarify: While I don't often use the

9. Alex Witchel, *Life After 'Sex'*, N.Y. TIMES MAGAZINE, Jan. 22, 2012, at 27.

10. Lucas Grindley, *Cynthia Nixon: Being Bisexual "Is Not a Choice,"* THE ADVOCATE (Jan. 30, 2012,), http://www.advocate.com/news/daily-news/2012/01/30/cynthia-nixon-being-bisexual-not-choice.

11. Lisa Leff, *Actress' Claim to be Gay by Choice Riles Activists*, YAHOO! NEWS (Jan. 27, 2012, 6:17 PM) http://news.yahoo.com/actress-claim-gay-choice-riles-activists-201717513.html (quoting and paraphrasing Wayne Bessen, founder of Truth Wins Out, an organization that monitors attempts to change the sexual orientation of children, and author of WAYNE R. BESSEN, ANYTHING BUT STRAIGHT: UNMASKING THE SCANDALS AND LIES BEHIND THE EX-GAY MYTH (2003)).

12. John Aravosis, *Actress Cynthia Nixon Says Being Gay is a Choice. And She's Wrong*, AMERICABLOG (Jan. 23, 2012, 11:49 PM), http://americablog.com/2012/01/actress-cynthia-nixon-says-being-gay-is-a-choice-and-shes-wrong.html.

> word, the technically precise term for my orientation is bisexual. I believe bisexuality is not a choice, it is a fact. What I have 'chosen' is to be in a gay relationship. As I said in the *Times* and will say again here, I do, however, believe that most members of our community—as well as the majority of heterosexuals—cannot and do not choose the gender of the persons with whom they seek to have intimate relationships because, unlike me, they are only attracted to one sex."[13]

The strong, swift, and negative reaction to the comments from Nixon and Richardson, both supporters of LGBT rights, exemplify the way dissent within the LGBT community on the issue of the origins of sexual orientation is received. Nixon is not alone in having concerns about innateness and immutability and their relevance to LGB rights. A significant minority of LGBT rights supporters, many of them LGBT people themselves, are critical of etiological arguments for LGB rights. Similarly, various scholars in law and other disciplines, including myself, who are personally supportive of LGBT rights and whose scholarship is supportive of LGBT rights, have been critical of these arguments from etiology.[14]

In this Article, I consider arguments from etiology for LGB rights. I begin, in Part II, by articulating these arguments and the ethical, scientific, and legal support for them. In Part III, I consider ethical, pragmatic, and bioethical problems with these arguments, problems that to some extent undergird dissent about etiological arguments for LGB rights. In Part IV, I discuss immutability in the legal context in detail, considering the ways in which arguments about the immutability of sexual orientation have—and have not—worked in U.S. courts. In Part V, I use the preceding analysis as a lens to evaluate immutability arguments in amicus briefs associated with the two same-sex marriages cases recently decided by the U.S. Supreme Court, namely, *U.S. v. Windsor*[15] and *Hollingsworth v. Perry*.[16] In particular, I focus on the *amicus* brief on behalf of the Gay and Lesbian Medical Association, the largest and oldest association of LGBT health care profes-

13. Grindley, *supra* note 10 (internal quotation marks omitted).

14. *See, e.g.*, EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY AND ETHICS OF SEXUAL ORIENTATION 277-327 (1999) [hereinafter STEIN, MISMEASURE]; Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1993-1994); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 501-07 (1994); Edward Stein, *Sexual Orientations, Rights, and the Body: Immutability, Essentialism, and Nativism*, 78 SOC. RES.: AN INT'L Q. 633 (2011); Edward Stein, *The Relevance of Scientific Research Concerning Sexual Orientation to Lesbian and Gay Rights*, 35 J. HOMOSEXUALITY 107 (1994); Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485 (1998).

15. 133 S. Ct. 2675 (2013) (finding unconstitutional the part of the Defense of Marriage Act ("DOMA") that defined marriage for purposes of federal law as between one man and one woman).

16. 133 S.Ct. 2652 (2013) (case concerning California's "Proposition 8" a referendum that amended that state's constitution to define marriage as between one man and one woman).

sionals,[17] and the *amicus* brief on behalf of Dr. Paul McHugh, a professor of psychiatry at the medical school at Johns Hopkins University,[18] which were both filed in *Windsor* and *Perry*. I conclude by synthesizing ideas from each of these briefs using the insights from earlier Parts as a filter. Although the two briefs represent interventions from opposing sides of the debate about LGB rights, considering what each says about arguments from etiology helps illuminate the pitfalls of making innateness and immutability arguments for LGB rights. Specifically, these scientific claims are not necessary to make the case for LGB rights and some scientific claims made in these briefs are dubious, unsupported, overly simplistic, and/or simply false. Further, some scientific-based arguments mischaracterize what is wrong with sexual-orientation discrimination. My overall goal is to evaluate arguments from etiology both generally and as they play out in LGB rights litigation practically. Doing so, will help explain and contextualize disagreement within the LGBT community about the wisdom and effectiveness of such arguments.

I. "BORN THAT WAY" AND "NOT A CHOICE" ARGUMENTS

A. The Argument Forms

The two types of arguments from etiology for LGB rights are each based on a distinct scientific claim about how sexual orientations develop. "Born that way" arguments start with the biological or genetic claim that sexual orientations are innate; alternatively, "not a choice" arguments start with the psychological claim that sexual orientations are impossible (or almost impossible) to change or are not the result of choices. Both arguments begin with a scientific claim that is supposed to lead to a legal or ethical conclusion in support of LGB rights.

Consider the following argument for LGB rights made by Andrew Sullivan:

> [H]omosexuality is an essentially involuntary condition that can neither be denied nor permanently repressed. . . . [S]o long as homosexual adults as citizens insist on the involuntary nature of their condition, it becomes politically impossible to deny or ignore the fact of homosexuality. . . . [The strategy for obtaining LGB rights is to] seek full public

17. Brief of *Amicus Curiae* GLMA: Health Professional Advancing LGBT Equality (Gay and Lesbian Medical Association) Concerning the Immutability of Sexual Orientations in Support of Affirmance on the Merits, *Windsor*, 133 S. Ct. 2675 (Nos. 12-307) [hereinafter GLMA Brief].

18. *Amicus Curiae* Brief of Dr. Paul McHugh in Support of Hollingsworth and Bipartisan Legal Advocacy Group Addressing the Merits and Supporting Reversal, *Hollingsworth*, 133 S. Ct. 2652 (No. 12-144) and *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter McHugh Brief].

> equality for those who, through no fault of their own, happen to be homosexual.[19]

The structure of Sullivan's argument is as follows:

(n1) Same-sex sexual attractions are involuntary. [scientific claim]

(n2) It is wrong to punish people or otherwise discriminate against them for something they did not choose and cannot change.

(n3) Therefore, it is wrong to punish or otherwise discriminate against LGB people. [normative conclusion]

While the "not a choice" argument begins with a psychological claim about sexual orientation, the "born that way" argument begins with a biological or genetic claim about sexual orientation. The structure of the "born that way" argument is as follows:

(b1) Sexual orientations are prenatally determined. [scientific claim]

(b2) It is wrong to punish people or otherwise discriminate against people for characteristics that are determined before birth.

(b3) Therefore, it is wrong to punish or otherwise discriminate against LGB people. [normative conclusion]

Both forms of the argument from etiology are intuitively plausible: it seems wrong to punish or withhold benefits from someone for doing something that she cannot help but do.

B. Scientific Premises

The popularity of arguments from etiology in the United States increased dramatically starting in the early 1990s with the publication of several scientific studies on the causes of homosexuality that captured the attention of many Americans.[20] With evidence from neuroscience, genetics, and psychology purporting to show that sexual orientation is either inborn or fixed at an early age, scientists, politicians, activists, religious leaders, and commentators began to appeal to scientific evidence to support LGB rights.[21]

19. ANDREW SULLIVAN, VIRTUALLY NORMAL 170-71 (1995).

20. *See* J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY 1089 (1991); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCI. 321 (1993); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034 (1991).

21. *See, e.g.*, David Gelman et al., *Born or Bred*, NEWSWEEK, Feb. 24, 1992, at 46, *available at* EBSCOhost, Accession No. 9202243553; Jamie Talan, *Study Shows Homosexuality is Innate: Gay Scientist is a Hero and a Villain*, NEWSDAY, Dec. 9, 1991, at 4, *available at* 1991 WLNR 317603.

1. Biological/Genetic Premise

Consider first the scientific claims associated with the "born that way" argument. In at least one sense, there seems to be a consensus that sexual orientations[22] are innate, genetic, or biologically based. Indeed, every psychological characteristic is in a sense biologically based. Specifically, human beings can have a sexual orientation while bricks and one-celled organisms cannot. This is because the physical characteristics (broadly construed) that make each of us a human—rather than a brick or an amoeba—also make it possible for each of us to have a sexual orientation. The same sort of claim is true, however, with respect to having a favorite type of music. A brick and a single-celled organism cannot have a favorite type of music. Even though a preference for classical music seems a paradigmatic example of a learned trait, the mental and physical characteristics necessary for having musical preferences are innate, genetic, and biologically based. Sexual orientation is at least biologically based in the same sense that musical preferences are. Any even vaguely plausible theory about how people develop sexual orientations (even one that sees social factors as playing a crucial role in shaping a person's sexual orientation) is a biological theory in this sense. As William Byne said, "The salient question about biology and sexual orientation is not *whether* biology is involved but *how* it is involved."[23]

To better understand the scientific claims at issue in the "born that way" argument, consider the range of ways in which traits might be biologically based. Consider first a person's eye color, a trait that is about as biologically based as can be. This does not, however, mean that a person's eye color is completely and unalterably determined by genes. There are various links between genes and eye color. Genes code for patterns of protein synthesis. Proteins lead to the development of hormones, other proteins, and, under the right circumstances, to the standard development of eyes. The appropriate proteins will be synthesized only given certain environmental conditions (such as the availability of various chemical compounds in the body). Further, these proteins will lead to the standard development of eyes only given appropriate developmental conditions. If a developing human fetus fails to get water and certain vitamins and minerals, it will fail to develop eyes of the color typically associated with the fetus's genes; for ex-

22. I use the term "sexual orientation" to refer to a person's sexual desires towards and dispositions to engage in sexual behaviors with others in virtues of their sex or gender. *See* STEIN, MISMEASURE, *supra* note 14, at 49.

23. William Byne, *The Biological Evidence Challenged*, 270 SCI. AM. 50, 50 (May 1994) (emphasis added).

ample, in the face of severe lack of the appropriate compounds, an infant might fail to develop functional eyes. The point is that there are various intervening environmental factors between having a certain gene configuration and having eyes of a certain color. In spite of this, because a person's genes strongly dispose him or her to develop a certain eye color, eye color is said to be biologically based.

Consider, in contrast, a person's musical tastes. This characteristic is quite different from eye color with respect to the degree to which it is biologically based; a person's musical tastes seem *weakly* biologically based. Biology does, however, have something to do with musical taste. An amoeba cannot have musical tastes. Further, biological differences between individuals do contribute in some way to their different tastes in music. For example, people who have genes for especially good hearing might be more likely to appreciate certain kinds of music (perhaps more subtle or intricate music). Still, the connection to genes is much less direct and the contributions of the environment are much more significant in the case of musical tastes as compared to eye color.

Using these two simple examples, imagine a continuum representing the contribution of biological factors to a trait: at one end is eye color and at the other end is taste in music. The debate about the extent to which sexual orientation is biologically based is, roughly, a debate about where sexual orientation falls on this continuum. The "born that way" argument starts with a strong claim about the biological basis of sexual orientation, namely that sexual orientations are inborn, strongly constrained by genetics, or determined by biological factors like the level of certain hormones in a fetus or very young children. In terms of the continuum, the scientific claim is that sexual orientations are close to eye color and far from musical tastes. Sexual orientations cannot, however, be biologically based in quite the way eye color is because sexual orientations are cognitively mediated, that is, having a sexual orientation requires mental states such as beliefs, desires, and thoughts. The scientific claim of the "born that way" argument is that a person's biological make-up at birth or at an early age determines or strongly constrains his or her sexual orientation, in particular, it determines or strongly constrains whether a person is attracted primarily to men or women or both.

Providing a detailed account of the scientific support for or against this claim is beyond the scope of this paper. Instead, a brief summary will suffice. Starting in the early 1990s, there were several apparent breakthroughs in scientific research on sexual orientation that appeared in top scientific journals. Most notably, Simon LeVay's neuroanatomical study

that reported differences between gay and heterosexual men in a region of the hypothalamus;[24] Michael Bailey, Richard Pillard, and their collaborators' heritability studies using twins as subjects;[25] and Dean Hamer, Angela Pattatucci, and their collaborators' genetic linkage study focusing on particular region of the X-chromosome.[26] Playing a supporting role are studies of the sexual behaviors and desires of animals that suggest animals exhibit sexual behaviors and preferences that are, in significant ways, similar to human sexual behaviors and sexual orientation.[27] Identifying same-sex sexual behaviors and same-sex sexual desires in non-human animals demonstrates that human sexual orientation, generally, and human homosexuality, more particularly, are viable subjects of scientific study and are open to biological explanation. Some saw these studies as mutually supporting and pointing towards a unified theory of human sexual orientation according to which sexual orientations are strongly biological and either inborn or determined at an early age.[28] Despite this, various commentators have offered systematic critiques of this research program, raising serious methodological and interpretive concerns that, in my view, completely undermine the scientific support for these theories and entail that we do not know all that much about how sexual orientations develop.[29]

24. *See* LeVay, supra note 20.

25. *See* Bailey & Pillard, *supra* note 20; *see also* J. Michael Bailey et al., *Heritable Factors Influence Sexual Orientation in Woman*, 50 ARCHIVES GEN. PSYCHIATRY 217 (1993).

26. *See* Hamer et al., *supra* note 20; *see also* Stella Hu et al., *Linkage Between Sexual Orientation and Chromosome Xq28 in Males but Not in Females*, 11 NATURE GENETICS 248 (1995); Angela M. L. Pattatucci & Dean H. Hamer, *Development and Familiality of Sexual Orientation in Females*, 25 BEHAV. GENETICS 407 (1995). Other, less noteworthy studies from around the same time include, *e.g.*, J.A.Y. Hall & D. Kimura, *Dermatoglyphic Asymmetry and Sexual Orientation in Men*, 108 BEHAV. NEUROSCIENCE 1203 (1994); and Dennis McFadden & Edward G. Pasanen, *Comparison of the Auditory Systems of Heterosexuals and Homosexuals: Click-Evoked Otoacoustic Emissions*, 95 PROC. NAT'L ACAD. SCI. 2709 (1998).

27. *See, e.g.*, BRUCE BAGEMIHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY 269 (1999); M. J. Baum et al., *Prenatal and Neonatal Testosterone Exposure Interact to Affect Differentiation of Sexual Behavior and Partner Preference in Female Ferrets*, 104 BEHAV. NEUROSCIENCE 183 (1990); Jean-François Ferveur et al., *Genetic Feminization of Brain Structures and Changed Sexual Orientation in Male Drosophila*, 267 SCI. 902 (1995); George L. Hunt Jr. & Molly Warner Hunt, *Female-Female Pairing in Western Gulls (*Larus occidentalis*) in Southern California*, 196 SCI. 1466 (1977); Charles E. Roselli et al., *The Volume of a Sexual Dimorphic Nucleus in the Ovine Medial Preoptic Area/Anterior Hypothalamus Varies with Sexual Partner Preference*, 145 ENDOCRINOLOGY 478 (2004).

28. Simon LeVay & Dean H. Hamer, *Evidence for a Biological Influence in Male Homosexuality*, SCI. AM., May 1994, at 44; Edward Stein, *Evidence for Queer Genes: An Interview with Richard Pillard*, 1 GLQ: J. LESBIAN & GAY STUDIES 93 (1993) [hereinafter *Pillard Interview*].

29. For some critiques, see STEIN, MISMEASURE, *supra* note 14, at 164-228; William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228 (1993); *see also* SCIENCE AND HOMOSEXUALITIES (Vernon A. Rosario ed. 1997); SEX, CELLS, AND SAME-SEX DESIRE: THE BIOLOGY OF SEXUAL PREFERENCE (John P. DeCecco & David Allen Parker eds. 1995).

2. Choice and Malleability

Turning to the "not a choice" argument, the scientific premise of this argument concerns the malleability of sexual orientations or the role of choice in their development—either the claim that a person's sexual orientation cannot be changed or the claim that a person's sexual orientation is not a choice. Choice and malleability are distinct but related claims and both are conceptually related to the origins of sexual orientations.

Many characteristics that are chosen are malleable (for example, one's career) and some characteristics that are not chosen are not malleable (for example, eye color). A characteristic can, however, be the result of choice but not be malleable once it is chosen. For example, deciding to have one's ovaries removed (perhaps to prevent ovarian cancer) is a choice, but the resulting state of one's reproductive system is not changeable. Also, a characteristic can be not chosen but still malleable. For example, a person does not choose to have an overbite, but this can be changed by enlisting the assistance of an orthodontist.

Some characteristics that are strongly biological, like blood type, are neither the result of choice nor malleable. Other characteristics, however, that are neither chosen nor malleable are not strongly biologically determined. For example, a person's native language is not innate, but a person does not choose her native language. Further, a person's native language, once it becomes cognitively entrenched, may not be changeable (even though one can stop speaking one's native language and/or become fluent in a new language).[30]

Choice might play a role in the development of characteristics that are strongly biologically determined. It might be, for example, that some people are born with the potential for a musical ability that few have. Decisions such people make may affect the development and expression of this ability. Having a well-developed musical ability is plausibly mutable because whether and how this trait is expressed depends on a person's choices (conscious or not). Not all biologically based traits are like this—no choice is involved in the development of blood type—but some traits, though strongly biologically based, involve choices in order to be expressed.

A characteristic can be fixed as the result of choices that, on the surface, seem to have nothing to do with the characteristic that they determine. For example, a child's decision to frequently play certain video games may

30. *See generally* STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE (1994).

have unintentionally led him or her to develop a violent temper as an adult. Without ever deciding to have a violent temper, the decision to play video games may have led to its development. If this were true, it is unclear whether it would be correct to say one *chose* to have a temper or that such a trait is immutable.

Returning to sexuality, people do not develop sexual orientations simply by considering what sexual orientation they want to have in the way one might decide what entrée to order in a restaurant. Similarly, no one thinks a person can change her sexual orientation as easily as one can change her shirt or hairstyle. Developing or changing a sexual orientation is on any plausible view much more complicated. The scientific premise of the "not a choice" argument says more than that sexual orientations are not chosen in the trivial sense. Rather, with respect to malleability, the claim is that sexual orientations, however they develop, are entrenched at an early age and are very difficult, if not impossible, to change. With respect to choice, the claim is that either sexual orientations are inborn or, if the result of post-natal environmental factors, they are not the result of conscious choices. What is the scientific support for these psychological claims about sexual orientation? To address this question, I discuss choice and malleability separately.

a. choice

Setting aside the claim that sexual orientations are strongly biological, consider the evidence that sexual orientations are not chosen. Part of what seems plausible about the claim that people do not choose their sexual orientation is "introspective" evidence. Andrew Sullivan, for example, when asked what evidence there is that sexual orientations are not chosen "repl[ied] quite simply: my life."[31] Few people recall choosing a sexual orientation. They may recall having made lots of decisions that relate in various ways to their sexual orientation—such as whether to engage in certain sexual behaviors and whether and in what contexts to identify as having a particular sexual orientation—but these decisions are different from *choosing* a sexual orientation. The introspective evidence against the idea that sexual orientations are chosen is the feeling of most men and many women in this culture, regardless of their sexual orientation, that they didn't choose their sexual orientations and desires.

Related to this introspective evidence is "sociological" evidence that sexual orientations are not chosen. Most gay men and many lesbians expe-

31. *See* SULLIVAN, *supra* note 19, at 15-16.

rience their sexual orientations as not chosen. In a book entitled *Is It a Choice?*, Eric Marcus wrote, "Why would I choose to be something that horrifies my parents, that could ruin my career, that my religion condemns, and that could cost me my life if I dared to walk down the street holding hands with my boyfriend?"[32] The suggestion is that sexual orientation is not chosen, because, if it were, there would be far fewer LGB people.

Such introspective and sociological evidence are both of limited value. The introspective evidence is based on people's own retrospective judgments about their own psychosexual development. Such judgments are likely to be plagued by memory bias. If a person were asked to describe his or her behaviors as a child, it seems quite likely that his or her description and assessment of his or her childhood behaviors will be influenced by his or her past and present self-assessment and self-identity in terms of gender, sexual orientation, and the like. In particular, LGB people may remember being gender-atypical children partly because they have internalized the stereotype that gay men are feminine and lesbians are masculine.[33] Similarly, heterosexuals may forget or reinterpret childhood gender-atypical behaviors as gender-typical. LGB people may over report and heterosexuals under report gender-atypical behavior.[34]

More generally, self-perception can be profoundly affected by experience, especially the feedback one gets from others. For this reason, it would not be surprising if LGB people internalized some of the cultural assumptions about sexual orientation and their origins. Specifically, memory bias problems seem likely to occur in *retrospective studies* of sexual orientation[35] due to the charged nature of sexual orientation in our society, the central role most people feel it plays in their character, and, for lesbians and gay men, the sense of needing to explain homosexuality to oneself and to others. In addition to these specific problems with introspective evidence of the development of sexual orientation, there are more general problems with introspective evidence about one's own cognitive processes and un-

32. ERIC MARCUS, IS IT A CHOICE?: ANSWERS TO 300 OF THE MOST FREQUENTLY ASKED QUESTIONS ABOUT GAYS AND LESBIANS 9 (1993) (internal quotations omitted).

33. Michael W. Ross, *Retrospective Distortion in Homosexual Research*, 9 ARCHIVES SEXUAL BEHAV. 523, 524 (1980).

34. J. Michael Bailey & Kenneth J. Zucker, *Childhood Sex-Typed Behavior and Sexual Orientation: A Conceptual Analysis and Quantitative Review*, 31 DEV. PYSCHOL. 43, 45 (1995).

35. A retrospective study of sexual orientation is one which asks adults about their prior sexual feelings, sexual activities, gender identifications, relationships with parents, and the like. One of the most detailed retrospective studies of sexual orientation is reported in ALAN P. BELL ET AL., SEXUAL PREFERENCE: IT'S DEVELOPMENT IN MEN AND WOMEN (1981).

conscious beliefs as demonstrated by *implicit bias* research in social psychology.[36]

Further, some people experience their own sexual orientation as chosen. Various studies of LGB people showed that some, especially some women[37], say that choices played a role in the development of their sexual orientation.[38]

Turning to the suggestion that sexual orientation is not a choice, because, if it were, there would be no LGB people in societies that treat LGB people poorly. People choose to embrace all sorts of unpopular positions, identities, and practices even in the face of strong social pressure to conform. For example, people openly identified as communists during the McCarthy era, and many Jewish people continued to publicly identify as Jews and openly engage in religious practices associated with Judaism during times of virulent anti-Semitism. These facts surely do not show that being an avowed communist or an observant Jew are not choices. Similarly, the fact that there are many LGB people in societies that treat LGB people poorly does not establish that choice is a non-factor in being gay, lesbi-lesbian, or bisexual.

Setting aside the biological evidence relating to the development of sexual orientations, the evidence that sexual orientations are not chosen is not especially strong. This does not, however, mean that sexual orientations are consciously chosen. Most people's sexual orientations are almost certainly not the result of choosing to have that sexual orientation, but having a particular sexual orientation could well involve some choices.[39] As noted earlier, a characteristic can be fixed by choices that seem to have nothing to do with the characteristic such choices determine.[40]

Even if sexual orientations are not innate and even though there is no good evidence about the role of choice in the development of sexual orientations, there are strong reasons for doubting that people consciously chose their sexual orientation.

36. For a summary of this research for a legal audience, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

37. *See, e.g.*, CLAUDIA CARD, LESBIAN CHOICES (1995); LISA M. DIAMOND, SEXUAL FLUIDITY: UNDERSTANDING WOMEN'S LOVE AND DESIRE 166-67 (2008).

38. *See generally* VERA WHISMAN, QUEER BY CHOICE: LESBIANS, GAY MEN, AND THE POLITICS OF IDENTITY (1996).

39. *See* STEIN, MISMEASURE, *supra* note 14, at 258-74.

40. *See supra* Part II.B.2.; *see also* DIAMOND, *supra* note 37, at 251.

b. malleability

Adult sexual orientations are difficult—and for some people basically impossible—to change.[41] Many LGB people have struggled with their attraction to people of the same sex and some have spent years of wrenching psychotherapy or gone through physically taxing procedures to try to change their sexual orientation.[42] Some feminists who, for ideological reasons, want to be lesbians find themselves acting on heterosexual desires.[43] Although most psychologists and scientists with expertise in this area believe that sexual orientations are basically fixed by early adulthood at the latest and very difficult to change after that time,[44] there is some suggestive evidence that a small number of highly-motivated individuals can, for at least some period of time, change their sexual behaviors and their sexual identities.[45] While the American Psychiatric Association and other professional organizations are skeptical about such treatment,[46] various "conver-

41. *See, e.g.*, Jack Drescher, *Sexual Conversion ("Reparative") Therapies: History and Update*, *in* MENTAL HEALTH ISSUES IN LESBIAN, GAY, BISEXUAL, AND TRANSGENDER COMMUNITIES 71 (Billy E. Jones & Marjorie J. Hill eds., 2002); SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL, AND RESEARCH PERSPECTIVES (Ariel Shidlo et al. eds. 2002); JANIS S. BOHAN, PSYCHOLOGY AND SEXUAL ORIENTATION: COMING TO TERMS 19 (1996).

42. *See generally* MARTIN DUBERMAN, CURES: A GAY MAN'S ODYSSEY (1992).

43. *See, e.g.*, Joyce Trebilcot, *Taking Responsibility for Sexuality*, *in* PHILOSOPHY AND SEX 421 (Robert Baker & Frederick Elliston eds., rev. ed. 1984); SANDRA LEE BARTKY, FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION 45-62 (1990).

44. *See, e.g.*, Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 149 (John C. Gonsiorek & James D. Weinrich eds. 1991); Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 221 (1994); Timothy Murphy, *Redirecting Sexual Orientation: Techniques and Justifications*, 29 J. SEX RES. 501 (1992); Charles Silverstein, *Psychological and Medical Treatments of Homosexuality*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 101 (John C. Gonsiorek & James D. Weinrich eds. 1991). Note that this evidence is not necessarily inconsistent with the feelings of many women and some men feel their sexual orientations are fluid and that some conscious choice is involved in the development of sexual orientation. *See, e.g*, CARD, *supra* note 37, at 47-57; Carla Golden, *Diversity and Variability in Women's Sexual Identities*, *in* LESBIAN PSYCHOLOGIES: EXPLORATIONS AND CHALLENGES 19 (Boston Lesbian Psychologies Collective ed., 1987); WHISMAN, *supra* note 38.

45. *See, e.g.*, Robert Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES SEXUAL BEHAV. 403 (2003), *reprinted in* EX-GAY RESEARCH: ANALYZING THE SPITZER STUDY AND ITS RELATION TO SCIENCE, RELIGION, POLITICS, AND CULTURE 35 (Jack Drescher & Kenneth J. Zucker eds., 2006) [hereinafter EX-GAY RESEARCH] (finding that for some LGB people, "conversion" therapy allows them to make "major changes from predominantly homosexual orientation to a predominantly heterosexual orientation"); Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumers' Report*, 33 PROF. PSYCH.: RES. & PRAC. 249, 257 (2002) (finding that a minority (4%) of consumers of sexual orientation "conversion" therapy were "helped in shifting their sexual orientation"); A. Lee Beckstead, *Cures Versus Choices: Agendas in Sexual Reorientation Therapy*, 5:3/4 J. GAY & LESBIAN PSYCHOTHERAPY 87 (2001), *reprinted in* SEXUAL CONVERSION THERAPY: ETHICAL, CLINICAL, AND RESEARCH PERSPECTIVES 87 (Ariel Shidlo et al. eds. 2001) (arguing that "conversion" therapy helps some people with same-sex attractions to have satisfactory heterosexual lives).

46. Commission on Psychotherapy by Psychiatrists, American Psychiatric Association, *Position Statement on Therapies Focuses on Attempts to Change Sexual Orientation (Reparative or Conversion*

sion" therapies—also called "reparative therapies," "re-orientation" programs, or ex-gay programs—have come into existence and attained some notoriety.[47]

Much of the psychological evidence supporting success in "converting" LGB people into heterosexuals suffers from methodological or design problems. For example, one study published in a respected journal reported successful spiritual treatment of LGB people.[48] As Janis Bohn has explained:

> [This study's successful treatment was of] eleven [gay men] from an initial pool of 300 "dissatisfied "gay men, of whom thirty were studied . . . . There is no explanation of why the other 270 . . . were excluded, nor why the other nineteen from this sample of thirty were not followed. Although success was defined by these authors as a complete shift in sexual orientation, of the eleven "successes," only three (of eleven, of thirty, of 300) reported no lingering same-sex fantasies.[49]

A recent study by Robert Spitzer claimed to show that some gay and bisexual men could become heterosexual.[50] Numerous commentators raised serious objections to Spitzer's methodology and conclusions,[51] and, ultimately, Spitzer retracted his study.[52]

The overwhelming evidence indicates that, for most people, sexual orientations are not consciously chosen and are very difficult or impossible to change. This suggests that sexual orientations do not need to be biologically determined in order to be immutable. Sexual orientations could be impervious to change even if they were caused by social experiences.[53]

Therapies), 157 AM. J. PSYCHIATRY 1719, 1720 (2000) ("APA recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation"). This statement also mentions that the American Academy of Pediatrics, the American Medical Association, the American Psychological Association, and the National Association of Social Workers also oppose "conversion" therapy. *Id.* at 1719.

47. For advocates of such conversion therapies, see generally JOSEPH NICOLOSI, REPARATIVE THERAPY OF MALE HOMOSEXUALITY: A NEW CLINICAL APPROACH (1991); JEFFREY SANTIOVER, HOMOSEXUALITY AND THE POLITICS OF TRUTH (1996). For critical discussion of "ex-gay" programs see generally BESEN, *supra* note 11; TANYA ERZEN, STRAIGHT TO JESUS: SEXUAL AND CHRISTIAN CONVERSIONS IN THE EX-GAY MOVEMENT (2006); MICHELLE WOLKOMIR, BE NOT DECEIVED: THE SACRED AND SEXUAL STRUGGLES OF GAY AND EX-GAY CHRISTIAN MEN (2006).

48. E.Mansel Pattison & Myrna Loy Pattison, *"Ex-Gays": Religiously Mediated Change in Homosexuals*, 137 AM. J. PSYCHIATRY 1553 (1980).

49. BOHAN, *supra* note 41, at 20.

50. EX-GAY RESEARCH, *supra* note 45.

51. *See generally, id.*

52. Robert L. Spitzer, *Spitzer Reassesses His 2003 Study of Reparative Therapy of Homosexuality*, 41 ARCHIVES SEXUAL BEHAV. 757 (2012) (Letter to the Editor); Gabriel Arana, *My So-Called Ex-Gay Life*, THE AMERICAN PROSPECT (Apr. 11, 2012), http://prospect.org/article/my-so-called-ex-gay-life.

53. *See* STEIN, MISMEASURE, *supra* note 14, at 258-74.

C. Law

Having articulated the etiological arguments for lesbian and gay rights and the scientific claims that are crucial to them, I turn now to the legal context into which these arguments fit. A primary source of civil rights in the United States is the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[54] The Supreme Court has interpreted this clause as requiring great scrutiny and skepticism towards laws that make use of certain classifications. In the terminology of contemporary equal protection jurisprudence, these "suspect" classifications are subject to "heightened" scrutiny. Although the Supreme Court suggested in 1872 that the only laws that would be found unconstitutional because of the Equal Protection Clause were those that make use of racial classifications,[55] the Court in 1886 used this clause to invalidate laws making use of other classifications.[56] By 1944, the Court specifically characterized the Fourteenth Amendment as requiring strict scrutiny of race-based classifications, ethnic classifications, and classifications involving national origin.[57] When strict scrutiny is applied, the use of a suspect classification in a law must be "justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."[58] Although it may seem that strict scrutiny is always fatal, the Court has explicitly said this is not the case.[59]

54. U.S. CONST. amend. XIV.

55. Slaughter House Cases, 83 U.S. 36, 81 (1872) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of th[e Equal Protection Clause].").

56. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) ("The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [T]hese provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.").

57. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) ("th[is] Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny").

58. Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

59. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' . . . [W]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test."); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003) (educational benefits related to diversity are compelling enough interests to justify considerations of race even under strict scrutiny); United States v. Paradise, 480 U.S. 149, 168, 171 (1987) (affirmative action plan constitutional because narrowly tailored).

Sex classifications receive *intermediate* scrutiny in contrast to the *strict* scrutiny that racial, ethnic, and nationality classifications receive.[60] When intermediate scrutiny is applied, there must be "important government objectives" behind the use of the suspect classifications and the use of such classifications must be "substantially related" to these objectives.[61] Sometimes, however, the Court talks about the standard of scrutiny applied to sex classifications in terms almost identical to how it talks about strict scrutiny.[62] Other times, especially when the Court holds that statutes making use of sex classifications pass constitutional muster, it treats sex classifications as if they do not warrant as much scrutiny as racial classifications do.[63]

Laws that use classifications that do not demand great skepticism need only pass the much weaker "rational review" test, under which laws are held constitutional so long as there is a rational justification for their use. Height classifications, for example, have not been held to warrant heightened scrutiny. As there are rational reasons why, for example, a fireman might be subject to certain height restrictions, such a body attribute would, in the context of hiring firefighters, survive rational review. Typically, rational review is a very easy standard to satisfy. Statutes that make use of non-suspect classifications are afforded "a strong presumption of validity"[64] such that "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification,"[65] the statute will satisfy rational review.[66]

60. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988) ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."). The Court did not settle on intermediate scrutiny for sex classifications easily. Before *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court applied rational review to a law that chose men over women, all else being equal, as executors of estates. Reed v. Reed, 404 U.S. 71, 75-76 (1971). Although a plurality of the Court applied intermediate scrutiny in *Frontiero* in 1972, it was not until 1976 that a majority of the Court applied heightened scrutiny to strike down a law that made use of sex classifications. Craig v. Boren, 429 U.S. 190, 197 (1976) (striking down different age requirements for boys as compared to girls to buy low-alcohol beer).

61. *Craig*, 429 U.S. at 197.

62. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 531 (1996) (holding that the justification for laws that make use of sex-based classifications must be "exceedingly persuasive").

63. *See, e.g.*, Nguyen v. Immigration & Naturalization Serv., 533 U.S. 53, 58-59 (2001) (upholding naturalization provision imposing different requirements for citizenship depending upon whether applicant's mother or father was U.S. citizen).

64. FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993).

65. *Id.* at 313.

66. The jurisprudence surrounding rational review is more complicated than this description suggests. In approximately nine percent of the equal protection cases that applied rational review between 1972 and 1996, the Court found the statute at issue unconstitutional. *See* Robert Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 369 (1998-99). Over time, a "more searching form" of rational basis review has emerged

A fundamental question about this three-tiered scheme (strict scrutiny, intermediate scrutiny, and rational review) concerns what the criteria are for determining how much scrutiny a law deserves. In other words, how are suspect classifications distinguished from non-suspect ones? The answer is far from clear. The Supreme Court did not start to articulate a detailed account of why certain classifications—but not others—warrant heightened scrutiny until the early 1970s.[67] The first time the Court provided such an account was in *San Antonio Independent School District v. Rodriguez*. In refusing to apply heightened scrutiny in a case brought by school children from relatively poor school districts, the Court said:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[68]

Later that same term, the plurality opinion in *Frontiero v. Richardson* held that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny."[69] In addition to discussing the factors mentioned in *Rodriguez*, the Court included two other factors among the "traditional indicia of suspectness" articulated earlier in that term.

> Moreover, since sex, like race and national origin, is an *immutable characteristic determined solely by the accident of birth*, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class

that the court has sometimes applied. Most relevantly, this "rational basis with bite", Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 802 (1987), has been applied to sexual-orientation classification in certain contexts. Lawrence v. Texas, 539 U.S. 558, 590 (O'Connor, J., concurring); Romer v. Evans, 517 U.S. 620 (1996). *See* Windsor v. United States, 699 F.3d 169, 180 (2d. Cir. 2012) (noting that some courts have "read the Supreme Court's recent cases in this area to suggest that rational basis review should be more demanding").

67. *See, e.g.*, Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 482, 485 (2004).

68. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

69. Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (finding unconstitutional requirements for establishing that the spouse of a servicewoman, as compared to a spouse of a serviceman, was a dependent of the service member).

> of females to inferior legal status without regard to the actual capabilities of its individual members.[70]

From this invocation of immutability in *Frontiero*, an equal protection hook emerged on which some LGB right advocates hope to hang an argument from etiology for LGB rights. Such advocates focus on the Supreme Court's interest in immutability with the thought that showing sexual orientations are inborn and/or not chosen will lead the Court to deem sexual orientation classifications suspect.[71] This is the legal context for arguments from etiology.

II. ETHICAL AND RELATED PROBLEMS WITH ARGUMENTS FROM ETIOLOGY

A. Ethical Problems

The strength of their scientific premises aside,[72] the "born that way" and the "not a choice" arguments face a significant ethical problem; even if sexual orientations are innate or not chosen, for any plausible theory of sexual orientations much of what is ethically relevant about being an LGB person is *not* innate and *not* determined and, thus, would not be reached by an argument from etiology. Even if sexual orientations are strongly biological, actually *engaging* in sexual acts with a person of the same sex, publicly or privately *identifying* as an LGB person, deciding to *establish* a household with a person of the same sex, and raising children as an openly LGB person are *choices*—choices that one might not make, that is, one can decide to be celibate, closeted, single, and childless. To put the point another way, even someone who is convinced that LGB people deserve rights only because sexual orientations are innate or immutable might still consistently accept that people can be treated differently on the basis of choices relating to their sexual orientation. One who thinks that LGB people are born with their sexual orientations might, because of the "born that way" argument or the "not a choice" argument, accept that LGB people should not be discriminated against on the basis of their sexual attraction to people of the same sex. Such a person could still, however, think that those who

70. *Id.* at 686-87 (emphasis added and quotation and citation omitted).

71. E. Gary Spitko, *A Biologic Argument for Gay Essentialism-Determinism: Implications for Equal Protection and Substantive Due Process*, 16 U. HAW. L. REV. 571 (1996); Richard Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. PSYCHIATRY & L. 537 (1988); Harris Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817-21 (1983-84); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 576 (1973).

72. See, *supra* text accompanying notes 20-53 for a discussion of the scientific premises. For critiques of these scientific premises, see, e.g., notes 29 and 53.

engage in sexual acts with people of the same sex *are* appropriate targets of discrimination and that people who have their primary romantic and/or domestic relationship with a person of the same sex should not get recognition for such relationships. Arguments from etiology have the potential to protect a person from being discriminated on the mere basis of having a desire to have sex with people of the same sex (that is, they have the potential to protect against discrimination for simply having a sexual orientation), but this is a very specific and quite limited protection. LGB people deserve rights with respect to their *actions* and *decisions* rather than simply for their orientations. LGB people need protection against discrimination especially when they engage in same-sex sexual acts, when they openly identify as LGB people, when they are in spouse-like relationships with people of the same sex, and when they raise children. The "born that way" and the "not a choice" arguments are unable to deliver these basic, significant, and important ethical needs. Arguments from etiology are simply impotent with respect to the most central claims for LGB rights, namely, claims for rights based on choices.

Martha Nussbaum articulated a version of the argument from etiology for LGB rights as follows:

> [M]ost Americans think of sexual fulfillment as one of the greatest goods of life, and are inclined to think that it is unreasonable to demand that people utterly forgo sexual fulfillment. If they can be persuaded that sexual orientations lie very deep in the personality, then they think that same-sex conduct is not at all like adultery or gambling or nude dancing, or even smoking (which is of course very difficult to give up). All of those forms of conduct could, they think, be omitted without crippling the personality. . . . [A]sking people not to engage in same-sex conduct is a cruel and unreasonable demand . . . . [D]enying people a form of sexual fulfillment that cannot be substituted for because of deep factors about the organization of their personalities is indeed cruel and unreasonable.[73]

I disagree with Nussbaum's optimistic assessment of American attitudes about sex. Many Americans still think that some types of sexual fulfillment—even if based on "deep factors" of personality—are morally problematic and the state should discourage people from acting on their desires to engage in these behaviors, even to the point of putting legal and social impediments in the way of engaging in them. Even if we restrict the sexual behaviors in question to consensual sex, as Nussbaum does,[74] many Americans would still object to these behaviors. For example, there are some people who are primarily—perhaps even exclusively—sexually ful-

73. Martha Nussbaum, *Millean Liberty and Sexual Orientation: A Discussion of Edward Stein's* The Mismeasure of Desire, 21 L. & PHILO. 317, 332 (2002).

74. *Id.* at 332.

filled though sadomasochistic sex, adultery, masturbation, anal sex, non-procreative sex, sex between adult siblings, asphyxiophilic sex,[75] or group sex. Some Americans who believe that sexual orientations are based on "deep" personality characteristics will still find these sexual practices immoral, appropriate targets for criminal sanctions, and the people who engage in them pariahs. The attitudes of some Americans aside, these practices may be illegal (even if laws against them are not enforced) and the people who engage in them may be discriminated against.[76]

The core intuition of Nussbaum's argument—that people should not be forced to forgo a life of sexual fulfillment (so long as the sexually fulfilling activities in question are consensual)—is plausible. But the intuition is the same whether or not the desire to engage in the sexual activities is innate or environmental, a choice or not. Understood this way, Nussbaum's defense of arguments from etiology for LGB rights is not really about etiology at all.

There are two more particular and practical ethical problems for arguments from etiology for LGB rights related to this concern. Insofar as there are some people or groups of people with same-sex sexual desires whose sexual orientations are neither innate nor immutable, the arguments from etiology for LGB rights are particularly impotent. Most notably, some scientists studying sexual orientation claim that women's sexual orientation is more fluid than men's.[77] If some women's sexual orientations—or women's sexual orientations generally—are mutable, not innate, or to some extent chosen, then the argument from etiology for LGB rights will fail to apply to women. As the comments of Cynthia Nixon suggest,[78] there is a similar problem related to bisexuals, who are sexually attracted to both men and women and who can be sexually and emotionally fulfilled by relationships with people of either sex.[79] Even if being bisexual is innate, immuta-

75. Asphyxiophilia, also known as autoerotic asphyxiation sex or hypoxyphilia, is the practice, whether alone or with a sexual partner, of intentionally reducing the amount of oxygen to the brain during sexual stimulation in order to heighten the pleasure received from an orgasm.

76. *See, e.g.*, R v. Brown, [1994] 1 AC 212 (H.L), [1993] 2 All ER 75 (H.L) (appeal from Eng.) (sadomasochism); Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002) (adultery); Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976) (en banc) (*ménage a trois*); *see generally*, Lawrence v. Texas, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting) (noting, *inter alia*, state laws against bigamy, adult incest, masturbation, adultery, and fornication). *But see* Brown v. Buhman, 947 F. Supp. 2d 1170 (2013) (striking down a portion of Utah's laws against polygamy).

77. *See generally* DIAMOND, *supra* note 37.

78. *See supra* text accompanying notes 9-13.

79. This is a simplification because some bisexuals are attracted to men and women differently, for example, some bisexuals may prefer to engage in sexual activities with people of one sex but to have their primary emotional and familial attachments with people of another sex. *See, e.g.*, MARTIN WEINBERG ET AL., DUAL ATTRACTION: UNDERSTANDING BISEXUALITY 39-58 (1994).

ble, and/or not a choice, a bisexual could in fact choose to have sex with and build relationships with people of a different sex. Even setting aside the ethical problem for the arguments from etiology for LGB rights discussed above, arguments from etiology would be especially problematic when applied to bisexuals.[80] A purported argument for LGB rights that turned out to be only effective as applied to the rights of gay men but not to the rights of lesbians and bisexuals would clearly be deeply problematic.

One response to the ethical problems with the arguments from etiology for LGB rights is that *sometimes* scientific evidence about how sexual orientations develop is ethically relevant. If, for example, it was established that sexual orientations are determined at birth, it might convince otherwise skeptical people that there are no problems with LGB people teaching elementary school. Similarly, showing that sexual orientations are not changeable once entrenched, might convince people that it is a waste of resources to try to change LGB people's sexual orientations[81] and perhaps justify laws that make it illegal to try to change a person's sexual orientation.[82] Showing, for example, that there is no problem with LGB people being teachers is a good thing to do; insofar as scientific evidence can help establish this, such scientific evidence is ethically relevant. That the argument from etiology for LGB rights is impotent is consistent with the claim that some scientific evidence about how sexual orientations develop is relevant to some specific goals of advocates of LGB rights. Such evidence is, however, of limited use in making the case for LGB rights generally, which is the aim of the arguments from etiology under consideration herein.

B. Political/Pragmatic Problems

Some advocates of LGB rights who are aware—at least implicitly—of problems with arguments from etiology still embrace such arguments because people are persuaded by such arguments despite the problems with such etiological arguments.[83] This pragmatic approach draws support from

80. That this issue has been overlooked is not surprising given the erasure of bisexuals in general. *See* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000).

81. *See, e.g.*, *Pillard Interview*, *supra* note 28, at 98.

82. *See* S.B. 1172, 2012 Cal. Legis. Serv. Ch. 835 (2012) (codified at CAL. BUS. & PROF. CODE §§ 865(a), 865.1 (West 2012) (prohibiting "mental health provider[s]" from "engaging in sexual orientation change efforts . . . with a patient under 18 . . . ."); Act of August 19, 2013, ch. 150, 2013 N.J. Sess. Law Serv. 3371 (S 2278) (same, supplementing Title 45 of N.J. Revised Statutes). For a pro-LGB critique of such laws, see Tia Powell & Edward Stein, *When New Desires Conquer: Legal and Ethical Concerns about Change in Sexual Orientation*, HASTINGS CENTER REP. (forthcoming 2014).

83. *See, e.g.*, MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE 90S, 184 (1989) (arguing that LGB people "should be considered to have been born gay[,] even though sexual orientation for most humans seems to be a

numerous opinion polls spanning more than two decades that show people who think homosexuality is biologically based or that sexual orientations are not chosen are more likely to favor LGB rights than those who do not.[84] This correlation between pro-LGB attitudes and the belief that sexual orientations are inborn or immutable seems a robust phenomenon that advocates of LGB rights should not ignore.

This pragmatic strategy is not, however, promising. Linking LGB rights to biology is a bad strategy even in political contexts. First, this argument has not worked historically. Starting around the turn of the twentieth century and continuing until the Nazis' rise to power in Germany, Magnus Hirschfeld, a German doctor and sexologist, attempted to gain legal protections for homosexuals on the grounds that they constituted a third biological sex. A centerpiece of Hirschfeld's lobbying effort for lesbian and gay rights was a version of the "born that way" argument.[85] Prior to his death, Hirschfeld conceded not only had he failed to prove his biological thesis, but also his use of the "born that way" argument unwittingly contributed to the persecution of homosexuals by stigmatizing them as biologically defective.[86] He presumably had in mind the fact that, in Nazi Germany, LGB people, transgender people, and other sexual minorities were imprisoned, castrated, mutilated in various ways, and sent to death camps to remove them from the "breeding stock."[87] This shows how claiming that sexual orientation is biologically based may not produce a positive result for LGB people. More generally, arguments of this form have not proven politically effective. It is widely believed—despite significant evi-

complex interaction between innate predispositions and environmental factors during childhood and early adolescence").

84. *See, e.g.*, JAMES BUTTON ET AL., PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES 61 (1997); Clyde Wilcox & Barbara Norrander, *Of Moods and Morals: The Dynamics of Opinion on Abortion and Gay Rights, in* UNDERSTANDING PUBLIC OPINION 139 (Clyde Wilcox & Barbara Norrander eds., 2d ed. 2002); Clyde Wilcox & Robin Wolpert, *Gay Rights in the Public Sphere: Public Opinion on Gay and Lesbian Equality, in* THE POLITICS OF GAY RIGHTS 409 (Craig Rimmerman et al., eds. 2000); J.E. Aguero et al., *The Relationship Among Beliefs, Attitudes, Experience and Homophobia*, 10 J. HOMOSEXUALITY 95 (1984); Kurt Ernulf et al., *Biological Explanation, Psychological Explanation and Tolerance of Homosexuals: A Cross-National Analysis of Beliefs and Attitudes*, 65 PSYCHOL. REP. 1003 (1989); Donald Haider-Markel & Mark Joslyn, *Beliefs About the Origins of Homosexuality and Support For Gay Rights: An Empirical Test of Attribution Theory*, 72 PUB. OPINION Q. 291 (2008); J. Piskur & D. Delegman, *Effect of Reading a Summary of Research about Biological Bases of Homosexual Orientation on Attitudes Towards Homosexuals*, 71 PSYCHOL. REP. 1219 (1992); B.E. Whitley, *The Relationship of Heterosexuals' Attributions for the Causes of Homosexuality to Attitudes towards Lesbians and Gay Men*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 369 (1990).

85. *See, e.g.*, Rainer Herrn, *On the History of Biological Theories of Homosexuality*, 28 J. HOMOSEXUALITY 31 (1995), *reprinted in* SEX, CELLS, AND SAME-SEX DESIRES, *supra* note 29, at 31.

86. *Id.*

87. *See generally* RICHARD PLANT, THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS (1986).

dence to the contrary[88]—that race is biologically based. The popularity of this belief does not seem to have had a mitigating influence on racism.

Even granting that the belief in a strong biological basis for homosexuality would persuade people to favor LGB rights in the short run, the belief that a characteristic is biologically based does not in any way guarantee that people will view this characteristic in a positive light. Many characteristics coded for by genes—for example, Down's syndrome, Tay Sach's syndrome, and to some extent, alcoholism—are viewed as undesirable, shameful, and worth going to great lengths to avoid.

Generally, it is a risky strategy to link LGB rights to the ups and downs of scientific research, especially since such research is, at best, in its early stages. Biological research into sexual orientation has a poor track record when it comes to reliability; what appear to be valid results today could turn out to be mistakes.[89] Making LGB rights contingent on a particular scientific finding is simply too risky. That people are persuaded by arguments from etiology may suggest a short-term public relations strategy, but it does not suggest a political strategy appropriate for achieving a set of important basic civil rights.

As an example of the risks of connecting particular scientific theories with LGB politics, consider the relationship of the LGB movement in America to psychiatry.[90] In the "pre-Stonewall" stage of the gay rights movement (from World War II to the late sixties), many LGB rights activists embraced psychiatry and its language, partly on political grounds. The idea was that psychiatry could help legitimate LGB people and their organizations.[91] But as the LGB movement grew, LGB people began to challenge psychiatry, ultimately protesting against the American Psychiatric Association's classification of homosexuality as a psychological disorder. Science, medicine, and psychology are tricky ethical and political weapons; at best, they are double-edged swords.

88. *See, e.g.*, K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, *in* COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 30 (K. Anthony Appiah & Amy Guttman eds. 1996); *see generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN (rev. ed. 1996). For a relevant legal discussion of race and immutability, see Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375 (1998-1999).

89. *See, e.g.*, William Byne, *Science and Belief: Psychobiological Research on Sexual Orientation*, 28 J. HOMOSEXUALITY 303, 336 (1995), *reprinted in* SEX, CELLS, AND SAME-SEX DESIRES, *supra* note 29.

90. RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY (Princeton Univ. Press 2d ed. 1987).

91. JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970, at 116-17 (1983).

A further problem for the pragmatic justifications for arguments from etiology is that the very terminology of the biological theories may contribute to the stigmatization of homosexuality. In some neurological and psychiatric literature, these theories are almost invariably couched in pejorative terms such as abnormality, deficiency, aberration and "gene-controlled disarrangement of psychosexual maturation patterns."[92] Traits that are perceived as both innate and undesirable are frequently assumed to be amenable to medical remedy or prevention. This might harm the cause of LGB rights more than it helps.

When advocates and allies of LGB rights are dealing with important strategic questions about legislation, they have been appropriately hesitant about making arguments from etiology. After Vermont's highest court ruled that the state constitution required that same-sex couples be able to obtain the same rights and benefits that married couples have, the Vermont legislature had to decide how to meet this constitutional requirement.[93] The lawyers who represented the couples seeking legal recognition of their relationships before the Vermont Supreme Court testified before a state legislative committee considering whether to legalize same-sex marriage as opposed to some other way of recognizing same-sex relationships. A legislator asked the lawyers whether sexual orientations—in particular, homosexuality—was inborn or a choice. Instead of making the "born that way" or "not a choice" argument, the lawyers argued that it did not matter whether sexual orientation is a choice because LGB people deserve equal rights to marry however sexual orientations develop.[94] This hesitance to make arguments from etiology in an important legislative context is not an isolated incident.[95] The hesitance of advocates for LGB rights to make the "born that way" or "not a choice" arguments in important contexts suggests that the arguments might not be as politically expedient as some think it is.

There is another, more limited, pragmatic argument from etiology for LGB rights that warrants consideration. Some have argued that arguments based on the innateness or immutability of sexual orientations will at least

92. COMPREHENSIVE TEXTBOOK OF PSYCHIATRY (Harold I. Kaplan & Benjamin J. Sadock eds., 4th ed. 1985); *see also* EVE KOSOFSKY SEDGWICK, EPISTEMOLOGY OF THE CLOSET 40-44 (1990); Byne & Parsons, *supra* note 29, at 236.

93. Baker v. State, 744 A.2d 864 (Vt. 1999).

94. DAVID MOATS, CIVIL WARS: THE BATTLE FOR GAY MARRIAGE 183 (2004) (discussing testimony of Beth Robinson and Susan Murray before the Vermont's House Judiciary Committee).

95. *See* Gary Mucciaroni & M.L. Killian, *Immutability, Science, and the Legislative Debate over Gay, Lesbian and Bisexual Rights*, 47 J. HOMOSEXUALITY 53 (2004) (finding, based on study of ten legislative debates at various levels of government concerning LGB rights, that arguments from etiology for LGB rights were infrequently, if ever, offered by advocates of LGB rights and had little or no impact on the debates).

discourage psychiatrists, psychologists, and therapists from trying to "cure" homosexuality and, thereby, protect minors who are at risk of harm from attempts to change their sexual orientation.[96] Etiological arguments for LGB rights may have some impact (at least in the short term) on how mental health professionals view homosexuality. The strength of this impact can, however, easily be overemphasized. Even if a therapist is convinced that his patient cannot change her sexual orientation, he might encourage the patient to change her behaviors, her sexual and emotional relationships, and her public sexual identity. Furthermore, even if he does not try to cure a patient's homosexuality, he might still view homosexuality as less desirable than heterosexuality and continue to accept a variety of mistaken and potentially harmful stereotypes about LGB people. This could adversely affect the therapeutic goals set for LGB patients. Further, there are strong arguments against "reparative" or "reorientation" therapies that can be made independent of any biological evidence about the origins of sexual orientation. One can argue there is no good reason to "convert" homosexuals by showing there is nothing wrong with homosexuality.[97]

Relatedly, the impact of arguments from etiology for LGB rights will be limited because those who think homosexuality is undesirable could, when faced with credible scientific evidence that sexual orientations are innate and not chosen, simply switch their support away from psychological "conversion" therapies to "reorientation" surgery, pharmaceutical interventions, gene therapy, or reproductive technological interventions.[98]

Some advocates of arguments from etiology for LGB rights focus on the observation that people who believe sexual orientations are innate, inborn, or not chosen are much more likely to support LGB rights. I have shown that this pragmatic interpretation of etiological arguments for LGB rights has problems. Further, I am skeptical about the way such advocates implicitly interpret the opinion polls that motivate this pragmatic view of arguments from etiology. These polls establish a *correlation* between supporting LGB rights and thinking that sexual orientations are innate or not a choice; they do not show that supporting LGB rights is caused by believing that sexual orientations are innate or not a choice. In fact, the causal con-

96. *See, e.g.*, Karen Ocamb, *NCLR Urges CA Guv to Sign Gay Child Abuse Bill,* THE BILERICO PROJECT (Sept. 17, 2012), http://www.bilerico.com/2012/09/nclr_urges_ca_guv_to_sign_gay_child_abuse_bill.php; *see also Pillard Interview*, *supra* note 28, at 98.

97. *See, e.g.*, CARLOS BALL, THE MORALITY OF GAY RIGHTS: AN EXPLORATION IN POLITICAL PHILOSOPHY (2003); RICHARD MOHR, GAYS/JUSTICE: A STUDY IN SOCIETY, ETHICS AND LAW (1990); Frederick Suppe, *Curing Homosexuality*, *in* PHILOSOPHY AND SEX 391 (Robert Baker and Frederick Elliston eds. 1984); David Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297 (1998-99).

98. *See infra* Part III.C.

nection might well be reversed, namely supporting LGB rights might make people more likely to believe that sexual orientations are biologically based or not chosen. Or, these beliefs might both be caused by some third belief. The truth of either alternative explanation would undermine the pragmatic version of the "born that way" argument. For this reason and the reasons discussed above, attempts to make a pragmatic argument for LGB rights based on scientific claims that sexual orientations are innate or inborn are misguided and futile.

C. "Bioethical" Problems

I turn now to another ethical concern about the "born that way" argument, namely, that it could hasten attempts to use reproductive technologies to produce heterosexual children, which, in turn, would potentially have deleterious effects on the situation for LGB people. Suppose it was widely believed that sexual orientations are strongly genetic. If scientists isolate a particular gene sequence associated with homosexuality, then it would probably be relatively easy to determine whether a fetus has this particular gene sequence. If prospective parents believe that the future sexual orientation of a fetus can be determined through a prenatal screening procedure, some of them would make use of such a procedure (or in some other way attempt) to prevent the birth of a fetus deemed to be "at risk" of becoming homosexual.[99]

I call techniques for selecting the sexual orientation of children *orientation-selection procedures.* It seems virtually certain that some prospective parents would, if technology permits, seek abortions or use other procedures to prevent the birth of non-heterosexual children.[100] Most people (even some lesbians and gay men)[101] have a strong preference for having

99. *See* Elizabeth Banger & Glenn McGee, *Aspiring Parents, Genotypes and Phenotypes: The Unexamined Myth of the Perfect Baby*, 68 ALB. L. REV. 1097, 1108 (2005) (surveying how likely people were to want to use selection techniques to prevent or insure a future child would have certain characteristics and finding that, of the "unimportant traits," which included, for example, eye color, hair color, and sexual orientation, subjects were most likely to want to use selection techniques to prevent their future child from being homosexual).

100. RICHARD POSNER, SEX AND REASON 308 (1992) ("[Y]ou can be sure that the child's parents would [make use of a technique to ensure their child would be straight], believing, probably correctly, that he would be better off . . . .").

101. The reasons some LGB people want heterosexual children are more complicated than why straight people do. Some LGB people who want heterosexual children may suffer from internalized homophobia; some, having experienced prejudice and discrimination for being an openly LGB person, want to their children to avoid a similar fate; and some want to avoid the appearance that LGB parents are more likely to produce LGB children. *See* Fred Kuhr, *In Our Parents' Footsteps*, THE ADVOCATE (June 5, 2006), http://www.advocate.com/politics/commentary/2006/06/05/our-parents-footsteps (discussing negative attitudes towards LGB children of LGB people).

heterosexual children. Even supportive parents of LGB people admit that they would have tried to insure that their children would be heterosexual.[102]

Making the "born that way" argument in social, political, and legal contexts will contribute to attitudes and perceptions about LGB people. Emphasis on the claim that sexual orientations are innate would increase interest in, the development of, awareness of, and trust in the effectiveness of orientation-selection procedures. As some indication of this, note that even though no such procedures have been developed thus far, a state law was proposed that would have made orientation-selection procedures illegal.[103]

If such procedures are available, people will almost certainly make use of such procedures *even if they do not work*. This is partly because it would be difficult for people who are considering using orientation-selection procedures to determine whether such procedures work. The vast majority of children turn out to be heterosexual even without the use of such procedures. Because of this, the majority of parents who attempt to select the sexual orientation of their children will believe that their interventions have been successful even though their children would have been heterosexual without the use of orientation-selection procedures. Further, most people take a while to figure out their sexual orientation and, for LGB people, it may even take longer to start talking about their sexual orientation. Parents who make use of an orientation-selection procedure might think their intervention had been successful in part because their child is not yet consciously aware of his or her sexual orientation or has not yet come out to his or her parents. If an LGB person knows that his or her parents used an orientation-selection procedure to ensure that he or she would be heterosexual, this would make it more likely that a person would hide his or her sexual orientation from his or her parents. For these reasons, once available, orientation-selection procedures will, even if they do not work, appear to work.

That orientation-selection procedures will be used even if they do not work fits a historic pattern of LGBT people being subjected to various

102. *See* Gelman, *supra* note 21 (quoting a leader of a group supportive of LGB rights as saying "[n]o parent would choose to have a child born with any factor that would make life difficult for him or her [including homosexuality]").

103. "An Act to Protect Homosexuals from Discrimination," L.D. 908, 122nd Leg. Sess. (Me. 2005) ("An abortion may not be performed when the basis for the procedure is the projected sexual orientation of the fetus after birth, based on analysis of genetic materials of the fetus in which sexual orientation is identified through the presence or absence of a so-called 'homosexual gene.'"). According to a news account, this bill was proposed by Brian Duprey, an ardent pro-lifer, who "received the idea for this bill when listening to the Rush Limbaugh radio show. 'I heard Rush saying that the day the 'gay gene' is determined to be real, that overnight gays would become pro-life.'" *New Maine House Bill Would Protect Fetuses Carrying the 'Gay Gene'*, MAGIC CITY MORNING STAR (Feb. 24, 2005) http://magic-city-news.com/article_3173.shtml. The bill died in the House Judiciary Committee.

forms of medical and psychological interventions for which there is no evidence of effectiveness.[104] For example, gay men were injected with testosterone with the aim of turning them into heterosexuals despite studies showing no correlation between sexual orientation and testosterone levels.[105] Even if the evidence supporting the claim that sexual orientations are genetic is weak, some people will probably still believe that orientation-selection procedures work and will make use of them. The result could well be the widespread use of techniques to avoid the birth of children thought to be carrying genes for homosexuality or bisexuality. Even if orientation-selection procedures do not work, their availability, the acceptability of their use, and the knowledge that they are used will shape attitudes towards LGB people. Specifically, the emergence of orientation-selection procedures will likely reinforce the preference for heterosexual over homosexual children. Making the "born that way" argument will likely increase interest in and spur the development of orientation-selection procedures and, when such procedures are offered—whether or not they work—the "born that way" argument will contribute to awareness of such procedures and trust in their effectiveness. In so doing, making the "born that way" argument will potentially have negative effects on the social climate for LGB people.

Additionally and relatedly, making the "born that way" argument will encourage the view that LGB people are diseased. Until recently, most people viewed homosexuality as a disease. Although some people, among them some doctors and psychiatrists, still see homosexuality as a mental illness,[106] there has been a significant shift away from this view. One indication of this shift was the American Psychiatric Association's 1973 decision to declassify homosexuality as a mental disorder.[107] The effects of the shift from viewing homosexuality as a disease have been dramatic: some of the stigma associated with homosexuality has lifted and more LGB people have become comfortable and open about their sexual orientation. However, the "born that way" argument, by emphasizing strong biological bases for homosexuality, represents a return of sorts to a disease model of homosexuality. Further, the mere availability and use of orientation-selection

104. *See, e.g.*, Haldeman, *Conversion Therapy*, *supra* note 44; JONATHAN N. KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 129-406 (rev. ed. 1992); Silverstein, *supra* note 44; Haldeman, *Practice and Ethics*, *supra* note 44; Murphy, *supra* note 44; Siobhan Somerville, *Scientific Racism and the Emergence of the Homosexual Body*, 5 J. HIST. SEXUALITY 243 (1994).

105. Heino Meyer-Bahlburg, *Psychoendocrine Research on Sexual Orientation: Current Status and Future Options*, *in* PROGRESS IN BRAIN RESEARCH 375 (G. J. Devries et al. eds. 1984).

106. *See, e.g.*, NICOLOSI, *supra* note 47; Joseph Nicolosi et al., *Beliefs and Practices of Therapists Who Practice Sexual Reorientation Psychotherapy*, 86 PSYCH. REP. 689 (2000); *see also* Shidlo & Schroeder, *supra* note 45, at 249; Cruz, *supra* note 97, at 1300.

107. *See, e.g.*, BAYER, *supra* note 90.

procedures could suggest that screening for homosexuality is a reasonable and sanctioned medical procedure. This too could contribute towards a return to seeing homosexuality as a physical or mental disorder.

Appeals to the innateness of sexual orientations potentially encourage interventions to prevent the development of homosexuality through orientation-selection procedures. The availability and use of orientation-selection procedures poses a threat to LGB people in societies that are generally unfriendly to them and in which most people have a preference for heterosexual children.

In this Part, I have argued that there are significant ethical, pragmatic, and bioethical problems with arguments from etiology for LGB rights. With these problems in mind, I turn to the legal context in which these arguments are supposed to have traction.

III. LEGAL CONTEXT

After the immutability factor first emerged in the Supreme Court's equal protection jurisprudence,[108] the Court has sometimes included immutability as among the factors it considers in determining whether to apply heightened scrutiny.[109] However, the Court does not always talk about immutability when it is determining the level of scrutiny a classification deserves.[110] Writing in 1980, John Hart Ely argued that the attempt to articulate criteria for distinguishing suspect from non-suspect classifications had failed "at the level of theory"[111] and criticized the suggestion that "the immutability of the classifying trait ought to make the classification suspect."[112] In *City of Cleburne v. Cleburne Living Center*,[113] which involved a group home for "mentally retarded" people, the Supreme Court agreed with Ely that immutability is not a central factor in determining whether a law that makes use of a classification should receive heightened scrutiny. Quoting Ely in support of its conclusion that the classification involved

108. *See supra* text accompanying notes 67-71.

109. See Lyng v. Catillo, 477 U.S. 635, 638 (1986) (holding that "close relatives are not a 'suspect' or 'quasi-suspect' class [because] . . . they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group"); Bowen v. Gilliard, 483 U.S. 587 602-03 (1987) (quoting *Lyng*); Parham v. Hughes, 441 U.S. 347, 351 (1979) ("the presumption of statutory validity may . . . be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes").

110. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (holding that the elderly "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities").

111. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 149 (1980).

112. *Id.* at 150.

113. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

does not get heightened scrutiny, the Court concluded its analysis as follows:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so.[114]

Since *Cleburne*, the Supreme Court has rarely mentioned immutability as a factor in equal protection analysis.

Insofar as immutability remains a factor in the Court's view of equal protection, it seems to be neither a necessary nor a sufficient condition for a classification being deemed suspect.[115] A bodily characteristic like, for example, height, is mostly immutable, but height classifications do not get heightened scrutiny.[116] More generally, classifications that are not related to political powerlessness are not deemed suspect even if they are immutable. Further, some suspect classifications are in some sense mutable. For example, while it is possible to change one's religion and to change—both legally and medically—one's sex,[117] sex classifications and religious classifications[118] are still both suspect.[119]

114. *Id.* at 445-46.

115. *See, e.g.*, Spitko, *supra* note 71, at 598 (arguing that "immutability of a characteristic is neither a prerequisite to nor a sufficient condition for heightened scrutiny of a classification relating to that characteristic"); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063, 1073 (1980).

116. *Cleburne*, 473 U.S. at 472 n.24 (Marshall, J. concurring and dissenting).

117. *See, e.g.*, Julie Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of Multiracial and Transgendered Experiences*, 39 SAN DIEGO L. REV. 917 (2002). *But see, e.g.*, Littleton v. Prange, 9 S.W.3d 223 (Tex. 1999) (holding a person's sex is fixed at birth).

118. Religious classifications are suspect but in light of the First Amendment's guarantee of free exercise of religion, see U.S. CONST. amend. I, not the Fourteenth Amendment. The California Supreme Court, for example, used the analogy to religion to show that immutability is not a requirement for being a suspect classification. *Marriage Cases*, 183 P.3d 384, at 442 ("[A] person's religion is a suspect classification for equal protection purposes and one's religion, of course, is not immutable but is a matter over which an individual has control.").

119. Some legal scholars have argued that the Court has effectively dispensed with—or at least de-emphasized—the three-tiered framework for assessing whether laws violate equal protection. *See, e.g.*, Goldberg, *supra* note 67; Samuel Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 665 (2001) (discussing "the Court's gradual abandonment of the once-rigid framework of equal protection analysis, with its levels of scrutiny serving as an almost perfect predictor of outcomes"); Cass Sunstein, *The Supreme Court 1995 Term; Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 77 (1996) ("The hard edges of the tripartite division have thus softened, and there has been at least a modest convergence away from tiers and towards general balancing of relevant interests."). Their argument is based, in part, on the fact that sometimes rational review is applied in a non-deferential manner (sometimes known as "rational review with bite", *see supra* note 66), the indeterminacy of the intermediate scrutiny standard, and, perhaps, the indeterminacy of the strict scrutiny standard. Even if

Regarding sexual orientation in particular, the Supreme Court has not directly ruled on the question of whether sexual-orientation classifications warrant heightened scrutiny and has steered clear of immutability when it has dealt with LGB rights cases. In *Romer v. Evans*, *Lawrence v. Texas*, and *Windsor v. United States*, all cases in which immutability arguments were presented, the Court held in favor of LGB litigants but without addressing the question of whether sexual-orientation classifications are suspect and thus without considering the immutability of sexual orientation. In *Romer v. Evans*, the Court held unconstitutional an amendment to Colorado's constitution[120] that *precluded* state and local action protecting homosexual and bisexual orientation, conduct, practices, and relationships.[121] The Supreme Court found the Colorado amendment unconstitutional *without* invoking heightened scrutiny because the classification at issue did not satisfy the rational review test.[122] In *Lawrence v. Texas*, the Supreme Court held that a Texas law prohibiting sodomy between persons of the same sex[123] was unconstitutional.[124] Of the six judges who held that the Texas sodomy law was unconstitutional, only Justice O'Connor held that it violated the Equal Protection Clause. In reaching this conclusion, O'Connor did not apply heightened scrutiny, but rather applied a "more searching form of rational . . . review."[125] Justice Kennedy, writing for the five-justice majority, found the Texas sodomy law unconstitutional on grounds that it violated the Due Process Clause of the Fourteenth Amendment;[126] thus, like O'Connor's concurrence, the majority did not reach the question of whether laws that make use of sexual-orientation classifications are suspect. Finally, in *Windsor v. United States*,[127] Justice Kennedy, writing for a five-justice majority, struck down the portion of DOMA that defined marriage for purposes of federal law so as to exclude same-sex couples from having their marriages recognized by the federal government, without

the three-tiered approach has been—or is on its way to being—abolished or if it is beginning to atrophy, immutability *may* remain a factor in assessing whether a law satisfies equal protection, see, e.g., Marcosson, *supra* note 119, at 669, but its role in this non-tiered legal terrain is even less certain than under the standard three-tiered framework. Even assuming the continued vitality of the three-tiered approach to equal protection, the role of immutability in determining the level of scrutiny to which a law is subject remains uncertain.

120. COLO. CONST. art. II, § 30b.

121. Romer v. Evans, 517 U.S. 620 (1996).

122. *Id.* at 632 ("[T]he sheer breadth [of the Colorado amendment] is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

123. TEX. 2003 PENAL CODE ANN. § 21.06(a) (Vernon 2003).

124. Lawrence v. Texas, 539 U.S. 558 (2003).

125. *Id.* at 580 (O'Connor, J., concurring).

126. *Id.* at 578.

127. 133 S. Ct. 2675 (2013).

reaching the question of suspect classification.[128] As in *Romer*, Kennedy found that the provision in question failed to satisfy the standard of review appropriate to laws based on animus.[129]

Although the Supreme Court has rarely mentioned immutability since *Cleburne*, lower federal courts and state supreme courts have continued to talk about immutability in the context of laws related to sexual orientation. Of these courts, some have rejected the claim that sexual orientations are immutable and, thereby, failed to apply heightened scrutiny to laws that make use of sexual orientation on that basis.

In 1987, Joseph Steffan, a midshipman, was forced to resign from the Navy because of his sexual orientation. Steffan challenged the policy under which he was forced to resign, citing equal protection grounds, and argued, in part, that the policy should be subjected to heightened scrutiny because sexual orientations are immutable.[130] In support of his argument, Steffan filed affidavits from Richard Green, a lawyer and psychiatrist who argued that homosexuality was immutable.[131] The trial judge held that

> [H]omosexual orientation is neither conclusively mutable nor immutable since the scientific community is still quite at sea on the causes of homosexuality, its permanence, its prevalence, and its definition. . . . [W]ithout a definitive answer at hand, yet confident that some people exercise some choice in their own sexual orientation, the Court does not regard homosexuality as being an immutable characteristic.[132]

On appeal, this ruling was reversed when a three-judge panel applied rational review and, under this weak standard, found the Navy's policy to be unconstitutional, thereby leaving unanswered whether sexual-orientation classifications are suspect.[133] However, the trial court's decision was eventually affirmed by an en banc panel of the appellate court, which agreed rational review was the appropriate standard of review, but disagreed with the original three-judge panel's application of the standard and upheld the Navy's policy, rejecting the idea that sexual-orientation classifications deserve heightened scrutiny.[134] In effect, the en banc panel in *Steffan* said that sexual-orientation classifications do not warrant suspect status because

128. *But see* Smithkline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014) (finding that the Supreme Court in *Windsor* actually applied heightened scrutiny to laws that make use of sexual-orientation classifications).

129. *Id.* at 2693.

130. GAYS AND THE MILITARY: JOSEPH STEFFAN VERSUS THE UNITED STATES 17 (Marc Wolinsky & Kenneth Sherrill eds. 1993) (reprinting memorandum of law in support of Steffan's motion for summary judgment in Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991)).

131. *Id.* at 56, 171 (affidavits of Richard Green).

132. *Steffan*, 780 F. Supp. at 6 & n.15.

133. Steffan v. Aspin, 8 F.3d 57, 63 (D.C. Cir. 1993).

134. Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc).

sexual orientation, unlike race, gender, and ethnicity, is a behavioral classification rather than a status-based classifications. The en banc panel in *Steffan*, in reaching that result, relied on *Bowers v. Hardwick*,[135] a Supreme Court case that is no longer good law.[136] Some opponents of LGB rights have, however, argued that this distinction between status-based and behavior-based classification as used in *Steffan* survives.[137]

The trial judge in *Romer v. Evans* responded to immutability arguments in a fashion similar to the *Steffan* trial judge. The lawyers for the plaintiffs challenging Colorado's anti-LGB rights amendment called various witnesses to testify that sexual orientations were immutable, including Richard Green, scientist Dean Hamer, and Judd Marmor, a psychiatrist and former Vice President of the American Psychiatric Association.[138] Although the trial judge found the Colorado amendment unconstitutional,[139] he rejected the argument that sexual-orientation classifications warrant heightened scrutiny based, in part, on the following analysis of the testimony on immutability:

> [W]itnesses addressed the question of whether homosexuality is inborn . . . or a choice based on life experiences. . . . Plaintiffs strongly argue that homosexuality is inborn. All the suspect and quasi-suspect classes, race, alienage, national origin, gender and illegitimacy, are inborn. Defendants argue that homosexuality or bisexuality is either a choice, or its origin has multiple aspects or its origin is unknown. The preponderance of credible evidence suggests that there is *a* biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is *some* genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs. "nurture" is a decision for another forum, not this court, and the court makes no determination on [it].[140]

The defendants appealed the trial court's ruling that the amendment was unconstitutional, but the plaintiffs did not appeal the trial court's find-

135. 478 U.S. 186 (1986).

136. *Lawrence*, 539 U.S. at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. . . . *Bowers* v. *Hardwick* should be and now is overruled.").

137. The Bipartisan Legal Advisory Group of the United States House of Representatives, who defended DOMA in *United Stated v. Windsor*, argued that sexual orientation are behavioral-based classifications and thus not immutable. Brief on the Merits for Respondent The Bipartisan Legal Advisory Group of the United States House of Representatives, United States v. Windsor, 133 S. Ct. 2675 (2013) (Nos. 12-307), at 55.

138. LISA KEEN & SUZANNE GOLDBERG, STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL 43-73 (1998) (discussing the testimony in support of the immutability of sexual orientation).

139. Evans v. Romer, No. 92-CV-7223, 1993 WL 518586, at *9 (Colo. Dist. Ct. 1993) (finding the law violated "the fundamental right of an identifiable group to participate in the political process without being supported by a compelling state interest.").

140. *Id.* at *11.

ing that sexual orientations do not warrant heightened scrutiny. The Colorado Supreme Court affirmed the trial court's decision,[141] but without addressing the equal protection issues.[142] Ultimately, as discussed above, the U.S Supreme Court also found the Colorado amendment unconstitutional, albeit on different grounds.[143]

The trial courts in *Steffan* and *Romer* and the en banc appellate court in *Steffan* together cover the major reasons that courts have given for rejecting immutability arguments in favor of treating sexual orientations as suspect classifications. First, some courts have said that sexual-orientation classifications are *behavior-based* classifications, not status-based classifications, and that behavior-based classifications cannot be immutable.[144] Second, courts have said that sexual orientations are not immutable because some people can change, choose, or hide their sexual orientations.[145] Third, courts have said that it is simply not yet known whether or not sexual orientations are immutable.[146]

At least one trial court that considered immutability found that sexual orientations are immutable for reasons rejected by the trial courts in *Steffan* and *Romer*. In *Equality Foundation of Greater Cincinnati v. City of Cincinnati*, the trial judge accepted as a finding of fact that "[s]exual orientation is set in at a very earlier age—3 to 5 years—and is not only

141. Evans v. Romer, 882 P.2d 1335 (Colo.1994).

142. *Id.* at 1341 n.3.

143. *See supra* text accompanying notes 120-121.

144. In addition to the en banc panel in *Steffan*, see, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("[H]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage."); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("[M]embers of recognized suspect or quasi-suspect classes, e.g. blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character.").

145. In addition to the trial court in *Steffan*, see, e.g., Equal. Found. of Greater Cincinnati v. Cincinnati, 54 F.3d 261 (6th Cir. 1995) (holding sexual-orientation classifications not suspect because LGB people do not "comprise an identifiable class," in part because "many homosexuals successfully conceal their orientation") *vacated by* 518 U.S. 1001 (1996), *reinstated on reh'g* 128 F.3d 289 (6th Cir. 1997); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987) (sexual-orientation classifications not suspect because "[i]t would be quite anomalous . . . to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."); Opinion of the Justices, 525 A.2d 1095 (N.H. 1987) ("For purposes of federal equal protection analysis, homosexuals do not constitute a suspect class . . . as sexual preference is not a matter necessarily tied to gender, but rather to inclination, whatever the source thereof.").

146. In addition to the trial court in *Romer*, see, e.g., Andersen v. Kings Cnty., 138 P.3d 963, 974 (Wash. 2006) ("To qualify as a suspect class for purposes of an equal protection analysis, . . . the characteristic defining the class [must be] an obvious, immutable trait. . . . [P]laintiffs must make a showing [that 'homosexuality is an immutable characteristic'] and they have not."); Conaway v. Deane, 932 A.2d 571, 615, n.57 (Md. 2007) ("[N]o studies currently available to the public have been subjected to rigorous analysis under the *Frye-Reed* standard in order to determine the scientific reliability of the methodology, principles, and resultant conclusion of the foregoing studies for the purposes of evidentiary admissibility.").

involuntary, but is unamenable to change."[147] The court went on to hold that sexual-orientation classifications warrant heightened scrutiny in part because "sexual orientation is a characteristic . . . beyond the control of the individual [and] unamendable to techniques to change it."[148] This court accepted the most straightforward application of immutability as entailing heightened scrutiny for sexual orientation.

Other courts that have found that laws that invoke sexual-orientation classifications warrant heightened scrutiny have done so by either expanding the definition of immutability or by looking at other considerations instead of immutability. One early case that looked beyond immutability was *Tanner v. Oregon Health Sciences University*, 971 P.2d 435 (Ore. App. 1998). In *Tanner*, three lesbian employees sued OHSU, claiming the university's refusal to give them domestic partner benefits violated the state constitution. The court did not require that sexual orientations be immutable to reach the conclusion that sexual-orientation classifications warrant heightened scrutiny:

> [I]mmutability—in the sense of inability to alter or change—is not necessary. . . . [A]lienage and religious affiliation . . . are suspect classes . . . [and b]oth . . . may be changed almost at will. For that matter, given modern medical technology, so also may gender. We therefore understand from the cases that the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.[149]

This approach—finding immutability is not necessary to hold that sexual-orientation classifications are suspect or quasi-suspect—was most recently embraced by the Second Circuit in *Windsor* when it struck down DOMA on equal protection grounds, although in a manner different than the way the Supreme Court eventually struck down DOMA.[150]

147. Equal. Found. of Greater Cincinnati v. Cincinnati, 860 F. Supp. 417, 426 (S.D. Ohio 1994) *rev'd* 54 F.3d 261 (6th Cir. 1995), *vacated* 518 U.S. 1001 (1996), *reinstated on reh'g* 128 F.3d 289 (6th Cir. 1997).

148. *Id.* at 437.

149. *Tanner*, 971 P.2d at 446. Instead of focusing on immutability, the court found that OHSU violated OR. CONST, ART. I § 20, which says, "No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." *Id.* at 448.

150. *Compare* Windsor v. United States, 699 F.3d 169 (2d. Cir. 2012) (Although "often couched in terms of 'immutability' . . . the test [for heightened scrutiny] is broader: whether there are 'obvious, immutable, *or* distinguishing characteristics that define . . . a discrete group.' Classifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny, even though these characteristics do not declare themselves, and often may be disclosed or suppressed as a matter of preference.") *with Windsor*, 133 S. Ct. 2675 (2013). *See supra* text accompanying notes 127-129.

Finally, other courts have reached the finding that laws that make use of sexual-orientation classifications warrant heightened scrutiny by articulating an alternative definition of immutability, namely, by saying that a trait is immutable if changing it is very difficult or if the trait is so important to a person's identity that it is deeply problematic for the government to force a person to change that trait.[151] I call this alternative definidefinition of immutability "soft" immutability. The Connecticut Supreme Court, for example, in a case concerning the constitutionality of providing relationship recognition to same-sex couples through a civil union scheme rather than through marriage, held that sexual orientation was a suspect classification "[b]ecause sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so."[152] The court held that the immutability factor was satisfied because LGB people "[a]re characterized by a 'central, defining [trait] of personhood, which may be altered [if at all] only at the expense of significant damage to the individual's sense of self.'"[153] Similarly, the California Supreme Court, in a case concerning the constitutionality of California's prohibition on marriage between two people of the same sex, held that sexual-orientation classifications warrant strict scrutiny, reasoning as follows: "Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[154] Other courts have similarly found sexual orientations to be suspect by construing immutability as soft immutability.[155]

To review, some courts have continued to focus on "standard" (that is, not soft) immutability in determining whether sexual orientation is a suspect classification—some find that sexual orientations are not immutable and thus that laws that make use of sexual-orientation classifications do not deserve heightened scrutiny, while others find sexual orientations are immutable and that laws that make use of sexual-orientations do warrant

151. Marcosson, *supra* note 119, at 652, tries to resuscitate the immutability argument by defining immutability as "[t]he condition of a characteristic or trait such that it is or is experienced as (1) either unalterable by a voluntary act of will by the individual; or alterable only with substantial cost or difficulty to the individual, and (2) not having been acquired through the voluntary choice of the individual."

152. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008).

153. *Id.* at 438-39.

154. In re Marriage Cases, 183 P.3d 384, 442 (Cal. 2008).

155. *See, e.g.*, Watkins v. United States Army, 847 F.2d 1329, 1347 (9th Cir. 1988) (defining a trait as immutable if "changing it would involve great physical difficulty" or if it is "so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change") *vacated and aff'd on other grounds*, 875 F.2d 699 (9th Cir. 1989) (en banc).

heightened scrutiny. Courts have reached the conclusion that laws that make use of sexual-orientation classifications warrant heightened scrutiny in two other ways: either by sidestepping immutability or by broadening what counts as immutable. The courts that sidestep immutability are not especially interesting for purposes of this paper, but the other approaches are. The courts that focus on "standard" immutability agree on the relevance of immutability, but disagree about whether it has been established that sexual orientation is immutable; in other words, they disagree about a scientific question. I now turn my attention to the remaining approach, which embraces soft immutability.

From the point of view of advocates of LGB rights, the main virtue of soft immutability is the relative ease of establishing sexual orientations are immutable in the "soft" sense compared to establishing they are immutable in the "standard" sense. Changing one's sexual orientation is difficult.[156] Even adherents of "conversion" therapy, who think that sexual orientations are, for some people, changeable, admit that such change is hard.[157] The challenge for advocates of LGB rights who wish to make use of immutability is to convince courts to focus on soft immutability rather than standard immutability, in other words, to convince courts to focus on whether sexual orientations are difficult to change or distinctly central to one's identity instead of focusing on whether sexual orientations are innate or unchangeable. Most, if not all, courts that have framed the question of whether sexual orientations are immutable in the "soft" sense have answered "yes."[158] However, this approach faces some problems.

The first problem is interpretative. When the Supreme Court discussed immutability in the context of equal protection jurisprudence, it clearly was not talking about "soft" immutability. In *Frontiero*, the Supreme Court case that introduced immutability as a factor in heightened scrutiny analysis,[159] the Court effectively defined immutability as "a characteristic determined solely by the accident of birth."[160] On its face, this definition is incompatible with "soft" immutability.[161]

156. See *supra* text accompanying notes 41-53.

157. *See, e.g.*, Bessen, *supra* note 11.

158. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 432 (Conn. 2008); *Watkins*, 847 F.2d at 1329; *Marriage Cases*, 183 P.3d 442.

159. *See supra* text accompanying notes 69-71.

160. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

161. The *Tanner* court, however, indirectly responded to this reading of *Frontiero*, in essence suggesting that *Frontiero* was consistent with a "soft" account of immutability by pointing out that this case was about sex classifications and that a person's sex is changeable through surgery. Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. App. 1998); *see also Watkins*, 847 F.2d at 1347. While the Supreme Court in *Fronterio* was certainly not thinking about sex change operations when it said the sex was immutable, it does not seem incompatible with the logic of the Court's analysis in

The second problem is that some characteristics that are immutable in the "soft" sense of the term do not warrant heightened scrutiny. For example, having a disposition for alcoholism or being sexually attracted to children are characteristics that might be "softly" immutable, but such characteristics do not, on any account, warrant heightened scrutiny. Thus, granting that sexual orientation is "softly" immutable would not seem to entail that sexual-orientation classifications warrant heightened scrutiny. If this is right, then the move from standard immutability to "soft" immutability does not deliver heightened scrutiny for sexual-orientation classifications.

The third problem for "soft" immutability, which relates to the two prior problems, is that this sense of immutability is very broad and does not fit at all with the standard usage of the concept of immutability. According to the "soft" definition of immutability, a person's religious affiliation is immutable even though a person's religious affiliation can be the result of a conscious, voluntary choice and even though it can be changed at will.[162] This "soft" sense of immutability is just not immutability in the standard sense of the term, which means something like unchangeable. To put the point another way, while few would disagree that the state should not try to change a person's religious affiliation, it seems too great of a definitional stretch to say that religious affiliations are immutable; surely, this is a characteristic that in a religiously free and pluralistic society the state should not attempt to change, but it is definitely possible for a person's religious affiliation to change.

For advocates of LGB rights, a more promising path is to deny that immutability is a necessary condition for heightened scrutiny. However, if a court insists that immutability is a necessary factor for treating sexual-orientation classifications as suspect, as did the highest courts in Maryland and Washington in their marriage equality cases,[163] the move to soft immutability may be helpful since it is much easier to establish that sexual orientations are immutable in the "soft" sense than in the standard sense.

Fronterio to allow that characteristics that can only be changed through dramatic surgical or other serious physical interventions could still count as immutable. Some courts have held that a person's sex is immutable, reasoning that a person's sex at birth is his or her sex for life. *See, e.g.*, In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002); Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. 1999).

162. *See, e.g.*, *Tanner*, 971 P.2d at 446; *Marriage Cases*, 183 P.3d at 442.

163. Andersen v. Kings Cnty., 138 P.3d 963, 974 (Wash. 2006); Conaway v. Deane, 932 A.2d 571, 616 (Md. 2007).

D. Summary

Some courts, when faced with the question of whether sexual-orientation classifications warrant heightened scrutiny, have ducked the question by finding that the provision that makes use of such classification fails under the weaker test of rational basis review. Those courts that do not take this approach have to tackle the question of heightened scrutiny. This leads to a doctrinal question about immutability (is immutability a necessary condition for a classification to warrant suspect status?), a definitional question (can immutability be defined in the "soft" manner), and a scientific question (are sexual orientations immutable?). The fate of the argument from etiology in the legal context hangs on the answer to these three questions.

IV. TWO OPPOSING AMICUS BRIEFS

I turn now to two amicus briefs from the *Windsor* and *Perry* cases in the Supreme Court's 2013 term. Both briefs, one in support of the legal recognition of same-sex marriages and the other opposed to such recognition, discuss immutability in greater detail than any of the over one hundred briefs filed in these two cases.[164] My aim is to use the preceding discussion as a lens for examining these briefs and a path to evaluating both the wisdom and efficacy of the arguments from etiology for LGB rights, generally, and in the legal context, more specifically.

I begin with the brief of Dr. Paul McHugh, a professor of psychiatry who, according to the statement of interest in the amicus brief, has scholarly expertise in gender identity and sexual orientation issues.[165] In relevant part, the reasoning of the brief is as follows: immutability is a necessary condition for sexual orientation to qualify as a suspect class entitled to heightened scrutiny under the equal protection clause (a doctrinal claim);[166]

164. The parties and the court-appointed amicus in *Perry* and *Windsor* together submitted 27 briefs. *See Filings in the Filings in the Defense of Marriage Act and California's Proposition 8 Cases*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/docket/domprp8.aspx (last visited Jan. 2, 2014). There were 96 amicus briefs in *Perry* at the merits stage while there were 80 such briefs in *Windsor*. *See, e.g.*, Mark Walsh, *It Was Another Big Term for Amicus Curiae Briefs at the High Court*, ABA J., Sept. 1, 2013, *available at* http://www.abajournal.com/magazine/article/it_was_another_big_term_for_amicus_curiae_briefs_at_the_high_court/. Many of these amicus briefs, like the McHugh Brief and the GLMA Brief, were submitted in both *Windsor* and *Perry*. (Full disclosure requires me to say that I was one of the amici who submitted a brief in *Perry*. Brief of *Amici Curiae* Edward Stein, Joanna Grossman, Kerry Abrams, Holning Lau, Katharine Silbaugh and 32 Other Professors of Family Law and Constitutional Law in Support of Respondents, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144)).

165. McHugh Brief, *supra* note 18, at 1.

166. *Id.* at 15.

the relevant definition of immutability is "determined solely by accident of birth" (a definitional claim, with doctrinal implications);[167] scientific evidence demonstrates that sexual orientation is not immutable (a scientific claim); and, therefore, sexual orientation should not be deemed a suspect classification.[168] Regarding the scientific evidence, the brief describes its thesis as the "modest" claim that we do not know enough "[a]bout what sexual orientation is, what causes it, and why and how it sometimes changes"[169] to undergird the claim that sexual orientations are immutable. Specifically, the McHugh brief claims that sexual orientation is "[i]nfluenced by a variety of factors beyond genetics and biology,"[170] as supported by the fact that "[t]here is not 100% concordance among identical twins" with respect to sexual orientation. The brief also claims that sexual orientations are fluid and can change over time, noting the existence of a large number of bisexuals[171] and studies of women's sexual orientation.[172] In light of what we know and do not know about sexual orientation, the McHugh brief argues that it would be a mistake to treat laws that make use of sexual-orientation classifications as warranting heightened scrutiny.[173]

The GMLA brief is partly a response to the McHugh brief, but it also makes a positive argument that sexual orientation warrants heightened scrutiny, in part because sexual orientations are innate and immutable. The GMLA brief begins with the doctrinal claim that immutability is not a necessary condition for a characteristic warranting heightened scrutiny[174] and the definitional claim (with doctrinal import) that immutability does not necessarily mean "accident of birth."[175] The GMLA brief, like the McHugh brief, points to genetic and biological research[176] when it discusses two scientific claims, namely most people view their own sexual orientation as innate[177] and changing one's sexual orientation is difficult.[178]

167. *Id.* (citing *Frontiero*, 411 U.S. at 686; and Quiban v. Veterans Admin., 928 F.2d 1154, 1160 n.13 (D.C. Cir. 1991)).

168. *Id.* at 15-28.

169. *Id.* at 3.

170. *Id.* at 18.

171. *Id.* at 21.

172. *Id.* at 21, 24.

173. *Id.* at 28-29.

174. GLMA Brief, *supra* note 17, at 4.

175. *Id.* at 5 n.3.

176. *Id.* at 12-26 (discussing, *inter alia*, the work of Bailey & Pillard, *supra* note 25; Hamer, et al., *supra* note 26; LeVay, *supra* note 20).

177. *Id.* at 26-27.

178. *Id.* at 27-31.

There are various claims in each of these briefs that are supported by the discussion in the preceding Parts of this Article.[179] Based on this, I suggest a way of thinking about immutability that combines some of what is right in each. Some of the scientific claims in the McHugh brief are well supported, namely that the development of sexual orientation is complicated and influenced by many factors,[180] that sexual orientation is more fluid than commonly assumed,[181] that there is no convincing evidence that sexual orientation is biologically determined, and that there is a great deal that we do not know about how sexual orientations develop.[182] The GMLA brief is, however, right about an especially important scientific claim, that a person cannot consciously change his/her sexual orientation.[183] Further, the GMLA brief is right—and the McHugh brief is wrong—about an important legal thesis, namely that immutability is not required to establish heightened scrutiny.[184]

In light of this discussion of these two briefs and the analysis of this Article, advocates of LGB rights should focus on scientific claims that are well supported. One such significant claim is that sexual orientations are not consciously chosen. While the GLMA Brief makes this claim, it is easily lost among the various other scientific claims the brief makes about sexual orientation, some of them dubious. In the development of this claim, it important to note that, *contra* the McHugh Brief,[185] the position that sexual orientations are not consciously chosen is consistent with the fact that bisexuals can chose between male and female sexual and life partners; as Cynthia Nixon suggested,[186] one does not chose to have a bisexual sexual orientation any more than one choses to have "monosexual" orientation (that is, gay or heterosexual). Another related significant and well-supported claim is that sexual orientations, although they may change over a lifespan, cannot be consciously controlled, and virtually all efforts to change sexual orientation are destined to failure, a point ignored by the McHugh Brief.[187] As a helpful analogy, note that hair color, dyeing aside,

179. There are also claims in both briefs, especially the McHugh brief, that are problematic. I do not here enumerate all of these problematic claims, but I do note some of them.

180. McHugh Brief, *supra* note 18, at 3.

181. *Id.* at 20-28.

182. *Id.* at 14-19; *see supra* note 29 and accompanying text.

183. GLMA Brief, *supra* note 17, at 13 ("No peer-reviewed published scientific studies support the hypothes[i]s that . . . sexual orientation is chosen."); *supra* text accompanying notes 39-40.

184. *Compare* GLMA Brief, *supra* note 17, at 4-8, *and supra* text accompanying notes 115-119, *with* McHugh Brief, *supra* note 18, at 15.

185. McHugh Brief, *supra* note 18, at 25-27.

186. Grindley, *supra*, note 10 ("[B]isexuality is not a choice . . . [w]hat I have chosen is to be in a gay relationship.").

187. McHugh Brief, *supra* note 18, at 27.

can change from blond to brown to gray to white (for example) over a lifetime, but hair color is still immutable and not subject to conscious change. In contrast, there are risks with putting claims about the innateness of sexual orientation at the center of a legal argument, especially because these claims have weaker scientific support and judges may have difficulty digesting the evidence that might support such claims.[188] This shows that the "not a choice" argument has stronger scientific premises than the "born that way" argument, and advocates of LGB rights should recognize this and structure their legal arguments accordingly.

In terms of legal doctrine, advocates of LGB rights should emphasize, as the GLMA Brief does, that immutability (at least in the standard definition) is not a necessary condition. The precedent for this is strong; the Second Circuit recently noted that immutability is just one of three options for satisfying one of the factors relevant to suspect (or quasi-suspect) status—that is "whether the class exhibits 'obvious, immutable, or distinguishing characteristics that define them as a discrete group.'"[189] Further support for this claim can be drawn from the fact that not all suspect classifications are immutable in the standard sense. Discussing citizenship status, illegitimacy, religious affiliations, and sex may be helpful.[190]

One additional problem with etiological arguments for LGB rights and the use of immutability in the legal context is worth noting. There is an expressive function to making legal arguments.[191] When one gives an account of why the use of a classification violates equal protection, part of what one is doing is giving an account of why it is wrong to make use of such classifications in the law. Advocates of LGB rights want to say that it is wrong to make use of sexual-orientation classifications in the law, whether or not sexual orientations are immutable (or even immutable in the "soft" sense). Just as focusing on whether a characteristic is inborn or chosen is beside the point generally, focusing on immutability should be beside the point legally.

188. *See, e.g.*, *supra* text accompanying notes 138-140.

189. Windsor v. United States, 699 F.3d 169, 181 (2d. Cir. 2012) (quoting Bowen v. Gilliard, 483 U.S. 587 (1987)).

190. In addition to text accompanying *supra* notes 117-119, see Watkins v. United States Army, 847 F.2d 1329, 1347 (9th Cir. 1988) ("People can have operations to change their sex. Aliens can ordinarily become naturalized citizens. The status of illegitimate children can be changed. People can frequently hide their national origin by changing their customs, their names, or their associations. Lighter skinned blacks can sometimes 'pass' for white, as can Latinos for Anglos, and some people can even change their racial appearance with pigment injections.").

191. *See, e.g.*, Cass Sunstein, *The Expressive Function of Law*, 144 U. PA. L. REV 2021, 2021-25, 2023 n.10 (1996).

A final pragmatic point is in order. Sometimes circumstances may force a litigator to address immutability as a factor in arguing that sexual-orientation classifications warrant heightened scrutiny. For example, imagine trying to argue that sexual-orientation classifications deserve heightened scrutiny in a state court in Washington, in light of the its highest court having said that "[t]o qualify as a suspect class . . . the characteristic defining the class [must be] . . . immutable."[192] In this context, it would be hard for an advocate for LBG rights to avoid addressing immutability. One might try to argue that this statement was dicta, but perhaps, in this context, a more promising strategy would be to try to shift the focus to soft immutability.

CONCLUSION

At the start of this essay, I presented two examples, supplemented by some related thoughts, about intra-group dissent regarding arguments for etiology about LGB rights. Bill Richardson and Cynthia Nixon got into trouble for suggesting that sexual orientation is not biological and that choice might play a role in the development of sexual orientations. Their comments rankled, in part, because many advocates of LGB rights accept that claims about how sexual orientation develop are legally and ethically important. While Part II showed that there are a variety of ethical and pragmatic problems with connecting scientific claims about the etiology of sexual orientation and LGB rights, Part III suggested that, although there are some problems with doing so, there may also be some legal benefits to be gained from trying to make such connections. Part IV suggested that this would best be done in a nuanced manner, and indicated more specifically what legal and scientific claims would be best emphasized by advocates of LGB rights.

192. Andersen v. King County, 138 P.3d 963, 974 (Wash. 2006).