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## **Born This Way: Scientific Authority And Citizenship In The American Lgbtq Movement**

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# Born This Way: Scientific Authority And Citizenship In The American Lgbtq Movement

## Abstract

This research is an empirical and theoretical account of the “born this way” phenomenon as it has developed within the liberal LGBTQ movement in the U.S. It is also a case study in the role that scientific authority can play in the construction of political identities and attendant claims to rights and citizenship. From the 1950s and 1960s homophile and lesbian movement through the present day liberal one, the relationship between researchers and activists developed, multiplied, and deepened as they co-produced understandings of sexuality and gender that drew their legitimacy from scientific authority. Since the early 1970s, intertwining political, legal, and scientific forces have worked together in tandem to construct and deploy increasingly biological theories of identity in venues including laboratories, professional and movement conferences, political campaigns, courtrooms, legislatures, and bureaucracies. This has resulted in the production, popularization, and politicization of bioessentialist renderings of gay, lesbian, bisexual, and transgender identities—i.e. the idea that they are discrete, stable, and relatively innate. These articulations of identity have come to inform and buttress the projects, policies, and ideology of the modern LGBTQ movement.

As a result of these alliances between movement actors and their scientific allies, liberal rights claims have become tethered to a narrow biopolitical mode of conceptualizing LGBTQ citizenship. This narrow version of citizenship stems from an ideology of “biologically-linked fate” that offers a limited array of rights to a skewed-segment of the population while constraining the range of what practices and expressions of sexuality and gender identity are deemed worthy of legal protections and social recognition. Though the historical progression of liberal bioessentialism has been punctuated by moments of refusal in the form of New Left gay liberationist and later radical queer suspicions of biomedical authority, the advancement of the born this way idea has been remarkably steady. Through its taxonomizing logic, its privileging of scientific authority for political legitimation, and its hubristic attitude toward what scientific inquiry has proven or can prove, bioessentialist ideology has become a pervasive, influential, and entrenched vision of gender and sexuality in American political culture.

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AMERICAN LGBTQ MOVEMENT

Joanna W. Wuest

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BORN THIS WAY: SCIENTIFIC AUTHORITY AND CITIZENSHIP IN THE AMERICAN  
LGBTQ MOVEMENT

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project its first interdisciplinary audience and began to illuminate just what it is that I wanted to bring back to political science.

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## ABSTRACT

### BORN THIS WAY: SCIENTIFIC AUTHORITY AND CITIZENSHIP IN THE AMERICAN LGBTQ MOVEMENT

Joanna W. Wuest

Rogers M. Smith

This research is an empirical and theoretical account of the “born this way” phenomenon as it has developed within the liberal LGBTQ movement in the U.S. It is also a case study in the role that scientific authority can play in the construction of political identities and attendant claims to rights and citizenship. From the 1950s and 1960s homophile and lesbian movement through the present day liberal one, the relationship between researchers and activists developed, multiplied, and deepened as they co-produced understandings of sexuality and gender that drew their legitimacy from scientific authority. Since the early 1970s, intertwining political, legal, and scientific forces have worked together in tandem to construct and deploy increasingly biological theories of identity in venues including laboratories, professional and movement conferences, political campaigns, courtrooms, legislatures, and bureaucracies. This has resulted in the production, popularization, and politicization of bioessentialist renderings of gay, lesbian, bisexual, and transgender identities—i.e. the idea that they are discrete, stable, and relatively innate. These articulations of identity have come to inform and buttress the projects, policies, and ideology of the modern LGBTQ movement.

As a result of these alliances between movement actors and their scientific allies, liberal rights claims have become tethered to a narrow biopolitical mode of conceptualizing LGBTQ citizenship. This narrow version of citizenship stems from an ideology of “biologically-linked fate” that offers a limited array of rights to a skewed-segment of the population while constraining the range of what practices and expressions of sexuality and gender identity are deemed worthy of legal protections and social recognition. Though the historical progression of liberal bioessentialism has been punctuated by moments of refusal in the form of New Left gay liberationist and later radical queer suspicions of biomedical authority, the advancement of the born this way idea has been remarkably steady. Through its taxonomizing logic, its privileging of scientific authority for political legitimation, and its hubristic attitude toward what scientific inquiry has proven or can prove, bioessentialist ideology has become a pervasive, influential, and entrenched vision of gender and sexuality in American political culture.

TABLE OF CONTENTS

**ACKNOWLEDGEMENT..... III**

**ABSTRACT..... V**

**INTRODUCTION..... 1**

**The Search for Sexual and Gender Identities in the Web of Life ..... 1**

**PART I: ORIGINS ..... 57**

**CHAPTER 1:THE HOMOPHILE MOVEMENT AND THE REPUDIATION OF  
HOMOSEXUALITY AS PATHOLOGY..... 58**

**Building Alliances in Science and Medicine ..... 58**

**CHAPTER 2: CONTESTING THE AMERICAN SEXUALITY REGIME ..... 109**

**Scientific Authority in Early Gay and Lesbian Civil Rights and Liberties Claims ..... 109**

**CHAPTER 3: DESIRE IN THE THROES OF POWER ..... 139**

**Gay Liberation and the Refusal of Scientific Authority..... 139**

**PART II: EVOLUTIONS..... 201**

**CHAPTER 4: “WHY IS MY CHILD GAY?” ..... 202**

**Co-Producing the Foundations of the ‘Born this Way’ Gay Political Identity ..... 202**

**CHAPTER 5: BUILDING BIOESSENTIALISM INTO GAY RIGHTS  
LITIGATION..... 257**

**Immutability Before the Gay Gene ..... 257**

**PART III: MATURATION ..... 307**

**CHAPTER 6: RISE OF THE GAY GENE..... 308**



<b>Popularizing and Politicizing Bioessentialism.....</b>	<b>308</b>
<b>CHAPTER 7: REIGN OF THE GAY GENE.....</b>	<b>377</b>
<b>The Power and Limits of Scientific Authority.....</b>	<b>377</b>
<b>PART IV: ADAPTATIONS .....</b>	<b>458</b>
<b>CHAPTER 8: THE SCIENTIFIC GAZE IN BISEXUALITY AND TRANSGENDER POLITICS .....</b>	<b>459</b>
<b>CONCLUSION: RESISTANCE IS FUTILE .....</b>	<b>511</b>
<b>The Resilience of Bioessentialism as Institution and Idea.....</b>	<b>511</b>
<b>BIBLIOGRAPHY .....</b>	<b>529</b>

## INTRODUCTION

### The Search for Sexual and Gender Identities in the Web of Life

The July 1993 publication of geneticist Dean Hamer's study purporting to have discovered the existence of a genetic link to homosexuality marked a seminal moment in the popularization and politicization of the "nature over nurture" theory of gay identity.<sup>1</sup> Coming on the heels of a number of other studies probing the genetic and hormonal origins of gay and lesbian orientations, Hamer's short article and subsequent media tour appeared to solidify the notion among gay rights advocates that sexual identity is an innate quality, a sexual and romantic expression of a person's genetic "truth."<sup>2</sup> The idea of the "gay gene" was adopted and rapidly spread by gay rights organizations and their civil rights allies. The Human Rights Campaign (HRC) passed out copies of journalist Chandler Burr's article on the studies to congressional representatives and others on Capitol Hill, and the researchers who conducted them quickly began to appear before courts testifying that the immutable nature of homosexuality necessitated heightened judicial protections.<sup>3</sup> In a rebuttal to the right-wing insistence that gays and lesbians voluntarily reorient their deviant desires, National Gay and Lesbian Task Force

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<sup>1</sup> Dean H. Hamer, Stella Hu, Victoria L. Magnuson, Nan Hu, Angela M. L. Pattatucci, "A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation," *Science* 261, no.5119 (July 16, 1993): 321-7.

<sup>2</sup> Other key studies included: Michael Bailey and Richard Pillard "A Genetic Study of Male Sexual Orientation," *Archives of General Psychiatry* 48, no.12 (December 1991): 1089-96; Simon LeVay, "A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men," *Science* 253, no.5023 (August 30, 1991): 1034-037; Dennis McFadden and Edward G. Pasanen, "Comparison of the Auditory Systems of Heterosexuals and Homosexuals: Click-Evoked Otoacoustic Emissions," *Proceedings of the National Association of Science of the United States of America* 95, no.5 (March 1998): 2709-713.

<sup>3</sup> Roger Lancaster, *The Trouble with Nature: Sex in Science and Pop Culture* (Berkeley, CA: University of California Press, 2003), 275; Lisa Melinda Keen and Suzanne B. Goldberg, *Strangers to the Law: Gay People on Trial* (Ann Arbor, MI: University of Michigan Press, 2000); Chandler Burr, "Homosexuality and Biology," *The Atlantic Monthly* (March 1993): 47-65.

spokesperson Robert Bray told *USA Today* that the findings “support what we've always believed—being gay is not a choice...it may even be determined before birth.”<sup>4</sup>

Two decades later, a nearly identical series of events have unfolded, only this time on behalf of transgender rights. Trans celebrity figures like Caitlyn Jenner and Jazz Jennings have declared that to be a transwoman is to possess a female brain chemistry, while journalist Katie Couric has hosted a popular *National Geographic* special focused in large part on how gender identity reportedly originates in biological phenomena.<sup>5</sup> Litigators for the American Civil Liberties Union (ACLU), Lambda Legal, the National Center for Lesbian Rights (NCLR), and several other trans advocacy organizations have invoked studies on the biological origins of transgender identities much in the same way as they had done in the 1990s, as well as just a few years prior in the same-sex marriage cases.<sup>6</sup> Even some bisexual activists have come to adopt biological conceptions of their identities, despite longstanding assumptions that theirs were the most immune to such logic, which has generally been expressed as a binary.<sup>7</sup> The scientific research too continues to feature prominently in both the mainstream and queer press as each new study generates wonderment and controversy among proponents and opponents who see

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<sup>4</sup> Marilyn Elias, “Difference Seen in Brains of Gay Men,” *USA Today* (August 3, 1992), 8D.

<sup>5</sup> Diane Sawyer, “Bruce Jenner: The Interview,” *ABC*, 24 April, 2015, <http://abcnews.go.com/2020/fullpage/bruce-jenner-the-interview-30471558> (accessed January 8, 2016); National Geographic, “Gender Revolution: How Science Is Helping Us Understand Gender,” *National Geographic*, January 2017; Jazz Jennings, *Being Jazz: My Life as a (Transgender) Teen* (New York: Crown Books for Young Readers, 2016).

<sup>6</sup> Jo Wuest, “The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases,” *Politics & Gender* (forthcoming).

<sup>7</sup> Benoit Denizet-Lewis, “The Scientific Quest to Prove Bisexuality Exists,” *New York Times Magazine* (March 20, 2014), [http://www.nytimes.com/2014/03/23/magazine/the-scientific-quest-to-prove-bisexuality-exists.html?\\_r=0](http://www.nytimes.com/2014/03/23/magazine/the-scientific-quest-to-prove-bisexuality-exists.html?_r=0) (Accessed April 16, 2018).

new possibilities of political power and influence to be gained in championing or opposing the findings.

What accounts for this tendency to perceive and to articulate LGBT<sup>8</sup> identities according to the authority, discourses, and logic of bioessentialism, i.e. the theory that genetics, brain structures, fetal development, and other biological factors play the most determinative role in establishing a person's sexual orientation and gender identity? In exploring this phenomenon, I track the political, scientific, and legal developments that have led to this biopolitical conception of these identities, which has become so pervasive in contemporary American politics and culture. Methodologically, I rely on a mix of archival research, case law analysis, and close reads of movement texts such as advocacy literature and canvassing materials, as well the scientific studies themselves. I contend that investigating the ideological and institutional developments and alliances among scientific and gay rights actors and organizations exposes how and why bioessentialist conceptions have come to possess such resonance, persistence, and adaptability in the LGBTQ movement and in American political culture more broadly.

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<sup>8</sup> Throughout the project, I have tried to be true to terminology that is appropriate to particular historical moments. For example, when referring to the early liberal period in gay and lesbian rights activism, I do not include reference to more contemporary articulations of identities (e.g. queer, transgender, etc.) because to do so would be anachronistic. When writing on the contemporary era, I have opted to refer to the LGBTQ movement with the "Q" mainly for the reason that it is how the movement now styles itself. Even though I am only giving significant attention to the construction of the first four letters in the acronym, I often attend to queer identities and politics, especially as they occur outside the boundaries of what is generally accepted to be the mainstream version of sexuality and gender identity political advocacy. Lastly and more importantly, I believe that using the term LGBTQ to describe the movement sheds light on how we are now in a peculiar moment when mainstream movement actors can square a nominal commitment to "queer" identities (e.g. ones that escape the narrow bounds of more traditional articulations of gay and lesbian ones in particular) while retaining a bioessentialist conception of themselves. This indicates the totalizing nature of the logic and the variety of ways it has become such a common sense understanding in American political culture.

In tracing these developments, I interrogate the relationship between the search for the “truths” of sexual and gender identities—i.e. the neat demarcation of gay, lesbian, bisexual, and transgender identities as discrete and relatively innate—and the projects, policies, and ideologies that have come to define the movement. Whereas others have noted that the geneticization craze has tended to disfavor minority groups with the exception of the LGBTQ movement, I demonstrate why history unfolded differently in this instance, as well as the limits and pitfalls that have accompanied this political support from the natural sciences.<sup>9</sup> Working within a range of theoretical traditions spanning studies of political identity construction, American political development (APD), public law, biopolitics, and citizenship, I address the causes and consequences of the “born this way” approach the movement has taken to fighting for civil rights and the privileges of citizenship. I merge these perspectives to examine the development, logic, and operation of this political ideology, one that is both specific to the LGBTQ movement but also linked to a larger political and social faith in scientific authority.

In tracking the development of these bioessentialist identities, I explore how the born this way conception has bolstered the presumption that the mainstream liberal LGBTQ movement’s nonprofit advocacy and litigation firms and their spokespersons amplify the authentic political voice of an ontologically-linked population.<sup>10</sup> In other words, the idea that there is some “biologically-linked fate” among queer people lends

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<sup>9</sup> Elizabeth Suhay and Toby Epstein Jayaratne, “Does Biology Justify Ideology? The Politics of Genetic Attribution,” *Public Opinion Quarterly* 77, no.2 (2013): 497–521; Catherine Bliss, *Social by Nature: The Promise and Peril of Sociogenomics* (Stanford, CA: Stanford University Press, 2018), 7.

<sup>10</sup> See, for example, the critiques of racial corporatism and assumptions of ontology in: Adolph Reed Jr., *Stirrings in the Jug: Black Politics in the Post-Segregation Era* (Minneapolis, MN: University of Minnesota Press, 1999).

support to the highly debatable notion that the loudest and most well-funded actors and institutions both represent and work to the benefit of all those who fall outside conventional sexual and gender roles.<sup>11</sup> For example, in the insistence that what all LGBTQ persons regardless of class position want are things like assimilation into legal marriage, there is an acceptance of the naturalness of relatively recent arrangements like the nuclear family and the mode of attaining health insurance through a spouse or some other kinship relation (an obviously class-skewed project that promises to benefit the most well-off or at least well-positioned).

As other scholars have indicated, this is the hallmark of neoliberal identity politics, in that it presents a vision of LGBTQ politics that pursues integration through narrow assimilation into the existing social and political economic orders.<sup>12</sup> It is a politics of identity brokerage wherein political and cultural spokespersons stand in as avatars of a larger mass of individuals that become intelligible through the assumption that the former are merely representatives of the latter. In the later chapters of the dissertation, I show how this plays out in instances such as the legal fight for same-sex marriage in which LGBTQ rights were legitimated in part through the notion expressed by Supreme Court Associate Justice Anthony Kennedy that gay and lesbian persons' "immutable nature[s] dictate" their desire for legal marriages.<sup>13</sup> There is a tendency among those sympathetic to past or contemporary self-styled radical queer demands to argue that this neoliberal

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<sup>11</sup> Dara Strolovitch, *Affirmative Advocacy: Race, Class, and Gender in Interest Group Politics* (Chicago, IL: University of Chicago Press, 2007).

<sup>12</sup> Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, edited by Russ Castronovo, Dana D. Nelson (Durham, NC: Duke University Press, 2002) 175-94; Craig A. Rimmerman, *The Lesbian and Gay Movements: Assimilation or Liberation? 2<sup>nd</sup> Edition* (New York: Routledge, 2014), 10-22.

<sup>13</sup> *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015), 4.

style of politics has crowded out a more left-wing version that would have come to the fore had the former project not been so adept at achieving its assimilation goals. Though the conclusion features a more extended discussion of queer resistance politics, I note here that this is emphatically *not* the argument of the present work. For reasons that will hopefully become clear throughout my tracing of the history of modern U.S. sexuality and gender politics, the persistent inability of those political projects to transcend their marginal activist circles is more reflective of their lacking a blueprint for how they might achieve some form of institutional power rather than their ever having presented a threat to the political economic and social order or even a convincing political theory of how they might become one.

This project speaks not only to those interested in the history and development of LGBTQ politics, but also to those with concerns about a broader resurgence of bioessentialist political and scientific discourses. Though earlier iterations of race and gender science were largely discredited as ideological dressing for inegalitarian political projects shortly after World War II, there has been a steady creep of such thinking that began in the 1980s, exploded in the 1990s with the Human Genome Project, and has been evolving in new ways ever since.<sup>14</sup> It is true that only some of the recent works are consciously tied to regressive ideologies of the past and that those like Harvard geneticist David Reich have tried to move the conversation in a direction that recognizes what they believe to be the reality of genetic differences among races while avoiding the eugenic

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<sup>14</sup> Ashley Montagu, *Statement on Race* (New York: Henry Schuman, 1951); Richard Lewontin, *It Ain't Necessarily So: The Dream of the Human Genome and Other Illusions* (New York: New York Review Books, 2000).

prescriptions that have historically accompanied such conclusions.<sup>15</sup> New public opinion research too suggests that while there are no doubt conservative intellectual projects that peddle in bioessentialism evidenced best by the rehabilitation on the right of famed race scientist Charles Murray, the liberal enthusiasts are the ones who have had the most success in instilling their blend of biological premises and ideology in the broader culture.<sup>16</sup>

However, critics in the natural and social sciences have argued that ostensibly liberal scholars in this tradition are merely rehabilitating old conceptual frameworks that owe their existence not to objective studies of natural processes but instead groupings of populations by phenotype and other subjective categorizations used to construct what are inherently *social* categories.<sup>17</sup> Additionally, those who charge critics of the new bioessentialism of being overly romantic and anti-scientific in denying the “reality” of these genetic differences are disturbingly close to revanchist alt-right voices who propagate pseudo-scientific myths about these fundamentally primordial distinctions among human beings that prevent them from living in harmony with one another. Race,

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<sup>15</sup> David Reich, *Who We Are and How We Got Here: Ancient DNA and the New Science of the Human Past* (New York: Pantheon, 2018). See also: Nadia Abu El-Haj. “The Genetic Reinscription of Race,” *Annual Review of Anthropology* 36 (2007): 283–300;

<sup>16</sup> Stephen P. Schneider, Kevin B. Smith, and John R. Hibbing, “Genetic Attributions: Sign of Intolerance or Acceptance?,” *Journal of Politics* 80, no.3 (July 2018), DOI: 10.1086/696860.

<sup>17</sup> Jonathan Kahn et al., “How Not To Talk About Race And Genetics,” *BuzzFeed News* (March 30, 2018), [https://www.buzzfeed.com/bfopinion/race-genetics-david-reich?utm\\_term=.cqRPRLG5#.inyj6ppDV](https://www.buzzfeed.com/bfopinion/race-genetics-david-reich?utm_term=.cqRPRLG5#.inyj6ppDV) (Accessed May 18, 2018).



gender ,and sexuality have all once again begun to be increasingly misunderstood as biological categories rather than as ideological ones.<sup>18</sup>

This trend has not been restricted to the natural sciences and adjacent fields but instead it has permeated many of the social sciences. In the discipline of political science specifically, studies in “empirical biopolitics” or “genopolitics” are now being published in which researchers have linked the study of personality traits and physiological characteristics such as the sense of smell with analyses of political ideology in attempts to find biological bases for political attitudes and predispositions.<sup>19</sup> This exemplifies the spread and adaptability of the bioreductive sensibility and its ability to naturalize all sorts of historically-contingent assemblages of identities and ideologies. As political scientist Jessica Blatt notes as well, there is a direct line of continuity between the race science foundations of political science as a discipline and the current biological determinism craze.<sup>20</sup> So while we are now experiencing a steady flow of new bioessentialist studies and pronouncements on race, gender, sexuality, and political ideology, the scientific tradition in which they are situated is as old as modern social science itself.

What follows then is in many ways a case study in the political creation of just one of these new bioessentialist narratives; however, it happens that this is the only part of that larger paradigm that has positively benefited some part of the population it speaks

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<sup>18</sup> For more on the theory that race and other ascriptive categories are fundamentally ideological ones that emanate from particular material relations, see: Barbara J. Fields and Karen Elise Fields, *Racecraft: The Soul of Inequality in American Life* (New York: Verso Books, 2012).

<sup>19</sup> James H. Fowler, Laura A. Baker, and Christopher T. Dawes, “Genetic Variation in Political Participation,” *American Political Science Review* 102, no.2 (2008): 233-48; Rose McDermott, Dustin Tingley, and Peter K. Hatemi, “Assortative Mating on Ideology Could Operate Through Olfactory Cues,” *American Journal of Political Science* 58, no.4 (2014): 997-1005.

<sup>20</sup> Jessica Blatt, *Race and the Making of American Political Science* (Philadelphia, PA: University of Pennsylvania Press, 2018), 3.

to (though I will argue that this benefit to LGBTQ persons in this country is more inherently limited and exclusionary than is usually supposed). It illuminates the ways in which this kind of scientific program achieves public popularity and political utility while also providing a normative warning about the consequences for both the study of politics and egalitarian visions of the future. For these reasons, I offer this project as an example of how to comprehend the political developments that have led to these kinds of scientific visions as well as an account of less-than-successful means by which some have attempted to break free of them and to articulate themselves as something other than biopolitical citizens.

*Overview of the Argument: Ideological and Institutional Origins of “Born this Way” Identities*

In mid-nineteenth century Germany and the United States, researchers, physicians, and reformers began crafting theories about the nature and origins of sexual and gender variance to explain deviations from the heterosexual norm (a relatively new scientific idea in itself).<sup>21</sup> This marked what Michel Foucault called the emergence of *Scientia sexualis*, the modern scientific study of sexuality, which led to a transition in legal and scientific thought from seeing sodomy as an abnormal criminal behavior to conceptualizing the sodomite as a taxonomic category of human being.<sup>22</sup> Early sexology was a heterogenous mix of those approaching the subject from a variety of evolutionary,

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<sup>21</sup> David F. Greenberg, *The Construction of Homosexuality* (Chicago, IL: University of Chicago Press, 1988); Jay Hatheway, *Gilded Age Construction of Homophobia* (New York: Palgrave Macmillan, 2003).

<sup>22</sup> Michel Foucault, *The History of Sexuality Volume I*, trans. Robert Hurley (New York, NY: Vintage, 1990), 68-9.

epidemiological, and psychogenic standpoints. Reform-minded researchers like Karl Ulrichs and Magnus Hirschfeld, for instance, saw homosexuality (in addition to many forms of gender transgression) as a type of relatively benign “sexual inversion” with congenital origins. Others were adherents to a pathological model that buttressed the criminal sanctions and social prejudices that the reformists sought to challenge. Those like psychiatrist Richard von Krafft-Ebing believed that “contrary sexual feelings” were indicative of a degenerative “constitutional defect,” and others in the conservative wing of the Neo-Freudian camp placed similar blame on early childhood experiences.<sup>23</sup> By the early 20<sup>th</sup> century in the U.S., a pathological model rooted in psychogenic and sociogenic causes emphasizing themes of contagion had become the dominant mode of categorizing—and criminalizing—homosexuality and gender transgression. Though Alfred Kinsey’s survey-based work in the 1940s and 1950s began to expose the fiction that the vast majority of Americans were “exclusively” heterosexual throughout their lifetimes, the scientific and legal landscape remained wedded to the pathological model through the immediate post-World War II era.<sup>24</sup>

My investigation starts in the 1950s, a time in which scientific and newly-organized homophile and lesbian rights actors and organizations developed their respective approaches to the question of identity in dialogue and collaboration with one another. This moment was a slow beginning to the end of the pathological model’s reign

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<sup>23</sup> Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Science* (Chicago: University of Chicago Press, 1999), 43.

<sup>24</sup> Alfred C. Kinsey, *Sexual Behavior in the Human Male* (Bloomington, IN: Indiana University Press, 1948); Alfred C. Kinsey, *Sexual Behavior in the Human Female* (Bloomington, IN: Indiana University Press, 1953). See also the diagnosis of homosexuality as a “sociopathic personality disorder” in American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 1st ed. (Washington, DC: APA, 1953).

and the advent of the first national gay and lesbian rights movement, which from its first few years cultivated relationships with sympathetic researchers and medical practitioners who sought to both study them and to champion legal and social reforms on their behalf. Though conservative inclinations prevailed among some of the early homophiles who saw themselves more as “heterosexuals-in-suffering” and embraced a respectability politics that sought at most to decriminalize homosexuality rather than advocate for political tolerance or social acceptance, more liberal sentiments began to arise throughout the 1960s.<sup>25</sup> The civil rights movement, the women’s movement, and the sexual revolution brought a sense of militancy to the homophiles who adopted the mantra “Gay is Good” and started to bring researchers and physicians before courts and bureaucratic agencies to contest their pathologization and criminalization. Though the New Left-inspired gay liberationists came to advocate a resistance to scientific authority in general and instead championed a radical “polymorphous perverse” project of transforming patriarchal social relations and encouraging a flourishing of diverse sexual desires, the gays and lesbians working in homophile organizations continued to see researchers and physicians more as resources than impediments to sexual freedom. By 1973, a coalition of the latter working alongside a few well-positioned psychiatrists within the American Psychiatric Association (APA) succeeded in de-medicalizing homosexuality in the APA’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM), thus demonstrating to themselves the prowess of their joined forces.

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<sup>25</sup> John D’Emilio, *Sexual Politics, Sexual Communities, 2<sup>nd</sup> ed.* (Chicago, IL: University of Chicago Press, 2008); Martin Meeker, “Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s,” *Journal of the History of Sexuality* 10, no.1 (January 2001): 78-116; Marc Stein, *Rethinking the Gay and Lesbian Movement* (New York: Routledge, 2012).

I take this moment to be a foundational moment in the history of the bioessentialist conception of LGBT identities in two senses. First, the early 1970s marked the birth of the national liberal gay and lesbian rights movement, as many of those active in these early political conflicts and the APA fight came to found organizations like the National Gay Task Force and Parents and Friends of Gays and Lesbians (PFLAG) that were committed to building and expanding their relationships with scientific and medical experts and using their theories in political articulations of their identities. At the same time, a paradigm shift was occurring within many of the sciences wherein an older psychoanalytic tradition that emphasized environmental influences on human sexuality was beginning to be displaced by a new one that gave serious attention to biological, hormonal, and neurological factors for the first time in decades. In part due to the influence of the HIV/AIDS crisis in the 1980s, researchers found new motivations and even more funding sources to investigate a myriad of biomedical questions about gay men and lesbians.<sup>26</sup>

These two trends reinforced one another as gay and lesbian leaders deployed these increasingly biologically-grounded assumptions in the courts and their antidiscrimination campaigns to deflect against theories of contagion propagated by the growing Religious Right. Researchers too welcomed collaboration as they discussed and disseminated their theories with an enthusiastic audience while also drawing on the movement to provide them subjects to study.<sup>27</sup> The biological turn also enabled the movement to downplay the

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<sup>26</sup> Terry, *An American Obsession*, 389-91.

<sup>27</sup> Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism*, (Minneapolis, MN: University of Minnesota Press, 2008).

*sexual* element of sexuality in the construction of a liberal assimilationist gay rights ideology that threatened neither the nuclear family nor the prevailing social order. Rooting sexuality in early childhood or in utero, for instance, bolstered defenses for gay parents seeking custody of their children and teachers who had been removed from the classroom out of the fear that they might corrupt their students.

In addition to incorporating etiological theories of sexuality into their national conferences, educational pamphlets, and campaign training manuals, the nascent liberal gay rights movement frequently brought their scientific allies to testify as expert witnesses in court as well as to give empirical and theoretical support and foundation to many of their constitutional arguments. The Task Force implored litigators to attack the credentials and work of those working in the older, more discriminatory psychoanalytic tradition as well as to “[a]ddress the judge’s curiosity” and to ask and answer questions such as: “What is lesbianism? What is homosexuality? What causes it?”<sup>28</sup> Although many scholars have noted that theories of homosexuality’s innate, fixed essence have tended to buttress equal protection clause arguments for increased judicial protections in providing proof of a contested identity or characteristic’s “immutability,” gay rights litigators also used this kind of scientific evidence for a broad variety of legal arguments, including the right to privacy and even in establishment clause claims.<sup>29</sup> Whereas the homophiles

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<sup>28</sup> National Gay Task Force, “Expert Testimony in Child Custody Cases (1979), Collection 7301, Box 153, Folder 17, The National Gay and Lesbian Task Force Records, 1973-2000, Cornell University, Ithaca, NY.  
<sup>29</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973); Immutability of the characteristic or identity in question is one of four factors the Supreme Court has said must be considered in meriting heightened judicial scrutiny (the others being: a long history of discrimination, political powerlessness, and no relation between the characteristic and an ability to contribute to society); Paisley Currah, “Searching for Immutability: Homosexuality, Race and Rights Discourse,” in *A Simple Matter of Justice?: Theorizing Lesbian and Gay Politics*, ed. Angelia R. Wilson (London: Cassell, 1995), 51-90; Terry, *An American Obsession*, 393-4;

before them had deployed scientific arguments in the courts in some parallel ways, the liberals were distinct in how hard they leaned on “nature over nurture” themes about the fixity of gay and lesbian identities as they made these new theories central to their fights against sodomy bans, exclusionary military policies, and other discriminatory laws and practices.

Thus, the 1990s scientific production and political adoption of the heavily-deterministic bioessentialist idea that characterized the gay gene, gay brain, and gay hormonal balance studies are best understood as constitutive of the ideology and institutional relations that had developed among the gay and lesbian rights movement and scientific researchers and institutes over several decades. Not only did the major gay and lesbian organizations like the Human Rights Campaign, the Task Force, and PFLAG work to popularize and politicize these studies by invoking them in their training materials for canvassers and bringing the researchers to testify in court, but representatives of many of them even sat on the advisory board that oversaw studies like Hamer’s gay gene one.<sup>30</sup> These studies also afforded the movement rhetorical leverage

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Edward Stein, “Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights,” *Chicago Kent Law Review* 89, no.597 (2014): 597-640; Lisa M. Diamond & Clifford J. Rosky, “Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities,” *Journal of Sex Research* 53, no.4-5 (2016): 363-91; Mary Ziegler, “Perceiving Orientation: Defining Sexuality after Obergefell,” *Duke Journal of Gender Law and Policy* 23, no.223 (2016): 224-61 (233).

<sup>30</sup> Dean Hamer, “Research Proposal for the Dean Hamer ‘Biological Determinants of Sexual Orientation’ Study” (May 28, 1991), Collection 7712, Box 127, Folder 48, Human Rights Campaign Records, 1975-2005, Cornell University, Ithaca, NY.

against Christian-backed reparative—i.e. “conversion”—therapy efforts that were part of attempts to revive the old psychoanalytic tradition.<sup>31</sup>

Even as Hamer’s, LeVay’s, and other studies came under scrutiny for flaws in their methodologies and their lab results which could often not be replicated, the last two decades have witnessed a plethora of new biodeterministic studies and a persistent ideological commitment to the bioessentialist premise within the LGBTQ movement and socially liberal American political culture at large.<sup>32</sup> The staying power of the idea is evident in the “born this way” narrative’s place in cultural politics, most notably in pop artist Lady Gaga’s song and role in the campaign against the military’s Don’t Ask Don’t Tell policy that gave the concept its catchy moniker. Bioessentialism has endured in the courts too, especially in the pursuit of same-sex marriage as Justice Anthony Kennedy’s 2015 opinion in *Obergefell v. Hodges* explicitly referred to the scientifically-affirmed immutable nature of gay and lesbian identities for the first time in a Supreme Court decision.<sup>33</sup>

Contrary to the belief among many scholars and critics of bioessentialist conceptions of gay and lesbian identities who lamented that bisexual and transgender persons’ identities would remain forever locked outside the bounds of this logic, the born

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<sup>31</sup> Tom Waidzunas, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, MN: University of Minnesota Press, 2015).

<sup>32</sup> Suzanna Walters, *The Tolerance Trap: How God, Genes, and Good Intentions are Sabotaging Gay Equality* (New York: New York University Press, 2014).

<sup>33</sup> *Obergefell v. Hodges*, 4, 8. “Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment... Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”



this way idea has proven surprisingly adaptive to these purposes.<sup>34</sup> In the case of bisexual identities, scientists like psychologist J. Michael Bailey, one of the authors of significant gay twins studies in the 1990s, came to reemerge in debates in the 2000s over the role of scientific authority ought to play in defining bisexuality.<sup>35</sup> The recent discriminatory transgender bathroom bills and bathroom access legal cases demonstrate too how much recent articulations of transgender identity have been informed by bioessentialist suppositions. Movement litigators have asserted the immutability of transgender identity in a manner similar to gay and lesbian equal protection clause claims. In attempts to provide transgender identity the same statutory protections as sex under civil rights laws like Title VII and Title IX, they have also begun to argue that gender identity ought to be understood as the primary biological determinant of sex. Just as critics castigated the turn to biology in the gay and lesbian movement decades prior, some bisexual and transgender advocates and scholars have denounced these developments as undermining their principled commitments to free, autonomous gender expression and sexual fluidity that defy the strictures of bioessentialism's deterministic logic and the external scientific and medical authority upon which their identities are legitimated.<sup>36</sup> For the present moment, however, bioessentialist articulations of identity are the most dominant and resonant

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<sup>34</sup> Kenji Yoshino, "The Epistemic Contract of Bisexual Erasure," *Stanford Law Review* 52 (January 2000): 356-460; Nancy J. Knauer, "Science, Identity, and the Construction of the Gay Political Narrative," *Law & Sexuality* 12 (2003): 1-87.

<sup>35</sup> Gerulf Reiger, Meredith L. Chivers, and Michael J Bailey, "Sexual Arousal Patterns of Bisexual Men," *Psychological Science* 16, no.8 (August 2005): 579-84.

<sup>36</sup> Kimberly Yuracko, *Gender Nonconformity and the Law* (New Haven, CT: Yale University Press, 2016); B. Aultman and Paisley Currah, "Politics Outside the Law: Transgender Lives and the Challenge of Legibility," in *LGBTQ Politics: A Critical Reader*, eds. Marla Brettschneider, Susan Burgess, and Christine Keating (New York: NYU Press 2017): 34-53.

versions of queer identity and, by virtue of their longstanding entrenchment, are likely to remain at the forefront of LGBTQ ideology and political struggle.

*The Politics of Scientific Authority and the Reductive Trappings of Bioessentialism*

While explaining the development and perpetual allure of scientifically-imbued notions of identity is the primary concern of this project, an equally important underlying question is what does it mean to assert that a scientific idea is in itself political? What is the case for seeing these kinds of scientific inquiries themselves as reflective of broader ideological currents and institutional arrangements, as products of history, political incentives, and dominant social practices and understandings, rather than representations of objective truths about the essences of sexuality and gender? Before embarking on an explanation of how this dissertation is informed by and contributes to various approaches to the study of political identity, political development, and citizenship, I want to first address how it is also a study in what Science and Technology Studies (STS) scholar Sheila Jasanoff has termed “co-production.”<sup>37</sup> This conceptual approach entails teasing out how scientific and political actors work in tandem—influencing one another, adopting one another’s discourses, conducting scientific inquiry together—in constructing a social logic.<sup>38</sup> Since the 1960s, both the gay rights movement and those engaged in sexological research have searched for the nature and origins of sexuality and gender identity with the shared hypothesis that such things exist naturally in the world as

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<sup>37</sup> Sheila Jasanoff ed., *States of Knowledge: The Co-Production of Science and the Social Order* (London: Routledge, 2004).

<sup>38</sup> *Ibid.*, 2-3, 13; Jasanoff explains that the four major sites of co-production are: identities, institutions, discourses, and representations.

innate, stable, dichotomous, and relatively mutually-exclusive identities. To make the claim that we ought then to recognize these scientific studies as inseparable from—albeit not reducible to—the political realm, I survey critical scholarship ranging from genetics, neurobiology, anthropology, and STS and use these critiques to explain why these are faulty assumptions upon which to build scientific theories of sexuality and gender.

When discussing the limits of objective scientific inquiry into human nature, it is important first to be definitionally clear about what is signified by the term “science.” Anthropologist Jonathan Marks offers a helpful tripart explanation in which science refers to: “a method of understanding and establishing facts, the facts themselves, [i.e.] the product of that method, and, a voice of authority and thus a locus of cultural power.”<sup>39</sup> From this understanding, Marks draws out a singular axiom that “[s]cience is the production of convincing knowledge in modern society,” one that is defined by a particular process and logic of fact-finding and theory-making that has its roots in Enlightenment traditions.<sup>40</sup> This is not to say that the production of scientific knowledge is always overdetermined by social influences or political demands; rather, it is a recognition that science is always conducted by human beings in contexts conditioned by those things.<sup>41</sup> For example, historian Elazar Barkan’s work on early twentieth century race science identified numerous ways in which both eugenicists and racial egalitarian reformers were constrained by their desire for scientific legitimation that could never

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<sup>39</sup> Jonathan Marks, *Why I Am Not a Scientist: Anthropology and Modern Knowledge* (Berkeley, CA: University of California Press, 2009), x-xi.

<sup>40</sup> *Ibid.*, 2-5; Italics in original.

<sup>41</sup> *Ibid.*, 141-160; I adhere to Marks’s distinction that the major difference between science and pseudoscience is that the latter has undergone a social process to become discredited.

support either's contentions entirely due to internal limitations imposed by the rules and logic of the scientific enterprise.<sup>42</sup> In other words, science's own autonomous logics and demands created conditions on either side's political influence. As I demonstrate time and again in this project, pronouncements on the hormonal, genetic, or neuroanatomical origins of sexuality and gender identity have always been constrained by the limits of the scientific replication process or even in the ultimately ambiguous and inconclusive results inherent in the studies themselves that are glossed over to make more politically-satisfying and bold ideological claims.

Nor does this perspective necessarily implicate one partisan tendency over another for its role in the production of less-than-objective science about human beings. Mark Pittenger's study of American socialists' evolutionary thought in the Progressive Era demonstrates how even left-leaning political forces came to adopt scientific views akin to their enemies in the Social Darwinist camp in part as a consequence of their "failure to develop fully a theory of science as a social product."<sup>43</sup> Prominent intellectuals in the U.S. Socialist Party, for instance, saw sociological laws as "exact counterparts" as those in biology and accordingly linked the theories of Charles Darwin and even Herbert Spencer to those of Marx.<sup>44</sup> Likewise, my project explores how bioessentialist understandings of sexuality and gender differences came to move from the domain of the

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<sup>42</sup> Elazar Barkan, *The Retreat of Scientific Racism: Changing Concepts of Race in Britain and the United States Between the World Wars* (New York: Cambridge University Press, 1992), 5.

<sup>43</sup> Mark Pittenger, *American Socialists and Evolutionary Thought, 1870-1920* (Madison, WI: University of Wisconsin Press, 1993), 251.

<sup>44</sup> *Ibid.*, 101.

(mostly) inegalitarian thinkers of this period to the liberal reformers of the past half century.

In his seminal *Biology as Ideology*, biologist Richard Lewontin provided a critique of the modern variant of biological determinism that still looms large today.<sup>45</sup> Beginning with a look at sociobiology's emergence in the 1970s and 1980s and the subsequent genetic zeitgeist that came to reign in the late 1980s and 1990s, Lewontin observed how these new forms of biodeterminism reduced all differences among human beings into naturalized ones, therein rationalizing the current state of the social and political order. According to proponents of these deterministic theories, everything from homosexuality to alcoholism to altruism could be explained with reference to natural selection processes that encoded certain traits into the human genome ten thousand years ago during the time of hunter-gatherer societies. Lewontin and others have also tied these research programs to the development of the Human Genome Project (HGP), which was in large part pursued by researchers and policymakers who believed that the effort would lead to the discovery of direct relationships between genes and social traits that would subsume the realms of identity, desire, and even culture writ large into biodeterministic narratives about human nature and society.<sup>46</sup> Whereas the HGP has undoubtedly led to useful biomedical knowledge, it has at the same time been a product of and a contributor to what geneticist Ruth Hubbard termed a "genomania" that has often led those working

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<sup>45</sup> Richard C. Lewontin, *Biology as Ideology: The Doctrine of DNA* (New York: HarperCollins Publishers, 1993).

<sup>46</sup> Ruth Hubbard and Elijah Wald, *Exploding the Gene Myth: How Genetic Information is Produced and Manipulated by Scientists, Physicians, Employers, Insurance Companies, Educators, and Law Enforcers* (Boston, MA: Beacon Press, 1995); Rodney Loepky, *Encoding Capital: The Political Economy of the Human Genome Project* (London, UK: Routledge, 2004); Jenny Reardon, *Race to the Finish: Identity and Governance in an Age of Genomics* (Princeton, NJ: Princeton University Press, 2004).

in paradigms who would never before so vulgarly suggest there to be a one-to-one relationships between a gene and a trait, nevertheless, to tout discoveries of *the* gene that codes for a particular complex cultural identity or pattern of behavior.<sup>47</sup>

Recent works have extended a similar critique to tendencies in the fields of evolutionary psychology, behavioral genetics, and epigenetics, all of which have been conduits for bioessentialist conceptions of sexuality and gender identity. Much like their forbearers in sociobiology, evolutionary psychologists operate with a theory that the present human condition has its roots in evolutionary adaptive processes that occurred during the Pleistocene Era. Adherents of these schools of thought have promulgated theories of homosexuality that construe non-reproductive-motivated males as facilitators of genetic transmission through their roles as caretakers or spiritual guides for those doing the reproducing.<sup>48</sup> As anthropologist Susan McKinnon explained, because this perspective interprets all kinship and social relations as rooted in genetic calculations, the existence of the gay-identified person in modern society is merely a “superficial dressing on an otherwise predetermined foundation.”<sup>49</sup> Sociologist Aaron Panofsky levied a similar critique against behavioral genetics, a field he described as a loosely-integrated group of researchers who framed themselves as scientific crusaders against anti-genetics

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<sup>47</sup> Ruth Hubbard, “Genomania and Health,” *American Scientist* 83, no.1 (1995): 8–10; Roger Lancaster, “Sex, Science, and Pseudoscience in the Public Sphere,” *Identities: Global Studies in Culture and Power* 13, no.1 (2006).

<sup>48</sup> E.O. Wilson, *On Human Nature, With a New Preface* (Cambridge, MA: Harvard University Press, 2004), 144.

<sup>49</sup> Susan McKinnon, *Neo-Liberal Genetics: The Myths and Moral Tales of Evolutionary Psychology* (Chicago, IL: Prickly Paradigm Press, 2005), 5.

partisans in their pursuit of hyper-reductive approach to studying human behavior.<sup>50</sup> This cohort leveraged the hype around the HGP to popularize their studies and to convert those in fields like psychiatry where biology was eclipsing older Freudian approaches.<sup>51</sup>

More novel approaches such as epigenetics and neurobiological theories of neuroplasticity, which emphasize the importance of context-specific environmental impacts on DNA expression and neuroanatomical structures respectively, have also carried on in the biodeterministic tradition despite their potential to transcend it. Whereas one might suspect that epigenetics—i.e. the idea that molecular mechanisms prompt the expression of a trait in response to genetic and environmental factors—might offer an alternative to this style of biodeterminism, historian of science Sarah Richardson has demonstrated how studies of sexuality and gender difference in this field have also succumbed to deterministic logic by allowing the genetic components of their analyses to do the heavy theoretical lifting.<sup>52</sup> In a review of epigenetic research on sex differences, Richardson argued that “[r]ather than making sexual phenotypes more complicated, or making them less determinant and more variable, epigenetic factors, in this prevailing model, work to fix and direct dimorphic development by encoding binary patterns of gene expression in the brain.”<sup>53</sup> In other words, and arguably against its own logic, epigenetics has often given little more than a supplemental methodological and

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<sup>50</sup> Aaron Panofsky, *Misbehaving Science: Controversy and Development of Behavior Genetics* (Chicago, IL: University of Chicago, 2014), 12, 141.

<sup>51</sup> *Ibid.*, 169.

<sup>52</sup> Sarah S. Richardson, “Plasticity and Programming: Feminism and the Epigenetic Imaginary,” *Signs: Journal of Women in Culture and Society* 43, no. 1 (2017): 29-52; Sarah S. Richardson and Hallam Stevens, eds., *Postgenomics: Perspectives on Biology after the Genome* (Durham, NC: Duke University Press, 2015).

<sup>53</sup> Richardson, “Plasticity and Programming,” 30.

theoretical sheen to a stale model. Lastly, for all the promise of the concept of neuroplasticity (i.e. the acknowledgement of malleability in neuroanatomical structures), research into sexuality and sex-based differences in the brain continue to perpetuate deterministic myths about hardwired dispositions.<sup>54</sup> Feminist critics have revealed how neurology has continued to tell “just-so” stories about the evolutionary-based differences between men and women’s brains (e.g. men are naturally attracted to risk and women to nurturing) that discount individual experience, historical contingency, and a plethora of other means of assessing from where these ideas of difference emerge.<sup>55</sup>

In their crude determinism, these various approaches to the science of bioessentialism disregard theoretical and empirical insights from the humanities, social sciences, and even the natural sciences that have complicated these neat causal origin stories, tidy dichotomies, and conflations of desire, behavior, and expression into the singular category of identity. For decades now, those working in the tradition of Foucault have uncovered the power dynamics laden in the taxonomies of human kinds, while others have heeded sociologists John Gagnon and William Simon’s call to explore sexuality as learned behavior—rather than purely the product of libidinal drives—wound

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<sup>54</sup> For example, see: <https://www.psychotherapynetworker.org/blog/details/89/is-sexual-orientation-hardwired-in-our-brain> (Accessed April 24, 2018). According to neurobiologist Louann Brizendine, “the thinking currently is that you emerge from the womb with a gay or straight brain...but the natural increase during puberty in becoming interested sexually in the opposite sex, if you’re going to be same-sex attracted you’re going to be attracted to the same sex. It develops in the normally developmental stage of all humans during puberty...The gay brain, if you will, is at birth...[but] same-sex attraction starts during puberty.”

<sup>55</sup> Cordelia Fine, *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Difference* (New York: W. W. Norton & Company, 2010); Rebecca Jordan-Young, *Brain Storm: The Flaws in the Science of Sex Differences* (Cambridge, MA: Harvard University Press, 2011); Victoria Pitts-Taylor, *The Brain’s Body: Neuroscience and Corporeal Politics* (Durham, NC: Duke University Press, 2016).



up in “social scripts” formed in particular cultures and historical contexts.<sup>56</sup> There too is a rich historical literature that examines the formation of gay and lesbian subcultures and identities within processes like industrialization, urbanization, and World War II that facilitated such arrangements as they allowed men—and to a lesser extent women—to live and work outside the nuclear family unit.<sup>57</sup> To use a distinction devised by the philosopher Edward Stein, rather than being “natural human kinds” (such as a person classified as AB based on blood type), it is more accurate to view these subcultures as consisting of “social human kinds,” in that their identities cannot be properly understood as existing outside the political economic and social order in which they took form.<sup>58</sup>

None of this is to say that the natural sciences are incapable of offering interesting or politically-relevant knowledge about gender identity and sexuality. After all, the homophile challenge to the pathological model of homosexuality was deeply rooted in

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<sup>56</sup> Gayle Rubin, “Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality,” in *Pleasure and Danger: Exploring Female Sexuality*, ed. Carole S. Vance (Boston, MA: Routledge, 1984): 267-319; David Halperin, *How to Do the History of Homosexuality* (Chicago, IL: University of Chicago Press, 2002); John Gagnon and William Simon, *Sexual Conduct: The Social Sources of Human Sexuality* (Chicago, IL: Aldine Press, 1973); John Gagnon, *An Interpretation of Desire: Essays in the Study of Sexuality* (Chicago, IL: University of Chicago Press, 2004).

<sup>57</sup> John D’Emilio, “Capitalism and Gay Identity from Powers of Desire,” in *The Politics of Sexuality*, eds. Ann Snitow, Christine Stansell, & Sharan Thompson (New York: Monthly Review Press, 1983): 100-13; Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War II* (Durham, NC: University of North Carolina Press, 1990); George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994); Elizabeth Lapovsky Kennedy and Madeline D. Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York: Routledge, 1993); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 1991); David K Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago, IL: University of Chicago Press, 2004).

<sup>58</sup> Edward Stein, *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation* (New York: Oxford University Press, 1999), 71-92.

studies that severed the tie between mental illness and same-sex desire.<sup>59</sup> Likewise, mainstream scientific opposition to “reorientation” schemes have proven effective in convincing state legislatures to ban the harmful practice. It follows then that any and all scientific inquiry into matters of human sexuality should not be abandoned; but at the same time its practitioners ought to recognize the limits to this enterprise, especially as it nears questions of etiology. Any work in sexuality and gender must acknowledge that human beings are inherently *biocultural* creatures in that the brain and culture co-evolved and continue to co-evolve alongside one another.<sup>60</sup> Consequently, it obfuscates more than clarifies to reduce something as complex as gender identity or sexuality to a biological core “truth” located in a gene, a segment of the brain, or in the flow of blood. Losing sight of the cultural meaning-making dimensions of any scientific storytelling about gender and sexuality blinds one to the important questions of *how* and *why* a search for some identity or behavior was pursued in the first instance and what elements of the reigning social order were taken to represent some natural default. Much like our sexualities and our gender identities, science does not exist in a cultural and political vacuum; therefore, scientific representations of sexuality and gender ought to be understood as significantly contingent upon specific historical moments and social and political understandings, commitments, and goals.

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<sup>59</sup> For a discussion of “emancipatory research,” see Henry L. Minton, *Departing from Deviance: A History of Homosexual Rights and Emancipatory Science in America* (Chicago, IL: University of Chicago Press, 2002).

<sup>60</sup> Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973); Jonathan Marks, *Tales of the Ex-Apes: How We Think about Human Evolution* (Oakland, CA: University of California Press, 2015), 157-9.

*Political Identity Formation and Scientific Institutions and Ideas in American Political Development*

To understand how scientific institutions and ideas came to play such a central role in the politics of sexuality and gender identity, I situate this project within the theoretical traditions of political identity formation and American political development. This historical institutional view is necessary to grasp how the scientific research agendas delineated above came to be implicated in political processes and developments such as the variety and unevenness of state protections for sexual and gender minorities as well as the LGBTQ movement's own conception and articulation of identity in political venues. The developmental perspective shows where alternatives existed and were abandoned as well as how new alliances, opportunities, and enemies shaped the movement's ideology and decision-making. Additionally, the institutional focus of APD directs attention to the ways in which bioessentialist understandings of these identities were deployed in a variety of institutions such as courts, legislatures, and bureaucracies and how the born this way idea evolved within these contexts. While such articulations of identity have never been reducible to mere strategic institutional considerations, at the same time they have always been textured by the ways that movement actors felt their ideas would be best heard and sympathized with depending on the venue in which they struggled. In this section, I outline the ways in which I am both working within these theoretical traditions as well as expanding upon studies in political identity and APD, especially in highlighting the importance of taking science seriously as a political idea and institution.

Too often in both politics and political science, there is a presumption that the most visible, organized, and well-funded actors represent an authentic depiction of that

identity's nature, history, and political preferences. One way to critique this trend would be to simply state that the bioessentialist image touted by the LGBTQ movement is a social construction, that the scientific ideas about identity do not exist independent of the discourses that circulate around them. While there is a great deal of truth to that statement, it elides a deep engagement with how a socially-constructed myth comes into being and is sustained. A theory of political identity ought to consider how these identities themselves are key sites of analysis for scholars who wish to explore how individuals mobilize and are mobilized into political movements and how an allegiance to particular beliefs and senses of who one truly *is* can influence the paths taken by those movements.<sup>61</sup>

The study of these political identities can demonstrate the dynamic ways in which groups such as the LGBTQ movement come to articulate a common sense of identity, interests, and beliefs. For this reason, I borrow from theorist of ethnicity and identity Rogers Brubaker's work to explain how it is that a particular *group* of those considered to be sexual and gendered "others" constructed and advanced a particular *categorization* of themselves.<sup>62</sup> In this formula, "group-making" is taken to be a social, cultural, and political endeavor wherein a group—in this case self-identified modern liberal LGBTQ political actors—creates itself and its political project in the mold of the category by

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<sup>61</sup> Rogers M. Smith, "The Politics of Identity and the Task of Political Science," in *Problems and Methods in the Study of Politics*, eds. Ian Shapiro, Rogers M. Smith, and Tarek E. Masoud (New York: Cambridge University Press, 2004), 42-66; Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (New York: Cambridge University Press, 2006), 101, 121; Rogers M. Smith, *Political Peoplehood: The Roles of Values, Ideas, and Identities* (Chicago, IL: University of Chicago Press, 2015).

<sup>62</sup> Rogers Brubaker, *Ethnicity without Groups* (Cambridge, MA: Harvard University Press, 2004).

which they conceive of themselves, i.e. the bioessentialist version of LGBTQ identity.<sup>63</sup> Brubaker insists on these terms in part to avoid assuming the ontology of a group and to highlight the constructedness and contingency of the category by which they see themselves (a “category of practice”) as well as how the state or other social forces understand them. Secondly, envisioning group-making as a process itself illuminates submerged alternatives presented by those like the gay liberationists of the early 1970s and the queer radicals who first came on the scene in the 1990s, both of whom opposed liberal gay and lesbian rights assimilationists as well as scientific conceptions of gay identity.<sup>64</sup> Attending to who is read out of a category, who is read in, and how those processes unfold thus avoids analytically reifying the dominant categorization. It does so in retaining a view of those sexual and gender practices and identifications excluded from the dominant liberal narrative of identity as well as those persons organized into different groups arguing for different modes of seeing and understanding sexuality and gender and the political projects that attend these disparate ideological commitments.

Sociologist Steven Epstein noticed the beginnings of this process back in 1985 when he remarked upon a peculiar split that had been growing between mostly academic adherents of the social constructionist version of identity and the growing gay and lesbian movement’s adoption of a very different narrative about their identities.<sup>65</sup> Epstein observed how the latter’s group-making process took the form of an ethnic model of identity that conceptualized its membership as comprising a stable and “distinct social

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<sup>63</sup> Ibid., 13.

<sup>64</sup> Ibid., 57.

<sup>65</sup> Steven Epstein, “Gay Politics, Ethnic Identity: The Limits of Social Construction,” *Social Review* 93-94 (May-August 1987): 9-54.

group with their own political and social interests.”<sup>66</sup> This was precisely the moment in the 1970s when the nascent liberal gay and lesbian movement began deepening its relationships with scientific researchers and institutes in collaborating on research and incorporating the latter’s findings in their educational pamphlets and their political mobilizing rhetoric. Bioessentialist ideation and a reliance on scientific authority was thus foundational to this group-making process that crystallized the emergent liberal ethnic model of sexual identity.

But where does the state factor into all of this? After all, it is governmental institutions that have historically provided the pivotal sites of conflict in which activists and their opponents have fought over how constitutional, statutory, and administrative law might police or protect certain sexual and gender behaviors and expressions. Looking first to the APD literature, Karen Orren and Stephen Skowronek have urged APD scholars to investigate how governmental institutions shape political identity.<sup>67</sup> In a plea for APD scholars to attend to LGBT politics in particular, Richard Valelly argued that an APD perspective provides the useful concept of “political construction,” which encourages one “to trace how and why both highly salient and apparently obvious (but nonetheless puzzling) features of the political present or past were consciously and unconsciously made over time—whether entrepreneurially, collectively, as a byproduct of other actions, or unintentionally.”<sup>68</sup> This view pushes scholars to consider how

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<sup>66</sup> Ibid., 22.

<sup>67</sup> Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 17.

<sup>68</sup> Richard Valelly, “LGBT Politics and American Political Development,” *Annual Review of Political Science* 15 (2012): 313-32 (319).

bureaucratic, military, legislative, and other state processes have been fundamental to the particular way that the state has come to understand sexual and gender identities in the first place.<sup>69</sup>

A small subset of political scientists and historians have begun in recent years to introduce APD to the study of sexuality. In doing so, they have made convincing arguments for the ways in which a politics of sexuality has shaped political institutions such as the military, marriage law, immigration, and welfare policies throughout American history.<sup>70</sup> With a few exceptions, however, most of these works have focused on how the state has categorized groups of sexual and gender nonconformists with less attention to how the identifiers themselves pushed these conceptions.<sup>71</sup> They too have been concerned largely with historical developments that do not account for the last several decades when the movement has had much more agency in directing how the state “sees” them. The focus of these works has been more on what Stephen Engel has termed earlier “modalities of recognition” through which the state categorized LGBT

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<sup>69</sup> Ibid., 319-20.

<sup>70</sup> Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009); Priscilla Yamin, “Studying Identity in an APD Framework,” *APSA Sexuality and Politics Newsletter* (2010): 16-7; Priscilla Yamin, *American Marriage: A Political Institution* (Philadelphia, PA: University of Pennsylvania Press, 2012); Stephen M. Engel, “An APD-Perspective on Sexuality Politics in the United States, or Explaining the Schizophrenic Experience of Contemporary Gay Citizens” *APSA Sexuality and Politics Newsletter* (2010): 7-10.

<sup>71</sup> New and forthcoming works including my own aim to address this: Stephen Engel, *Framed Citizenship: The Changing Landscape of Gay and Lesbian Lives* (New York: New York University Press, 2016); Matthew Dean Hindman, *Political Advocacy and Its Interested Citizens: Neoliberalism, Postpluralism, and LGBT Organizations* (Philadelphia, PA: University of Pennsylvania Press, 2018); Zein Murib, “Brokering Identity: Exploring the Construction of LGBT Political Identity and Interests in U.S. Politics, 1968-2001,” Ph.D. Dissertation, University of Minnesota, 2016.

persons as threats to national security and social hygiene, more so than how they have gained public recognition of their identities and protections against discrimination.<sup>72</sup>

In pursuing this work on how these movement actors organized themselves and came to advance their own expressions of identity, it is essential to view scientific institutions and ideas as being near the center of those developmental processes of identity formation.<sup>73</sup> Thus, mine is a dual appeal to both take science seriously as a political ordering force as well as to attend to the structuring role of ideas when doing APD work. APD scholars who champion the study of ideas in addition to institutions have been careful to note that institutions are not merely carriers of ideas but rather they are constituted by the latter and, therefore, must be theorized as operating and changing simultaneously.<sup>74</sup> For instance, scientific and political actors have intertwined institutionally in coalitions wherein they co-produce new ideas about LGBT identities as the identifiers assert their rights and make themselves legible in a variety of governmental venues. Taking an ideational and institutional view entails not simply tracking discursive changes such as the rhetoric deployed in an antidiscrimination campaign or the texts of organization's educational materials, but instead it is about linking ideas and institutions together in a larger developmental story about the

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<sup>72</sup> Engel, *Fragmented Citizenship*, 27.

<sup>73</sup> *Ibid.*, 33; Engel has called for work in APD and sexuality politics to attend to the role of private institutions.

<sup>74</sup> Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Political Change," *American Political Science Review* 96, no.4 (December 2002): 697-712; Stephen Skowronek, "The Reassociation of Ideas and Purposes: Racism, Liberalism, and the American Political Tradition," *American Political Science Review* 100, no.3 (August 2006): 385-401; Vivien Schmidt, "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse," *Annual Review of Political Science* 11, (June 2008): 303-26; Rogers M. Smith, "Ideas and the Spiral of Politics: The Place of American Political Thought in American Political Development," *American Political Thought* 3, no.1 (Spring 2014): 126-36.



emergence of an ideology and its evolution and political effects. In this case, it means to get at the materiality of the bioessentialist conception by tracking its evolution in sites ranging from the correspondence between a scientific institution like the Kinsey Institute and the National Gay Task Force to the sparring of movement lawyers and their favored expert scientific witnesses in the courts. Ultimately, this is a recognition that the scientific realm of ideas and institutions about sexuality and gender is a political one, which is at once shaped by and constitutive of LGBTQ politics.

This approach complicates neat stories about the role of bioessentialist ideas in court cases that tend to depict such developments as mere strategic invocations of an idea that was simply “out there” and ready to be politicized for such use. Oftentimes, scholars seeking to understand why the gay and lesbian movement began arguing that their identities were immutable look to the equal protection clause jurisprudence, which allows for increased judicial protections of a minority group if its defining characteristic can be shown—among other things—to be immutable.<sup>75</sup> The usual institutionalist way of reading an event like Hamer’s testimony on his gay genetics study in the *Romer v. Evans* (1996) litigation, a case challenging a discriminatory Colorado constitutional amendment, would emphasize the incentive inherent in equal protection clause case law as well as the usual practice of bringing expert witnesses before trial courts. However, what this misses is how Hamer’s study itself and its legal use were contingent upon decades of political and scientific collaboration both in the laboratory and in political and legal forums. The

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<sup>75</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973); Currah, “Searching for Immutability,”; Terry, *An American Obsession*, 393-4; Stein, “Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights,”; Diamond and Rosky, “Scrutinizing Immutability,”; Ziegler, “Perceiving Orientation,” 233.

scientific idea and the study purporting to demonstrate its validity did not originate independent of the broader political processes that brought these issues into the courts.

Additionally, the narrow institutionalist view does not show how gay and lesbian rights litigators since the mid-1970s had been using biological studies to make a variety of legal claims about their identities, sometimes in cases that did not even have an equal protection clause component to them.<sup>76</sup> Nor does a mere focus on legal status versus conduct claims illuminate much about this identity construction as both have been channels for biological renderings, despite the former's linguistic similarity to orientation and the notion that conduct distinctions might be less amenable to firmly-planted and stable sexual identities. Surely the legal institutional incentives played a role in movement litigators' strategies, but a more complete picture of these political developments attends to how ideologically central scientific institutional and ideational factors have been. Rather than being merely strategic deployments of useful ideas, these instances ought to be seen as only the most visible signs of the deeply institutionally and ideologically intertwined liberal gay rights actors and their scientific allies, engaged in co-production of both the science of sexuality and socio-political conceptions of sexual and gender identities.

In addition to speaking to the substantive and methodological interests of political identity and APD studies, this long developmental vantage point helps to resolve debates in other areas of political science research where scholars have grappled with similar

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<sup>76</sup> For example, see cases such as: *Joseph Acanfora v. Board of Education of Montgomery County* No. 72-1136-Y (D. Md.) 359 F. Supp. 843 (1973); *Enslin v. North Carolina*, 425 U.S. 903 (1976); *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tx. 1982); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

questions about the political role of etiological identity frames. For the past decade, public opinion scholars have attempted to pinpoint whether those who accept the biological narrative come to support LGBTQ rights because of that previously-held view or, rather, socially liberal persons are more likely to accept the biological narrative because they perceive it as linked to such support. Proponents of the former have claimed that attribution theory—the idea that individuals come to their political opinions on a group like LGBTQ rights based on their underlying beliefs about causes or origins—explains this phenomenon; as biological evidence has proliferated, they contend, more Americans have grown sympathetic to LGBTQ political struggles.<sup>77</sup> Conversely, a newer line of research has suggested that attribution theory is merely capturing a correlation that is best explained by people forming beliefs about the origins of these identities to match existing commitments to expanded rights.<sup>78</sup>

My account offers evidence for the critics of the attribution model in demonstrating how the gay and lesbian movement pushed its way into liberal and Democratic Party channels with a message that blended ideas of tolerance with bioessentialism. It makes little sense to think of the belief in the born this way narrative as prior to a political attitude because the former's modern character has always been political. This accords with Elizabeth Suhay and Jeremiah Garretson's recent work that

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<sup>77</sup> Donald P. Haider-Markel, and Mark R. Joslyn, "Beliefs about the Origins of Homosexuality and Support for Gay Rights: An Empirical Test of Attribution Theory," *Public Opinion Quarterly* 72, no.2 (2008): 291–310.

<sup>78</sup> Gregory B. Lewis, "Does Believing Homosexuality Is Innate Increase Support for Gay Rights?" *Policy Studies Journal* 37, no.4 (2009): 669-93; Elizabeth Suhay and Toby Epstein Jayaratne, "Does Biology Justify Ideology? The Politics of Genetic Attribution," *Public Opinion Quarterly* 77, no.2 (2013): 497–521; Jeremiah Garretson and Elizabeth Suhay, "Scientific Communication about Biological Influences on Homosexuality and the Politics of Gay Rights," *Political Research Quarterly* 6, no.1 (2016): 17–29.

used an experimental-research design to get beyond the correlation or causation issue with past studies.<sup>79</sup> Suhay and Garretson found that a person's liberal or conservative attitudes toward gays and lesbians acted as a cognitive filter that bias the uptake of certain kinds of biological evidence. As expected, liberals were more persuaded by evidence that people were born into their sexual orientations and conservatives were more swayed by evidence that they were not.<sup>80</sup> This makes sense as even those on the Right have been known to argue that even if there is a genetic factor involved, to act upon one's homosexuality is what is ultimately immoral. This contention too seems to strike against the core of attribution theory's narrow understanding of etiological theories' effects on politics.<sup>81</sup> Overall, the thick developmental story I am telling here is in harmony with this new quantitative work that also recognizes the fact that bioessentialist beliefs are inseparable from the liberal political ideology of which they are an integral part.

### *Biopolitical Citizens: Scientific Claims to Inclusivity and Citizenship*

In this section, I think through the consequences of tying citizenship claims so closely to a biopolitical framework of political legitimation. Drawing from APD and

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<sup>79</sup> Elizabeth Suhay and Jeremiah Garretson, "Science, Sexuality, and Civil Rights: Does Information on the Causes of Sexual Orientation Change Attitudes?," *Journal of Politics* 80, no.2 (2018): 692-96; See too: Jeremiah J. Garretson, *The Path to Gay Rights: How Activism and Coming Out Changed Public Opinion* (New York: New York University Press, 2018), 45-6.

<sup>80</sup> As a group of journalists noted cheekily in a statement published in 2000, the "Law of Biodeterminism" is that that "[c]onservatives believe that genes determine everything except homosexuality; liberals believe that genes determine nothing except homosexuality;" Chatterbox, "Does a Short Index Finger Make You Gay?," *Slate* (March 30, 2000), <https://slate.com/news-and-politics/2000/03/does-a-short-index-finger-make-you-gay.html> (Accessed January 21, 2019).

<sup>81</sup> Terry, *An American Obsession*, 398.

sexuality scholar Stephen Engel's writings on the fragmented and incomplete nature of contemporary LGBT citizenship, I conceive of citizenship as including both the ways in which the state's "sight or recognition, identification, and classification" condition the legal rights of LGBTQ persons as well as how "claim[s] on the public attention and concern" are made.<sup>82</sup> This institutionalist conception of citizenship accounts for how rights and privileges emanate from particular arrangements of political institutions such as legislative protections against employment discrimination or the judicially-granted right to marry in any of the U.S. states.<sup>83</sup> The "fragmented" qualifier is meant to express how elements of the U.S. political system such as federalism mean that LGBTQ persons have a patchwork of legal rights that are often conditional, based on the city or state in which a person resides.

What the biopolitical framework adds is a look to how scientific institutions and logics have played important roles in the uneven advancement of LGBTQ privileges and protections. Not only are these rights fragmented based on their political institutional locus, but they are contingent also upon an external authority due to their underlying biopolitical character and have limiting contours based on that character. Borrowing from Thomas Lemke's definition of biopolitical citizenship, I argue that one cannot fully understand LGBTQ citizenship without attending to the "systematic connection between medical knowledge, concepts of identity, and modes of political articulation" that lie at

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<sup>82</sup> Engel, *Fragmented Citizenship*, 7.

<sup>83</sup> *Ibid.*, 23.

the core of many of these claims to identity.<sup>84</sup> Whereas the scholarly work that generally flies under the banner of biopolitical citizenship studies are usually concerned with political conflicts within medical bureaucracies, the LGBTQ movement's adoption of the born this way idea has shown that certain identity-based interest groups have also taken a scientific and medical approach to undergird their rights claims.<sup>85</sup> The frequent reliance on scientific discourses has had an immense impact on *how* claims to citizenship have been asserted in at least three important ways. These include: the weight of scientific authority in determining the “deserving” subject of rights, protections, and recognition; the racial, class, and gendered dimensions of the deserving subject; and lastly, the defensive posture that has defined the logic of many legal and constitutional claims and the limits of scientific authority in the face of competing theories of ontology most often found in certain religious liberty claims.

To the first point, many of the problems with the dependence on scientific authority lead back to the origins of the relationship between biopolitics and modern modes of political rationality and state governance. As Foucault noted and scholars in his wake have explored, since at least the late-nineteenth century modern states have articulated their sovereignty—in the areas of sexuality and gender especially—through a

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<sup>84</sup> Thomas Lemke, *Bio-politics: An Advanced Introduction* (New York, NY: New York University Press, 2011), 98.

<sup>85</sup> For examples of more traditional work in this field see: Adriana Petryna, *Life Exposed: Biological Citizens after Chernobyl* (Princeton, NJ: Princeton University Press, 2002); Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton, NJ: Princeton University Press, 2006); Steven Epstein, *Inclusion: The Politics of Difference in Medical Research* (Chicago, IL: University of Chicago Press, 2007); Kelly E. Happe, Jenell Johnson, and Marina Levina, *Biocitizenship: The Politics of Bodies, Governance, and Power* (New York: New York University Press, 2018).

style of governance based on sciences relating to the body and population.<sup>86</sup> Though some have interpreted Foucault as declaring biopower to have engulfed or replaced an older version of liberal sovereignty, one need not take a totalizing stance on the extent of biopolitical governance's purview in order to make use of it as an analytic. Accounting for the biopolitical dimensions of the current state of LGBTQ affairs thus entails observing which experts and which methodologies and procedures are thought to give the "truth" of sexuality and gender as it relates to both the nature of rights at stake, who it is exactly that *counts* as a possessing subject of those rights, and, lastly, through what modes of evidence a subject may rely upon to make oneself legible.

The following two examples illustrate how scientific authority has been invoked in political communities and in the courts to draw the boundaries around legitimate bisexual and transgender identities respectively. First, a rift among bisexuality activists over the role of science formed in 2005 when the *New York Times* published an article titled "Gay, Straight, or Lying? Bisexuality Revisited," which covered a study conducted by a Northwestern University research team led by J. Michael Bailey.<sup>87</sup> In that study, Bailey and his team conducted "genital arousal" tests using a phallometric device while their male subjects watched different pornographic stimuli to test the physiological "truth" of their sexual identities based on the assumption that blood flow to the penis was

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<sup>86</sup> Foucault, *History of Sexuality*; Michel Foucault, *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, trans. David Macey (New York, NY: Picador, 2003); Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, ed. Michel Senellart (New York, NY: Picador, 2009).

<sup>87</sup> Benedict Carey, "Gay, Straight or Lying? Bisexuality Revisited," *New York Times*, (July 5, 2005), <http://www.nytimes.com/2005/07/05/health/straight-gay-or-lying-bisexuality-revisited.html> (Accessed May, 14, 2018).

more accurate than self-descriptions.<sup>88</sup> The study concluded that because there was no demonstrable “bisexual pattern” of arousal in their subjects (self-identified bisexual men tended to respond physiologically to only the gay pornography), male bisexuality in large part did not exist. This caused significant uproar in bisexual political circles as many decried the research as conceptually and methodologically flawed. However, one advocacy group, the American Bisexuality Institute (AIB), was more sympathetic to the research and saw a collaborative opportunity for integrating scientific evidence into their political work. AIB activists and leaders funded a new study by members of the original research team, which was published in 2011 and purported to have found physiological evidence of bisexuality after all.<sup>89</sup> So rather than disputing the research as being methodologically and conceptually flawed, some bisexual activists who were beholden to the bioessentialist model funded new research in an attempt to definitively *prove* themselves to exist with reference to scientific instrumentation.

My second example of how scientific authority often works to fashion the legitimate political LGBTQ citizen deals with legal conceptions of transgender identity. In 2016, the Supreme Court agreed to hear Gloucester County transgender high school student Gavin Grimm’s case against the county school board for denying his right to use the bathroom of his choosing. To reassure the Court that Grimm’s identity was a “permanent” one recognized by the biomedical community, the ACLU wrote in a brief

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<sup>88</sup> Gerulf Reiger, Meredith L. Chivers, and Michael J Bailey, “Sexual Arousal Patterns of Bisexual Men,” *Psychological Science* 16, no.8 (August 2005): 579-84; For more on phallometric devices and their use in categorizing sexual orientation, see: Tom Waidzunas and Steven Epstein, “For Men Arousal is Orientation?: Bodily Truthing, Technosexual Scripts, and the Materialization of Sexualities Through the Phallometric Test,” *Social Studies of Science* 45, no.2 (April 2015): 187-213.

<sup>89</sup> Allen M. Rosenthal et al., “Sexual Arousal Patterns in Bisexual Men Revisited,” *Biological Psychology* 88, no.1 (September 2011): 112-5.



that “Gavin has never argued that the Board should accept his ‘mere assertion’ that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents.”<sup>90</sup> This is not simply an ACLU-specific approach to trans advocacy litigation, but instead it is the dominant mode through which a variety of LGBTQ and trans groups have framed these claims.<sup>91</sup> Under this legal formulation, a legitimate transgender identity is one that can be confirmed by the proper clinical examinations as well as verified by the state in the form of medical papers.

Contrast this with the fact that courts have generally denied challenges to employers’ sex-based grooming standards such as requirements that employees deemed female must wear makeup. As legal scholar Kimberly Yuracko has explained, this is because judicial prohibitions against sex stereotyping—which has often encompassed transgender identity claims—are not rooted in a broad principle of free gender expression but instead are tied to a conception of gender identity that emphasizes it as a core aspect of one’s psychological being, a quality that is innate and essential to a person.<sup>92</sup> Thus, the movement’s current approach to trans rights has been to rely on medical and psychiatric authority to prove a person’s identity in ways that subject them to extensive administrative encounters of “proving” their identities, an arrangement that political theorist Heath Fogg Davis has argued itself results in anti-trans violence and discrimination.<sup>93</sup> It too presents challenges to a more inclusive LGBTQ+ politics that

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<sup>90</sup> Brief of Respondent, *Gloucester County School Board v. G. G., By His Next Friend and Mother, Deirdre Grimm*, No. 16-273 (February 2017).

<sup>91</sup> Wuest, “The Scientific Gaze in American Transgender Politics.”

<sup>92</sup> Yuracko, *Gender Nonconformity*, 174, 98-9.

<sup>93</sup> Heath Fogg Davis, *Beyond Trans: Does Gender Matter?* (New York: New York University Press, 2017).

recognizes sex binary classifications as tied to “corrective surgeries” that harm and erase intersex persons and all others who sit outside misleading textbook versions of “properly-sexed” bodies.<sup>94</sup>

Biopolitical representations of LGBTQ citizens too have been skewed along a variety of racial, class, and gender normative lines in ways that reflect and reinforce dominant intra-group identity characteristics within the movement. Harkening again back to the Victorian era, the biopolitical project has always been a class one in that the ruling class focused such research and governance on discovering the veracity of proper bodies and behaviors and reading the rest as signs of degeneration and deviancy.<sup>95</sup> Other works too have explored the racialized and gender-normative contours of late-nineteenth and early-twentieth-century iterations of the science of sexuality.<sup>96</sup> The contemporary era has seen some of the same: the modern studies that have generated the most attention have featured white gay men and have carried with them all the sorts of prejudices regarding who is assimilable and into what kind of social order.

This is not to suggest at all that a more inclusive bioessentialism would be a just alternative, not least because all the other pathologies of a biopolitical approach to citizenship claims would remain intact. Others have shown, for instance, how expanding the coverage of bioessentialist logic has resulted paradoxically in directing primary

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<sup>94</sup> Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000); Georgiann Davis, *Contesting Intersexuality: The Dubious Diagnosis* (New York: New York University Press, 2015).

<sup>95</sup> Foucault, *History of Sexuality*, 124; See also, Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law (Rev. Ed.)* (Durham, NC: Duke University Press, 2015).

<sup>96</sup> Siobhan Somerville, “Scientific Racism and the Invention of the Homosexual Body,” in *The Gender/Sexuality Reader: Culture, History, and Political Economy*, eds. Micaela di Leonardo and Roger Lancaster (London: Routledge, 1997): 37-52; Terry, *An American Obsession*.

attention away from reducing inequality across identity groups and instead has focused the attention more so on biological studies that attend to racial and sex-based differences based on the false notion that this route inherently leads toward more egalitarian outcomes.<sup>97</sup> One of the most pernicious examples of this involved a race-targeted heart disease drug called BiDil, which exploited an empirical reality of high heart disease rates in the U.S. black population by erroneously attributing the difference entirely to a racial genetic heritage.<sup>98</sup> Not only was the science flawed from its basic premises, but the ideology underpinning it serviced a pharmaceutical company that was looking for an opportunity to patent its drug, which the racial designation allowed them to do.

Lastly, I attend to what I perceive as an inherent limiting and defensive posture in the biopolitical articulation of LGBTQ citizenship claims. Throughout the course of the liberal LGBTQ movement's existence, and particularly in the last two decades, rights have been won in an unprecedented quantity and speed for a once-maligned minority group. Yet as political theorist Shane Phelan has argued, as the movement has increasingly won rights and recognition in political culture and in formal politics, the victories have been won in ways that have essentialized sexual orientation and shunned gender deviance.<sup>99</sup> An attention to the biopolitical dimensions of this shift from "strangers to the law" to the contemporary moment's expanded universe of rights reveals the conditions and limitations intrinsic to this mode of citizenship. This rests partially

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<sup>97</sup> Epstein, *Inclusion*, 4.

<sup>98</sup> Jonathan Kahn, *Race in a Bottle: The Story of BiDil and Racialized Medicine in a Post-Genomic Age* (New York: Columbia University Press, 2012).

<sup>99</sup> Shane Phelan, *Sexual Strangers: Gays, Lesbians, and Dilemmas of Citizenship* (Philadelphia, PA, Temple University Press, 2001), 78.

upon the sexist understandings upon which the biological frame is built. The science of homosexuality has always been built upon “vernacular understandings” of gender such as what it means to be a “real” heterosexual man or a “natural” heterosexual woman, and, its corollary, what it means to be the “other” to these normative categories.<sup>100</sup> Sometimes these conceptions of the “real” entail what neuroscientist Cordelia Fine terms “neurosexist” pseudoscientific assumptions about sex-based differences in neuroanatomical structures and the relation between those differences and supposedly naturally masculine ways of thinking and being in men and innate feminine characteristics in women.<sup>101</sup> For instance, gay men and male-to-female transgender persons are presumed to possess hypothalami that more closely resemble those in biological females.<sup>102</sup> This is based on the postulation that both gay men and transwomen are both naturally similar to or even biological variations on female biological sex.

Looking beyond the science itself, this has had an enormous impact on the ideas about sexuality and the family at the root of major LGBTQ policies such as same-sex marriage. In 2002 when the marriage fight was in its infancy, political scientist Jonathon Goldberg-Hiller noted how the conservative opposition linked its position to issues of sovereignty in arguing that the state had an interest in retaining a natural order and hierarchy by disallowing queers to enter into relationships that were reserved for heterosexual couples, i.e. the reproductive unit deemed essential for the modern

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<sup>100</sup> Lancaster, *The Trouble with Nature*, 19.

<sup>101</sup> Cordelia Fine, *Delusions of Gender*; Cordelia Fine, *Testosterone Rex: Myths of Sex, Science, and Society* (New York: W. W. Norton & Company, 2017).

<sup>102</sup> Natalie Angier, “Study Links Brain to Transsexuality,” *New York Times* (November 2, 1995), <http://www.nytimes.com/1995/11/02/us/study-links-brain-to-transsexuality.html> (Accessed May 21, 2019).

biopolitical state.<sup>103</sup> What someone like Goldberg-Heller did not perceive, however, was how a decade-and-a-half later the Supreme Court would not only rule against this opposition, but they would do so in a way that flipped the biopolitical narrative, rewriting it rather than undermining it for the benefit of LGBTQ persons.<sup>104</sup> Relying in part on ideas about the biologically innate nature of these identities, Justice Anthony Kennedy's opinion folded them into themes of the nuclear family, love among monogamous couples, and the importance of a stable and permanent family for children's development.<sup>105</sup> Thus, the biopolitical underpinnings of the marriage project allow its proponents to assert that integration into state institutions of marriage will not undermine the family unit or its attendant ideology, but rather they will help perpetuate it.

Parallel dynamics can be seen across a wide variety of issue areas where the liberal LGBTQ movement has made gains in using scientific authority to assimilate into existing cultural frameworks and governing institutions. On the antidiscrimination front, psychologists have been invoked to reassure nervous parents that gay teachers cannot affect the sexualities of their children due to the natural roots of everyone's sexual orientation; if the origins of sexuality are situated in one's genetic code then there is no fear of contagion, and, if sexual orientation can be divorced from the performance of actual sexual behavior, then there is nothing explicit to fear in discussing sexuality (likewise, no new understandings or even tolerance of how sex is enjoyed or appreciated

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<sup>103</sup> Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbor, MI: University of Michigan Press, 2002), 101-2.

<sup>104</sup> *Obergefell v. Hodges*.

<sup>105</sup> Joe Rollins, *Legally Straight: Sexuality, Childhood, and the Cultural Value of Marriage* (New York: New York University Press, 2018), 131; Cyril Ghosh, "Marriage Equality and the Injunction to Assimilate: Romantic Love, Children, Monogamy, and Parenting in *Obergefell v. Hodges*," *Polity* 50, no. 2 (2018): 275-99.

beyond a delimited private sphere need be accommodated). Those seeking military inclusion have similarly relied on scientific studies to argue that they present no threat of contagion to their fellow servicemembers. For those seeking access to the bathroom that accords with their gender identity, trans proponents have argued that transgender persons pose no threat to the gendered social order because their gender identities *are* their sexes in a deeply biological sense. So, even though queer identities, cultures, and practices are often presumed to expose things like the constructed nature of stable and exclusive heterosexuality, the historical dimensions of modern notions of kinship, and the mythical nature of a host of other “just so” ideas about human social orderings, the biopolitical style of liberal LGBTQ politics has proven exceptionally capable of downplaying those dimensions and, instead, carving out narrow spaces in the existing order of things.

One final consequence of the biopolitical frame has been the constant reassurance that by no means would allowing more LGBTQ folks into society lead to the proliferation of more queer people. Since the days of the Kinsey studies, researchers have worked under the assumption that there are only so many non-heterosexual, non-gender-normative Americans “out there.” Kinsey and his immediate predecessor at the Institute Paul Gebhard pegged the number of “exclusive homosexuals” at somewhere around 10% of the U.S. population.<sup>106</sup> Since the 1970s, gay and lesbian rights activists have used this scientific premise—along with statistical estimates of their exact number in the population—to assert that their assimilation would simply mean them exiting the closet and entering political and social institutions that would in the large part need not be

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<sup>106</sup> See Chapter 4 for a discussion of these estimates and the conversations about them that Gebhard had with early gay and lesbian liberals about them.

changed in any meaningful sense for their integration. Along with this then came the logic that all sorts of regressive social practices could continue and gendered (and usually sexist) ideas about the natures of men and women could continue basically uninterrupted. Today, this idea about there being a static and finite number of LGBTQ people has come to be deployed against opponents of trans rights who insist that gender identity acceptance has led to “trans trending” among gender “confused” children, a claim in which one can hear the echo of earlier conservative fears of contagion and “recruitment” to homosexuality.<sup>107</sup> Another common argument reinforced by many sincere narratives from the closet is that these natural orientations are finally being allowed to surface after a long history being sublimated by social restrictions.

The problem with this defensive positioning is two-fold. First, it is not at all apparent that it is true or at least anywhere near the entire truth. To argue that there are fixed numbers for each type of sexual orientation and gender identity variant that exist in a society is to side with the strongest version of bioessentialism in a world where even weak forms of the argument tend to be unreplicable and subject to a host of methodological and conceptual errors. As such, it is not a capitulation to neo-Freudian or other socially conservative theories about contagion effects to recognize that expressions of sexuality and gender identity are always subject to political, social, and cultural factors that very well could influence what behaviors and identities with which a person comes to associate themselves. Expanded visibility, political freedoms, and an increasingly

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<sup>107</sup> Julia Serano, “Transgender Agendas, Social Contagion, Peer Pressure, and Prevalence,” *Medium* (November 27, 2017), <https://medium.com/@juliaserano/transgender-agendas-social-contagion-peer-pressure-and-prevalence-c3694d11ed24> (Accessed May 17, 2018).

queer-friendly social terrain could shape people in ways that conservatives have always feared and that liberals—being so wedded to the biopolitical legitimation of these identities—could hardly afford to consider. In other words, when it is less dangerous and more socially acceptable to identify with queerness broadly construed, there just might become more people who fit under that umbrella.

Second, the reach for static estimates betrays a longstanding tradition extending back to the gay liberationist era that has sought to alter the state of society's sexual and gender mores. The animating mission here has been to create more queer identifiers or at least to engender the proliferation and acceptability of the desires that tend to congregate under these identities. Co-founder of the Gay Liberation Front Martha Shelley expressed this view in her 1970 essay exhorting heterosexual Americans to recognize and to reject the social strictures that kept them from exploring and expanding their sexualities.<sup>108</sup> Shelley and others believed that heterosexual desire was artificially imposed and that the “proper material conditions” could allow for a more complete expression of sexual desire.<sup>109</sup> One need not endorse radical queer politics to see the sociological sense in this position either. Since the original Kinsey studies, we have known that sexuality in its practice is not nearly as neat and tidy as it is expressed in standard political or biological terms. A 2018 UCLA study showed too that there is a rapid growing acceptance of gender nonconformity as over a quarter of California adolescents now identify as such.<sup>110</sup>

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<sup>108</sup> Martha Shelley, “Gay is Good,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 31-3.

<sup>109</sup> *Ibid.*, 33.

<sup>110</sup> Bianca D. M. Wilson, Soon Kyu Choi, Jody L. Herman, Tara L. Becker, and Kerith J. Conron, “Characteristics and Mental Health of Gender Nonconforming Adolescents in California: Findings from the



New polling data too indicate a rise in LGBT identification across a variety of demographics.<sup>111</sup> So while there is perhaps a growing tension between more queer-minded ideas about desire and identity and the dominant representations of such in mainstream LGBTQ politics, the commitment to bioessentialist framings in legal fights and political discourse has persisted in making the narrow arguments the loudest ones.

*Chapter Outline: Origins, Evolutions, Maturation, Adaptations*

In tracing the origins and development of the born this way biopolitical ideology, this project is divided into eight substantive chapters that track its origins, its evolutionary path, its maturation into its present form, and, lastly, its adaptability. I begin with two chapters on the 1950s and 1960s homophile and lesbian movement's cultivation of scientific allies to contest the pathological model of homosexuality and their deployment of those allies in a variety of governmental institutions. The section concludes with a third chapter on gay liberation radicals' brief challenge to the authority of scientific expertise before their movement's collapse. Chapter 1 tracks the early homophile and lesbian movement and demonstrates how an early, more conservative faction was gradually displaced by a more militant one throughout the mid-to-late 1960s. Whereas the early homophiles of the 1950s were hesitant about upending sickness model in their advocacy against police brutality and for the decriminalization of sodomy, the militants

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2015-2016 California Health Interview Survey," *The Williams Institute and UCLA Center for Health Policy Research* (December 2017).

<sup>111</sup> Frank Newport, "In U.S., Estimate of LGBT Population Rises to 4.5%," *Gallup* (May 22, 2018) [http://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_content=morelink&utm\\_campaign=syndication](http://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx?utm_source=alert&utm_medium=email&utm_content=morelink&utm_campaign=syndication) (Accessed May 23, 2018)

advanced a full-throated repudiation of the pathological conception of homosexuality, declaring instead that their sexualities were healthy variants of human sexuality. Most importantly, both conservative and more militant factions of homophile and lesbian activists cultivated relationships with sympathetic researchers and physicians who came to be some of their first political allies.

I move from analyzing this relationship-building project and in Chapter 2 turn to how homophiles and lesbians brought their scientific and medical experts to testify on their behalf before courts and bureaucratic agencies. In criminal, administrative, immigration, and constitutional cases, these experts combatted notions that homosexuals were naturally predatory and that they exhibited a constant threat of sexual contagion. With the help of Kinsey Institute-affiliated researchers in particular, militant homophile leaders like Frank Kameny and Barbara Gittings protested targeted police brutality and federal government hiring exclusions while bar owners that catered to gay and lesbian crowds challenged the revocation of their liquor licenses on the grounds that they were creating havens of unhygienic public nuisances. Though the homophiles began to express gay and lesbian identity in an ethnic minority model fashion (e.g. to be gay was akin to being black), the legal and political defenses raised in this moment often vacillated between defining homosexuality as a behavior or as a legal status. And though scientific authority was deemed a requisite resource for contesting the pathological account, but there was no accompanying scientific reification of what homosexuality intrinsically *was* during this period.

The influence of the New Left and the 1969 riot at the Stonewall Inn in New York City brought about a new type of gay and lesbian politics that differed greatly even from the most militant homophiles. Chapter 3 focuses on these gay liberationists, paying close attention to how groups like the Gay Liberation Front (GLF) and others like lesbian separatist, black lesbian feminist, and transsexual organizations rejected the authority of clinicians and researchers. Like others in the broader New Left political universe, gay liberationists saw themselves as challenging not only their own mistreatment as stemming from capitalism, patriarchy, and imperialism. These radicals sought to undermine the distinction between heterosexuality and homosexuality and offered instead a vision of a less-constrained sexually-fluid society where desires could be expressed more freely and outside of what they deemed repressive and sexist institutions like monogamy, marriage, and the nuclear family unit. The chapter ends with the successful fight at the American Psychiatric Association where both militants and homophiles and liberationists clashed with proponents of the pathological account, albeit in dissimilar ways. Whereas liberationists mainly staged direct action protests and disrupted panels, militant homophile leaders worked within the APA making alliances and even sitting on panels. While the liberationist groups the GLF and others largely dissolved like many of their sister New Left organizations did at the time, the 1973 victory within the APA to de-pathologize homosexuality coincided with the birth of modern liberal gay and lesbian rights organizations that emerged from the APA fights with even deeper ties to the scientific and medical expert class than ever before.

The two chapters comprising Part II explore the early liberal gay and lesbian movement, tracking its expanding ties with scientists as the latter turned to more biological explanations for gay identity and then analyzing the effect of these ideas in a variety of legal cases. Chapter 4 details the formation of groups like the National Gay Task Force and Parents and Friends of Gays and Lesbians (PFLAG) worked together with a new cohort of more gay-friendly researchers to co-produce new scientific and political ideas about the nature and origins of homosexuality. The Task Force and PFLAG incorporated the perspective of these scientists both to combat a new wave of oppressive right-wing forces as well as to downplay the controversial *sexual* element of sexuality, which could largely be avoided by theorizing gay and lesbian identity's roots in very early childhood or in utero. To show this co-production process, I mine archival records including advocacy and educational pamphlets, speeches given by gay and lesbian leaders, correspondence between activists and researchers, campaign training materials, and conference presentations. Additionally, I track developments within the sciences themselves to show how this moment was one in which previously-marginal biological hypotheses were explored with new technologies and methodologies in the wake of the demise of the neo-Freudian consensus in psychiatry. Chapter 5 then focuses on how these new ideas were brought into the courts and began to lay the foundations of the bioessentialist version of gay and lesbian identity. From cases involving discrimination against parents and teachers to those challenging state sodomy bans, liberal gay rights litigators became increasingly wedded to arguments that gay identity was an innate phenomenon. This chapter also serves as a corrective to those who have

interpreted the reach for such studies as a response to the invention of the immutability requirement in equal protection clause jurisprudence. I demonstrate how immutability was only one channel among many for biological claims by analyzing cases in which scientific authority was not used so heavily to meet this requirement as well as cases that, despite not featuring equal protection clause challenges at all, incorporated the same scientific arguments as those with such challenges.

Beginning Part III, Chapter 6 covers the late 1980s and early 1990s as the bioessentialist narrative matured with the publication of gay gene, gay brain, and other heavily biodeterministic accounts of gay and lesbian identity. I delineate the ways in which the movement popularized and politicized the studies and their authors in trumpeting them in press releases and in advocacy materials as well as in using them in legislative and legal campaigns for military inclusion, same-sex marriage, and antidiscrimination ordinances. While commentators and scholars tend to attribute the “by nature” argument in large part to a defensive posturing against the Religious Right’s insistence sexual orientation being primarily a choice (and an immoral one at that), this chapter (and the two preceding it) demonstrates that gay and lesbian actors were actually the first to use this language and the Right responded with charges of “nurture” and critiques of bioessentialist studies. Not only did organizations like the Human Rights Campaign, PFLAG, and the Task Force fight off the Religious Right in articulating their identities in this mold, but they also fended off radical queer organizations like ACT UP and Queer By Choice, which opposed the bioessentialist framing on the basis that they

believed them to be an affront to their own experiences of identity as well as eerily reminiscent of the logic of eugenics and the concentration camp.

By the end of the first decade of the twenty-first century, the bioessentialist idea had become enshrined in the mainstream LGBTQ movement and much of American political culture as *the* explanation and means of legitimating gay and lesbian sexual orientations. In the campaigns and legal fights to repeal military exclusion, to ban conversion therapy, and to find a constitutional right to same-sex marriage, the born this way idea featured prominently in everything from the pop culture opposition to continued discrimination as well as in litigators' briefs before the Supreme Court. Chapter 7 documents these most recent political invocations of the bioessentialist idea and notes how other political cultural and scientific discussions of biology and identity have buttressed this vision of a liberal LGBTQ politics that has been long in the making. It also considers the ways in which biopolitical citizenship claims present a narrow and exclusionary depiction of ontology that finds itself at an impasse in relation to certain religious liberty claims, especially in the realm of conversion therapy bans, which test the limits of scientific authority's political and legal prowess.

The last substantive chapter that makes up Part IV examines how bioessentialist ideas about gay and lesbian identities have been adapted to fit bisexual and transgender ones. I observe in Chapter 8 how contentious scientific authority has been in bisexual activist circles as those in the American Bisexuality Institute have sought—to the chagrin of a queerer cohort of activists—to use the tools of scientific legitimation to update understandings of what it means to have a bisexual orientation. The second half of this

chapter then considers how as the “T” in LGBTQ has been assimilated into the movement since the 1990s. It notes the ways how trans identity has taken on an increasingly bioessentialist character, one defined through neurological studies based on regressive precepts about natural biological divisions between male and female sexes. Tracking changes in case law and in gay and lesbian leaders’ attitudes toward transgender identity and issues, I note the disconnect between a movement that has become more nominally accepting of queer notions of identity (e.g. nonbinary genders and gender fluidity) has, in its legal and political discourses, reduced a category thought by at least some to be a capacious one down to a narrower transgender-as-transsexuality version of the identity.

In the last chapter, I conclude with a brief look at the tenacity of bioessentialist theories evidenced in part by new studies that, despite being mostly old, flawed conceptual frameworks tested with more sophisticated methodologies, are being conducted and incessantly hyped by scientists, journalists, and LGBTQ advocates. Here, I end with a speculation on the staying power of the bioessentialist idea and the political power of scientific authority as they have been instrumental in achieving many policy and legal goals while enabling the LGBTQ movement to integrate itself into mainstream political coalitions. I too reflect on what this means for a politics of queer resistance, which, for all its laudable goals of working toward an “unsettling” and “disruption” of these constrained forms of identity, has proven powerless in its opposition to the behemoth that has become the modern neoliberal LGBTQ movement and its scientific and medical allies.

What follows is a developmental account of the persistent and surprisingly adaptive quality of bioessentialist conceptions of identity in the modern LGBTQ movement. In tracking the processes of scientific and political co-production that have given birth to these ideas about identity and the networks of institutional arrangements in which they are continuously produced and reproduced, it reveals how this narrative of identity has shaped the movement's pursuit of projects such as same-sex marriage, military inclusion, bans on conversion therapy, and antidiscrimination policies. I demonstrate the factors that have led to this new form of bioessentialism by establishing its post-World War II origins in the relationships among the early homophile and lesbian and their sympathetic allies in the sciences. From nearly the beginnings of the modern organized gay and lesbian movement, reformers found that the institutions of the state were receptive to their invocations of scientific authority. From these foundations, the nascent liberal gay and lesbian movement of the 1970s expanded and entrenched their alliances with scientific actors, incorporating their ideas into their projects and political ideology at a time when biological theories and research programs were on the rise in a variety of fields studying human identity and behavior. Since then, the modern LGBTQ movement has built many of its political and legal gains—as well as social and cultural ones—by advancing rights claims backed by scientific authority. This has culminated in the formation of the born this way narrative and its place as a dominant means of politically legitimating gay, lesbian, bisexual, and transgender identities.

This historical institutionalist analysis is guided by more theoretical and normative considerations of the causes and consequences of tethering liberal citizenship



claims regarding rights and recognition to a biopolitical mode of legitimation. In examining the content and development of these bioessentialist claims, I reflect on the ways that such a heavy reliance on scientific authority has set sharp limits to the movement's political and social agenda and how it has often reified sexist assumptions about sexuality and gender identity that progressive politics is generally—or at least nominally—oriented toward exposing and undermining. Lastly, I juxtapose the bioessentialist idea with both alternative theories and queer political programs to show how the born this way phenomenon distorts understandings of sexuality and gender that highlight their multidimensionality, malleability, contingency, and fluidity. As a result, much of what ought to be understood as historically-contingent and the products of intertwining political and scientific developments is presently conceived of as a cultural gloss on a largely predetermined set of underlying biological foundations. It is my hope that what follows might illuminate the origins and history of an idea that is now taken to be commonsense, but which should be properly understood as anything but.

## PART I: ORIGINS

## **CHAPTER 1: The Homophile Movement And The Repudiation Of Homosexuality As Pathology**

### **Building Alliances in Science and Medicine**

This chapter explores the construction of 1950-1969 homophile and lesbian era conceptions of gay identity by attending to the political and scientific forces that shaped those conceptions and, in doing so, put future gay and lesbian politics on a particular path going forward. Throughout these early years of organizing, different groups of homophiles and lesbians constructed several distinct political and scientific theories to make sense of their desires and identities. These frameworks for understanding sexuality were requisite not just for making sense of oneself, but also for devising political programs to challenge an oppressive sexuality regime that had come to categorize homosexuality as a deviant pathology, a sign of mental illness that threatened the health, safety, and morals of the American public. Whereas the earliest homophiles relied upon Marxist-inspired conceptions of how homosexuals might constitute a distinct social class, others from more conservative middle-class backgrounds accepted the premise of the pathological model that they were indeed mentally ill and perhaps even in need of reparative therapeutic solutions to “fix” their aberrant predilections. Even if they did exhibit some form sexual pathology, these conservative homophiles reasoned, they ought to be afforded medical assistance and treatment rather than being treated punitively for acting upon their desires.

Though these and other competing orientations to a politics of homosexuality contended for dominance within the early homophile and lesbian organizations of the

mid-twentieth century, the movement ultimately came to be led by those who maintained that gay and lesbian Americans constituted a social class akin to other ethnic minority groups fighting for political and legal rights and social acceptance during this period. Accordingly, they came to see the pathological model as a mere pseudoscientific justification for their continued oppression. What follows is thus the story about how an alliance of organized homophiles and lesbians came to work in tandem with a number of sympathetic scientists and clinicians to co-produce a new logic of homosexuality, one which emphasized natural patterns of variance in human sexuality that posed no threat to the social political order nor the moral integrity of the country.<sup>112</sup> It is too an account then of how this political movement came to adopt a liberal pluralist political orientation that was buttressed by scientific and medical institutions, which afforded it a language as well as an authoritative voice to repudiate the pathological model. This is not to say that this scientific alternative to the pathological model was the *only* means by which gays and lesbians came to see themselves; rather, it is to say that this was quickly becoming the dominant discursive and institutional means by which they articulated and defended their identities in political terms.

This chapter proceeds to investigate these developments as follows: first, I review the origins of the homophile movement, focusing on the origins of the idea that gay men and women constituted a unique minority group. I then spend several sections delineating the different approaches to identity that existed within the homophile and lesbian movement, paying close attention to how particular ideological commitments led the

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<sup>112</sup> Sheila Jasanoff ed., *States of Knowledge: The Co-Production of Science and the Social Order* (London: Routledge, 2004): 2-3, 13.

movement to ally with scientific and medical experts, especially those working with famed sexologist Alfred Kinsey's Institute for Sex Research at Indiana University. This involves charting how the earliest instantiations of the homophile movement such as the Mattachine Society from 1953 to the mid-1960s and the lesbian group the Daughters of Bilitis engaged with scientific theories and elites in a different mode than did the militant homophiles that took over many of those institutions and the movement more broadly in the early-to-mid 1960s. It is here that I demonstrate how an anti-illness model approach to gay and lesbian identity won out in homophile ideology over more conservative capitulations to the medical model. I conclude with a look toward the next chapter, which centers on how the homophile and lesbian movement came to deploy these scientific resources and conceptions of sexuality in struggles against the oppressive sexuality regime as it existed within a variety of state institutions.

*The Birth of the Homophile Movement and the Origins of the Homosexual-as-Political-Minority Model*

The U.S. homophile movement, which existed roughly from 1950 to the late 1960s, was the first instantiation of the modern gay rights movement. While there were similar, more short-lived political organizations—such as the Society for Human Rights which crumbled under the weight of obscenity charges after being active for only several months in 1924—as well as social communities of same-sex attracted persons in the United States prior to the mid-twentieth century, the homophile movement exhibited the

first long-lasting and politically-mobilized constituency of gay Americans.<sup>113</sup> The post-World War II moment proved to be fertile ground for such organizing as soldiers who had been involved in same-sex practices and relationships abroad returned home, and brought with them the experience of serving in an incredibly sex-segregated context where men—many whom had been previously unexposed to same-sex pleasures and relationships—came to create a gay subculture within the military.<sup>114</sup> Additionally as the political economy of the U.S. shifted even further away from agrarianism and into a modern industrial state, Americans moved into cities where the nature of factory work allowed individuals to work and live outside of the nuclear family mode.<sup>115</sup> Historian John D’Emilio has emphasized the importance of economic and spatial changes within cities that led to this ability for men (and some women) to subsist outside of the traditional family structure and to form relationships and communities based on same-sex attraction.<sup>116</sup>

These early communities were met by a wave of intense sexual repression during beginnings of the Cold War and the budding of McCarthyism. As one part of a national program aimed at demonstrating political and moral superiority over the Soviet Union,

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<sup>113</sup> Some of the more well-known texts covering these earlier periods of gay, lesbian, and early queer life include: George Chauncey, *Gay New York: Gender, Urban Culture, and the Making of the Gay Male World, 1890-1940* (New York: Basic Books, 1994); Elizabeth Lapovsky Kennedy and Madeline D. Davis, *Boots of Leather, Slippers of Gold: The History of a Lesbian Community* (New York: Routledge, 1993); Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 1991).

<sup>114</sup> Allan Berube, *Coming Out Under Fire: The History of Gay Men and Women in World War II* (Durham, NC: University of North Carolina Press, 1990); John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970, 2<sup>nd</sup> ed.* (Chicago, IL: University of Chicago Press, 1998): 22-5.

<sup>115</sup> John D’Emilio, “Capitalism and Gay Identity from Powers of Desire,” in *The Politics of Sexuality*, eds. Ann Snitow, Christine Stansell, & Sharan Thompson (New York: Monthly Review Press, 1983): 100-13.

<sup>116</sup> *Ibid.*

homosexuality became equated with psychopathy and communist sympathies, which led to a suppression of gay life just as soon as it began to bloom in the United States.<sup>117</sup> In response, organizations like the Veterans Benevolent Association in New York and other smaller lesbian groups in Los Angeles arose to protect gay men and women in this new climate of oppression.<sup>118</sup>

The advent of the gay bar also facilitated the creation of a broader gay culture. As police raids became a frequent occurrence of state oppression in these spaces, the gay bar became a political site in which the presence of these assaults served as a collective consciousness-raising experience.<sup>119</sup> Gradually, these encounters with one another in combination with the violence of the state began to transform these former servicemen, bar patrons, and others into a new political assemblage. Although the first homophile organizations were developed outside of the bar scene (and sometimes their members opposed these “merely social” venues), these kinds of gay spaces were an important site of contact for same-sex attracted persons during this early period and were targeted for mobilizing supporters in the early years of the homophile movement.<sup>120</sup>

The most important of the early homophile organizations was the Mattachine Society. Founded in 1950 by Harry Hay and a small group of former Communist Party of the United States members, the Mattachine was formed with the aim of studying and

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<sup>117</sup> David K Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago, IL: University of Chicago Press, 2004); Stacy Brauckman, "Nothing Else Matters but Sex': Cold War Narratives of Deviance and the Search for Lesbian Teachers in Florida, 1959-1963," *Feminist Studies* 27, no.3 (2001): 553-575.

<sup>118</sup> Barry D. Adam, *The Rise of a Gay and Lesbian Movement* (New York: Twayne Publishers, 1995): 67.

<sup>119</sup> D'Emilio, *Sexual Politics*, 32-3.

<sup>120</sup> Martin Meeker, *Contacts Desired: Gay and Lesbian Communications and Community, 1940s-1970s* (Chicago, IL: University of Chicago Press, 2006).

advocating for gay identity in the Los Angeles area.<sup>121</sup> Hay as well as his comrades were dismayed at the treatment of homosexuality within the rightward-turning political climate in the U.S. that had engendered such institutions as the House of Representatives subcommittee on “Employment of Homosexuals and Other Sex Perverts.” Moreover, the Communist Party, which Hay and a few others had worked within since the 1930s, had become increasingly intolerant of homosexuality in part as a defensive posture in an era in which communists were being interrogated, jailed, and sometimes deported by the federal government.<sup>122</sup> Out of a desire to maintain secrecy for its membership during this repressive era, the Mattachine Society was structured hierarchically. Most members were placed into one of five orders of ascending responsibility and knowledge of the full workings of the organization.<sup>123</sup> The leaders of the fifth order then directed the efforts of the Mattachine while members in lower orders worked to expand their own bloc into separate autonomous cells, so that the process of growth would maintain the anonymity of members by ensuring that members of one cell did not have access to the membership list of another cell.<sup>124</sup> It was through this work that the founders of the Mattachine began sowing the seeds that would become the homophile movement during such a hostile moment.

As the founders of the Mattachine had been deeply entrenched in communist politics for decades prior to their homophile organizing, their conception of gay identity

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<sup>121</sup> Ibid., 60-3.

<sup>122</sup> Jonathan Ned Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.* (New York: T.Y. Crowell, 1976): 91-2; The Stalin-era Communist Party came to perceive homosexuality as a sign of bourgeois decadence within capitalist and fascist societies.

<sup>123</sup> D’Emilio, *Sexual Politics*, 64.

<sup>124</sup> Ibid.



relied heavily on the tools of Marxist analysis. Hay and the others observed that gay men and women constituted an “oppressed cultural minority” whose yearnings and behaviors were at odds with the traditional nuclear family and the larger culture in which it was situated.<sup>125</sup> They entertained theories of homosexuality-as-pathology and other medicalized notions of homosexuality as “deviant” or a “disturbed” state of mind. But they ultimately settled on a sociologically-informed theory that recognized the notion that heterosexuality was the universal norm was a myth, as well as the error of taking the male-and-female-partnered family to be a simple fact of nature rather than a historical contingency.<sup>126</sup> Indeed, Hay’s adoption of the term “homophile” was an attempt to distance this approach to gay identity from the medicalized term “homosexual.”<sup>127</sup>

Drawing from Marxist theories of class consciousness, these men determined that the homosexual existed within a class “in itself” (as an objective and identifiable social category) but also had the potential to become a class “for itself,” i.e. as a mobilized constituency that could engage in political struggle to fight for its own interests and, above all, its legitimacy to exist.<sup>128</sup> The Mattachine members argued that the homosexual was an abused and neglected minority and that, therefore, they must come to feel a sense of pride in themselves and to cultivate a “highly ethical homosexual culture.”<sup>129</sup> In fashioning themselves as a political minority group with its own culture and political

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<sup>125</sup> Ibid., 65.

<sup>126</sup> This view of the family as a social category has its roots in the Marxist tradition going back to Friedrich Engels’s 1884 treatise *The Origin of the Family, Private Property, and the State: in the Light of the Researches of Lewis H. Morgan*.

<sup>127</sup> It was not until the 1960s that “gay” began to be adopted as the progressive term of choice.

<sup>128</sup> Ibid., 64-5.

<sup>129</sup> Ibid., 66; Stephen M. Engel, *The Unfinished Revolution: Social Movement Theory and the Gay and Lesbian Movement* (Cambridge, UK: Cambridge University Press, 2001): 31.

interests, they aligned themselves with their “fellow minorities...the Negro, Mexican, and Jewish people” and insisted on developing a sense of leadership to enable all “social deviants” to “take the actions necessary to elevate themselves from the social ostracism an unsympathetic culture has perpetuated upon them.”<sup>130</sup> This theory of identity drove the Mattachine to expand its ranks (albeit discretely), drawing in all of those who had the same inclinations and desires as they did in an effort to coalesce them into a politically-conscious body.

Though they were few, there were at least some other left-wing political actors thinking through theories and practices of diverse sexualities during this era as well. In 1952, H.L. Small penned a defense of sexual freedom in the Young Socialist’s (the youth branch of the Socialist Party) newsletter.<sup>131</sup> While the Young Socialists had neither endorsed nor prohibited homosexuality among its members nor did they advance any understanding of the homosexual as a minority class in and of itself, Small argued against the medical notion of homosexuality and championed sexual freedom as a means for achieving “whole, productive individual[s].”<sup>132</sup> In his dismissal of the mental illness model, Small compared the claims of deviancy to an older religious tendency to condemn certain “libidinal expressions” as the work of the devil.<sup>133</sup> The six short paragraphs that make up Small’s article demonstrate a significant connection between these sociologically-informed ideologies and a rejection of the idea that homosexuality was a

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<sup>130</sup> Mattachine Society, “Statement of Purpose of the Mattachine Society,” in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 283-4.

<sup>131</sup> H.L. Small, “Socialism and Sex,” reprinted in Christopher Phelps, “A Neglected Document on Socialism and Sex,” *Journal of the History of Sexuality* 16, no.1 (January 2007): 1-13.

<sup>132</sup> *Ibid.*, 13.

<sup>133</sup> *Ibid.*

sign of sickness or mental disturbance. While the Mattachine argued for raising consciousness of homosexual identity and the Young Socialists advocated for expanding sexual freedom in a larger sense, none of these approaches appear to have taken seriously the notion that the psychiatric clinic was the best means to understanding same-sex attraction among those living in modern industrial societies.

As for the actual work of fighting for freedom of sexuality and establishing the institutional foundations that would become the homophile movement, the Mattachine Society spent the first three years of the 1950s moving steadily out of shadows and into the realm of political advocacy. The organization first gained attention in the summer of 1952 when one of their members, Dale Jennings, became a victim of police entrapment as he was cruising in a Los Angeles park.<sup>134</sup> Before his trial, the other members of the Mattachine drafted press releases and letters to the media demanding his release. After receiving no response to their pleas, they turned to their informal network of gay men through which they distributed flyers and other political propaganda. The latter approach gained the Mattachine financial contributions and legal advising to help Jennings's case. During his trial on June 23, 1952, Jennings made the bold and dangerous declaration before the court that he was a homosexual but that the specific charges were false. This risky political decision to affirm his homosexual identity while denouncing the police's unjust tactics provided a necessary spark to the Mattachine's political program (it helped that the charges were dropped after the trial ended in a hung jury). As the flyers made in support of Jennings and transcripts of his trial testimony legitimating his homosexual

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<sup>134</sup> D'Emilio, *Sexual Politics*, 70-4.

identity spread throughout southern California, the group began to expand rapidly, growing to nearly one hundred discussion groups and over two thousand members by 1953.<sup>135</sup>

In response to this enthusiasm and membership growth, the Mattachine Society extended its institutional presence by founding the nonprofit educational Mattachine Foundation in 1952, which among other things plugged the homophile movement into academic research on homosexuality.<sup>136</sup> Initially, the Mattachine Foundation contacted Evelyn Hooker, a research psychologist at UCLA, to sit on their first board of directors. Although Hooker declined the offer, she did so only because she had just begun to study male homosexuality and did not want her peers to believe that her research had been compromised by an engagement with this newly organized political community. The following year, Hooker did, however, establish ties with the Foundation by drawing from its membership for her studies, which would be mobilized toward the end of the decade as evidence against the pathological model. This early relationship between a scientific actor and a homophile political organization demonstrates how strong the impetus was for the growing movement to align itself with the tools of scientific legitimation. With the dominant political-cultural narrative casting them as sick, making allies in a prominent academic institution such as UCLA was a strategic move that provided a defense against the medical model that would accompany the positive strategy of constructing the homophile as an oppressed cultural minority.

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<sup>135</sup> Engel, *The Unfinished Revolution*, 32.

<sup>136</sup> D'Emilio, *Sexual Politics*, 73-4.

*Split in the Mattachine: Identity, Sexology, and the Politics of Tolerance*

As the Mattachine Society grew and gained more attention throughout southern California, tensions fomented among those who demanded that the organization be run more democratically and transparently as well as those seeking to gain favor with the public by abandoning its left-wing political affinities.<sup>137</sup> During the Mattachine's April 1953 convention, several leaders within the "Fifth Order," the steering body of the Mattachine, began to fight for a more democratically-controlled and less secretive structure. Other members called for the organization to shed its ties to leftist political groups and ideologies in order to make the Mattachine less susceptible to attacks on the basis of its Communist members. A subsequent convention held just one month later saw the ratification of these reforms which would establish the Mattachine as a nonpartisan group more in the mold of the pluralistic interest groups that would come to dominate the American political scene in the 20<sup>th</sup> century.

Scholars have debated the significance of this internal split. Some have argued that it signaled a sharp conservative turn in the homophile movement's politics, whereas others have drawn a relatively unbroken line of continuity between the two instantiations of the Mattachine. The standard account advanced by John D'Emilio characterizes this moment as a definitive breaking point between a radical, communist politics and a more conservative accommodationist movement.<sup>138</sup> D'Emilio argued that this marked the formation of an identity politics that was more committed to assimilating into a heterosexual culture than it was to radically shifting the political consciousness of

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<sup>137</sup> Ibid., 78-80.

<sup>138</sup> Ibid.

gay Americans and society. As evidence for this, D’Emilio quoted Marilyn Reiger, a member of the Fifth Order who helped reorient the Mattachine, as stating that equality would be best achieved through “declaring ourselves, by integrating...not as homosexuals, but as people, as men and women whose homosexuality is irrelevant to our ideals, our principles, our hopes and aspirations.”<sup>139</sup> Dennis Altman, a political scientist who was also active in the later years of the homophile movement, claimed similarly that the movement became committed to liberal tolerance, a politics in which the struggle for equality in practice constituted a superior-inferior relationship between heterosexuals and homosexuals.<sup>140</sup>

Historians writing more recently, however, have begun to argue that D’Emilio’s classic account of the homophile’s conservative turn is stated too starkly and thus erases important elements of continuity between the earlier and later versions of the Mattachine. Historian Martin Meeker has argued that not only did the political context of McCarthyism essentially necessitate the abandonment of Mattachine’s communist politics, but that the actual practice of homophile politics did not change nearly as drastically post-1953.<sup>141</sup> Although Meeker agreed that the new Mattachine did engage in a “politics of respectability” in order to appease an intolerant American society, many in

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<sup>139</sup> Ibid., 79.

<sup>140</sup> Dennis Altman, *Homosexual: Oppression and Liberation*, 2<sup>nd</sup> edition (New York: New York University Press, 1993): 59; Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2008); This view is akin to later theorizing of Wendy Brown who has argued that under the liberal tolerance model, the deviant remains defined by his otherness and is tolerated only conditionally by a society that remains wedded to a dichotomous, hierarchical distinction between the natural and the unnatural

<sup>141</sup> Martin Meeker, “Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s,” *Journal of the History of Sexuality* 10, no.1 (January 2001): 78-116.

the organization continued to fight against discrimination and criminalization of those engaged in same-sex behavior and relationships. And as those such as historian Whitney Strub have indicated, there were prominent homophiles such as Mattachine member and author Wallace de Ortega Maxey who expressed dismay at the conservative turn post-1953 and worked to reorient the movement away from the constraints of respectability politics.<sup>142</sup>

Both D’Emilio and Meeker are correct to identify significant changes and continuities between the two forms of the Mattachine but they overstate the degree to which either form represented a consensus opinion on the nature of homosexuality identity and what kinds of political programs and ideologies should attend this understanding. D’Emilio rightfully indicated that the post-1953 Mattachine did eliminate the influence of Marxist analysis from their conception of homosexual identity and political commitments but it is important to note that the communist orientation of the early days was only really prominent when the group consisted of a handful of ex-Communist Party members.<sup>143</sup> Even the pre-1953 Mattachine abandoned some of its Marxist language and theorizing as it expanded its numbers.<sup>144</sup> Similarly, Meeker was correct in arguing that the post-1953 Mattachine continued to mobilize support among elites such as sexologists and other medical experts just as the original Mattachine had in establishing its first ties with the UCLA psychologist Evelyn Hooker.<sup>145</sup> The Mattachine

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<sup>142</sup> Whitney Strub, “The Homophile Is a Sexual Being: Wallace de Ortega Maxey’s Pulp Theology and Gay Activism,” *Journal of the History of Sexuality*, 25, no.2 (May 2016): 323-53.

<sup>143</sup> D’Emilio, *Sexual Politics*, 75.

<sup>144</sup> Ibid.

<sup>145</sup> Meeker, “Behind the Mask of Respectability,” 94.

did change, however, by becoming a more visible nonprofit institution reconfigured in its advocacy to the constraining context of the McCarthy Era.

So, while it makes some sense to argue that the first Mattachine was more radical than its post-1953 counterpart, the best way to grasp the complexity of thought among the early homophiles is by exploring the variety of theories of identity and political practice that existed within the Mattachine from its founding. In closely examining the scientific theories that were advanced by academic researchers, psychiatrists, and other medical authorities brought in to speak to or work with the Mattachine, the heterogeneity in early homophile political thought becomes clearer. Due to the prevalence of the pathological model of homosexuality, some homophile activists became increasingly attracted to medical and scientific experts because they offered a counter-hegemonic discourse about their identity. Others saw scientific theories as a means of explaining their sexualities to others as well as themselves and to potentially enable a “reversal” of their homosexual orientations that might allow them to live more comfortably in a heterosexist society. The variety of approaches that these experts employed reflected the political attitudes of various strains of homophile political thought, ranging from those on the conservative extreme end of respectability politics who entertained the idea that homosexuality could—and should—be treated as a curable condition and those who believed that a gay identity expressed nothing beyond a mere sexual disposition, a “normal variance” of human sexuality.

Looking more closely at the scientific and medical expert opinions considered by the early homophile movement, it is clear that Alfred Kinsey’s work was among the most



impactful, as his studies established a baseline of influence among homophiles of nearly all political persuasions. Kinsey's 1948 and 1953 studies on male and female sexuality sparked controversy as the zoologist-turned-sexologist purported to show how pervasive same-sex sexual behavior was in American society.<sup>146</sup> Armed with evidence showing that over a third of American men had had sex with other men and that nearly ten percent of American men and women engaged in homosexual relations exclusively, gay Americans began to be drawn out of their isolation both socially and politically.<sup>147</sup> Not only were his findings considered radical in their political potential, Kinsey also developed a novel theoretical framework, the "Kinsey scale," which postulated sexuality as fluid and existing on a continuum (this scale ran from 0 to 6, with 0 signifying "exclusive heterosexuality" and 6 "exclusive homosexuality"). During a time in which homosexuality was criminalized by the state and medicalized by mental health professions in ways that reinforced one another, the Kinsey Reports were an essential scientific source against gay men and women's supposed "deviancy."<sup>148</sup>

In the immediate post-1953 Mattachine Society, many homophiles entertained conservative opinions about the pathological model and the possibility that, even if they

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<sup>146</sup> Alfred C. Kinsey, *Sexual Behavior in the Human Male* (Bloomington, IN: Indiana University Press, 1998); Alfred C. Kinsey, *Sexual Behavior in the Human Female* (Bloomington, IN: Indiana University Press, 1998).

<sup>147</sup> Ibid.

<sup>148</sup> Tom Waidzunus, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, N: University of Minnesota Press, 2015): 37. This was not, however, the first moment in which the America state and medical professions wielded such symbiotic power over the shape and content of sexual and gender identities (see also): Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago, IL: University of Chicago Press, 1999), 219-267; Henry L. Minton, "Community Empowerment and the Medicalization of Homosexuality: Constructing Sexual Identities in the 1930s," *Journal of the History of Sexuality* 6, no.3 (January 1996): 435-458; Henry L. Minton, *Departing from Deviance: A History of Homosexual Rights and Emancipatory Science in America* (Chicago, IL: University of Chicago Press, 2002).

did not merit criminalization for their behavior, that they were ultimately in need of psychiatric care for their supposedly abnormal patterns of sexual desire. Psychiatrists working within the neo-Freudian psychoanalytic school were particularly influential among those who championed the idea that homosexuality was both deviant and curable in those who were willing to submit themselves to therapy. Having gained prominence during World War II for treating “war neuroses,” the discipline of psychiatry had both the resources and the clout to call for treating the “homosexual menace,” a figure of fear conjured by McCarthyism and anxiety over the statistics in the Kinsey Reports.<sup>149</sup> These psychiatrists and other sexologists studying homosexuality during this period tended to blame some developmental phenomenon that led to the fear of the opposite sex. The school of psychoanalytic thought that became most prominent tended to see homosexuality as some form of maladaptation to social life in modernity.<sup>150</sup> The homophiles that were attracted to this model were not as interested in cultivating and legitimating a gay identity as the founders of the Mattachine were; instead, they pursued the decriminalization of homosexual behavior while simultaneously advocating the exploration of treatments for what they perceived to be a medical or psychiatric condition.

One of the most widely-read proponents of this model was the sociologist Donald Webster Cory (a pseudonym for the closeted Edward Sagarin) who published his (partial)

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<sup>149</sup> Waidzunus, *The Straight Line* 36; D’Emilio, *Sexual Politics* 42.

<sup>150</sup> D’Emilio, *Sexual Politics*, 140.

defense of homosexuality in his 1951 *The Homosexual in America*.<sup>151</sup> Arguing for decriminalization of same-sex sexual relations and for the civil rights of oppressed homosexuals, Cory drew connections to other ethnic minorities struggling for their rights.<sup>152</sup> Despite the fact that this position appeared on its face to be rather similar to the writings of the more radical founders of the Mattachine, Cory defended the medical model and condemned those who advanced the idea that the homosexual was just as healthy and normal as the heterosexual. Writing in 1959, he argued that homosexual Americans ought to be treated the same as an alcoholic: a stain on an otherwise proper civil society that nonetheless retained his rights within society and was provided options to treat his pathology.<sup>153</sup> Despite these views that many would now find to be regressive, Cory was a popular figure in the homophile movement and has even come to be championed by some as the “godfather of the homophile movement” for how widespread his political message of tolerance became.

Those in the homophile movement who took to Cory’s insistence on seeking treatment had options as the American Psychiatric Association listed “homosexuality” as a treatable personality disorder in the first edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM)* in 1952. During its first years in power, those leading the post-1953 Mattachine Society often hosted psychiatrists and others who endorsed the *DSM* approach to speak to members of the organization, including those such as the psychologist Albert Ellis who insisted that “exclusive” homosexuality was a

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<sup>151</sup> Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (New York: Greenberg, 1951).

<sup>152</sup> D’Emilio, *Sexual Politics* 33.

<sup>153</sup> *Ibid.*, 167.

sign of neurosis.<sup>154</sup> Despite this disparaging view, Ellis was a frequent contributor to the Mattachine's journal, the *Mattachine Review*, and characterized himself as one of the "rare psychologists who was known to be pro-homosexual" during the 1950s.<sup>155</sup> At the height of this attitude's saliency within the Mattachine, Chairman Ken Burns, speaking at a convention in 1956, insisted that the *prevention* of the spread homosexuality was key.<sup>156</sup> Burns's statement was in part a strategic deflection of the pervasive argument that homosexuals were part of a broader class of sexual psychopaths, some of whom preyed on children as contagion was the only means by which the homosexual could reproduce.<sup>157</sup> It was also, however, based on a political commitment to a form of sexual advocacy that prioritized the dual project of decriminalizing and treating homosexuality.

Although it is easy to retrospectively condemn Cory, Burns, and others as "self-loathing," these experts and elites represented a contingent of largely middle-class white men who fought for the civil rights of gay Americans according to their own political interests and political visions. They placed their faith in medicine and psychiatry to convince the broader American public to afford them the same rights as all other citizens. This was exemplified by Mattachine member Curtis Dewees's correspondence with Kinsey Institute researcher Wardell Pomeroy in which he wrote: "I regret that there is no

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<sup>154</sup> John D'Emilio, *Making Trouble: Essays on Gay History, Politics, and the University* (London: Routledge, 1992); Learned Foote, "Homosexual Democracy in America: Political Ideology & Organization in the Mattachine, 1950-1954," Unpublished Thesis, Columbia University Department of History, (2011): 28, 61. Waidzunus, *The Straight Line* 54; Ellis adhered to a belief in "innate bisexuality" but was firmly opposed to "the homosexual" as a natural sexual variant.

<sup>155</sup> Albert Ellis, "Rumors about My Anti-Homosexual Views: A Reply to Kristin Gay Esterberg," *The Journal of Sex Research* 27, no. 4 (Nov., 1990): 645-6.

<sup>156</sup> Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (New York: Basic Books, 1981): 76.

<sup>157</sup> Estelle B. Freedman, "Uncontrollable Desires!: The Response to the Sexual Psychopath, 1920-1960," *Journal of American History* 74 (June 1987): 83-106.

group working for the homosexual in this country similar to the National Council of Alcoholism or the National Family Council on Drug Addiction.”<sup>158</sup> Homophiles like Dewees were situated on the conservative flank of the liberal tolerance model; they asked for treatment to integrate into the existing social order, whereas their more progressive counterparts would come to argue for an acceptance of the homosexual as an oppressed cultural minority equal to the heterosexual citizen. Those homophiles who entertained the illness model wished to be cured of a condition that prevented them from living happily within the paradigm they felt they naturally belonged. These men trusted scientific authority as both a political and a therapeutic tool, which could provide them protection from society’s prejudices while also reorienting what they perceived as deviant, abnormal desires. The medical model allowed these men to fashion themselves as political patients, heterosexuals-in-suffering rather than homosexuals.

While this conservative disposition was prevalent in the post-1953 Mattachine, not all homophile activists were willing to accept that their sexual natures were indicative of an illness or disturbance of the mind. Evidence of this can be found in a September 1954 proposal to institute a standard operating procedure for physicians, psychologists, and psychiatrists.<sup>159</sup> This proposal required that any practitioner seeking referrals from the Mattachine Society would need demonstrate his or her professional qualifications and experience in matters of human sexuality, and to declare support for the “sexual equality

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<sup>158</sup> Curtis Dewees letter to Wardell Pomeroy, (September 2, 1963) Gebhard Era Correspondence 1960-1969 Part One: A-Z, File Cabinet 4, Drawer 5, Mattachine Society 1960s, Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana.

<sup>159</sup> Meeker, “Behind the Mask of Respectability,” 93.

of the variant.”<sup>160</sup> As Meeker notes, the fact that this proposal was considered but never adopted demonstrates that there was a split among members over an adherence to the homosexuality-as-illness conception and the de-pathologizing impulse.<sup>161</sup>

Despite the more conservative political turn of the *Mattachine* in 1953, opposition to the mental illness paradigm as promulgated by those like Cory and Ellis began to increase in influence in the following years. The ONE organization, a splinter element of the *Mattachine* that housed some of the more radical members of the *Mattachine* after the 1953 split, frequently condemned the advocates of the medical model in the pages of its eponymous journal. Its editors still wedded to the project of cultivating a homosexual political consciousness, *ONE* ran articles with titles such as “I Am Glad I Am Homosexual” as well as critiques of those who would call to treat rather than celebrate their homosexual identities.<sup>162</sup> By the mid-to-late 1950s, even the more conservative *Mattachine* gradually became more disillusioned with the contingent of pro-homophile psychiatrists and psychologists who remained wedded to the idea of homosexuality as an illness. In 1956 for example, psychoanalyst Edmund Bergler was denounced by the *Mattachine* for his vitriolic take on homosexuals as “unreliable” and “miserable souls.”<sup>163</sup> By 1958, the *Mattachine Review* took a firm stance against reorientation therapies, arguing that homosexuals were not diseased and that they need not change their sexualities.<sup>164</sup>

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<sup>160</sup> *Ibid.*, 94.

<sup>161</sup> *Ibid.*

<sup>162</sup> D’Emilio, *Sexual Politics*, 88.

<sup>163</sup> Minton, *Departing from Deviance*, 240.

<sup>164</sup> Bayer, *Homosexuality and American Psychiatry*, 79-80.

Even those homophiles who rejected the medical model, however, were still tied to expert opinion during this period. The spectrum of political opinion ran from those who sought their civil rights partially through treatment for their conditions to the notion that homosexuality was a normal variant of human sexuality and equivalent to heterosexuality. Some of the movement's early scientific allies told activists to downplay their sexualities and to emphasize a desire to live as "responsible" citizens. Both psychologists such as Evelyn Hooker and homophile leaders like Ken Burns argued that adopting the early Mattachine leaders' language about awakening a politically-radical "homosexual consciousness" and changing the mores of society would lead them to political defeat. Even those who opposed the illness framework needed to express their commonality with the heterosexual majority.<sup>165</sup>

### *Early Lesbian Organizing and Scientific and Medical Expertise*

A mark of the early homophile era's relative conservatism was the degree to which gay men and lesbian women worked in gender-segregated political organizations.<sup>166</sup> The early lesbian political institutions mirrored many of the political dynamics and affiliations with scientific and medical institutions exhibited in the male-dominated Mattachine Society and ONE. In San Francisco in 1955, Del Martin and Phyllis Lyon, two middle-class white women described by historian Marcia Gallo as liberal New Dealers, founded the first lesbian homophile organization, the Daughters of

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<sup>165</sup> D'Emilio, *Sexual Politics*, 84.

<sup>166</sup> Though there were women in the Mattachine, for instance, the homophile organizations tended to be disproportionately male.

Bilitis (DOB).<sup>167</sup> Although the DOB was originally established as a social club for women searching for contact and camaraderie with other gay women, within its first year it transformed into a political organization for lesbians and sprouted branches in New York, Chicago, and Los Angeles among many others. The DOB traded in a similar politics of respectability and tolerance that was popular within the post-1953 Mattachine. This political orientation is evidenced in their 1955 statement of purpose in which they declared their intention to “promo[te] the integration of the homosexual into society” through such means as education and penal reform.<sup>168</sup> The members eschewed endorsing any particular political party or ideology and some discussions in early meetings nearly led the DOB to declare itself to be an anti-communist organization.<sup>169</sup>

In a similar vein to the post-1953 Mattachine Society, the Daughters of Bilitis sought aid from scientific and medical experts in their quest for this integration into American society. In its statement of purpose, the DOB indicated a desire to spread educational literature on homosexuality to a broader public. More importantly, they pledged “[p]articipation in research projects by duly authorized and responsible psychologists, sociologists and other such experts directed towards further knowledge of the homosexual.”<sup>170</sup> This engagement with scientific authority took a similar form to what Foucault called a reverse discourse in that these lesbian activists made a founding commitment to the production and articulation of scientific knowledge regarding their

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<sup>167</sup> Marcia M. Gallo, *Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement* (New York: Carroll & Graf Publishers, 2006): xx.

<sup>168</sup> Daughters of Bilitis, “Statement of Purpose (1955),” in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 328.

<sup>169</sup> Gallo, *Different Daughters*, 10.

<sup>170</sup> Daughters of Bilitis, “Statement of Purpose,” 328.



identity.<sup>171</sup> They were not merely objects of study but instead were active participants in a dialogue about their identities that was based in a scientific/medical logic and discourse. The DOB worked toward this goal by replicating the Mattachine's strategy of publishing a journal—*The Ladder*—which became home to many of these scientific discussions as well as by creating political ties to these researchers. The DOB even undertook a massive sociological survey project among its membership and possible research contacts to create a database for medical and academic professionals to use to study their identities.<sup>172</sup>

Paralleling their male counterparts in the Mattachine, the DOB often endorsed conservative expert theories on the nature of homosexuality, some of which were disparaging and closely tied to the pathological model. Sociologist Kristin Esterberg's study on research published in *The Ladder* demonstrates that during the late 1950s, the journal often printed the opinions of researchers who argued that lesbianism was an impediment to "full happiness" and that same-sex attraction was correlated with criminal behavior including homicide.<sup>173</sup> Esterberg notes that many in the organization believed that their white middle class audience and political constituency relied upon expert opinion and that straying too far from established scientific opinion would be harmful to their goal of integration. More progressive voices, however, did find their way into *The*

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<sup>171</sup> Terry, *An American Obsession*, 17; Michel Foucault, *The History of Sexuality Volume I*, trans. Robert Hurley (New York, NY: Vintage, 1990); Though in Foucault's model, this involved sexual minorities speaking their legitimacy and desire for some kind of political and social emancipation whereas some in the DOB remained committed to at least parts of the pathological model in their conception of self.

<sup>172</sup> Daughters of Bilitis, "What About the DOB? (1959)," in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 328-30. This survey project was, however, unsuccessful in its execution.

<sup>173</sup> Kristin G. Esterberg, "From Illness to Action: Conceptions of Homosexuality in The Ladder, 1956-1965," *The Journal of Sex Research*, 27, no. 1 (Feb., 1990): 65-80.

*Ladder*; as early as 1956, the journal published an interview with psychotherapist Alice LaVere arguing against the notion that one should seek to treat lesbianism as an illness or mental disturbance.<sup>174</sup> By 1959, even the more conservative members of the DOB began to wean themselves from some of the most regressive assumptions laden in the medical model as leaders such as Florence Jaffy wrote that psychoanalytic theories condemning lesbians as innately irresponsible and immature were wrongheaded and that lesbian sexuality should be seen as merely another variant of human sexuality.<sup>175</sup>

The Daughters of Bilitis also explicitly distinguished themselves from child molesters and sexual predators by invoking scientific knowledge and authority. In a 1959 statement, the DOB leaders emphasized their policy against allowing any minor to join the organization and insisted that they represented only adult women.<sup>176</sup> Citing a senior psychiatrist at Bellevue Hospital, they pointed to evidence that homosexual-identified persons were no more likely to prey on children than were their heterosexual counterparts. In the same document, the DOB argued that although they wished to reform sex crime legislation, they sought to keep laws on the books that protected against the molestation of children as well as those that prohibited “indecent public behavior” on the grounds that both crimes were harmful to society.<sup>177</sup> Although as a matter of conservative principle the early homophile organizations did not fight for the right to cruise or act “lewdly” in public, there is also a logical connection here to be drawn between the protection of the child in a very immediate sense against molestation and the societal

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<sup>174</sup> *Ibid.*, 67.

<sup>175</sup> *Ibid.*, 69.

<sup>176</sup> Daughters of Bilitis, “What About the DOB? (1959),” 329.

<sup>177</sup> *Ibid.*, 330.

imperative to retain the sanctity and innocence of public space, especially where children might be present. Here, the DOB invoked a blend of the authority of science and the moral sentiments of the broader society to draw a distinction between both the homosexual and the pedophile/sexual predator as well as between appropriate sexual behavior (hetero or homo) and behavior that could be construed as an attack on the public realm of decency.

Throughout the course of their internal debates over which scientific and medical authorities to trust, the Daughters of Bilitis came to argue that homosexuality was not a “choice” as early as 1959. As Esterberg recounts, readers of *The Ladder* often wrote into the journal to express their diverse theories of how they came to have a lesbian identity.<sup>178</sup> These ranged from explanations by those who believed they suffered from a mental pathology as well as those who expressed their sexualities with reference to Kinsey-inspired spectrum model. Within the first several years of the DOB’s existence, some leaders began to retaliate against assumptions that lesbians were ill or even that they had any meaningful agency over their sexualities. DOB leader Stern Russell exemplified this trend when she remarked that it was strange to hear the “ancient heterosexual viewpoint that homosexuality is simply a matter of *choice*, as easily changed as an old shirt...” from some of the readers of *The Ladder*.<sup>179</sup> The shift away from the pathological model is evidenced in a 1959 DOB statement published in *The Ladder* asserting that it was “generally established by the experts in the field that the *cause* of homosexuality is still an unknown quantity [and] that it is a process of

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<sup>178</sup> Esterberg, “From Illness to Action,” 70-1.

<sup>179</sup> *Ibid.*, 72.

development and *not a matter of choice*.”<sup>180</sup> By the end of the 1950s, the DOB leadership had deemed expert opinion as integral to their success and that the most appropriate scientific voices were those of which advocated for a theory of relative innateness in contrast to one that defined homosexuality as a condition over which the sufferer had some degree of agency and, therefore, responsibility to correct.

*“Gay is Good”: The Rise of the Militant Homophile Movement*

The mid-to-late 1960s signaled a progressive, more militant change in the homophile movement’s politics. This era saw the beginnings of a civil rights-style political orientation within the movement. This took the form of orchestrated joint activist and scientific actions against the pathological model of homosexuality as well as the coining of the now famous phrase, “gay is good,” to express the legitimacy of gay and lesbian identities.”<sup>181</sup> Inspired by civil rights organizations and the rise of student organizations like the Student Non-Violent Coordinating Committee (SNCC), militant homophile activists seized control from the conservative old guard in organizations such as the Mattachine Society and established new ones such as the Society for Individual Rights (SIR) and the Council on Religion and the Homosexual (CRH). No longer willing to condemn themselves as ill, these activists fought their oppressors by emphasizing their status as an oppressed minority group.

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<sup>180</sup> Daughters of Bilitis, “What About the DOB? (1959),” 330.

<sup>181</sup> Franklin Kameny, “Gay is Good,” in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 366-76.

Shifts in attitudes toward scientific discourses and institutions accompanied this militant change in direction for the homophile movement as well. Although there were fights among the leadership of some homophile organizations as for how much authority scientific and medical experts should have over gay identities, this new instantiation of the movement remained committed to expert discourses and institutions, especially as homophile activists came to increasingly collaborate with them in the laboratory as well as on the stand as expert witnesses in trials and appeals courts. Herein lie the roots of the modern gay rights movement's relationship with these authorities where scientific discourses provided a firm foundation against attacks—which came in the form of both public political discourse as well as legal discourse—on homosexuality as an illness, a contagion, or a choice.

Looking first to political changes within the homophile movement itself, militant homophile activists began to establish new, more aggressive Mattachine Society chapters as well as oust the conservative leadership from established ones. One of the key figures in this shift was Frank Kameny, an astronomer working for the U.S. Army map service who became an activist upon being fired by the Civil Service Commission (CSC) in 1957 when an investigative report revealed that he had been arrested for lewd conduct the previous year.<sup>182</sup> Kameny immediately pursued internal appeals procedures as well as an unsuccessful federal lawsuit against the Civil Service Commission for unjustly firing him

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<sup>182</sup> David K. Johnson, "Franklin E. Kameny," in *Before Stonewall: Activists for Gay and Lesbian Rights in Historical Context*, ed. Vern Bullough (Binghamton, NY: Harrington Park Press, 2002), 209-218.

and barring him from future employment by the U.S. federal government.<sup>183</sup> While fighting in the courts, Kameny was introduced by a D.C. friend to members of the New York City Mattachine Society (MSNY) who provided him with the names of those in D.C. interested in forming a homophile organization of their own. In the summer of 1961, Kameny and this handful of activists founded the Mattachine Society of Washington (MSW) and elected Kameny its president.<sup>184</sup>

Kameny's leadership at the MSW provided inertia for a militant change in direction for the broader Mattachine Society and the homophile movement at large. Guided by a strategy of aggressive direct action, Kameny lashed out against the respectability and political neutrality approach that characterized the old guard; instead, he argued that a civil rights-styled direct action campaigns against oppressive government institutions had to be at the core of the movement's grand strategy.<sup>185</sup> This led Kameny to spend the early 1960s leading the Mattachine of Washington in direct actions against the Civil Service Commission, the D.C. police, even the United States Congress when it attempted—but failed—to rescind the MSW's permit to fundraise in retaliation for the MSW's combative stance against discriminatory D.C. political institutions.<sup>186</sup> In taking on these fights, the MSW began to coalition build with organizations such as the local ACLU affiliate as well as a few sympathetic officials in

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<sup>183</sup> The case, *Franklin Edward Kameny v. Wilber M. Brucker*, was eventually denied an appeal by the United States Supreme Court, which upheld the D.C. Circuit Court of Appeals ruling against Kameny.

<sup>184</sup> D'Emilio, *Sexual Politics*, 152.

<sup>185</sup> *Ibid.*, 152-3.

<sup>186</sup> *Ibid.*, 154-7; Adam, *The Rise of a Gay and Lesbian Movement*, 76.

the bureaucracy as Kameny and others increased their political power and public presence in the capital.

This political strategy pursued by the MSW was accompanied by a novel approach to gay identity and the role that scientific and medical experts had traditionally played in its crafting. On this front, Kameny challenged the Mattachine Society to abandon the “ivory-tower concept of aloof, detached dignity” that came from the authority of those such as Donald Webster Cory. Instead, Kameny argued that the movement must approach its political work and conceptions of themselves in a self-reinforcing mode in which on-the-ground organizing was accompanied by a positive sense of gay identity that came from the members’ dignity, pride, and—perhaps most importantly—knowledge of their own identities.<sup>187</sup> In Kameny’s Supreme Court appeal which he filed during the same year he founded the MSW, he argued that gay persons were the experts and the authorities over their own identities and their own lives.<sup>188</sup> This ethos that demanded a self-determined identity was mobilized during this time against the illness model of homosexuality. Shortly after its founding, the Mattachine Society of Washington became the first to declare that homosexuality was not a sickness but instead a “preference, orientation, or propensity, on par with, and not different in kind from, heterosexuality.”<sup>189</sup> This marked the beginning of the demise for both the old conservative guard politically as well as those homophile activists who had held onto the

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<sup>187</sup> D’Emilio, *Sexual Politics*, 152.

<sup>188</sup> Johnson, “Franklin E. Kameny,” 212.

<sup>189</sup> *Ibid.*, 213.

notion that their preferences and identities were undesirable and could potentially be cured by scientific and medical intervention.

The militant spirit that moved Kameny to action began to spread throughout the rest of the homophile movement in the early 1960s. Kameny and others from the MSW began to work alongside progressive homophile activists in the MSNY who sought to overthrow their conservative leadership. In July 1964, Kameny gave a speech to their general membership at the behest of the MSNY militants in which he invoked the figure of Martin Luther King Jr. and the civil rights movement as an influence for the broader homophile movement and urged a repudiation of the idea that homosexuality was immoral, an illness, or anything other than a net good for the individual gay person and for the society in which he lives.<sup>190</sup> The following year, a slate of militant activists wrestled control from the old guard, many of whom, upon losing, departed from the organization entirely. With the loss of the conservative contingent in New York came another blow to the authority of the medical model of homosexuality-as-illness. The conservative faction in the MSNY was beholden to psychologists and other academic experts such as Donald Webster Cory himself. With their ousting from rule, Cory and others lost not only their political power in a more immediate sense but also their epistemological authority over the identities of their membership's identities and behaviors.

The conservative old guard of the Daughters of Bilitis also began to experience challenges to its authority by militant lesbian activists during this period. Those like

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<sup>190</sup> David Carter, *Stonewall: The Riots That Sparked the Gay Revolution* (New York: St. Martin's Press, 2010): 39-40.



Barbara Gittings did this work by taking on editorial control of *The Ladder* in 1962 and using it to publish articles against the medical model.<sup>191</sup> This and other militant attempts to take power away from the leadership led conservatives to struggle to reorient the DOB and its journal back to more conservative academic and medical voices and to avoid adopting the “gay is good” mantra. At a 1964 national convention, Cory, who was present as a speaker, fought back against the militants and implored them not to abandon science and to dismiss the “delusion” that there was no truth to the psychopathological model of homosexuality.<sup>192</sup> These internal struggles continued throughout the mid-1960s and eventually gave way to militant control by 1965; however, the old guard regained its power the next year, leading to an exodus of militant lesbian activists into more militant Mattachine chapters and other newly-formed organizations.<sup>193</sup>

Sensing a need for a network for militants to work across their organizations throughout the process of purging their conservative elements, the MSW, MSNY, DOB of New York, and the Janus Society of Philadelphia founded the East Coast Homophile Organizations (ECHO) in 1963. The ECHO became an important site for consolidating militant power by providing a communication network for those doing political strategy work. It also exposed even more members of diverse organizations within the homophile movement to vocal critics of the illness model.<sup>194</sup> In a famous example of militant homophile expression, one activist denounced Albert Ellis in front of a 1963 ECHO

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<sup>191</sup> Adam, *The Rise of a Gay and Lesbian Movement*, 77.

<sup>192</sup> D’Emilio, *Sexual Politics*, 167.

<sup>193</sup> Adam, *The Rise of a Gay and Lesbian Movement*, 77-8.

<sup>194</sup> D’Emilio, *Sexual Politics*, 161.

convention, declaring that any homosexual who sought treatment from Ellis must be a psychopath for indulging the psychologist's condemnation of their nature.<sup>195</sup>

Some interactions within the ECHO coalition led to conflicts about how militant and radical these new homophile activists were willing to take the movement. Kameny and Clark Polak, the founder of the Janus Society, disagreed publicly about the place of sexuality and sexual practices in militant homophile discourse.<sup>196</sup> Whereas Polak advocated for more centrally situating sexuality in discussions about homosexuality and sexual freedom in general, Kameny and others downplayed the sexuality component of homosexuality. The libertine Polak attempted to run the Janus Society in an even more radical direction than many militant homophiles as he advertised its journal, *Drum*, as a news source for “faggots, fairies, and queers.”<sup>197</sup> For many activists, “gay is good” was an argument about status, preference, and orientation in contrast to one about sexual behavior. This lingering conservative streak in the militants' political program came from a cautiousness about the legal and moral environment in which sodomy remained illegal in much of the U.S. and a wide range of less-than-intimate same-sex behavior was often treated with arrests for lewd conduct and similar charges.<sup>198</sup> Although the rejection of the illness model defined the militants broadly, this split between Polak's exuberance for challenging mores directly and the militant homophile predilection for caution

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<sup>195</sup> Ibid., 163.

<sup>196</sup> Marc Stein, *Rethinking the Gay and Lesbian Movement* (New York: Routledge, 2012): 71.

<sup>197</sup> Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972, 2<sup>nd</sup> Edition* (Philadelphia, PA: Temple University Press, 2004): 232.

<sup>198</sup> As one homophile wrote in 1958, most homophiles preferred to present homosexuality through conformity, normalcy, and a degree of asexuality. Hollister Barnes (Dorr Legg), “I Am Glad I Am a Homosexual (originally published in *ONE*), in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 323-6.

demonstrates the persistence of an attachment to the older respectability mode of avoiding a transgressive presentation of gay identity or behavior.

By 1966, the militant homophiles were able to form a national coalition, the North American Conference of Homophile Organizations (NACHO), which became a key site for solidifying the idea that gay men and women constituted a discrete class of sexual minorities deserving of their civil rights.<sup>199</sup> This coalition represented those organizations that constituted the ECHO as well as other groups that were formed throughout the mid-to-late 1960s as the homophile presence grew throughout the country. During its fourth conference in 1968, the NACHO affirmed the militant stance on gay identity by officially adopting “Gay is Good.”<sup>200</sup> In doing so, the NACHO indicated that “the homosexual in our pluralistic society has the right to be a homosexual” and that just as Catholics and Jews are “free of insolent and arrogant pressures to convert to the prevailing Protestant Christianity” the homosexual must be free to live without suffering penalties for living out a homosexual identity and life and without the pressure to “convert” to heterosexuality.<sup>201</sup> Throughout its existence from 1966-1970, the NACHO entrenched this idea socially and politically as it advised the formation of new homophile organizations, established a legal defense fund to challenge oppressive laws and police practices, and to publish position papers on issues pertaining to civil rights issues.

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<sup>199</sup> Gallo, *Different Daughters*, 155-7; As Gallo has revealed, however, the involvement of the DOB in the NACHO was not uncontroversial especially as a growing female separatism had begun to grow within the lesbian community.

<sup>200</sup> Elizabeth A. Armstrong, *Forging Gay Identities: Organizing Sexuality in San Francisco, 1950-1994* (Berkeley, CA: University of California Press, 2002): 53-4.

<sup>201</sup> North American Conference of Homophile Organizations Meeting Minutes from Fourth Meeting (August 1968), Gerber/Hart Library and Archives, <http://www.gerberhart.org/wp-content/uploads/2016/03/North-American-Conference-of-Homophile-Orgs-Minutes-August-1968.pdf> (Accessed October 13, 2016).

As the homophile movement came into its second decade of existence, new organizations proliferated that moved even further beyond the influence of the militant Mattachine chapters. San Francisco organizations such as the Society for Individual Rights (SIR) and the Council on Religion and the Homosexual (CRH), both founded in 1964, sought to unite politically-driven homophile activists with the social gay communities that had emerged from the bar scene as well as in progressive religious communities.<sup>202</sup> The leaders of these organizations believed that the power of the homophile movement was limited if it could not bring out supporters by attending to their social and spiritual needs (this was key as religious opposition to homosexuality could be especially vitriolic) and by linking their political program with the influential ministers and business owners in these communities. The SIR grew to be the largest homophile organization by the late 1960s as it drew from a large base within the San Francisco bar scene, drawing resources from gay entrepreneurs hurt by the police crackdown on their establishments, as well as from those interested in placing gay issues at the center of local electoral politics and legal battles. On the electoral front, the SIR fought a defensive war against police raids and discriminatory laws targeting gay sexualities. Additionally, they engaged in offensive strategies as well and were successful in electing Dianne Feinstein to the San Francisco Board of Supervisors in the fall of 1969.<sup>203</sup>

Perhaps the most characteristic element of the late homophile movement's political orientation and the shape of gay identity was on display in the Annual Reminder,

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<sup>202</sup> Armstrong, *Forging Gay Identities*, 51; Christina B. Hanhardt, *Safe Space: Gay Neighborhood History and the Politics of Violence* (Durham, NC: Duke University Press, 2013).

<sup>203</sup> Ibid., 125.

a Fourth of July protest at Independence Hall in Philadelphia that was held annually from 1965 to 1970. As historian Henry Abelove recounts, this demonstration was attended by the likes of those from the SIR, Mattachine chapters, and the DOB and was used to rally support around the idea that gay men and women lacked the “sacred American rights” guaranteed to all by the American ideals of liberty and equality.<sup>204</sup> As a SIR flyer for the 1968 Reminder declared, “the principles of the Declaration of Independence [must] now be extended to all Americans.”<sup>205</sup> Though the movement had become less conservative throughout the 1960s and more radical positions on sexual freedom were beginning to be championed by those at the Janus Society, the Annual Reminders represented the homophile movement’s fundamental commitment to integration: these activists were asking for reforms of the law so that they might join American society in its current form of political and social arrangements. The politics of respectability were reflected in the attire and gender presentation demanded at these and other similar protest events. Frank Kameny, for example, had been influential in demanding that women wear dresses and men don suits to eschew controversy as much as possible by looking the part of middle class, mostly white, heterosexual America.<sup>206</sup> The public face of the gay political identity during the late homophile era was defined by this strategy based in a sense of propriety as well as a strict adherence to gender norms.

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<sup>204</sup> Henry Abelove, “How Stonewall Obscures the Real History of Gay Liberation,” *The Chronicle of Higher Education Review* (June 26, 2015) <http://www.chronicle.com/article/How-Stonewall-Obscures-the/231099/> (Accessed May 21, 2019).

<sup>205</sup> Society for Individual Rights, “Homosexuals Call for Completion of American Revolution,” (1968) Collection 2011-075, Box 1, Folder 1, Society for Individual Rights (SIR) Records, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>206</sup> Mattachine Society of Washington, “Committee on Picketing and Other Lawful Demonstrations: Regulations for Picketing,” (n.d.), Library of Congress, <http://www.kamenypapers.org/images/KamenyPicketInstructions.jpg> (Accessed October 13, 2016).

*The Changing Face of Science: Homophiles and (Some) Scientists Combat the Illness Model*

As the militant homophile movement came to increasingly reject theories of psychopathology, scientists and psychiatric practitioners, some of whom were already skeptical of the illness model and its theoretical underpinnings, worked alongside homophile activists to change the reigning scientific approach to homosexuality. While the early Mattachine had attempted to establish ties to the UCLA psychology faculty as early as 1952, the late homophile movement was much more successful in creating bridges to scientific and medical institutions and actors throughout the late 1950s and 1960s. Activists came to participate in research studies, publish favorable scientific results in their journals, and target professional academic and medical associations as a means to legitimating their gay identities. Although some in the movement rallied against a reliance on experts to define (and protect) gay identities, the movement largely accepted the influence and resources of scientists willing to come out against the illness model and to articulate alternative understandings of homosexual behavior and identity. These relationships between scientific and political actors were symbiotic in nature: as the “gay is good” message and political attacks on the authority of science to declare homosexuals sick spread, the scientific agendas of sympathetic researchers began to change as they published an increasing number of studies on sexuality. Together, these scientists and activists reshaped scientific and academic discourses in cultivating both expert-driven political campaigns and research agendas that favored the militant homophile

movement's message that homosexuality was on par with heterosexuality and presented no threat to the broader social order.

One of the most direct ways in which homophile activists worked with scientific elites was by volunteering themselves as subjects of study to sympathetic researchers. Activists engaged in the scientific production of knowledge—using its discourses, logics, and institutions—in a political attempt to affirm their identities. The most famous and influential of these early studies were conducted by UCLA psychologist Evelyn Hooker who had come to sympathize with the struggle of homosexual men upon witnessing oppression firsthand while working in Nazi Germany and the Stalinist Soviet Union.<sup>207</sup> The founding chapter of the Mattachine Society in Los Angeles had originally reached out to Hooker in 1952 to little avail but just several years later they had secured a connection to the psychologist as she sought to challenge the reigning scientific approach to homosexuality. By providing Hooker with willing subjects from the Mattachine and ONE's membership for studies on the differences between homosexual and heterosexual men, activists were able to strategically position themselves to show that homosexual men did not experience psychopathological behavior in greater degree than their heterosexual-identified counterparts.

Hooker published studies in 1956 and 1957 in which she demonstrated that homosexuality did not constitute a particular personality disorder as homosexuals were just as likely as heterosexuals to display a variety mental conditions from healthy and

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<sup>207</sup> Waidzunus, *The Straight Line*, 54.

“well-adjusted” to mentally ill.<sup>208</sup> Hooker also criticized previous psychoanalytic studies of pathology for not taking into account social factors—such as employment and housing discrimination, social stigma, and violence—that might account for higher rates of mental illness among those who identified as homosexuals.<sup>209</sup> This gave scientific authority to the political demand for a more tolerant approach to homosexuality as “coming out” came to be cast as a remedy to much of the depression and other symptoms that signified a personality disorder. Hooker’s research suggested that the criminalization and medicalization of homosexuality in the older approach was a cause for the pathologies that many psychiatrists had purported to be treating through such measures.

Evelyn Hooker’s studies represented only a fraction of those in the fields of psychiatry, psychology, and medicine that had begun to perceive severe theoretical and empirical shortcomings of the psychoanalytic illness model throughout the 1950s and 1960s. Psychiatrist Thomas Szasz was one of the early vocal critics of his own discipline’s approach to conceptualizing and treating homosexuality as a mental illness or personality disorder.<sup>210</sup> In 1961, Szasz wrote *The Myth of Mental Illness* in which he sought to undermine contemporary psychiatry’s central purpose of classifying and “curing” a wide range of conditions thought to be diseases of the mind.<sup>211</sup> Similar to Michel Foucault’s writings on psychiatry and the psychiatric clinic’s medical gaze, Szasz sought to undermine the ideological foundation of psychiatry that viewed any expression

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<sup>208</sup> Evelyn Hooker, “A Preliminary Analysis of Group Behavior of Homosexuals,” *Journal of Psychology* 42 (1956): 219; Evelyn Hooker, “The Adjustment of the Male Overt Homosexual,” *Journal of Projective Techniques* 21 (1957): 18-31.

<sup>209</sup> Waidzunus, *The Straight Line*, 55.

<sup>210</sup> Bayer, *Homosexuality and American Psychiatry*, 54-7.

<sup>211</sup> Thomas Szasz, *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct* (New York: Harper & Row, 1961).



of behavior or predilections divergent from societal norms as signs of illness necessitating a regiment of invasive therapies—accompanied by criminal codes to discourage such deviance—to remedy.<sup>212</sup> By 1965, Szasz had begun to take on the homosexuality diagnosis specifically in an essay “Legal and Moral Aspects of Homosexuality,” in which he argued that taking heterosexuality to be the natural norm was a false premise that led to perceiving all other forms of sexual attraction and behavior as unnatural and deviant.<sup>213</sup> One of Szasz’s most important contributions against the illness model was his insistence that a patient could not be “helped” or “cured” if they did not want to be. Szasz’s critique of the fundamentals of psychiatry’s approach to mental illness carved out an academic space for those who wished to reorient the discipline’s obsession with diagnosing and curing a wide variety of supposed deviant behaviors.<sup>214</sup>

In addition to Szasz, physicians and psychologists too began to study and work with the homophile movement and gay cultural communities to better understand this seemingly new minority group. The physician Martin Hoffman’s 1968 book *The Gay World* became immensely popular among homophile activists who promoted its message of tolerance and its call for legal reforms.<sup>215</sup> Hoffman came to advocate for gay civil rights after studying the San Francisco homophile movement and gay culture for three years during the mid-1960s. Much like Hooker, Hoffman’s investigations led him to

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<sup>212</sup> Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (New York: Vintage, 1994).

<sup>213</sup> Thomas Szasz, “Legal and Moral Aspects of Homosexuality,” in *Sexual Inversion: The Multiple Roots of Homosexuality*, ed. Judd Marmor (New York: Basic Books, 1965): 124-139.

<sup>214</sup> Thomas Szasz, “What Psychiatry Can and Cannot Do,” *Harper’s Magazine*, 228 (February), 50-3.

<sup>215</sup> Martin Hoffman, *The Gay World: Male Homosexuality and the Social Creation of Evil* (New York: Basic Books, 1968).

realize that the “social evil” of homosexuality actually came from the demonizing and pathologizing of homosexual behaviors and identities. Psychoanalyst Hendrik Ruitenbeek published an edited volume in 1963, which also cast suspicion on the illness model and called for future studies of homosexuality to be undertaken by sociologists rather than psychologists or psychoanalysts, based on the assumption that the former were less interested in diagnosing and “curing” their subjects of study.<sup>216</sup> Ruitenbeek’s status as an eminent scholar of Freud and psychoanalysis buttressed Szasz’s calling into question the authority of psychiatry and psychoanalysis to classify and treat homosexuality.<sup>217</sup>

One of the most long-lasting and formative relationships between a prominent scientific actor and the homophile movement was established in 1965 when psychoanalytic clinician and researcher Judd Marmor published his classic edited volume, *Sexual Inversion: The Multiple Roots of Homosexuality*.<sup>218</sup> Marmor was well positioned to help homophile activists push to reorient the fields of psychiatry and psychoanalysis as he held top officer positions within the American Psychiatric Association (APA) and the American Academy of Psychoanalysis. He was also sympathetic to homophile political struggles as he had become deeply influenced by the Kinsey studies as well as Hooker’s late 1950s studies. Upon encountering them, Marmor came to believe that his discipline had become complicit in perpetuating the myth that

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<sup>216</sup> Hendrik Ruitenbeek, *The Problem of Homosexuality in Modern Society* (Boston, MA: Dutton, 1963).

<sup>217</sup> New York Times, “Dr. Hendrik Ruitenbeek, 55: Author and Expert on Freud,” *New York Times* (May 26, 1983) <http://www.nytimes.com/1983/05/26/obituaries/dr-hendrick-ruitenbeek-55-author-and-expert-on-freud-united-press-international.html> (Accessed May 21, 2019).

<sup>218</sup> Judd Marmor (ed.), *Sexual Inversion: The Multiple Roots of Homosexuality* (New York: Basic Books, 1965).

homosexuality was an identifiable and treatable mental illness.<sup>219</sup> In his 1965 volume, Marmor worked to convince his fellow clinicians and researchers that those who read their patients' sexualities as indicators of mental illness were guilty of imposing their own social and cultural biases upon their theory and practice. Rather than pointing to some determinative root cause of homosexuality, Marmor's approach was multi-causal; he believed that there were biological, psychological, and social factors to consider in interpreting the nature and development of a person's sexuality and that claiming one could so easily identify homosexuality as a static and discrete phenomenon with its own corresponding cure ran against both scientific evidence and logic. In casting his opponents' theories and studies in this light, Marmor was able to argue that the illness model was not only cruel and discriminatory, but it was also a betrayal of scientific objectivity.

As these scientists engaged more with the network of homophile and lesbian associations, their work began to be covered more in the homophile journals and magazines in the place of older illness model studies. In the late 1950s and early 1960s as the militants came to exercise increasing control of these publications, those like Barbara Gittings at *The Ladder* and the militants who ran *ONE* and the *Mattachine Review* began to publish the findings of Hooker, Marmor, and others while lashing out against those who continued to promote the idea that homosexuality signified a personality disorder. In some instances, the editors of these publications or other homophile activists would write critically of sympathetic researchers when they felt that they were not representing the

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<sup>219</sup> Vernon A. Rosario, "An Interview with Judd Marmor, MD", *Journal of Gay & Lesbian Psychotherapy*, 7, no.4 (2003): 23-34.

identities that they had so carefully crafted. In 1966, for example, Mattachine leader C.A. Tripp wrote into *The Ladder* to criticize Marmor for what he perceived as inaccuracies in his edited book on *Sexual Inversion*.<sup>220</sup> Tripp condemned those pieces in the volume that used the language and logic of psychoanalysts like Irving Bieber who were attempting to breathe new life into the illness model during this time.<sup>221</sup> He also attacked Marmor for confusing homosexuality with gender identity by equating gay identity with personality traits such as femininity in men. Tripp and others thus guided these sympathetic researchers toward a particular construction of gay identity, one which fit the elements of the respectability mode that even militant homophiles clung to so as not to be mistaken for the more transgressive transvestites, cross dressers, and others who did not fit the political form they thought was best suited for attaining their rights.

It was not uncommon for homophile leaders to be in direct correspondence with these researchers as the latter were often keen to advise organizations on how to challenge discriminatory laws, which were often implemented and defended with reference to the pathological model. Founder of the Florida chapter of the Mattachine Society Richard Inman, for example, had multiple exchanges with Kinsey Institute-affiliated researchers as well as with then-director Paul Gebhard throughout the mid-1960s. Inman sought their counsel in fighting back against an oppressive state legislature. In a letter to Gebhard, Inman wrote that the Institute's advocacy against the Criminal

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<sup>220</sup> C.A. Tripp "Psychiatric Moralists in Unison," (January 1966) Collection 007-009, Box 4, Folder 8, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>221</sup> Irving Bieber et al., *Homosexuality: A Psychoanalytic Study of Male Homosexuals* (New York: Basic Books, 1962).

Sexual Psychopath bill was “the key factor” in defeating that measure.<sup>222</sup> What is also revealing about these letters are discussions on the etiology of homosexuality, a topic which tended to receive less attention among this scientific crowd as they generally sought to emphasize the wrongness of the pathological model without offering much in the way of a robust alternative framework. However, in this rare extended exchange on the subject between scientists and a homophile leader, Inman and a group of prominent Kinsey Institute researchers shared their musings on the question with one another. In response to Dr. Walter Alvarez’s remark that “most of you were born with it,” Inman laid out a skeptical view of the notion that heredity might be a determinative factor. He explained that:

“Studies of genetics as applied to the ancestry of homosexuals might be good and might indeed develop more evidence that heredity is a factor, or even a major force, as to why some persons become homosexuals, and why others do not. This would, to some extent, result in evidence to show that ‘homosexuals are born that way and can’t help what they are.’ From the point of view of the homosexual, who is attempting through the Homophile Movement, to educate the public not to discriminate against him, such evidence would be a possible key towards solving of some of the problems. But I think the addition of the ‘sickness’ through

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<sup>222</sup> Richard Inman to Paul Gebhard (August 30, 1965) Gebhard Era Correspondence 1960-1969 Part One: A-Z, File Cabinet 4, Drawer 5, Mattachine Society 1960s, Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana.

hereditary theory, without some additional evidence is a very dangerous course to take.”<sup>223</sup>

What is so striking about this response is Inman’s conflicted feelings about a genetic origins story for homosexuality. At this early moment in 1966, he saw both the political promise and problems that attended an appeal based on bioessentialism, which was still at least a decade out from beginning to move to the center of debates regarding gay identity. Gebhard’s response that he “agree[d] that the odds are against homosexuality being genetic” was also more characteristic of this moment than Alvarez’s genetic hypothesis.<sup>224</sup>

One of the most famous disputes over the role of science in the homophile movement played out in the pages of *The Ladder* in 1965 between Frank Kameny and Florence Conrad, research director of the DOB. In the standard interpretation of this feud, this was a fight between a Kameny, a supposed skeptic, and a pro-science Conrad. Historian Jennifer Terry has argued that this debate represented a larger split between those who trusted in the authority of science and those militants who began to reject science and medicine’s role entirely in their emancipation.<sup>225</sup> There is much truth to this framing of the dispute, as Conrad insisted that “[o]urs is a science-oriented society, and

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<sup>223</sup> Richard Inman to Walter Alvarez CC: Harry Benjamin, Wardell Pomeroy, and Paul Gebhard (May 5, 1966) Gebhard Era Correspondence 1960-1969 Part One: A-Z, File Cabinet 4, Drawer 5, Mattachine Society 1960s, Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana.

<sup>224</sup> Paul Gebhard to Richard Inman (January 5, 1966) Gebhard Era Correspondence 1960-1969 Part One: A-Z, File Cabinet 4, Drawer 5, Mattachine Society 1960s, Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana.

<sup>225</sup> Jennifer Terry, “The Seductive Power of Science in the Making of Deviant Subjectivity,” in *Science and Homosexualities*, ed. Vernon A. Rosario (New York: Routledge, 1997): 271-96.

scientists are God to most people” while Kameny insisted that gay men and women were to be their own authorities and that the experts tended to misrepresent them as ill or, slightly more benignly, “ill-adjusted.”<sup>226</sup> The old guard of the DOB represented the pro-science side of this debate. Its leaders fired Barbara Gittings from her editor position at *The Ladder* shortly after the publication of this exchange, as well as numerous other critical pieces critical of the illness model and the various scientists supporting it.<sup>227</sup>

Still, one could easily overstate the degree to which Kameny was entirely anti-science in his rhetoric or, even more so, in his actions outside of this debate in *The Ladder*. While Kameny was one of the most vocal critics of scientific expertise and he often expressed a desire to downplay its role in the movement, he was still comfortable with using the studies and voices of Hooker, Marmor, and others to make political arguments. One of Kameny’s pieces in *The Ladder* was titled “Emphasis on Research Has Had Its Day” but he did not think that sympathetic researchers and experts were without a place in helping activists argue against the medical model by invoking what those such as Marmor believed to be a more objective scientific approach to the question of homosexuality. The “right kind” of science for those like Kameny, therefore, could still aid in constituting the homosexual subject by establishing the identity as non-deviant and a “normal variance” of human sexuality. Accordingly, Kameny had a strong working relationship with the Kinsey Institute, in ways which Gebhard described as “a

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<sup>226</sup> Gallo, *Different Daughters*, 104; Franklin E. Kameny, “Does Research Into Homosexuality Matter?” *The Ladder* 10, no.1 (May 1965): 14-20; Florence Conrad, “Research Is Here to Stay,” *The Ladder* 8, nos. 10 and 11 (July/August 1965): 15-21; Franklin E. Kameny, “Emphasis on Research Has Had Its Day,” *The Ladder* 10, no.1 (October 1965): 23-6.

<sup>227</sup> D’Emilio, *Sexual Communities*, 171.

cooperative venture rather than the usual scientists-and-the-object-under-the-lens” approach.<sup>228</sup> Kameny was also at the forefront of homophile actions against the American Medical Association (AMA) and the American Psychological Association (APA) in the early 1970s as activists challenged the medical model by both protesting at these associations’ conferences as well as putting together panels of anti-medical model scientific and medical experts to speak on their behalf.<sup>229</sup> Though he was distrustful of many scientific experts and sometimes even doubted their political efficacy, Kameny and his rhetoric in these debates might best be described as a rejection of the medical illness model, rather than a refutation of all aid that scientific actors and institutions might bring.<sup>230</sup>

While Kameny was an important force in the establishment of the militant streak in the homophile movement, focusing too much on his charged rhetoric toward expert discourses can quickly overshadow the fact that the movement at large was not lashing out against science and medicine in total during this time. On the contrary, the late 1960s saw a series of actions against those promulgating the illness model (and its political implications in the law) that would form the foundation of a working relationship between scientific and political actors and institutions that has continued into the current day. As sociologist Tom Waidzunas notes, the late 1960s saw the accumulation of both sympathetic studies on the academic front and political mobilization on the activist front

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<sup>228</sup> Franklin Kameny to Paul Gebhard (May 10, 1969) Gebhard Era Correspondence 1960-1969 Part One: A-Z, File Cabinet 4, Drawer 5, Kameny, Franklin, Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana

<sup>229</sup> These developments are the subject of the last section of Chapter 3.

<sup>230</sup> Bayer, *Homosexuality and American Psychiatry*, 83. Bayer for instance noted that Kameny did not think that Hooker’s studies were as influential in the movement as many others did.



that would soon combine to oppose the homosexuality diagnosis in the *DSM* in the following decade.<sup>231</sup> Protests at professional academic and medical conferences began during this period, one of the first of which occurred in the summer of 1968 at the American Medical Association conference where psychoanalyst Charles Socarides spoke on the pathological qualities of homosexuality.<sup>232</sup> Sensing a coming fight over homosexuality, drafters of the second edition of the *DSM* recategorized homosexuality no longer as a personality disorder but as a sexual deviation, a move which Waidzunas believes to have been a strategic change in order to make moot Hooker's conclusion that homosexuality did not constitute a personality disorder.<sup>233</sup> These events marked the beginnings of a series of political protests and scientific dissents in the following years that would eventually bring together scientists, clinicians, and political activists to go as far as to sit on panels together at the American Psychological Association annual conferences to articulate an alternative to the illness model.

One of the most significant products of collaboration between scientists and homophile activists was the National Institute of Mental Health (NIMH) Task Force on Homosexuality's 1969 report. Homophiles were thrilled in September 1967 when the NIMH announced the creation of this task force, which was constituted by many of their allies in the sciences and medicine (several legal experts also sat on the task force as well) and was chaired by Evelyn Hooker. Charged with the duty of reviewing "the current state of knowledge regarding homosexuality in its mental illness aspects and

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<sup>231</sup> Waidzunas, *The Straight Line*, 59.

<sup>232</sup> D'Emilio, *Sexual Politics*, 216.

<sup>233</sup> Waidzunas, *The Straight Line*, 59.

[making] recommendations for [NIMH] programing in this area,” the Task Force analyzed psychiatric theories and practices, legal prohibitions against sodomy, and police entrapment in their report.<sup>234</sup> Activists were not disappointed in October of 1969 when the Task Force announced results and recommendations that were heavily in the favor of civil rights for homosexual Americans and decidedly against conceiving of homosexuality as a mental illness. The Task Force concluded that human sexuality was a continuum, that the “homosexual personality” the illness model proponents spoke of did not exist as a meaningful medical entity, and that discrimination in the realms of criminal and civil law were unwarranted, especially because homosexuality did not resemble a pathological personality disorder and did not represent any genuine threat to the social order.<sup>235</sup> The Task Force report here thus demonstrates the project pursued by scientists, clinicians, and homophile activists to use expert discourses and institutions to affirm that homosexuality was not a disorder and that legal reform was necessary to alleviate the social problems caused by overcriminalization of benign sexual practices and relationships.

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<sup>234</sup> National Institute of Mental Health, “Final Report of the Task Force on Homosexuality,” (1969) Collection 7301, Box 154, Folder 34, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York. The report’s stance on the scientific knowledge of homosexuality as well as its radical policy proposals led the Nixon administration denounce the Task Force’s work as “too liberal and tolerant” and thus withheld it from being published until 1972.

<sup>235</sup> Only three of the fifteen final members of the Task Force signed onto a dissent that argued there was insufficient evidence for the Task Force to make the broad policy recommendations that it did in the majority report. Six of the remaining fifteen contributed to the majority report.

*Gay and Lesbian Identity in the Late Homophile Era and Beyond*

The story of the early homophile and lesbian movement's relationship to scientific and medical authority is thus a dynamic one. It is one in which early Marxist sociological theory of identity that largely eschewed scientific thinking came to be displaced by more conservative ones indebted to an older psychiatric paradigm, which then were ultimately supplanted by an incipient liberal pluralist notion of identity that came to be defined by its opposition to an understanding of homosexuality as pathology or mental illness. In this later stage, homophile relationships with scientific experts became an essential way for articulating the harmlessness of gay identity and the necessity of treating such identifiers with tolerance and respect. As the next chapter delineates, these relationships would be crucial to a variety of conflicts with bureaucratic, legislative, and judicial institutions that had come to perceive homosexuality as a thing to be policed rather than to be afforded rights and legal protections. As a result of such repeat interactions with state institutions and other oppressive forces in civil society, a new sense of the shape and content of gay and lesbian identities would come to be co-produced. These processes would not only change the way that identifiers and the state came to understand sexual identities, but the research programs and attitudes of individual clinicians and scientists would too come to be textured by these experiences.

There were, however, significant fissures and conflicts in theorizing sexuality among these various actors and organizations that would have consequences for the construction of these identities in the near future. The first of these was a disconnect in how to approach notions of masculinity and femininity in conceptualizing the nature of

homosexuality. For leaders in the movement such as C.A. Tripp and Frank Kameny as well as others in the Daughters of Bilitis, it was important that gay men and lesbians present themselves as “normal” and “straight” in their appearance. This was not a movement of drag queens, dykes, and fairies: a middle-class white aesthetic and sense of propriety reigned. Scientists and physicians, however, oftentimes approached homosexuality with the opposite assumption. They instead often believed that gay men tended toward effeminate features and character traits and lesbians to masculine physical and behavioral ones. As historian Joseph Lapsley has argued, an ideology of “liberal heterosexism” dominated scientific understandings of masculinity and femininity, in which the default assumption was that masculine and feminine gender norms (in appearance and behavior) aligned with their respective sex roles and that deviations from a this baseline were “abnormal” or against nature in some way.<sup>236</sup> Some of even the more tolerant sexologists of the time, such as those who sat on the NIMH Task Force, studied men predominately out of a fear of declining masculinity and heterosexuality.<sup>237</sup> At the core of these theories thus was a conflation of gender identity and the directionality of a person’s sexual desire.

Additionally, scientists and homophiles alike tended not to see bisexuality as a distinct identity or even distinct predilection from homosexuality. Both groups tended to adhere to some form of the Kinsey scale in their theorizing and advocacy in which

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<sup>236</sup> Joseph Lapsley, “Liberal Heterosexism: Masculinity, Male Heterosexuality, and the 1969 National Institute of Mental Health Task Force Report on Homosexuality,” *Left History: An Interdisciplinary Journal of Historical Inquiry and Debate* 11, no.2 (2006): 75-95.

<sup>237</sup> Steven Seidman, “From Polluted Homosexual to the Normal Gay: Changing Patterns of Sexual Regulation in America,” in *Thinking Straight: New Work in Critical Heterosexuality Studies*, ed. Chrys Ingraham (New York: Routledge, 2005): 39-62.

sexuality existed on a continuum. Much unlike the contemporary view of bisexuality, having sex with people different gender identities did not represent a discrete identity and was generally not theorized as something disparate from homosexuality broadly conceived. While homophile journals occasionally published an essay about a person's experience with being attracted to men and women, the notion of a distinct bisexual identity had not yet developed into its contemporary form.<sup>238</sup>

Finally, this era saw the founding of a relationship between gay rights activists and their allies in the sciences that would continue to influence the politics of the former and the research questions of the latter for decades to come. Having staked a claim in scientific objectivity, the homophile movement wedded itself and future iterations of the gay and lesbian rights movement to fields that would come to trade sociocultural approaches for more biological and genetic one.<sup>239</sup> Moving beyond neo-Freudian concepts and toward the theories and methodologies of the hard sciences, scholars of sexuality would begin to articulate their conceptions of social identities in more essentialist modes in the following decades. This would lead scientists to search for the biological and genetic nature and origins of identities that would come to have a profound impact on the future of the gay and lesbian movement.

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<sup>238</sup> Ward Summer "On the Bisexuality of Man," (1955) originally in the *Mattachine Review* in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 292-3.

<sup>239</sup> Aaron Panofsky, *Misbehaving Science: Controversy and the Development of Behavioral Genetics* (Chicago, IL: University of Chicago Press, 2014): 169.

## CHAPTER 2: Contesting the American Sexuality Regime

### Scientific Authority in Early Gay and Lesbian Civil Rights and Liberties Claims

Whereas the previous chapter detailed how scientific and social movement actors and institutions began to co-produce shared understandings of sexuality, this chapter turns to how these new articulations of sexuality were further shaped throughout a series of contestations within governmental institutions such as the courts, legislatures, and bureaucracies. In doing so, it demonstrates how processes of co-production here include not only those conversations and collaborations between political and scientific entities, but also how those actors engaged with legal and constitutional discourses and institutions in ways that further influenced these visions of sexuality. Thus, members of the Mattachine Society, the Daughters of Bilitis, and other mid-twentieth century homophile organizations not only worked alongside sympathetic researchers and psychiatric practitioners to change their social biases and theories of what it meant to be a homosexual. They also deployed those scientific allies and studies into legal confrontations with discriminatory governmental institutions and laws. By positioning their allies in roles such as expert witnesses, friends of the court, and members of federal bureaucratic committees such as the National Institute of Mental Health's Task Force on Homosexuality, the homophile and lesbian movement fought to translate a new science of sexuality into policy and law.

The early-to-mid-twentieth century had seen the rise of what some scholars have termed a "sexuality regime" in which local, state, and federal governments pursued a dual project of public health initiatives and mass criminalization of "deviant" behaviors in an

effort to eradicate homosexuality, prostitution, and a vast array of other so-called social maladies.<sup>240</sup> In the name of “social hygiene,” proscriptions against a wide varieties of sexual behavior and gender presentation proliferated within bureaucracies and legislatures and were widely upheld by courts.<sup>241</sup> Even though there were marked differences among those who took some of the premises of the illness model seriously and those who militantly asserted that “gay is good,” the homophile movement in all its instantiations called for legal reform by challenging this sexuality regime and its oppressive restrictions on their identities and behaviors. As homophile activists built their movement and their alliances with scientific and medical experts throughout the 1950s and 1960s, they increasingly brought these demands against the state in the realms of criminal, administrative, immigration, and constitutional law. It was a time in which as Craig Konnoth has argued, “activists replaced stigmatizing medico-religious models of homosexuality with self-affirming civil rights-based models.”<sup>242</sup> As this chapter documents, those alliances between homophiles and scientific experts were the foundation upon which this new civil rights model was constructed.

*Defending the Gay Bar: Scientific Expertise Before State Liquor Bureaucracies and State Courts*

A series of cases in California, New York, New Jersey, and Florida involving the policing of gay bars became some of the first civil rights struggles pursued by homophile

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<sup>240</sup> Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009); Richard Valelly, “LGBT Politics and American Political Development,” *Annual Review of Political Science*, 15 (June 2012): 313-32.

<sup>241</sup> See among other cases the Supreme Court’s decision to rule Virginia’s program of forced sterilization as constitutional in *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>242</sup> Craig J. Konnoth, “Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s-1970s,” *Yale Law Journal* 119, no.2 (2009): 316-72.

organizations. The first of these were fought not by activists, but instead by bar owners who began to lose their liquor licenses when state liquor bureaucratic authorities began to crack down on establishments that had become safe havens for gay, lesbian, cross-dressing, and other supposedly “deviant” customers. The earliest of these came out of San Francisco when the owner of the gay-friendly Black Cat Café sued the California Board of Equalization for suspending the bar’s liquor license on the basis that he had allowed the “premises to be used as a disorderly house for purposes injurious to public morals,” i.e. serving a gay clientele.<sup>243</sup> In 1951, the California Supreme Court ruled in favor of the owner of the Black Cat, citing civil rights law protections in the California Unruh Civil Rights Act which protected all classes of people against discrimination in places of public accommodation.<sup>244</sup> As legal scholar Patricia Cain emphasizes, this case ought not be interpreted as a court protecting gay rights directly, as what was really at stake was a property rights of the bar owner. Still, this case did set a precedent in California (that would be cited in later challenges in other cities and states) that a bar could not lose its license purely because it allowed homosexuals to congregate within it.<sup>245</sup>

The California court ruling did, however, craft an important legal distinction between homosexuality as a status (a protected category in places of public accommodation) and unprotected homosexual behavior (which could be interpreted as

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<sup>243</sup> *Stoumen v. Reilly*, 37 Cal.2d 713 [S. F. No. 18310. In Bank. Aug. 28, 1951]. The Board of Equalization regulates tobacco, alcohol, and fuel in the state of California.

<sup>244</sup> 1905 Cal. Stat. 553 (codified as amended at Cal. Civ. Code §§ 51, 52 (West 1982).

<sup>245</sup> Patricia A. Cain, “Litigating for Lesbian and Gay Rights: A Legal History,” *Virginia Law Review*, 79, no.7 (October 1993): 1551-642 (footnote #106).



something as innocuous as two men holding hands). The court's interpretation of homosexuality as a status was novel and helped to roll back the state's power to prohibit even persons merely perceived to be homosexual in public. This was key to the nascent homophile movement—only a year old when this decision was handed down—as it inspired the idea that gay persons might constitute a legally protected category. Sensing that there were similar victories to be won on the back of this logic, the homophile movement went on to fund subsequent cases in other states in which state liquor authorities policed the mere presence of homosexual persons in public places such as bars. Early homophile organizations such as the Mattachine Society and later the Society for Individual Rights contributed resources to this litigation project, believing that the courts were one the most efficacious state venues in which to pursue challenges to discriminatory laws and policies.<sup>246</sup> These litigatory efforts paid off as homophile organizations allied with bar owners came to win once again in California after the legislature passed a discriminatory law to thwart the 1951 ruling. In the 1959 *Vallegra v. Dept. Alcoholic Bev. Control*, the California Supreme Court reiterated that while plenty of homosexual conduct and behavior could be policed in public spaces, the mere presence of homosexual persons could not be.<sup>247</sup>

As homophile organizations and their allies in the bar scene brought the legal fight in California to other states, these battles against state liquor authorities quickly became conflicts over the scientific and medical accuracy of the illness model. In a 1955

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<sup>246</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*, (Chicago, IL: University of Chicago Press, 1998).

<sup>247</sup> *Vallerga v. Dept. Alcoholic Bev. Control* 53 Cal. 2d 313, 347 P.2d 909, 1 Cal. Rptr. 494.

New Jersey Alcoholic Beverage Control (ABC) hearing, the owner of a bar introduced expert testimony that homosexuality was not a contagion and that the mere presence of a group of gay or lesbian patrons would not affect the health or morals of heterosexual customers.<sup>248</sup> Although the director of the ABC continued to rule against bar owners, in 1967 the Supreme Court of New Jersey heard an appeal to one of these administrative hearings and ruled similarly to California that there was an important distinction between homosexual status and conduct, and that the mere presence of homosexuals in a bar could not provide a justification to revoke a bar owner's liquor license.<sup>249</sup> Unlike the early California cases which were brought primarily by the owner of the Black Cat bar, the Mattachine Society orchestrated this appeal by securing funds to challenge the ABC as well as providing expert testimony by Dr. Wardell Pomeroy, a renowned sexologist who had co-authored the famous Kinsey studies. Pomeroy's testimony proved influential as the court argued that his evidence legitimated the California Supreme Court's ruling in *Vallegra* in 1959 that upheld the status versus conduct legal distinction. The court also chastised the liquor authority for not providing its own scientific expert witness and for making ostensibly baseless claims about the dangers that a congregation of homosexuals presented to the heterosexual public at large.

As the homophile movement grew and their challenges to these oppressive laws and policies proliferated, states began to bring their own scientific experts into the

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<sup>248</sup> [Cited from *Vallegra*] *Re Kaczka and Trobiano*, 333 A.B.C. Bulletin 1063, Item 1 (April 21, 1955). In another state liquor bureaucratic hearing, *Re Louise G. Mack*, A.B.C. Bulletin 1088, Item 2 (November 2, 1955), the director of the New Jersey ABC ruled against a bar owner because although the majority would be unaffected, "some members of the public" might be adversely affected by homosexuals in a bar and that was enough to ban their presence.

<sup>249</sup> *One Eleven Wines & Liquors, Inc. v. Div. Alcoholic Bev. Control*, 235 A.2d 12 (N.J. 1967).

courtroom to challenge the testimonies given by those such as Pomeroy. In 1967, the city of Miami passed a local ordinance prohibiting the sale of alcohol to “known homosexuals” under the pretense that homosexuality was correlated with criminality and psychopathology and presented a threat to the city’s health, safety, and morals.<sup>250</sup> While a Florida state court upheld this law as a rational use of legislative power, homophile activists began to invoke scientific expertise within cases outside of the bar scene as well.<sup>251</sup> For example, homophiles challenged a New York state law that banned homosexual persons from serving as case workers due to psychiatric and medical studies proving that they were mentally unsuitable for such positions. In a 1968 challenge to this law, both homophiles and the state marshaled their experts and presented the court with conflicting medical and scientific opinion on the matter.<sup>252</sup> Unable to discern who represented the “truth” here, the court commissioned a scientific study to evaluate the competing scientific claims before it. Although homophiles lost many of these early challenges, they did succeed in introducing ambiguity regarding scientific authority into courts, legislatures, and bureaucracies and, in doing so, disrupted the dominant notion that homosexuality presented a unique threat to the public.

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<sup>250</sup> Cain, “Litigating for Lesbian and Gay Rights,” 1572.

<sup>251</sup> *Inman v. City of Miami*, 197 So.2d 50, 51 (1967), cert. denied, 201 So.2d 895 (Fla. 1967), and cert. denied, 389 U.S. 1048 (1968); Karen L. Graves, *And They Were Wonderful Teachers: Florida's Purge of Gay and Lesbian Teachers* (Champaign, IL: University of Illinois Press, 2009); The discrimination faced by gays and lesbians in Florida had been constructed on earlier racist and anti-communist actions taken by the state legislature. As Graves notes, the state had set up its Legislative Investigation Committee in 1956 to investigate the NAACP in response to the U.S. Supreme Court’s desegregation case *Brown v. Board of Education* (1954). Like in many other similar circumstances, this quickly morphed into a witch hunt for gays and lesbians as well.

<sup>252</sup> *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968).

These cases lead one to wonder how it is that scientific expertise had become so essential to both challenging and defending these state laws. The answer lies in the fact that psychiatry and medicine provided the theoretical foundations of these laws from the origins. After the repeal of prohibition with the Twenty-first Amendment in 1933, the states were returned their original jurisdiction over the regulation of alcohol per their state police powers, i.e. the power to regulate on behalf of their citizenry's health, safety, and morals.<sup>253</sup> These laws were passed during the height of eugenic thinking and thus targeted a slew of criminal behavior including prostitution and lewd conduct with the aim of promoting social hygiene among the "good stock" of Americans.<sup>254</sup> As homophile activists allied with sympathetic scientists and physicians to create new knowledges of homosexuality, the foundation upon which these laws rested began to be gradually undermined. Without a unified scientific voice condemning homosexuality as inherently pathological, judges, bureaucrats, and legislators were tasked with deciding among competing truth claims, which could at times benefit homophile and lesbian advocates.

Thus, as scientific authority became the terrain upon which these legal battles would be fought at the state level, the legal distinction between status and conflict emerged from this epistemological struggle over what homosexuality signified. While homophile-allied scientists such as Hooker, Pomeroy, and others avoided endorsing the idea that homosexuality could be conceived of as a distinct identity (rather than a benign

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<sup>253</sup> *New York v. Miln*, 36 U.S. 11 Pet. 102 (1837).

<sup>254</sup> Siobhan B. Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in American Culture* (Durham, NC: Duke University Press, 2000). As Somerville indicates, these policies and laws that policed homosexual practices and related gender and sexuality concerns tended to be skewed along racial, gender, and class lines.

variant of sexual behavior), their influence as expert witnesses helped construct the foundations for a *legal* status and identity for homosexuality. Even as police, mayors, and other state actors frequently disregarded these cases as they did in cities such as San Francisco and Washington D.C. in their attempts to thwart growing homophile activism, the status versus conduct distinction provided a legal basis upon which they could argue for the rights of homophiles as a discrete class of gay and lesbian Americans.

*Scientific Authority Before the Civil Service Commission and the Federal Judiciary*

Homophiles were also able to make gains throughout the 1960s in challenging discriminatory federal bureaucratic employment policies by mobilizing both the studies of anti-illness model scientists and academics as well as the power of the emerging right to privacy jurisprudence, a constitutional doctrine that grew most immediately out of a 1965 Supreme Court decision finding a married couple's right to obtain contraceptive care.<sup>255</sup> Legal battles in the federal judiciary came to make a similar distinction between status and conduct; however, in these cases, status and conduct were both deemed to be impermissible bases upon which to fire a federal employee without evidence that they were connected to immoral conduct that would threaten one's ability to perform the duties of their position. These cases laid significant legal groundwork for promoting the idea that homosexual conduct (in a narrow sense of private behavior between consenting adults) might ultimately be legally and constitutionally-protected behavior. The extension

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<sup>255</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); For a detailed history of the relationship between advocacy for homosexuals and the right to privacy, see: David Minto, "Perversion by Penumbra: Wolfenden, *Griswold*, and the Transatlantic Trajectory of Sexual Privacy," *American Historical Review* 123, no.4 (2018): 1093-121.

of the right to privacy to protect this type of behavior more broadly, however, was still decades away as judges would continue to find reasons to legitimate anti-homosexual legislation and policing practices.<sup>256</sup> These cases also reveal that while sometimes homosexuality as status and conduct could be distinguished from one another, in other areas of the law the line between status and conduct was much more ambiguous and ill-defined.

The backdrop to these legal victories was a series of laws and practices that barred suspected homosexuals from employment within the federal bureaucracy. Following the investigations of the House Subcommittee on the Employment of Homosexuals and Other Sex Perverts, and J. Edgar Hoover's "Sexual Deviant" program to root out homosexuals in the federal government, President Eisenhower issued his 1953 Executive Order 10450, which among other things established a strict security clearance procedure for employment in civil service.<sup>257</sup> The Civil Service Commission (CSC) produced its "Sustainability Rating Examiners Handbook," which instructed investigators on how to determine the ways in which an employee's sexuality proved grounds for dismissal.<sup>258</sup> This investigation was done in order to identify "any criminal, infamous, dishonest, immoral or notoriously disgraceful *conduct*, habitual use of intoxicants to excess, drug addiction, or *sexual perversion* [italics added for emphasis]" that might allow for a

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<sup>256</sup> Anna Lvovsky, "Cruising in Plain View: Clandestine Surveillance and the Unique Insights of Anti-homosexual Policing," *Journal of Urban History* (2017), DOI: 10.1177/0096144217705495

<sup>257</sup> Executive Order 10450 18 FR 2489, 3 CFR, 1949-1953 Comp., p. 936 (April 27, 1953).

<sup>258</sup> Memorandum from John W. Steele to O. Glenn Stahl, "Homosexuality and Government Employment," (November 17, 1964), <http://files.mwe.com/info/mattachineamicus/document12.pdf> (Accessed November 7, 2016); Mattachine Society of Washington, D.C., "History of the Civil Service Commission," (n.d.) <https://mattachinesocietywashingtondc.org/legal-documents/amicus-marriage-equality/argument-3/> (Accessed November 7, 2016).

federal employee to be coerced or blackmailed into a divulging information that might pose a threat to national security.

These cases emerged from Frank Kameny's initial lawsuit against the Civil Service Commission for his termination from the Department of Defense and were brought continually by members of the Mattachine Society of Washington (MSW) as they pressed the federal government to change its practices regarding its homosexual employees. The MSW was able to make progress during this period of waning McCarthyist attacks on deviants and its more general attack on the bureaucracy, which was seen as a den of communist sympathizers and weak-willed bureaucrats ready to give way to Soviet Union spies who would readily blackmail them for their shameful sexualities.<sup>259</sup> By making arguments against the illness model, Kameny and others began to establish employment protections—albeit limited ones—for both openly gay Americans as well as those in the federal bureaucracy merely suspected of “homosexual tendencies.”<sup>260</sup>

When Kameny was fired from his position at the U.S. Army Map Service in 1957, he began what would become a decades-long fight to topple these barriers to federal employment. In his original lawsuit, Kameny demanded that he be tried as an individual

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<sup>259</sup> David K. Johnson, “Homosexual Citizens: Washington’s Gay Community Confronts the Civil Service,” *Washington History* 6 (Fall/Winter 1994-1995): 44-63. In *Cole v. Young*, 351 U.S. 536 (1956), the Supreme Court limited the scope of McCarthyism by ruling that the termination of a Food and Drug Administration employee was improperly discharged for his “close association with individuals reliably reported to be Communists.”

<sup>260</sup> *Clackum v. United States*, 296 F.2d 226 (C1. Ct. 1960); Canaday, *The Straight State*, 174-213; Not all challenges to federal policies regarding the employment of homosexuals won out in these early battles in the federal judiciary. For example, cases challenging the military’s exclusion and expulsion of open and suspected homosexuals (defined in terms of both identity and behavior) were less successful and dealt more with narrow due process protections that tended not to be enforced in practice.

and not a homosexual; however, by the time he filed for an appeal to the Supreme Court in 1961, Kameny had founded the Mattachine Society of Washington and had accordingly changed his legal argument to stress his status as a homosexual to highlight the discrimination he had experienced as a member of a larger political class of minorities.<sup>261</sup> In his first appeal to the D.C. Circuit Court, the importance of scientific discourse to the proceedings in general was apparent as Kameny submitted a statement by his psychiatrist attesting to his sound mental health.<sup>262</sup> Kameny's much more famous petition to the Supreme Court went beyond his own personal stake as he argued that the CSC security clearance policy violated constitutional rights to due process and equal protection under the law. As William Eskridge, Jr. has noted, Kameny shifted the argument from one that stressed anti-punishment reform to a citizenship claim about his identity in which he implored the courts to consider that homosexuality was not a disease but rather a legitimate and harmless sexual identity.<sup>263</sup>

Although Kameny's 1961 appeal was unsuccessful, the 1960s saw an increased in legal challenges to the CSC policy spearheaded by the growing militant MSW. In 1965, 1968, and 1969, the D.C. Circuit Court decided cases that eroded the power of the CSC to terminate its employees solely on the basis that they identified (or were identified by another or by a criminal sex-related charge) as a homosexual. In the first of these cases *Scott v. Macy* (1965), Secretary of the MSW Bruce Scott sued CSC Chairman John Macy

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<sup>261</sup> *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960) (upholding the dismissal), cert. denied, 365 U.S. 843 (1961)

<sup>262</sup> *Ibid.*

<sup>263</sup> William N. Eskridge, Jr., "Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century," *Michigan Law Review*, 100, no. 8 (August, 2002): 2062-2407 (p.2169).



Jr. after he was fired for his sexuality from the Department of Labor where he had served for over seventeen years.<sup>264</sup> The D.C. Circuit ruled in Scott's favor, citing that the CSC's actions were based on an impermissibly vague standard that Scott had engaged in "unspecified homosexual conduct." In a later hearing by the court on another element of this case, Scott was also victorious when the court ruled that a federal employee does not forfeit all rights of privacy when questioned about issues such as homosexual conduct.<sup>265</sup>

The case that came to change the CSC's discriminatory approach to homosexuality the most dramatically was the D.C. Circuit Court's ruling in *Norton v. Macy* (1969).<sup>266</sup> *Norton* involved a NASA employee who had been dismissed from his position when he was arrested for cruising. The MSW funded Norton's appeal in which he argued that his due process and privacy rights were violated and that there was no significant causal connection between his ability to perform his duties and his sexual behavior outside work. Chief Judge David Bazelon of the D.C. Circuit Court accepted this argument and his opinion stressed a difference between the kind of immoral conduct that the CSC had a rational reason to want to enforce and the mere status of a person's sexuality or their engagement in private sexual behavior. Bazelon constructed a "rational nexus test" that differentiated homosexuality as a status and a conduct from older assumptions that any kind of non-heterosexual behavior or self-identification was a sign of a pathological deviancy that could potentially threaten the functioning of the federal bureaucracy and pose a national security risk. The rational nexus test, which was later

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<sup>264</sup> *Scott v. Macy* 349 F.2d 182 (D.C. Cir. 1965).

<sup>265</sup> *Scott v. Macy*, 402 F.2d 644, 648 (D.C. Cir. 1968).

<sup>266</sup> *Norton v. Macy*, 417 F.2d 1161, 1167 (D.C. Cir. 1969)

codified in 1978, was a serious blow to the sexuality regime as it limited the scope of “immoral conduct” and “sexual perversion” as evidenced in CSC memos that described the cases that they could no longer pursue because of the *Norton* ruling.<sup>267</sup>

Although *Scott* and *Norton* have generally been discussed by scholars interested in the constitutional development of privacy jurisprudence and its effects on gay civil rights, the central role that science played in these cases has been largely neglected.<sup>268</sup> Part of the reason scientific understandings of homosexuality played such a large role in these cases is a point that this chapter has made repeatedly: these oppressive laws were founded upon and defended by the idea that homosexuality was a form of pathology. But a less immediately discernible factor has to do with the makeup of the D.C. Circuit Court and in particular Chief Judge David Bazelon, who wrote the majority opinion in both these cases. Bazelon himself was a key nexus between scientific and legal institutions as he became a proponent of employing psychiatric and medical theories and evidence in his legal decision-making throughout the 1950s and 1960s.<sup>269</sup> By the early 1960s, Bazelon had been honored by the American Psychiatric Association and the Salk Foundation for Biological Studies. He had also become renowned in both legal and scientific communities for his opinion in *Durham v. U.S* (1954), in which he had invoked modern

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<sup>267</sup> Civil Service Reform Act of 1978. Pub. L. No. 95-454, § 907, 92 Stat. 1111, 1227; Memorandum from Anthony L. Mondello to Chairman Robert Hampton I (March 4, 1971), <http://files.mwe.com/info/mattachineamicus/document23.pdf> (Accessed November 8, 2016); Memorandum from Anthony L. Mondello to Chairman Robert Hampton I (April 6, 1971), <http://files.mwe.com/info/mattachineamicus/document24.pdf> (Accessed November 8, 2016).

<sup>268</sup> Sklansky, y, “One Train May Hide Another: Katz, Stonewall, and the Secret Subtext of Criminal Procedure,” *University of California Davis Law Review* 41, no.3 (2008): 875-934.

<sup>269</sup> Bernard Wolfman, “Introduction,” *University of Pennsylvania Law Review* 123, no.2 (December 1974): 243-6. Bazelon was not an anomaly or an aberrational actor who acted as an individual to shape this jurisprudence. Rather, he was the embodiment of a larger legal and scientific apparatus in which experts from both fields influenced one another.

psychiatric theory to rule that “an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”<sup>270</sup> Due to his engagement with the psychiatric community and his growing clout as a legal expert in mental health law, Bazelon was invited to sit on the 1967 National Institute of Mental Health Task Force on Homosexuality which came to endorse broad legal reforms to the punitive treatment of homosexuality.

In the *Scott* and *Norton* opinions, Bazelon evaluated competing authoritative voices while attempting to apply their findings to an equally unstable political and legal field of shifting jurisprudence. On the scientific front, Bazelon noted in his 1965 opinion in *Scott* that scientists were divided on not only the nature of homosexuality but even over what exactly one spoke of when discussing the “homosexual” or “homosexual conduct.” In making this point, he juxtaposed quotes from the 1950 Senate Subcommittee’s reference to medical and psychiatric experts on sexual perversion against a quote from an academic article that accused psychiatrists of placing their own social biases at the core of psychoanalytic theories of homosexuality-as-pathology.<sup>271</sup> From there, Bazelon reached for the Kinsey studies to argue that at least 37% of the American male population would engage in homosexual conduct at least once in their lifetimes and that excluding one-third of the male population from federal employment would pose a larger threat to the functioning of the government than would allowing these men to take federal jobs.<sup>272</sup> In his decision in *Norton*, Bazelon combatted the idea that homosexual

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<sup>270</sup> *Durham v. U.S.* 214 F.2d 862 (D.C. Cir. 1954).

<sup>271</sup> *Scott v. Macy* (1965), 184 footnote 12.

<sup>272</sup> *Ibid.*, para 187.

conduct was to be seen as a proxy for mental illness, again citing the Kinsey studies in an attempt to separate homosexual conduct from other conduct that might actually interfere with the workings of the federal bureaucracy.<sup>273</sup>

Bazelon strategically combined his calling into question the longstanding scientific and medical theories that disparaged homosexuality with a privacy and liberty-oriented jurisprudential argument. In *Norton*, he cited both the due process clause and the right to privacy to argue against the notion that “it could be an appropriate function of the federal bureaucracy to enforce the majority’s conventional codes of conduct in the private lives of its employees.”<sup>274</sup> Bazelon stated that the witch hunts against suspected homosexuals in the bureaucracy was “at war with elementary concepts of liberty, privacy, and diversity” and even if the CSC found homosexuality to be “immoral” or “indecent,” it did not have the authority to police the lives of its employees to the extent to which it had become accustomed.<sup>275</sup> While the Chief Judge did allow for the CSC to discriminate if it could point more explicitly to instances in which a particular form of conduct led to something like the blackmail of an employee and thus actual, discernible damage to the “efficiency of service” of the government, Bazelon struck powerfully at the scientific assumptions of the dangers of sexual perversion and deviancy which had given legitimation to the CSC’s discriminatory policies.<sup>276</sup>

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<sup>273</sup> *Norton v. Macy* (1969), footnote 28.

<sup>274</sup> *Ibid.*, 37.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*, footnote 5. Bazelon adhered to a precedent here that the courts would defer in general to the CSC’s discretion concerning employment issues. See *Hargett v. Summerfield*, 243 F.2d 29 (D.C. Cir.), cert. denied, 353 U.S. 970 (1957). The fact that Bazelon saw the discrimination against homosexuals as an instance in which deference was inappropriate gives credence to the idea that scientific authority in this

*Expression and Conduct: Challenging Charges of Obscenity and Psychopathology*

State and federal laws policing homosexual sexual conduct and speech about homosexuality did not go without challenge during the 1950s and 1960s either. As early as 1955, the American Law Institute, a prestigious body of legal professionals, judges, and scholars, began to draft its Moral Penal Code in which they called for a decriminalization of sodomy and other laws used to police same-sex behavior among consenting adults.<sup>277</sup> By 1962 when the final version of the Moral Penal Code was published, the sexual revolution of the 1960s was underway and the oppressive sexuality regime that flourished under McCarthyism had begun to take significant blows to its legitimacy. The homophile movement gained legal, political, and cultural support for its claims against oppressive laws as it rode the waves of the Kennedy and Johnson administrations' policies of deinstitutionalization, which shuttered medical facilities and asylums that had once housed a variety of those deemed to be sexual psychopaths. Accordingly, homophile advocates came to rely on the constitutional right to privacy and free speech claims to challenge laws that prohibited the publication of sexual content deemed impermissibly obscene often targeted at discussion and depictions of sexuality.<sup>278</sup>

The legal cases pursued by homophile organizations on grounds including freedom of expression and the freedom to engage in same-sex sexual behavior as

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instance helped the legal case for separating out (certain kinds of) homosexual conduct from the realm of the CSC's policing.

<sup>277</sup> American Law Institute, "Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C.," (Philadelphia, PA: The American Law Institute, May 24, 1962).

<sup>278</sup> Minton, *Departing from Deviance*, 240; *Griswold v. Connecticut*; *Roth v. United States*, 354 U.S. 476 (1957); *Katz v. United States*, 389 U.S. 347 (1967).

consenting adults have one thing in common: they all came to be pursued with the intention of constructing a gay political identity that was defined in large part by its antithesis—the illness model. This dynamic can be seen in the 1958 freedom of speech case *ONE, Inc. v. Olesen* in which ONE Inc. sued the United States Postal Service for refusing to deliver its magazine due to what the USPS classified as obscene content.<sup>279</sup> While the Supreme Court decided this case by simply ruling that ONE Inc. was protected due to a 1957 case that narrowed the application of obscenity law, ONE Inc.’s argument before the Ninth Circuit of Appeals demonstrates how the organization appealed to its scientific orientation.<sup>280</sup> In arguing that the federal government had violated its First Amendment freedom of speech rights in deeming its magazine “obscene non-mailable matter,” ONE Inc. argued that it published its magazine with “the purpose of dealing primarily with homosexuality from the scientific, historical and critical point of view.”<sup>281</sup> ONE Inc. said its magazine was a vehicle for promoting a better *understanding* of “the problems of [sexual] variation” that was accompanied by educational programs and lectures by various experts.<sup>282</sup>

While ONE Inc. did have a relationship with scientific experts, it was run by former radical members of the Mattachine who were predominately interested in cultivating a gay political identity and protections for that identity and thus more skeptical of those at *The Ladder* who emphasized scientific expertise as the most important form of political legitimation. Free speech doctrine, however, incentivized

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<sup>279</sup> *One, Incorporated v. Olesen*, 355 U.S. 371 (1958).

<sup>280</sup> *One, Incorporated v. Olesen* 241 F.2d 772 (9th Cir. 1957).

<sup>281</sup> *Ibid*, 777.

<sup>282</sup> *Ibid*.

*ONE* magazine to rely on such expertise to demonstrate larger social importance of their content rather than being a channel merely for “smut.” ONE Inc. emphasized its relationship to scientific expertise and its goal of understanding the condition of homosexual identity and behavior as a part of its larger project of combatting the notion that homosexuality was a danger to social morality and public health. As an alternative, homosexuality was posited as something to be contemplated, explored, and discussed through constitutionally protected venues of freedom of speech. Having realized the cleverness of *ONE*’s argument that it was a scientifically-inclined magazine rather than a homophile one, some critics immediately lambasted the Supreme Court’s decision in favor of *ONE* for not acknowledging that the “[the] magazine for homosexuals entitled *One — The Homosexual Magazine*, which was definitely not a scientific or critical magazine, [appeared] to have been written to appeal to the tastes and interests of homosexuals.” However, there was much truth to this legal argument that *ONE* magazine, just like other homophile journals, magazine, and organizations, did facilitate discussions about scientific theories and expertise, which were always linked to debates about what role science should play in social, legal, and political conceptions of homosexuality.<sup>283</sup>

While advocates for gay and lesbian rights would not begin to bring constitutional challenges to sodomy laws and related legal proscriptions against same-sex sexual

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<sup>283</sup> William B. Lockhart and Robert C. McClure, “Obscenity Censorship: The Core Constitutional Issue — What Is Obscene?” *Utah Law Review* 7, no.3 (1961): 289-303 (p. 293). By 1962, the Mattachine Society of Washington was arguing that obscenity restrictions to homosexual freedom of speech made them into second class citizens. See Brief of Appellant at 23, *Manual Enters. v. Day*, 370 U.S. 478 (1962) (1961 Term, No. 123).

behavior to the Supreme Court until the late 1970s , the movement did routinely condemn these laws and began the (decades-long) work of ridding states and cities of laws that criminalized the physical expression of their sexualities.<sup>284</sup> Advancing sodomy challenges was a difficult task for a movement that adhered to a notion of respectability politics.<sup>285</sup> As noted earlier, leaders of organizations such as Kameny and Polak came into conflict over the place of “sex” in the politics of *sexuality* that the movement was pursuing. Internal and external pressures also constrained the possibility of launching a campaign against sodomy laws, as lesbians tended to see this as a largely male issue (the cruising in parks that led to sodomy convictions was a male-dominated activity), and liberal civil rights organizations such as the ACLU expressed support for the constitutionality of these laws as late as 1957.<sup>286</sup>

Despite these reservations, militant homophiles became increasingly willing to denounce sodomy laws at their conferences and to champion legal reform more broadly against laws that were used to prosecute same-sex sexual behavior such as “crimes against nature,” “lewd conduct,” and oral and anal sex.<sup>287</sup> The few legal cases that were brought against these laws refuted the characterization of homosexuals as sexual predators and psychopaths by asserting homosexuality to be a healthy and benign

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<sup>284</sup> These laws did not go without significant legal challenges during this period; however, they tended to be brought by individuals and had little to no connection with the homophile movement. See for example *Franklin v. State*, 257 So.2d 21 (Fla.Sup.Ct.1971).

<sup>285</sup> David A. Sklansky, “One Train May Hide Another,” 888-9.

<sup>286</sup> The ACLU would come to reverse this position in 1967, which led to a slew of legal challenges to sodomy laws in the 1970s. By the time these became a primary site of legal opposition, the homophile movement had given way to the modern gay and lesbian rights movement.

<sup>287</sup> Many of these laws, which were passed during the height of the moral sex panic concerning sexual predators and psychopaths, grouped same-sex sexual behavior in with such crimes as child molestation and bestiality.



disposition. A California state legislative study of the Los Angeles County police department's policies towards suspected homosexuals and homosexual activity buttressed these calls for legal reform as its authors noted that police entrapment was the primary cause of convictions under local and state sex laws.<sup>288</sup> This indicated to the authors and to homophile activists that the LA mayor and police force were creating the “problem of homosexuality” themselves by engaging in overly aggressive police tactics that did little to encourage actual public health, safety, or morality.

In challenging these laws, homophiles and their allies in the sciences and medicine often pushed state institutions to distinguish homosexuality from psychopathological sexuality and personality disorders. They did so in large part by claiming that the latter encompassed persons that the movement explicitly rejected from its advocacy. The figure of the sexual psychopathic predator still loomed large from decades before and those in the homophile movement were vocal in assuring their constituencies and the public that they would not fight for the rights of those deemed to be predators. For example, the Society for Individual Rights (SIR) issued a 1966 report in which they argued for a reform of all sex laws except for those that criminalized sex with minors.<sup>289</sup> SIR juxtaposed a statement against the illness model with this call to keep pedophilia laws on the books to separate out homosexuality from other pathological sexual desires and actions. Homophile activists were also able to distinguish themselves from other older assumptions about the nature of homosexuality in fighting off the notion

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<sup>288</sup> Jon J. Gallo et al., “The Consenting Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County,” *UCLA Law Review* 13, no.3 (March 1966): 644-832.

<sup>289</sup> Society for Individual Rights, “Annual Report,” (February 1966) Collection 2011-075, Box 1, Folder 1, Society for Individual Rights (SIR) Records, ONE National Gay & Lesbian Archives, Los Angeles, CA.

that their sexuality was a contagion. By the late 1960s, state courts began to rule against state liquor authority bans on homosexual patrons by declaring that it was absurd to believe that the mere presence of a homosexual or congregation of homosexual persons in a bar was enough to affect a heterosexual man who might encounter them.<sup>290</sup>

One of the only major legal challenges to one of these laws came out of the Mattachine Society's Los Angeles chapter in the late 1960s when two male patrons were caught kissing one another at the Black Cat Café and were charged with violating California's disorderly conduct statute.<sup>291</sup> In appealing the charge of engaging in "lewd" conduct, longtime Mattachine lawyer Herbert Selwyn argued that this law disproportionately targeted homosexual individuals and, therefore, violated their rights under the Fourteenth Amendment's equal protection clause.<sup>292</sup> Although the law targeted homosexuality-as-conduct in this instance using a vague law purporting to protect public health and morals, the homophile argument against it rested on the identity of the convicted men. Selwyn's brief to the Supreme Court emphasized the fact that while the law could be used to police any sexual conduct including kissing between a heterosexual couple, the equal protection clause was violated here because the law in practice targeted homosexual couples.<sup>293</sup> Here again homophile advocates asserted that gay identity and the behavior that attended that identity were socially benign, nonpathological, and deserved heightened legal protections.

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<sup>290</sup> *One Eleven Wines & Liquors, Inc. v. Div. Alcoholic Bev. Control*, 235 A.2d 12 (N.J. 1967).

<sup>291</sup> *Talley v. California*, 390 U.S. 1031 (1968). This case was denied cert by the U.S. Supreme Court.

<sup>292</sup> Joyce Murdoch and Deb Prince, *Courting Justice: Gay Men and Lesbians v. The Supreme Court* (New York: Basic Books, 2001): 144.

<sup>293</sup> *Ibid.*, 146.

*The Sexual Psychopath in U.S. Immigration Law*

Lastly, the legal struggle for the rights of homosexual and suspected homosexual immigrants saw some of the most explicit reliance on scientific discourses and institutions during the homophile movement era. Organizations such as the Homophile Law Reform Society (HLRS) in Philadelphia, a group comprised of both gay men and lesbians, mobilized its resources alongside the New York ACLU and movement leaders such as Frank Kameny and their scientific allies to oppose the dominance of the illness model in immigration law. Together, these organizations and activists challenged the persistence of the psychopathological view of homosexuality as it was used to deny citizenship and deport suspected and criminally-charged homosexual immigrants. In looking at two of the most infamous cases concerning immigration law and homosexuality from this era, one can see how the homophile activists sought to undermine the way in which the government had come to rely on classifying homosexual immigrants they wished to deport increasingly by reference to their status as a homosexual “psychopath” rather than their actual engagement in some illicit conduct. These cases demonstrate the unsettled and ambiguous way both homophile activists and their opponents would come to approach the legal categorization of homosexuality during this time—both sides mobilized status and conduct arguments as they suited their legal interest in respectively attacking and defending the illness model and the policies and laws it legitimated.

As historians of sexuality have noted, the status versus conduct distinction became a central feature of immigration law during this period as the authority of institutionalized psychiatric expertise promoting the illness model was challenged by homophile activists and their scientific and political allies.<sup>294</sup> Prior to McCarthyism, immigration law allowed for the deportation of aliens charged with a crime of “moral turpitude,” a catch-all provision that included same-sex sexual behavior. By the 1950s, the moral turpitude test had proved inefficient because it relied upon criminal charges coming from state and local law and thus made for a patchwork approach to policing homosexuality among immigrants. Additionally, a trend among some states to liberalize their sodomy and lewd conduct laws during this period meant that the basis of the moral turpitude test was in jeopardy.<sup>295</sup> In 1952, Congress passed the McCarran-Walter Act, a sweeping immigration law that was so discriminatory that President Truman unsuccessfully attempted to thwart it with a presidential veto, which included a “psychopathic personality” provision.<sup>296</sup> This provision allowed Public Health Services (PHS) psychiatrists to work with the Immigration and Naturalization Services (INS) to more effectively target suspected homosexuals by using a status distinction rather than relying on the more difficult moral turpitude test (though often in practice they used both). As the psychiatric profession began to fissure as the pathological model began to be called into question in the 1960s, however, there emerged a legal controversy over this

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<sup>294</sup> Margot Canaday, “Who Is a Homosexual?”: The Consolidation of Sexual Identities in Mid-Twentieth-Century American Immigration Law,” *Law & Social Inquiry* 28, no.2 (April 2003): 351-86; Marc Stein, “*Boutilier* and the U.S. Supreme Court’s Sexual Revolution,” *Law and History Review* 23, no.3 (Fall 2005): 491-536.

<sup>295</sup> Canaday, *The Straight State*, 218-9.

<sup>296</sup> The Immigration and Nationality Act of 1952 (Pub.L. 82–414, 66 Stat. 163, enacted June 27, 1952)

provision as its scientific justification was becoming undone. Sensing an opportunity, homophile activists began to mount challenges to the scientific legitimacy of the psychopathic personality provision.<sup>297</sup>

The Supreme Court first heard a challenge to this law in a 1963 case brought not by a homophile activist but instead the Swiss immigrant George Fleuti acting on his own accord to challenge the McCarran-Walter Act. Throughout his deportation hearings, Fleuti's psychiatrist and resident psychiatrists from the PHS dueled over whether Fleuti could be diagnosed as having a homosexual psychopathological personality based on his 1958 arrest for cruising in a California park.<sup>298</sup> The case was eventually taken to federal court and culminated in a 1963 Supreme Court case *Rosenberg v. Fleuti* in which Fleuti narrowly won on statutory grounds.<sup>299</sup> Writing for a five-four majority, Justice Arthur Goldberg stated that the statute's language was too imprecise to justify giving the INS the ability to deport homosexuals (defined by law through both conduct and status) as a class. In response, Congress amended the immigration statute with the language "sexual deviation" in an effort to be more precise about whom they were targeting.<sup>300</sup> As the militant homophile movement grew in the wake of *Fleuti* and began to challenge these kinds of discriminatory laws in the courts, the stage was set for a new legal fight over the McCarran-Walter Act.

In 1963, Clive Michael Boutilier, a Canadian citizen residing in the U.S., was denied citizenship after disclosing a history of same-sex sexual behavior in an affidavit.

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<sup>297</sup> Canaday, *The Straight State*, 214-20.

<sup>298</sup> Murdoch and Prince, *Courting Justice*, 91.

<sup>299</sup> *Fleuti v. Rosenberg*, 374 U.S. 449 (1963).

<sup>300</sup> Eskridge, Jr., "Some Effects of Identity-Based Social Movements," 2166-7.

The INS used Boutilier's sexual history to categorize him as a sexual psychopath, which therefore deemed him unfit for naturalization. Boutilier responded by filing a federal suit against the INS, and upon his appeal to the Second Circuit of Appeals homophile activists came to his side. The Philadelphia-based group Homosexual Law Reform Society partnered with the New York ACLU to provide both legal resources as well as their allies in the sciences to Boutilier's case.<sup>301</sup> The HLRS collected expert testimonies from top practitioners and researchers in the field of sexuality including John Money, Harry Benjamin, and even famed anthropologist Margaret Mead in an amicus brief that argued that homosexuality and psychopathy were distinct and nonoverlapping phenomena.<sup>302</sup> Although the Second Circuit's majority opinion ruled in favor of the INS, Judge Moore stated in a dissent that it could not possibly be the case that Congress had intended to discriminate against *all* homosexual immigrants given the Kinsey studies' conclusion that over a third of all men would qualify as homosexual and would, therefore, be ineligible for citizenship.<sup>303</sup>

In attempt to bypass the scientific controversy entirely, the INS's argument before the Second Circuit had rested on the notion that the psychopathic personality provision did not signify so much a strict *medical* definition as much as it did a *legal* distinction.<sup>304</sup> To avoid addressing the fact that Boutilier had provided two independent psychiatric reports that showed inconsistent findings with the INS's special inquiry officer's diagnosis of Boutilier, the INS appealed to sense of conventional mores against deviant

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<sup>301</sup> Stein, "Boutilier," 497-8, 530.

<sup>302</sup> Canaday, *The Straight State*, 242-3.

<sup>303</sup> *Boutilier v. INS* 363 F.2d 488, 496 (2d Cir. 1966), 496.

<sup>304</sup> *Ibid.*, 494.

sexualities rather than any strict adherence to scientific objectivity.<sup>305</sup> Once again, Judge Moore's dissent reveals how the law and its application was purposefully obfuscating as to *how* one is classified as a psychopath. Moore argued that the language of the provision "suggests a careful and particularized analysis by distinguished psychiatrists to determine whether appellant was so disturbed as to be 'afflicted with psychopathic personality'" when in fact the PHS and INS had merely looked at Boutilier's criminal past and deemed him a psychopath simply from his record.<sup>306</sup> By doubling down on the broader moral and legal argument here to buttress the psychopathic personality provision, the INS ignored the fact that the studies and medical opinions that had originally inspired the law were crumbling under the weight of new evidence.

In response to INS's decision to defend the psychopathic personality provision as a legal and not a medical definition, the homophile and ACLU-backed appeal to the Supreme Court focused in part on undermining the logic of the immigration law. Even if the Court was to decide this case on legal grounds rather than scientific ones, Boutilier's team believed they might win by characterizing the legal nature of the provision as just as ambiguous and ill-defined as the scientific nature of the sexual psychopath diagnosis. In their petition to the Court, Boutilier's team raised questions such as: who is a homosexual and how can one define a homosexual?<sup>307</sup> They argued that Boutilier might not be a homosexual at all because he engaged in sexual behavior with women as well as men. Kameny advised Boutilier's legal team to press even further here by calling into question

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<sup>305</sup> This parallels the INS's approach in an earlier case in *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923)

<sup>306</sup> *Ibid.*, 497.

<sup>307</sup> Canaday, *The Straight State*, 243.

the INS's use of a status claim about homosexuality that they continued to define in part by using testimony from an immigrant about the kinds of sexual conduct in which he engaged.<sup>308</sup> While the Court eventually ignored this distinction and deferred to Congress's apparent intent to bar all "sexual deviants," Justices Douglas and Fortas spent most of their dissent combing through the inconsistencies in the varied psychiatric theories used by the INS to characterize Boutilier as a sexual psychopath, indicating that the law, science, and medicine often tended to conflate, confuse, and contradict distinctions between status and conduct.<sup>309</sup>

Although the courts ultimately denied that this case should turn on the validity of a medical definition, Boutilier consistently invoked scientific authorities to argue that there was a distinction to be made diagnostically between a homosexual person and one suffering from some form of psychopathy. The Supreme Court recognized that Boutilier "stresse[d] that only persons afflicted with psychopathic personality are excludable [i.e. deportable]. This, he sa[id], is 'a condition, physical or psychiatric, which may be manifested in different ways, including sexual behavior.'"<sup>310</sup> Here, Boutilier's legal team did not deny that there could be some association between psychopathy and sexual behavior. Ostensibly this referred to conceptions of sexual predators that the homophile movement had consistently tried to separate themselves from such as the figure of the child molester or the rapist.

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<sup>308</sup> Stein, "Boutilier," 531-2.

<sup>309</sup> *Boutilier v. INS*, 387 U.S. 118 (1967), 125-35.

<sup>310</sup> *Ibid.*, 122.



Though Boutilier and his homophile allies lost this case before the Supreme Court, the arguments in *Boutilier* were influential in future engagements with immigration law. As Margot Canaday has argued, the Court, Congress, and the INS had no idea that their decision to constitute homosexuality as a legal status in this way lent “authority to a burgeoning gay rights movement that...base[d] its claims on a legal-political conception of homosexuals as potentially good citizens.”<sup>311</sup> While the CSC was during this same moment refusing to acknowledge that homosexuality could be coherently understood as a status or an identity, the INS here defended the notion that a person could indeed be said to be gay as a matter of status or condition. And even though the Court decided against Boutilier in this case, the dissenters gave legal credence to the homophile claim by using science in a way that affirmed the legitimacy of gay identity and distinguished it from mental illness. In continuing their attack on the illness model while also exposing the illogical and inconsistent way in which its suppositions had been used to constitute legal prohibitions and restrictions, the homophile movement advanced its message that the illness model was flawed and that a truly objective scientific approach could prove that “gay is good” or at least demonstrate it to be benign with regards to public health and morality.

### *Science and Civil Rights Going Forward*

Lessons from the homophile movement’s victories and losses throughout their engagement with the state in this early period shaped the political construction of gay and

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<sup>311</sup> Canaday, “Who Is a Homosexual?,” 383.

lesbian identities. As homophile and lesbian leaders and their attorneys explored what kinds of arguments would be most efficacious in these domains, they repeatedly articulated notions of identity and desire with the logic and backing of their newly-established allies in the sciences and psychiatry. Regarding cases that dealt with homosexuality as a status, the homophile experience with the Civil Service Commission as well as with state liquor authorities molded the “gay is good” message into legal arguments about the nature of sexuality as a healthy and normal part of one’s personhood rather than a statement about the kinds of supposedly deviant behaviors in which one engaged. Early notions of sexual identity as a status were linked to other claims such as equal protection clause ones that categorized gays and lesbians as a minority cultural group in need of protections. This was a key step toward later constitutional claims based on a notion that gay identity was an immutable characteristic, i.e. something that was *essential* to a person’s nature (which would come to be defined in biological terms). On another front, the homophile movement also set itself on a path of making arguments about conduct and behavior by using the emerging right to privacy notion and the due process clause of the Constitution’s 5<sup>th</sup> and 14<sup>th</sup> Amendments.<sup>312</sup> By the end of the 1960s, a wide variety of legal and constitutional paths were beginning to be pried open as they were increasingly utilized by homophiles, civil rights litigators, and the movement’s

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<sup>312</sup> Oftentimes the science and its use in legal contexts did not differentiate among the status and conduct claims. For example, many judges writing in support of homophile litigants referenced Kinsey’s claim that a third of the male population could be defined as homosexual. This claim about the nature of a third of the male population, however, was based on the Kinsey scale, which placed persons in categories based on their relative engagement in same-sex sexual behavior.

scientific allies both to combat representations of homosexuality as pathology as well as to advocate for alternative explanations for their sexual desires and identities.

### CHAPTER 3: Desire in the Throes of Power

#### Gay Liberation and the Refusal of Scientific Authority

Much of the gay and lesbian history literature highlights what a stark break gay liberation made with both the organizational style and the ideological current of the homophile movement that preceded it. Fueled by a blend of anarchic, socialist, communist, libertarian, and anti-imperialist politics stemming from the New Left and a fervor to make the left and the country as a whole less patriarchal and more open to a diversity of sexual and gender expression, the Gay Liberation Front (GLF) and similar organizations and activists marked a sharp split from even the most militant homophiles of the 1960s.<sup>313</sup> Sparked in part by the riots at the New York City Stonewall Inn in June of 1969, these radicals formed their institutions around an opposition to any semblance of a respectability politics; instead, they sought to bring the anger and the idealism of the New Left to bear on gay and lesbian politics. Following self-consciously in the path laid out by black liberation and the students' and women's movements, gay liberationists abjured what they perceived to be a moderate civil rights tradition of liberal inclusion for a transformative vision of what sexuality and gender might look like in a more just world.

It is true that gay liberation did not spring *sui generis* independently from the decades of prior gay organizing, nor did it avoid perpetuating some of the flaws of the homophile movement such as its inability to meet its feminist principles in practice, which contributed to a widening chasm between gay men and women that would

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<sup>313</sup> Though there were exceptions such as the homophile activist Clark Polak's Janus Society in Philadelphia, which practiced a libertine sexual politics that aligned more with some in gay liberation than with traditional homophile organizations such as the Mattachine; See Marc Stein, *Rethinking the Gay and Lesbian Movement* (New York: Routledge, 2012), 71.

ultimately limit their collective projects.<sup>314</sup> Gay liberation did, however, constitute an attempt to abjure a more incremental and cautious politics that at its most militant demanded liberal inclusion and an anti-police brutality politics. Instead, liberationists sought to connect struggles around sexuality and gender to broader efforts aimed at fundamentally altering politics and society. So while Larry Littlejohn of the Society for Individual Rights advocated for a gay movement that made space for “all types of persons from the John Bircher at one extreme to the Anarchist at the other extreme,” gay liberationists were bound not only by a commitment to gay rights but also to the rights of other marginalized populations and against the unequal power relations they identified as inherent in capitalism and imperialism.<sup>315</sup> Gay liberation’s organizing model represented another notable difference as the GLF structure was a decentralized one based on a non-hierarchical horizontalist ethos that allowed for regional chapters spanning from Los Angeles to New York to have almost complete autonomy over their own internal governance and political positions. While this structural feature to gay liberation severely limited its political efficacy, activists under the liberation banner did engage in campaigns ranging from solidarity campaigns with left-wing Nicaragua revolutionaries to

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<sup>314</sup> John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970*, 2<sup>nd</sup> ed. (Chicago, IL: University of Chicago Press, 1998); Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago, IL: University of Chicago Press, 2000); Marcia M. Gallo, *Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement* (New York: Carroll & Graf Publishers, 2006).

<sup>315</sup> Larry R. Littlejohn, “SIR President’s Annual Report by Larry R. Littlejohn” (February 1970) Collection 2011-075, Box 1, Folder 1, Society for Individual Rights (SIR) Records, ONE National Gay & Lesbian Archives, Los Angeles, CA.

labor struggles alongside the American Federation of Teachers in Los Angeles against gay and lesbian discrimination of rank-and-file teachers.<sup>316</sup>

Like the militant homophiles of the late 1960s, gay liberationists too championed the idea of “coming out” and building cultural and political power by making their identities visible to the straight world. Unlike the homophiles, these radicals made a distrust of scientific and medical authority a central part of their political identity construction; rather than seeing scientists as potential allies who might produce research on their behalf and testify before courts and legislatures, gay liberationists took a longer view. They believed any short-term gains made on the backs of such experts would ultimately serve as obstacles to their goals of sexual liberation in the future. Instead of carving out a space in American political culture to express that being gay was as good and as healthy and natural as being straight, gay liberation’s goal was to radically undermine the idea that heterosexuality was inscribed in nature in the first place and to expose the broader society to their sublimated and repressed desires. In their critiques of capitalism and patriarchy, they saw science as rationalizing and buttressing a sexist Fordist political economic mode that had naturalized the heterosexual nuclear family, an arrangement of human relations that they and many other left intellectuals believed to be the fundamental social unit of capitalist reproduction.<sup>317</sup> Their idea of gay power thus

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<sup>316</sup> Donn Teal, *The Gay Militants: How Gay Liberation Began in America, 1969-1971* (New York: St. Martin’s Press, 1995), 74-5; Emily Hobson, *Lavender and Red: Liberation and Solidarity in the Gay and Lesbian Left* (Berkeley, CA: University of California Press, 2015), 78; Sara R. Smith, “Organizing for Social Justice: Rank-And-File Teachers’ Activism and Social Unionism in California, 1948-1978,” PhD diss., University of California, Santa Cruz, 2014, 369; See also the essays in Mariam Frank, *Out in the Union: A Labor History of Queer America* (Philadelphia, PA: Temple University Press, 2014).

<sup>317</sup> I draw the idea that gay liberation’s criticisms of capitalism were focused on the sexist elements of Fordist institutions from Roger Lancaster’s *The Trouble with Nature*.

entailed a severing of this relationship with the homophiles' allies in the sciences and a refusal to allow the authority of an expert class do the work of defining and legitimating gay and lesbian identities.

Accordingly, this chapter marks what I see to be an ideological critical juncture in gay politics, one which throws into relief the fundamental ideological and conceptual differences between these two political assemblages' approaches to the science of sexuality and gender and to the goal of a gay politics in general.<sup>318</sup> Unlike those who unconsciously blend together liberationists together with their homophile forebearers and contemporaries or even those who self-consciously make an effort to avoid emphasizing differences between one era of such politics from another, I take this division between the two here to be crucial to understanding the trajectory that the modern movement has taken in the years since.<sup>319</sup> In highlighting this divide, I want to be careful as to not overstate the degree of actual power or political potential gay liberation had in its context, especially as it emerged not long before the New Left crumbled. Gay liberation too experienced much of the same structural deficiencies, infighting, inwardness, and disconnect between activists and an existing or clearly conceived of mass constituency that characterized the larger New Left movement.<sup>320</sup> Still, gay liberation offered the prescient view that the scientific and medical institutions of the period would contribute to a narrowing of sexuality and gender politics. They believed that the expert gaze was

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<sup>318</sup> Desmond S. King and Rogers M. Smith, "Without Regard to Race": Critical Ideational Development in Modern American Politics," *Journal of Politics* 76, no.4 (2014): 958-71.

<sup>319</sup> Matthew Dean Hindman, *Political Advocacy and Its Interested Citizens: Neoliberalism, Postpluralism, and LGBT Organizations* (Philadelphia, PA: University of Pennsylvania Press, 2018), 21.

<sup>320</sup> Adolph Reed Jr., "Black Particularity Reconsidered," *Telos* 39 (1979): 71-93; Elizabeth Armstrong, *Forging Gay Identities: Organizing Sexuality in San Francisco, 1950-1994* (Chicago, IL: University of Chicago Press, 2002), 24, 115.

one that would at best complement a liberal minority civil rights model and one that stood in the way of their goal of exposing the myth of heterosexuality and the political economic oppression and social repression that served to enshrine it as truth. Gay liberationists articulated a much more expansive notion of sexuality that condemned sexism and advocated for a fundamentally anti-punitive politics in the face of an alternative that naturalized homosexuality and heterosexuality at the expense of those who did not come to fit what would become an increasingly gender normative, depoliticized gay identity politics.

To draw out these features, I begin with a brief introduction to the intellectual tradition that inspired these radicals and then trace that influence through gay liberation pronouncements on scientific and medical authorities. I then move to a discussion of the diversity in gay liberation circles and in adjacent ones with close attention to how lesbian feminists, black lesbian feminists, black nationalists, transsexuals and transvestites, and bisexuals thought of their own political identity projects with reference to both other gay identities and the scientific experts. Though these alternatives to identity construction were limited in regard to the way in which they approached the movement-building politics of social change, choosing instead to orient themselves inward to small sects of radicals, they do shed light on the ways in which some political actors and organizations of the time were not as beholden to expert scientific discourses as others. Though they were creative in rethinking the dynamics and possibilities they saw as laden in a radical identity-centric politics, they lacked in a vision of an effective political organization that doomed their ideas to small subcultural realms of society, and eventually the academy,



but rarely in politics in ways that effected any significant or lasting change. Lastly, I trace the developments that led to the American Psychiatric Association's (APA) 1973 decision to remove homosexuality from the *DSM*. By focusing on the strategies taken by liberationists and homophiles during these fights, I demonstrate how gay liberation's demise during this several-years campaign led to a gay political movement that was much more willing to establish long-term collaborative relationships with their allies in the APA and other scientific institutions that would shape the nascent liberal gay rights movement and its conception and articulation of gay political identity for decades to come.

*The Meaning of Identity and the Refusal of Scientific Authority in Gay Liberation*

The ideological and organizational factors that distinguished gay liberation from its homophile roots came to bear heavily on the ways in which activists understood the relationship between the epistemological character of their identities and their radical political program. Liberationists spurned what they saw to be the homophile movement's devotion to the high priests of psychology, psychiatry, and sexology; even the militant homophile Frank Kameny, who was one of the first to question the strong reliance on medical explanations of homosexuality, were more conservative than those radicals who sought to reexamine heterosexuality and homosexuality as socially constructed entities that might be reconfigured or transcended entirely.<sup>321</sup> As historian Jennifer Terry has argued, gay liberation presented the first organized challenge to the scientific paradigm,

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<sup>321</sup> Franklin E. Kameny, "Emphasis on Research Has Had Its Day," *The Ladder* 10, no.1 (October 1965): 23-6.

which differentiated it from the later-era homophiles who were largely accepting of experts probing into the etiology of sexuality as long as they were not doing so with hostility.<sup>322</sup> This section thus builds from her argument by fleshing out the ways in which liberationists resisted the allure of science. I carry out this work by detailing the alternative constructions and legitimations of gay identities that the movement crafted. In examining essays penned by gay liberation activists and theorists as well as archival evidence spanning various GLF chapters' statements of purpose and correspondence among members, I show how these radicals aimed at replacing an outside and intrusive scientific and medical authority that they believed would ultimately limit gay life to the margins of respectable society at best, rather than presenting a crucial challenge to orthodox assumptions of heterosexuality and gender normativity.

The writings of activists, who often doubled as social theorists, in gay liberation offer a sketch of how many in the movement came to think of their sexual and gender identities—as well as heterosexual ones—as historically and culturally-determined rather than scientifically-discoverable inner essences. Relying on the writings of those like Kate Millet, John Gagnon, Herbert Marcuse, and a variety of neo-Freudians, these early gay theorists departed from communist and Mattachine Society founder Harry Hay's description of the homosexual as distinct class in the Marxist sense.<sup>323</sup> Instead, liberation theorists identified a shared oppression among gay and lesbian persons that offered a

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<sup>322</sup> Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago, IL: University of Chicago Press, 1999), 373.

<sup>323</sup> Jeffrey Escoffier, "Left-Wing Homosexuality: Emancipation, Sexual Liberation, and Identity Politics," *New Politics* 12, no.45 (2008), <http://newpol.org/content/left-wing-homosexuality-emancipation-sexual-liberation-and-identity-politics> (Accessed May 22, 2017); Russell Jacoby, *Social Amnesia: A Critique of Conformist Psychology from Adler to Laing* (Boston, MA: Beacon Press, 1975).

radical political—and personal—potential to those who organized and resisted the constructed norms which dominated their present conditions. Marcuse’s 1955 classic *Eros and Civilization* came to be incredibly influential in the late 1960s and 1970s as liberationists latched onto his call for a politics of sexuality that might overcome the repression inherent in modernity and transform society through reconstructing “the human body [as] an instrument of pleasure rather than labor.”<sup>324</sup> Early gay theorists also took inspiration from sociologists John Gagnon and William Simon’s writings, which in the early 1970s provided the most *social* explanation for sexuality at the time.<sup>325</sup> Gagnon and Simon conducted much of their work within the Kinsey Institute as they developed a theory and language of “social scripts” to emphasize the contingent character of sexual identities that relied upon cultural norms to function and perpetuate themselves.<sup>326</sup> This sociological explanation paired with radical re-interpretations of Freud by Marcuse and others gave liberationists a language and a conceptual framework for their radical desires for sexual liberation and political revolution.

These intellectual influences can be seen in the essays and books written by early gay theorists and activists. Dennis Altman, a GLF member in both the U.S. and his home country of Australia, published his on-the-ground analysis of gay liberation titled *Homosexual: Oppression and Liberation* in 1971.<sup>327</sup> In that work, he expounded upon

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<sup>324</sup> Herbert Marcuse, *Eros and Civilization: A Philosophical Inquiry into Freud* (Boston, MA: Beacon Press, 1966), xv, 50; Though one finds a less optimistic reading of the political potential of *eros* in the 1966 preface to the original 1955 text.

<sup>325</sup> John Gagnon, *Interpretation of Desire: Essays in the Study of Sexuality* (Chicago, IL: University of Chicago Press, 2004), xvi, xx.

<sup>326</sup> *Ibid.*, xvi.

<sup>327</sup> Dennis Altman, *Homosexual: Oppression and Liberation, 2<sup>nd</sup> edition* (New York: New York University Press, 1993).

“polymorphous perversity,” a term that Marcuse took from Freud to describe the malleability of human sexuality and its potential to escape the constraints of modernity and to flourish in a liberatory sexual mode.<sup>328</sup> To ascend to this form of political sexuality, Altman wrote that gay liberationists were correct to emphasize gay identity as a social concept rather than a “fact” of human life but that there was more work to be done to realize a non-repressive emancipatory sexuality.<sup>329</sup> Altman argued that changes were necessary in both straight consciousness as well as gay consciousness to rise above societal constrictions that encouraged the practices of exclusive heterosexuality and exclusive homosexuality and instead to introduce anarchic principles of sexuality—in all its diversity—to transform the traditional Marxist revolutionary project that liberationists and other New Left types found to be lacking.<sup>330</sup>

Though many in the movement came to believe that straight America’s consciousness needed to be altered prior to thinking “the end of the homosexual” and the advent of a polymorphous perverse society, Altman’s text illustrates the liberationist approach to thinking beyond the binaristic and naturalistic assumptions of the homophiles. This style of thinking was not constrained to the more heavily-theoretical texts such as Altman’s but was also a frequent feature of the discourse in gay liberation newspapers. For example, activist and journalist Jim Fouratt wrote in a 1970 article in the paper *Come Out!* that homosexual and heterosexual labels did not signify a natural

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<sup>328</sup> Altman, *Homosexual*, 88-9; Marcuse, *Eros and Civilization*, 49.

<sup>329</sup> Altman, *Homosexual*, 87-90. As I discuss later in this chapter, many liberationists and radical lesbians came to denounce bisexuality as being complicit in the oppression of heterosexuality.

<sup>330</sup> *Ibid.*, 90-2, 111-6, 242. On pages 91-2, Altman mused that “[i]t is probably true that individuals are often forced into exclusive homosexuality because of both the way in which society brands those who deny its roles and the penalties meted out to those who are unwilling to accept them.”

taxonomy of human identity; on the contrary, Fouratt rebuked such claims as the symptoms of a “culture [that] has created these artificial categories defining human sexuality, to protect and to perpetuate the institutions and systems in power whose end result is only to dehumanize life.”<sup>331</sup> Others like David (no surname) writing in the paper *Gay Community* perceived gay identity claims as a “barrier toward liberation” based on the premise that “a self-definition is the most oppressive act one can perform,” as any identity claim in this mold “gives birth to oppressive duality” by implying that there is an opposite against which it is defined.<sup>332</sup> Rather than agitating for inclusion then, these radicals sought to strike at the foundation of institutions ranging from heterosexual marriage and the nuclear family to the gay cultural and bar scenes in their strivings toward a sexual politics that was “joyful, spontaneous, and erotic” and free from the strictures of their repressive historical moment.<sup>333</sup>

In her seminal 1970 essay “Gay is Good,” former Daughters of Bilitis leader and Gay Liberation Front co-founder Martha Shelley authored a critique of homophile politics that, in co-opting the phrase from militant homophiles like Frank Kameny, rejected the message that gay and lesbian Americans were simply another minority class that ought to be seen as on par with straight Americans.<sup>334</sup> In recognizing that “[w]e gays are separate from you—we are alien,” Shelley argued that the homosexual was simply the

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<sup>331</sup> Jim Fouratt, “Homosexual,” in *Come Out!: Selections from the Radical Gay Liberation Newspaper* (New York: Times Change Press, 1970), 16 Collection 2012.031, Box 1, Folder 6, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>332</sup> David, “Gay Relationship,” *Gay Community* 1, no.1 (n.d.) Collection 127, Box 1, Folder 40, Michael O’Grady’s Papers, New York LGBT Community Center Archives, New York, NY.

<sup>333</sup> Altman, *Homosexual*, 115.

<sup>334</sup> Martha Shelley, “Gay is Good,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 31-3.

negation of the socially-constructed heterosexual; the homosexual, thus, could not be eradicated as the category itself owed its existence to those sexual characteristics expelled by definition of heterosexuality.<sup>335</sup> Addressing straight America, Shelley asserted that “[y]ou have managed to drive your own homosexuality down under the skin of your mind,” which expressed the liberationist tenet that the whole spectrum of sexual desires are embedded or are realizable in every person, simply awaiting the proper conditions to materialize.<sup>336</sup> Gay activism was for Shelley and her fellow activists a catalyst that could insert itself into straight consciousness and work to orient—or perhaps *enlighten*—a person toward a more liberatory sexuality. Shelley spoke to all heterosexuals in declaring that liberationists wanted “not for you to tolerate us, or to accept us, but to understand us...[we] want to reach the homosexuals entombed in you, to liberate our brothers and sisters, locked in the prisons of your skulls.”<sup>337</sup>

Based in London as a member of a GLF chapter there, Jeffrey Weeks wrote several influential early essays on the sociology and philosophy of gay liberation. In his 1972 essay “Ideas of Power” published in the British newspaper *Gay News*, Weeks implored fellow activists and allies not to consider gay identity as representative of a distinct class but instead as an assemblage of persons varying in racial, gendered, and class dimensions.<sup>338</sup> Distinguishing his approach from the homophile conception of identity that perversely naturalized gay identity as white, middle-class, and mostly male

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<sup>335</sup> Ibid., 33.

<sup>336</sup> Ibid.

<sup>337</sup> Ibid., 34.

<sup>338</sup> Jeffrey Weeks, “Ideas of Gay Liberation,” *Gay News* 6, (September 1, 1972): 6, <http://gaynewsarchive.org/006/006-06/ideas-of-gay-liberation/>

based on its constituency and leadership, Weeks asked rhetorically “[w]hat’s the use of having equality with straights if we are still imprisoned by class, racial and sex divisions?”<sup>339</sup> This was reflective of the coalitional politics that defined gay liberation’s project of both eradicating oppressive restrictions that prevented the flourishing of diverse sexualities while also incorporating a sense of sexual liberation into the New Left and the politics of revolution. Drawing on the experience of activists who had experienced rampant homophobia and sexism in left circles, Weeks argued that capitalism did indeed stand in the way of liberation in many ways but that revolutionary struggle on its own would not necessarily bring about gay liberation. Following from this premise, Weeks praised the GLF’s de-centralized organizational model as he and many others believed that a gay movement with broad ideological currents and an ability to address repression in diverse realms of society would serve the goals of sexual and gay liberation best.<sup>340</sup> Additionally, Weeks strongly identified with the radical feminist strain of thought in gay liberation, which posited sexism as a fundamental element of oppression of both lesbians and gay men alike. This argument can be seen in other essays such as in Altman’s writings on the necessity of transcending the masculine and feminine constraints of modern heterosexual culture, which treated feminine qualities in men and masculine ones in women as unnatural aberrations or perversities.<sup>341</sup>

The statements of purpose, manifestos, meeting minutes, and correspondence of gay liberation activists and their organizations illustrate how liberationists castigated the

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<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

<sup>341</sup> Altman, *Homosexual*, 87-92.

homophile movement for its fidelity to science and medicine and their tendency to naturalize both gay identity and the political and social status quo. In these writings, there is a visible theoretical and political break—theoretical in the sense that the term “gay” came to hold a radical transformative potential that it had not for most homophiles, and political in that liberationists came to resist the scientific alliances that homophiles had cultivated and upon which they had built many of their early political and legal challenges to oppressive laws and administrative practices. Like the more formal published writings cited above, these sources demonstrate the opposition to all “expert” discourses and other outside authorities claiming that their sober and technical methods were the most appropriate means by which to *know* the “homosexual.” Additionally, these documents speak to the anti-sexist/feminist<sup>342</sup> nature of gay liberation’s hypothesis for why homosexuality was so disdained. This stance led activists to criticize heterosexuality in its existing cultural and institutional forms as an affront to women, effeminate men, and to human dignity more broadly.

These themes can be found in the 1970 essay “Refugees from Amerika: A Gay Manifesto,” which became one of the most widely-circulated texts in gay liberation.<sup>343</sup> This essay was written by Carl Wittman, a founder of the Red Butterfly cell in the Los Angeles chapter of the GLF, and exhibits a pointed critique of the tendency to naturalize homosexuality and heterosexuality through science. In the spirit of other gay liberation

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<sup>342</sup> Liberationists often used the term “anti-sexism” in a similar way that we might refer to “heterosexism” today. Both terms capture the sexist and homophobic elements of the heterosexual social order.

<sup>343</sup> Carl Wittman, “Refugees from Amerika: A Gay Manifesto,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 330-41.



theorists, Wittman wrote that “[n]ature leaves undefined the object of sexual desire. The gender of that object is imposed socially” by which he meant that the origins and character of a particular desire are somewhat elusive and that “gender” works as a cultural code for establishing a social meaning for that desire.<sup>344</sup> Wittman followed this claim by emphasizing that homosexuality was not the “hatred or the rejection of the opposite sex” and that heterosexuality contained more of this tendency than same-sex desire did, as masculine sexual aggression and male chauvinism were inherent in such relations.<sup>345</sup> Notably, Wittman also wrote that homosexuality is “not genetic,” which sounds almost anachronistic as the genetics craze that came to read every behavior and identity into the human genome would not hit its high point until nearly two decades after the publication of this essay.<sup>346</sup> Protesting the genetic origins of gay desire and identity appears to stand in for a broad attack on the basic conceptual framework that would attempt to locate homosexuality in a person’s biology or some other taxonomy of essence, rather than perceiving the notion of a scientifically-discoverable and fixed homosexuality as the social manifestation of heterosexual society’s propensity to cast certain behaviors and desires as inherently deviant.

An anti-scientific sentiment is readily discernible in the statements of the GLF chapter in Los Angeles (GLF-LA), which was one of the strongest, most active chapters in the front. It is worth quoting the chapter’s section on their philosophy from their 1970

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<sup>344</sup> Ibid., 331.

<sup>345</sup> Ibid., 331-2.

<sup>346</sup> Ibid., 331.

“Statement of Purpose” in its whole to get a sense of the animosity the members had for scientific arguments deployed by straight society and the liberal plea for equality alike:

“We say that homosexuality is a perfectly natural state, a fact, a way of life, and that we enjoy our sexuality, without feelings of inferiority or guilt. We seek, and find, love, and approach love as a feeling of loving mutuality. We refuse to engage in discussion of causation, “Sickness” (A LIE), degrees of sexuality, or any other such Establishment Hang-Ups. We accept ourselves with totally self-respect, and respect our associates as they are, not what some social arbiter [sic] says they should be.”<sup>347</sup>

The anti-illness model rhetoric is unsurprising given the previous two decades of activism against various oppressive uses of science, but the language on “causation” and “degrees of sexuality” is indicative of how different this resistance to expert scientific opinion was from the homophile style. In choosing this language, GLF-LA members were defying the scientific quest for the origins of homosexuality, as such a project reified assumptions about the heterosexual-homosexual binary as well as gave undue authority to those serving what they termed “Establishment Hang-Ups.”<sup>348</sup> Opposition to the focus on “degrees of sexuality” indicates a distaste for the homophile reliance on Kinsey statistics and figures to assert the normality of various “perverse” sexual predilections and

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<sup>347</sup> Gay Liberation Front, Los Angeles, “Statement of Purpose,” (c. 1969-70) Collection 2012.031, Box 1, Folder 23, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>348</sup> Ibid.

behaviors.<sup>349</sup> Non-heterosexual sexual desire was not a symptom of a natural state of orientation for GLF-LA activists but rather, as they stressed at the close of their statement, a “SURE CURE OF BOREDOM AND...AN ANTIDOTE TO THE VIOLENCE THAT IS SO AMERICAN.” Sexual liberation for these liberationists meant abandoning the clinician’s diagnoses and the researcher’s statistics and surveys for a recognition of the social nature and radical possibilities of sex.

The GLF-LA also disseminated several flyers and other short documents against scientists touting the pathological model of homosexuality as well as against the reign of experts in the movement more broadly. In one two-page handout that begins with the statement “HOMOSEXUALITY IS NOT A SICKNESS,” the GLF-LA referred to the pathological diagnosis as “oppression sickness.” This critique inverted the clinical approach by explaining the depression many homosexual patients expressed to mental health professionals as symptomatic of the oppressive way in which society and the sciences and medicine treated those who desired and engaged in same-sex sexual behavior and relationships.<sup>350</sup> They declared that “only sick homosexuals visit psychiatrists” and listed their organization’s address and contact information for professionals to refer patients who were “suffer[ing] from stress resulting from oppression of homosexuals in our society.”<sup>351</sup> This paper and another similar one demanded that researchers and physicians assist in gay struggles against those who

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<sup>349</sup> Ibid.

<sup>350</sup> Gay Liberation Front, Los Angeles, “Homosexuality Is Not A Sickness,” (n.d.) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA; This is not entirely dissimilar than Evelyn Hooker’s hypothesis for why homosexual patients were so prevalent in psychiatrists’ offices.

<sup>351</sup> Ibid.

continued to define them as ill. GLF-LA recommended that these experts “utilize their skills for the sexual liberation of all people” by reprimanding their domineering colleagues and clearing a space for gay men and women to define their own identities and behavior as they wished.<sup>352</sup> The most directed assault on the expert scientific class came in a GLF-LA handout titled “Brief Essay on Bullshit Expertise.”<sup>353</sup> Liberationists here excoriated those professionals who would call themselves “experts,” labeling them instead “charlatans” and taking back the language of expertise to refer to gay persons themselves who ought to have the ultimate say concerning what their sexualities signified.<sup>354</sup>

It is important to make a distinction between the antipathy these radicals had for the purported “experts” and their attitudes toward science more generally. Though the GLF did not make an appeal to their own understanding of science and sexuality central to their messaging, they did lean on biological arguments occasionally such as in their responses to the homophobic elements of the New Left as well as those in the CPUSA, which clung to the theory that homosexuality was a mere symptom of bourgeois decadence. In a 1971 address to the latter, the GLF-LA reprimanded those they termed “Marxist-Leninist heterosexuals” who believed that destroying capitalism would inevitably lead to the destruction of homosexuality, which for them was a mere

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<sup>352</sup> Gay Liberation Front, Los Angeles, “A Statement on Gay Liberation,” (October 24, 1970) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>353</sup> Gay Liberation Front, Los Angeles, “Brief Essay on Bullshit Expertise,” (n.d.) Collection 2014-109, Box 1, Folder 10, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>354</sup> Ibid.

superstructural effect of that mode of political economy.<sup>355</sup> To counter this attack, the GLF argued that “[t]here is growing evidence that homosexuality has a biological rather than an environmental basis. Eliminating capitalism will not eliminate homosexuality.”<sup>356</sup> In a longer essay on anthropology and gay liberation, the Red Butterfly cell cited the Kinsey studies and zoological studies on the sexual habits of primates as they were “enlightening as to genetic bases of our own behavior.”<sup>357</sup> This essay also includes references to studies on human sexuality in prison contexts with accompanying commentary on the malleability of sexuality. But there is a striking nuance to these radicals’ approach to a variety of evidence—some biological and genetic—concerning the origins and nature of sexuality.<sup>358</sup> The essay’s closing discussion of anthropologist Clellan Ford and zoologist Frank A. Beach’s theory on the unnaturalness of both exclusive homosexuality and exclusive heterosexuality provides the most clear link between this endorsement of certain scientific theories and the GLF’s radical sexual politics.<sup>359</sup> Citing the theory approvingly, the authors were able to link this research to their own vision of orienting societal sexual mores away from these constraining poles.

Looking beyond the hub of activism in Los Angeles, many of the same attitudes toward science and an affinity for social constructionist accounts of gay identity could be found in other gay liberation organizations across the country. For example, the Hartford

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<sup>355</sup> Craig Hanson, “LA-GLF vs. Dorothy Healey,” (February 18, 1971) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>356</sup> Ibid.

<sup>357</sup> Red Butterfly, “An Anthropological Perspective,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 157-65 (160).

<sup>358</sup> Ibid., 161.

<sup>359</sup> Ibid., 162.

Connecticut Gay Liberation Front asserted that “WHAT A PERSON DOES SEXUALLY SHOULD NOT CONSTITUTE A COMPLETE SOCIAL CLASSIFICATION.”<sup>360</sup> Like those in the GLF-LA, Connecticut liberationists expressed a belief in radical homosexuality as a social cure to “the racism, sexism, and general intolerance to new life styles and ideas” and the “increasing factor of violence in our society” against marginalized populations especially.<sup>361</sup> The Minnesota gay liberation group Fight Repression of Erotic Expression (FREE) too fought against the imposition of regressive stereotypes and pathological diagnoses of homosexuality in arguing that gay identity “will be defined by Gay people” and that “Gay Power is needed to secure and protect [gay] identity in this society.”<sup>362</sup> In a FREE brochure, the organization cited Wardell Pomeroy of the Kinsey Institute and others who argued that “the homosexual” is not a meaningful psychological or physiological category.<sup>363</sup> In using these critiques of scientific experts touting the illness model, FREE demanded that gay persons be allowed to self-determine their own behaviors and identities and that the ultimate goal of gay liberation was “the right to sexual self-determination” and the creation of a world of expanded sexual choice.<sup>364</sup>

Although gay liberation organizations in more conservative regions were at times less vehement and militant in their rhetorical opposition to the reign of scientific

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<sup>360</sup> Ronald J. Carrier, “Hartford Connecticut Gay Liberation Front Letter to Stanley Brossette Questionnaire,” (February 6, 1971) Collection 2014-109, Box 1, Folder 4, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>361</sup> Ibid.

<sup>362</sup> FREE: Gay Liberation of Minnesota, “FREE: Gay Liberation of Minnesota Brochure,” (n.d.) Collection 2014-109, Box 1, Folder 6, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>363</sup> Ibid.

<sup>364</sup> Ibid.

expertise, this signifies minor differences in degree of how radical a group was rather than indicating some qualitatively dissimilar ideology. These differences can be observed in various organizations' responses to a survey conducted by gay liberation activist and journalist Stanley Brossette. When responding to a question about how many gay persons a group suspected lived in their area, the St. Louis chapter of the GLF and others like it tended to respond with reference to Kinsey's estimates about gay persons existing in the general population; this meant that they would multiply Kinsey's infamous 10% figure (or a variation on it from later studies conducted at the Institute) by the population number for their city, county, or state.<sup>365</sup> While these estimates using Kinsey's and other allies in the sciences were accompanied by the more radical denunciations of expertise and the right to define one's own sexuality and identity, some of the more radical GLF chapters and affiliated groups responded much differently to Brossette's questionnaire. For example, the editorial collective of the New York City GLF paper *Come Out!* answered the same question by declaring: "Gay Liberation has to be. There can be no life in this country without it. All women and men must be liberated. All women and men must be gay."<sup>366</sup> Rather than attempting to use scientific estimates regarding the "gay population," the most self-styled radical organizations tended to reaffirm their ideological stance that their gay political program had the potential to transform heterosexual culture,

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<sup>365</sup> Gay Liberation Front, St. Louis, "Letter to Stanley Brossette Questionnaire," (1971) Collection 2014-109, Box 1, Folder 4, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>366</sup> *Come Out!*, "Come Out! Editorial Collective of the GLF-NY Letter to Stanley Brossette Questionnaire," (1971) Collection 2014-109, Box 1, Folder 4, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

institutions, and even individuals, thus making it almost nonsensical to draw boundaries around who was and was not gay, especially at the level of population.

*Beyond Gay Identity: Radical Lesbian, Black Feminist Lesbian, Transsexual/Transvestite, and Bisexual Identities in Gay Liberation*

Accompanying the gay left's new approach to the politics of identity was a flourishing of other approaches to notions of political identity as well. From lesbian separatism to transvestite support organizations to alliances with black nationalism, gay liberation became a key site in the New Left's attempts to refashion Marxist theory and to give new character and constituencies to the notion of the revolutionary subject. As many scholars have noted, this moment contained in it the micro-foundations of the shift from a labor movement-centric radical politics oriented more directly toward ending class oppression to one that emphasized marginality.<sup>367</sup> Ironically, just as these disparate identity-based groups were developing new theories of subjectivity, identity, and revolution the broader political tide was shifting rightward. Though these identity-based organizations rallied against evils committed in the name of capitalism and imperialism, they did so with novel interpretations of the relationship between gender, sex, and race and the idea of an impending left-wing revolution. Across these theories of identity was a rejection of the place of scientific authority in their conceptions of identity, as well as the idea that a decision to adopt transgressive identities and personal sexual practices was of considerable political importance in creating a new more just society. A common method

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<sup>367</sup> Reed, "Black Particularity Reconsidered,"; Vivek Chibber, "Rescuing Class from the Cultural Turn," *Catalyst* 1, no.1 (Spring 2017), <https://catalyst-journal.com/vol1/no1/cultural-turn-vivek-chibber>



was to question how and in what ways a politics based on identity could be (or must be) intrinsically linked to the struggle against a capitalist, patriarchal, and imperialist reigning political and social order.

The propensity to imbue lesbian feminist identity with radical notions of political “choice” to stand against capitalist and imperialist patriarchal oppression marks one of the most anti-scientific tendencies in the era of gay liberation. This approach to identity-as-choice and the establishment of separatist sects of women-only political spaces that accompanied it was influenced by two notable developments: the first in homophile and gay liberationist politics and the second in the exclusionary nature of the predominately white and straight feminist/women’s movement. Historians have now documented how, despite the best intentions of some members of gay liberation and its nominally anti-sexist and feminist ethos, the liberation movement shared some of the uglier patriarchal qualities of its homophile predecessors.<sup>368</sup> As Marcia Gallo has noted, debates over separatism within the Daughters of Bilitis (DOB) had been occurring since the late 1960s with regards to the male-dominated nature of homophile organizations such as the Mattachine, and there had even been discussion in 1968 over whether to integrate into the North American Conference of Homophile Organizations (NACHO), which they perceived to be plagued with a similar gender imbalance of power.<sup>369</sup>

While GLF chapters often wrote anti-sexist principles into their charters, using language like “the purpose of gay liberation is to examine the deleterious consequences of the American tendency to polarize the sexes,” the movement shared in the legacies and

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<sup>368</sup> Stein, *City of Sisterly and Brotherly Loves*; 3, 11, 13, 385.

<sup>369</sup> Gallo, *Different Daughters*, 155-60.

practices of misogyny and male-dominated leaderships that had plagued older homophile groups and their contemporary New Left ones alike.<sup>370</sup> Notes from the First National Gay Liberation convention, held in October 1970 in Minneapolis, illustrate the internal tensions over sex and gender within the GLF. From the beginning of the convention, lesbian activists began self-organizing against what they perceived to be the “chauvinism of an all-male dominated group” running the convention and their own local GLF chapters.<sup>371</sup> Even those who did not prefer separatism lamented that “[t]he men’s acceptance would be tokenism and then we’ll be fucked over again.”<sup>372</sup>

The second influential factor was the exclusionary nature of straight white feminism that was exemplified best in Betty Friedan’s 1970 warning to the National Organization of Women (NOW) that a “lavender menace” loomed imminently over the women’s movement.<sup>373</sup> Her words became a self-fulfilled prophecy later that year at NOW’s Congress to Unite Women when a group of radical lesbian activists affiliated with the GLF and the Women’s Liberation Movement protested the conference under the title the “Lavender Menace,” inspiring others to join and form lesbian feminist organizations as well as fight to expand access into the already-existing women’s movement.<sup>374</sup> Though there was no shortage of anger and disillusionment with the women’s movement among lesbian feminists—the first gay liberation convention was

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<sup>370</sup> Gay Liberation Front, Austin, “Why Gay Liberation,” (n.d.) Collection 2014-109, Box 1, Folder 9, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>371</sup> Jim Chesebro, “The First National Gay Liberation Convention: One View from Minneapolis,” (1970) Collection 2014-109, Box 1, Folder 6, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>372</sup> *Ibid.*, 7.

<sup>373</sup> Katz, *The Invention of Heterosexuality*, 139.

<sup>374</sup> Teal, *The Gay Militants*, 162.

full of those proclaiming that women's liberation had "done nothing for Gay Women"—many women in gay liberation came to believe that the only way to eliminate sexism was to engage other women and form an autonomous political movement.<sup>375</sup>

Lesbian feminists built their organizations and crafted their ideological positions in stark contrast to an older model of respectability politics and the deference to scientific elites within older homophile and lesbian organizations. In the months after Stonewall in 1969, groups like Gay Women's Liberation (GWL) in California and the Radicalesbians in New York City emerged to combat both the male-driven GLF as well as more respectable and conservative groups like the Society of Individual Rights (SIR). This new spirit of radical separatism was accompanied by the exits of lesbian activists from homophile organizations such as former DOB leader Del Martin's 1970 split from the group.<sup>376</sup> These new lesbian feminist groups oftentimes abandoned the older respectability approach to achieving civil rights and instead borrowed tactics from the black liberation movement that centered around a "collective defense strategy."<sup>377</sup> This included tactics such as collective and communal living arrangements, armed resistance, theft of government documents, and vigorous protest and dissent.<sup>378</sup> These activists were deeply critical of not only the illness model but also the privilege that homophiles had given sympathetic scientific experts over their identities. As historian Rebecca Jennings has shown, the Radicalesbians, the GWL, and the Counter-Psychiatric Group preferred to define their identities with reference to the political choice of lesbianism rather than

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<sup>375</sup> Chesebro, "The First National Gay Liberation Convention," 7.

<sup>376</sup> Armstrong, *Forging Gay Identities*, 141.

<sup>377</sup> Hobson, *Lavender and Red*, 43.

<sup>378</sup> *Ibid.*

asking researchers to examine them in studies to determine how normal and inoffensive they were and to reassure the public that they did not seek to disrupt heterosexist societal norms.<sup>379</sup>

One key place to observe this discourse of political choice and identity is in the lesbian feminist manifesto, “The Woman-Identified Woman,” which was distributed during the Radicalesbian zap at the 1970 Congress to Unite Women.<sup>380</sup> The piece opens with the definition of a lesbian as “the rage of all women condensed to the point of explosion. She is the woman who, often beginning at an extremely early age, acts in accordance with her inner compulsion to be a more complete and freer human being than her society—perhaps then, but certainly later—cares to allow her.”<sup>381</sup> Lesbianism here is immediately linked to the larger category of women and, in doing so, is self-consciously reoriented away from male homosexuality and toward an alliance with straight women. The writers of the manifesto declared that it was far more important politically to recognize that “there is really only one essential different between a lesbian and other women: that of sexual orientation—which is to say, when you strip off all the packaging, you must finally realize that the essence of being a ‘woman’ is to get fucked by men.”<sup>382</sup> As a consequence of society’s conceptualization of women as subservient and men as independent, the lesbian came to stand in as a challenge to that supposedly natural order

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<sup>379</sup> Rebecca Jennings, “The Most Uninhibited Party They’d Ever Been To’: The Postwar Encounter Between Psychiatry and the British Lesbian, 1945–1971,” *Journal of British Studies* 47, (October 2008): 883–904; Hobson, *Lavender and Red*, 58–61.

<sup>380</sup> Radicalesbians, “The Woman-Identified Woman,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 172–7.

<sup>381</sup> *Ibid.*, 172.

<sup>382</sup> *Ibid.*, 173.

of human relations—in her defiance of traditional male-female roles, the lesbian attempted to throw into relief the sexist foundations of the current order.

Thus, identity was seen as a radical and necessary choice, leading the Radicalesbians to declare that “[u]ntil women see in each other the possibility of a primal commitment which includes sexual love they will be denying themselves the love and value they readily accord to men, thus affirming their second-class status.”<sup>383</sup> Through such self-identification, lesbian feminists hoped to erase the categories of homosexuality and heterosexuality entirely as they could only be useful concepts in a sexist order that policed the social roles and desires of non-heterosexual persons. To this effect, the Radicalesbians predicted that “[i]n a society in which men do not oppress women, and sexual expression is allowed to follow feelings, the categories of homosexuality and heterosexuality would disappear.”<sup>384</sup> To be a lesbian then was to enact the political catalyst for facilitating this political and moral project of challenging sexism and homophobia alike as they were deemed to be linked phenomena. Overcoming self-hate was a chief concern for these activists as they perceived the internalizations of sexism to be a major obstacle on the road to these goals. This explains why internal consciousness-raising sessions as well as educating straight feminists in venues such as the Congress to Unite Women and other NOW events were so central to lesbian feminist organizing. The aim of such actions was to not only destabilize the naturalistic categories of sexuality that many others in gay liberation rejected; rather, the Radicalesbians encouraged lesbian identity as a means of developing a political disposition with references to themselves as

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<sup>383</sup> Ibid., 174.

<sup>384</sup> Ibid., 173.

women instead of mere, subordinated referents to the dominant category of male. They believed that the cultivation of lesbian identity to be “the revolutionary force from which all else will follow, for ours is an organic revolution.”<sup>385</sup> A political lesbian identity was for them “at the heart of women’s liberation” and “the basis for the cultural revolution” for which they strove to make a reality.<sup>386</sup>

Though the Radicalesbians and similar organizations tended to work alongside others struggling for justice including gay, minority, student, homeless, and environmental groups, lesbian feminists came to develop and practice a theory of anti-sexism that encouraged female separatism.<sup>387</sup> Whereas women caucuses in the GLF remained committed to organizing alongside gay men, the Radicalesbians and groups that they inspired such as the Furies practiced female separatism in a variety of contexts.<sup>388</sup> This ideology of separatism is spelled out in a short piece by the Gay Revolutionary Party Women’s Caucus in 1971 titled “Realesbians and Politicalesbians.”<sup>389</sup> Here, the caucus drew a distinction between “realesbians,” who were proper lesbian feminist subjects, and “politicalesbians,” a class composed of female allies of lesbian feminism but who did not desire to engage in sexual activity with other women and who might be involved

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<sup>385</sup> Ibid., 176.

<sup>386</sup> Ibid.

<sup>387</sup> Chelsea Del Rio, “Voicing Gay Women’s Liberation: Judy Grahn and the Shaping of Lesbian Feminism,” *Journal of Lesbian Studies* 19, no.3 (2015): 357-66; This view carried on into the 1980s with the publication of essays such as: Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence,” *Signs: Journal of Women in Culture and Society* 5, no.4 (1980): 631–60.

<sup>388</sup> Teal, *The Gay Militants*, 167; Teal notes that women organizing in the GLF-NY issued a statement declaring that “lesbian activists fight [sic] oppression on two fronts: As homosexuals, we work with our gay brothers to fight oppression based on society’s exclusion of individuals who love members of the same sex. As women, we work with Women’s Liberation to fight the oppression of all women.”

<sup>389</sup> Gay Revolutionary Party Women’s Caucus, “Realesbians and Politicalesbians,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 177-81.

romantically or physically with men. Expressing dismay with so many of their fellow females' reluctance to divorce themselves entirely from men in their personal lives in addition to their political organizational work, the authors wrote that these women "apparently believe that men can be educated out of their sexism."<sup>390</sup> Any trace of a heterosexual relationship within the movement—be it a political or an intimate one—was seen by many as infecting the political project of combatting sexism.

Co-founder of the Radicalesbians Rita Mae Brown explained in a short essay how lesbians could acknowledge the constructed natures of the sexuality binary while also pushing for this mode of same-sex enclosure in the present.<sup>391</sup> Brown argued that at the root of all social ills was sexism. Since the beginning of human civilization, men degraded women by placing them in inferior roles and, in doing so, degraded himself and all of humanity.<sup>392</sup> "Imperialism, racism and the attendant disregard for human life," Brown professed, "spring from sexism."<sup>393</sup>

For Brown and her fellow activists, lesbian feminism needed to be engaged with the women's movement above all other struggles to achieve not only a feminist cultural revolution but also any major element of social change for which her contemporaries and allies were fighting to accomplish. Groups such as the Furies, an off-shoot of the

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<sup>390</sup> Ibid., 177.

<sup>391</sup> Rita Mae Brown, "Hanoi to Hoboken: A Round Trip Ticket," in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 195-201.

<sup>392</sup> This theory of sexism—sometimes termed *sexage*—remained a theoretical force in analyses of patriarchy for decades to come. For an example of this orientation, see Colette Guillaumin, *Racism, Sexism, Power and Ideology* (London: Routledge, 1995). For critiques of this theory see: Katz, *The Invention of Heterosexuality*, 150-1; Martha E. Gimenez, "What's Material about Materialist Feminism?," *Radical Philosophy*, no. 101 (May/June, 2000): 19-28.

<sup>393</sup> Rita Mae Brown, "Hanoi to Hoboken," 197; Others like feminist social theorist and co-founder of the radical feminist group the Redstockings Shulamith Firestone took a similar line on sex and radical left politics albeit one that excluded gays and lesbians from their analysis.

Radicalesbians, practiced this ideology by removing their political and personal lives as far away from male influence as possible. In a 1972 special issue of *Motive*, the Furies wrote that political and personal separatism was necessary as “[a]t this time, we are separatists who do not work with men, straight or gay, because men are not working to end male supremacy” and that “ending gay oppression will not autonomically end woman oppression.”<sup>394</sup> For the Furies and others, the revolutionary subject for true liberation had to be female.

Unfortunately for these lesbian feminists, their organizational shortcomings and internal tensions stood in the way of realizing their political ideals. Looking back on her experience in the Radicalesbians, Ellen Shumsky wrote that in their attempts to avoid replicating the entrenched leaderships in other groups that they disdained, the non-hierarchical structure of their organization contributed to its downfall.<sup>395</sup> As was the case in a variety of gay liberation groups that were built around similar structures and principles, their meetings became increasingly disorganized, practical tasks could not be fulfilled, and fissures between various factions emerged and undermined their agenda. Restrictions on the relationship between “choice” and identity also contributed to internal disagreements and the alienation of some classes of women; for example, critiques of butch women as “male-identified lesbians” who suffered from internalizing noxious notions of masculinity limited efforts to even include all self-identified women in their

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<sup>394</sup> Joan E. Biren, Rita Mae Brown, Charlotte Bunch, and Coletta Reid, “Editorial: *Motive* Comes Out!,” *Motive* 32, no.1 (1972): 1, [http://sth-archon.bu.edu/motive/issues/1972\\_LesbianFeminist/assets/basic-html/page-1.html](http://sth-archon.bu.edu/motive/issues/1972_LesbianFeminist/assets/basic-html/page-1.html) (Accessed June 2, 2017).

<sup>395</sup> Ellen Shumsky, “Radicalesbians,” *The Gay & Lesbian Review*, July 1, 2009, <http://www.greview.org/article/article-511/> (Accessed June 2, 2017).



organizing.<sup>396</sup> Lastly, groups like the Furies demonstrated how the identity of choice led to further splintering within the movement as they argued that, “[l]esbianism is not a matter of sexual preference, but rather one of political choice which every woman must make if she is to become woman-identified and thereby end male supremacy... Lesbians must get out of the straight women’s movement and form their own movement in order to be taken seriously, to stop straight women from oppressing us, and to force straight women to deal with their own Lesbianism.”<sup>397</sup> In 1972, calls came for an even tighter drawing of the boundaries of exclusion in efforts to achieve radical political change, which facilitated the collapse of Radicalesbians and the Furies.

As gay liberation styled itself as an anti-racist movement that rallied against capitalist and imperialist power, the GLF and others made alliances with the Black Panther Party (BPP). Additionally, black and person of color gay and lesbian organizations formed in the months and years after Stonewall. Rather than being simply a single-issue front, the gay liberation movement’s theories of oppression and identity encouraged its participants to find commonalities with one another across what were both discrete yet interconnected struggles for sexual liberation, women’s rights, and racial justice. This meant that many gay and lesbian radicals found more solidarity in their actions alongside the Black Panthers than they did with their homophile counterparts who believed it best to stick to solidly “gay issues.” And as these relationships were forged and previously-silenced voices could be heard, new articulations and conceptual

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<sup>396</sup> Terence Kissack, “Freaking Fag Revolutionaries: New York’s Gay Liberation Front, 1969-1971,” *Radical History Review* 62 (1995): 105-34 (p.123).

<sup>397</sup> Genny Beemyn, *A Queer Capital: A History of Gay Life in Washington, D.C.* (New York: Routledge, 2014), 198 (quoting from the 1972 issue of *Motive* published by the leadership of the Furies).

approaches to political identity came from the Third World Gays and black lesbian feminists who—dissatisfied with the sexism and racism that persisted even in the liberationist movement—laid out paths forward that sought to unite these interrelated struggles.

In 1970, the Black Panthers began to organize the Revolutionary People's Constitution Convention in Philadelphia to bring together various strands of the New Left with the goal of drafting a revolutionary alternative constitution for the U.S. Although the BPP had a history of referring to its enemies as “cocksuckers” and “faggots,” the influences of Jean Genet and James Baldwin on the party pushed co-founder Huey P. Newton to publish a letter in support of gay liberation and the women's movement and invite organizations representing both fronts to the convention in 1970.<sup>398</sup> In his letter, Newton addressed the fear that straight black men felt in the presence of both gay persons and women as they represented threats to their masculinity.<sup>399</sup> But Newton implored his fellow Panthers to overcome such instinctual feelings of hatred or disgust as he saw a revolutionary impulse in these radicals that accorded with the Panthers' political project. He suggested that that instead of saying “even a homosexual can be a revolutionary” that the Panthers ought to consider that “maybe a homosexual could be the most revolutionary.”<sup>400</sup> After all, he noted, “homosexuals are not given freedom and liberty by

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<sup>398</sup> Ronald K. Porter, “A Rainbow in Black: The Gay Politics of the Black Panther Party,” in *Sexualities in Education: A Reader*, eds. Erica Meiners and Therese Quinn (New York: Peter Lang, 2012): 364-75.

<sup>399</sup> Huey P. Newton, “A Letter from Huey to the Revolutionary Brothers and Sisters About the Women's Liberation and Gay Liberation Movements,” in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 404-6.

<sup>400</sup> *Ibid.*, 405.

anyone in the society.”<sup>401</sup> Newton ended his missive by reminding his constituency to recall that there were obvious oppressors in the world and that learning to distinguish friends from enemies—not on the basis of sexuality or gender but on who holds and wields oppressive power—was a crucial revolutionary exercise.<sup>402</sup>

There were, however, significant boundaries that existed between these groups, which engendered a variety of outrage and additional considerations about *how* a broad coalition-based movement could incorporate so many identities that had histories of antagonism among one another. While Newton’s words of solidarity and the organizers of the RPCC offered a bridge to gay liberation, lesbian feminists and the women’s movement were treated with disdain for being both female and gay at the RPCC. In a reflection piece published several weeks after the convention, the lesbian activist journal *off our backs* recounted the abuse that they had endured for their gender and sexualities.<sup>403</sup> The organizers ended up canceling several of the women’s workshops and refused to allow a previously-vetted woman of color to address the entire convention alongside the predominately male BPP leadership. On one of the last days of the convention, a fight broke out among attendees and BPP member and famed poet Miriam Makeba denounced the lesbian activists as “men” and was instrumental in eliminating much of the lesbian-written statements from the final contribution to the convention.<sup>404</sup>

The Chicago-based Third World Gay Revolution (TWGR) also sought to build bridges between groups by highlighting the ill treatment gay black men and women

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<sup>401</sup> Ibid.

<sup>402</sup> Ibid., 405-6.

<sup>403</sup> *off our backs* inc., “lesbian testimony,” *off our backs*, 1 no. 11, (September 30, 1970): 4-5.

<sup>404</sup> Ibid., 5.

suffered in black communities as well as the marginalization that gay black persons underwent in mostly-white gay liberation chapters. In their 1970 founding statement published in the paper *Gay Flames*, TWGR expressed a belief in the self-determination of all peoples that entailed the liberation of persons of color, women, gays and a slew of economic guarantees including public housing, full employment, free education, and free reproductive health services.<sup>405</sup> Due to this commitment to a diverse revolutionary and inclusive movement, TWGR activists were distraught by what they termed the “triple oppression” that affected gay persons of color. In a statement titled “The Oppressed Shall Not Become the Oppressor,” TWGR denounced the three evils tormenting third world gays as capitalism, “White Amerika,” and sexism, the last of which present itself in black communities as a vigorous defense of masculinity at the expense of women and black gays.<sup>406</sup> Addressing their oppressors from within the left, TWGR wrote that “[b]y your counterrevolutionary struggle to maintain and to force heterosexuality and the nuclear family, you perpetuate out-moded remnants of Capitalism. By your anti-homosexual stance, you have used the weapons of the oppressor thereby becoming the agent of the oppressor.”<sup>407</sup>

The organizational-building and discursive contributions of gay and lesbian persons of color during this time led also to a new practice and theory of black lesbian feminist politics best embodied by the Combahee River Collective (CRC). Formed in

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<sup>405</sup> Teal, *The Gay Militants*, 194-5.

<sup>406</sup> Third World Gay Revolution, “The Oppressed Shall Not Become the Oppressor,” in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 400-1.

<sup>407</sup> *Ibid.*, 400.

1974 when they split from the newly-formed National Black Feminist Organization (NBFO), the Combahee River Collective is often cited as one of the first groups to refer to their political program as “identity politics.” As literary scholar Roderick Ferguson has noted, the CRC took concepts such as the “nation” in black liberation politics to be a constructed rather than ones that existed prior to their articulation.<sup>408</sup> In other words, the CRC contested the idea in black liberation that there existed a primordial “nation” but rather the nation was achieved itself through political struggle. Accordingly, the collective saw the necessary first step to a black lesbian feminist politics was to theorize their own identity and culture so as to formulate discursive and alternative practices to the masculinity-imbued politics that was pervasive in black nationalism as well as the sexist biases that permeated throughout the left.

The Combahee River Collective’s views on the political articulation of black lesbian feminist identity can found in its 1977 statement of purpose.<sup>409</sup> In this document, the collective declared that “[t]he most general statement of our politics at the present time would be that we are actively committed to struggling against racial, sexual, heterosexual, and class oppression, and see as our particular task the development of integrated analysis and practice based upon the fact that the major systems of oppression are interlocking.”<sup>410</sup> To do so, the CRC believed that black lesbians needed to conceive of their own identities as a site of political contestation and to think through ways in which

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<sup>408</sup> Roderick Ferguson, *Aberrations in Black: Toward A Queer Of Color Critique* (Minneapolis, MN: University of Minnesota Press, 2003), 117.

<sup>409</sup> Combahee River Collective, “Statement,” (1977), <http://historyisaweapon.com/defcon1/combrivercoll.html> (Accessed June 7, 2017).

<sup>410</sup> Ibid.

they might open political space to assert a socialist politics in a moment when heterosexism and racism were so pervasive in both society and leftist movements. Like white lesbian separatists, the CRC saw the social construction of heterosexual masculinity as having led to a state of male domination over women; they too resisted biological categorization and essentialist logic in arguing that “any type of biological determinism [is] a particularly dangerous and reactionary basis upon which to build a politic.”<sup>411</sup> Rather, they preferred to theorize these developments that led to such a situation and how to think through how to liberate themselves from such racial and gendered oppression. Ultimately, the collective’s project was about the ways in which the cultural and the “personal” are political formulations and how that sort of orientation might expand the bounds of the hegemonic idea of “woman” that had rendered their identities previously invisible.

Gay liberation’s skeptical attitude toward the norms of masculinity and femininity also made way for the expression of a myriad of transsexual, transvestite, and drag queen gender throughout the era. Unlike the homophile movement which had shunned transgressive gender presentations in favor of respectable dress especially at their protests, many in gay liberation called for the dismantling of normative gender codes and believed that sexual and gender liberation entailed the destabilization of such roles prescribed by a heterosexist political and social order. Thus, these identities proliferated

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<sup>411</sup> Ibid; They also found more solidarity with men than did their white lesbian counterparts as they believed that, “[o]ur situation as Black people necessitates that we have solidarity around the fact of race, which white women of course do not need to have with white men, unless it is their negative solidarity as racial oppressors. We struggle together with Black men against racism, while we also struggle with Black men about sexism.”

as transsexual and transvestite persons encouraged one another to live relatively full-time as another gender and drag queens dressed up for the streets and for the dances put on by gay liberation groups. Gender transgression was not only reserved for those who we would think of as falling under the contemporary label of trans or transgender, but the questioning of gender norms also led those like The Flaming Faggots Collective to celebrate male effeminacy in the face of many who still looked upon such transgression with uncertainty.<sup>412</sup>

Though internal tension and conflict over such transgression was by no means entirely eradicated in radical gay circles, transvestite and transsexual identities were included in the platforms of many GLF chapters and autonomous transsexual and transvestite organizations that worked in some degree alongside gay ones were formed as well. In a statement titled “Gay Liberation Demands,” the GLF-LA asserted that “[t]ranssexuals and transvestites have the right to change sex or cross dress.”<sup>413</sup> Despite this example and frequent inclusion of transsexual and transvestites in the statements of purpose of other chapters, the GLF organizations frequently experienced in-fighting over the ways that some members and those in leadership treated these issues and identities.<sup>414</sup> The persistence of such divisions was a motivating factor in the establishment of autonomous transsexual and transvestite organizations, which included those like Lee Brewster’s Queens Liberation Front (QLF), Sylvia Rivera’s and Marsha P. Johnson’s

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<sup>412</sup> Kissack, “Freaking Fag Revolutionaries,” 124.

<sup>413</sup> Gay Liberation Front, Los Angeles, “Gay Liberation Demands,” (n.d.) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>414</sup> Craig A. Hanson, “Gay Liberation Problems” (c. 1969-70) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

Street Transvestite Action Revolutionaries (STAR), and Angela Douglas's Transvestite-Transsexual Action Organization (TAO). These groups shared almost no commonalities with those that came before them such as early transvestite advocate Virginia Prince's the Foundation for Personality Expression (FPE) and the Society for the Second Self, which were recreation-focused rather than political and excluded homosexual men from their ranks.<sup>415</sup> STAR, QLF, and TAO were instead fueled by a sense of injustice and exclusion in both straight and gay communities.<sup>416</sup> Activists who considered themselves most aligned with radical gay politics were those like Sylvia Rivera and Marsha Johnson who inaugurated gay liberation by participating in the riot at Stonewall and began their organizing concurrently with the Gay Liberation Front.<sup>417</sup>

Though it would be anachronistic to think of these articulations of political identity as akin to queer transgender ones of the 1990s that conceived of trans identity as defined by its radical contingency and gender as an ultimately elusive, unstable referent, some transvestite and transsexual liberationists did bring about a new sense of gender and identity to their politics. For instance, while earlier transsexual advocates were primarily concerned with access to healthcare treatments like hormones and surgeries, liberationists were opposed to the overly-clinical view of their identities. At a 1971 meeting of the National Transsexual Counseling Center where Angela Douglas presented alongside a

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<sup>415</sup> Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* (Cambridge, MA: Harvard University Press, 2002), 50-5; Prince's groups and similar ones were primarily concerned with issues like the obscenity laws that prevented them from exchanging literature and photos through the postal service.

<sup>416</sup> Some political differences did exist within these groups. Notably the QLF actually defined itself as a "homophile organization" but also had cross-organizing with more radical founders and members of STAR; See Drag Queens, "Editorial," *Drag Queens: A Magazine about the Transvestite* 1, no. 1 (1971), 5.

<sup>417</sup> Martin Duberman, *Stonewall* (Boston, MA: Dutton, 1993), 251-5.



panel of lawyers, physicians, and welfare workers, an editorial team writing in *Drag Queens* was dismayed at what seemed to be a strictly medical view of their identities, which they felt encouraged the view that transsexuality was a “disease for which there is no cure.”<sup>418</sup> Elsewhere, drag queens associated with the QLF remarked in a 1971 piece in *Drag Queens* that a drag queen is “many times more militant and flamboyant than his transvestite sisters” because he plays around more with gender without hang-ups about masculinity or femininity.<sup>419</sup> While these taxonomies of transsexual vs. transvestite vs. drag queen were not uncommon, most of these organizations stressed at least a nominal inclusivity. At their most ecumenical and aspirational, gay liberation groups conceptualized their constituency as reaching across traditional sexual and gender divisions in their visions of bringing about a new more equal and erotic world. One statement that was formed by the GLF-LA and the Peace and Freedom Party, for example, defined “gay” to “refer to types of non-heterosexual expression including the female and male homosexual, bisexual, transsexual, transvestite, etc.”<sup>420</sup>

Not everyone in gay liberation, however, was so enthusiastic about treating gender transgressors—especially transsexuals—as proper revolutionary gay subjects. While drag queens escaped some vilification in gay liberation groups, transvestites and transsexuals were often denounced by radical gays and lesbian feminists alike. The Red Butterfly cell of GLF-LA issued a statement at the 1970 Revolutionary People’s

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<sup>418</sup> Drag Queens, “Transsexual Conference in Miami,” *Drag Queens: A Magazine about the Transvestite* 1, no. 1 (1971), 8.

<sup>419</sup> Drag Queens, “Viewpoint: Drag Queen vs. Transvestite,” *Drag Queens: A Magazine about the Transvestite* 1, no. 1 (1971), 11.

<sup>420</sup> Gay Liberation Front, Los Angeles, “Peace and Freedom Party Platform Section,” (n.d.) Collection 2012.031, Box 1, Folder 22, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

Constitutional Convention in which they opposed the Gay Caucus's inclusion of a right to self-determination regarding one's sex. They wrote:

“[W]e see this demand as advocating the mutilation of the human body—and at the expense of the State! ‘Modification of sex’ is a false concept... We are philosophical materialists, rejecting the theological concepts of soul-body dualism, and therefore, we consider an injury to the body an injury to the real person. We are opposed to surgical mutilation. Medicine should serve the people.”<sup>421</sup>

Rather than seeing transsexuals as deserving of autonomy over their gender identities, these liberationists cast them as victims of a faulty Cartesian dualism-inflected pattern of thought mixed with oppressive modern medical diagnoses and technologies. The Red Butterfly statement contains too an implicit criticism of scientific and medical authority as it was wielded in that historical moment. Such authorities could only do harm to the body (and in the case of the pathological mode, the mind as well) and thus, surgical modification for transsexuals was seen as inherently suspect and counterrevolutionary.

Many lesbian feminists came to perceive this form of gender transgression as a threat to their project of creating autonomous spaces for women to organize themselves. This essentialist commitment to “womanhood” led to a backlash against transwomen such as lesbian activist and musician Beth Elliott who was removed from both her DOB

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<sup>421</sup> Altman, *Homosexual*, 159.

chapter in 1972 and her role in the 1973 West Coast Lesbian Feminist Conference, the latter at which the keynote speaker Robin Morgan attacked Elliot for being a man masquerading as a woman to infiltrate and rape female attendees.<sup>422</sup> Even those who were more sympathetic such as second wave feminist Andrea Dworkin saw transsexualism not as a result of the psychiatric profession's view that transsexuality stemmed from "faculty socialization" but rather due to "extremely adverse social conditions."<sup>423</sup> By this, Dworkin meant that a mismatch between human nature and an individual's environment was what caused trans persons to seek medical treatment and that in a society that accepted and encouraged androgynous the need for such changes to the physical body would be deemed unnecessary. Writing in 1974, Dworkin did advocate for a right to surgery and hormones for transsexuals, but her theory of their origins was informed by a belief in humanity's multisexual nature which had been reduced to a heterosexual binary system.<sup>424</sup> Dworkin moved further away from her supportive position, however, as she later endorsed Janice Raymond's 1979 *The Transsexual Empire*, in which Raymond condemned transwomen for their "raping" of the female body as a result of their transitions.<sup>425</sup> Raymond and her adherents saw transsexual medical procedures as indicative of a trend of sexist "sex-stereotyping" that presented an additional impediment

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<sup>422</sup> Susan Stryker, *Transgender History, Second Edition: The Roots of Today's Revolution* (Berkeley, CA: Seal Press, 2017), 102-3; Robin Morgan, *Going Too Far: The Personal Chronicle of a Feminist* (New York: Random House, 1977).

<sup>423</sup> Andrea Dworkin, *Woman Hating* (New York: Plume, 1974), 185-6.

<sup>424</sup> Ibid.

<sup>425</sup> Janice G. Raymond, *The Transsexual Empire: The Making of the She-Male, Reissued Version* (New York: Teachers College Press, 1994).

to women's liberation, a late-stage manifestation of heterosexism rather than an opportunity to highlight the socially-constructed elements of gendered identities.<sup>426</sup>

Transvestite/transsexual radicals were not without retorts to these assaults on the supposedly regressive and counterrevolutionary nature of their identities. In her 1973 speech at the Christopher Street Liberation Day, Sylvia Rivera delivered a response to lesbian separatists in which she claimed that the transsexuals that STAR helped did not say that men helped them or that women did; they instead said that STAR got them off the streets, wrote to them in prison, and helped with their transitions.<sup>427</sup> Rivera stressed that the political actions performed by STAR members were of primary importance (as opposed to the nature of their identities) and she contrasted those in opposition to her work as “men and women that belong to a white, middle-class, white club.”<sup>428</sup> Writing in a 1971 issue of *Come Out!*, Rivera wrote that transvestites (and implicitly transsexuals as well) were both the “most oppressed people in the homosexual community” as well as the “most liberated homosexuals in the world.”<sup>429</sup> She argued that radical transvestite/transsexual activists predated radical gay and lesbian ones—this was most likely a reference to a pre-Stonewall riot in San Francisco in 1966—and that being liberated meant being willing to engage in political struggles that might cause one to lose one's job, house, friends, and family in the pursuit of justice.

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<sup>426</sup> Ibid., 179.

<sup>427</sup> Sylvia Rivera, “Y'all Better Quiet Down: Sylvia Rivera's Speech at the 1973 Liberation Day Rally,” in *Street Transvestite Action Revolutionaries: Survival, Revolt, and Queer Antagonist Struggle*, ed. Untorelli Press (Untorelli Press, 2013): 30-1.

<sup>428</sup> Ibid., 30.

<sup>429</sup> Sylvia Rivera, “Transvestites: Your Half-Sisters and Half-Brothers of the Revolution: Sylvia Rivera in 1971 *Come Out!*,” in *Street Transvestite Action Revolutionaries: Survival, Revolt, and Queer Antagonist Struggle*, ed. Untorelli Press (Untorelli Press, 2013): 19-20 (p.19).

Co-founder of STAR Marsha P. Johnson similarly defended her transsexual identity by observing that gay men's hostility toward transwomen might stem from their own unreformed sexist attitudes.<sup>430</sup> On this point, Johnson contended that “[a] lot of gay brothers don't like women! And transvestites remind you of women!”<sup>431</sup> Transmen such as Lou Sullivan were also vocal in their opposition to gay and lesbian denunciations of their identities. Writing throughout the 1970s for the Wisconsin gay paper *GPU News*, Sullivan carved out a space for FTM identities in what he termed “transvestite liberation” and explained to readers and fellow activists that all persons reach for different gender conventions in defining themselves, meaning that trans identities did not represent some abnormal deviation from a natural order.<sup>432</sup> In all, these early trans radicals emphasized that they too were revolutionary-minded subjects engaged in the same gay liberation and women's movement struggles despite the propensity of other members who attempted to write them out based solely on their gender presentations.

Lastly, gay liberation's stance on the malleability of sexuality and the ideology of sexual freedom and experimentation that was all pervasive in New Left circles led to tensions surrounding the practice and identity of bisexuality in a movement that was committed to the idea of a *gay* identity rather than a bisexual one. Liberation groups like the Sexual Freedom League as well as San Francisco Sex Information advocated for the proliferation of diverse and experimental sexual activities and encouraged the practice of

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<sup>430</sup> Marsha P. Johnson, “Rapping with a Street Transvestite Revolutionary: An Interview with Marsha P. Johnson,” in *Street Transvestite Action Revolutionaries: Survival, Revolt, and Queer Antagonist Struggle*, ed. Untorelli Press (Untorelli Press, 2013): 21-9.

<sup>431</sup> *Ibid.*, 23.

<sup>432</sup> Stryker, *Transgender History*, 114-20.

bisexuality for everyone from gays and lesbians to straight Americans.<sup>433</sup> Despite the fact that many gay and lesbian radicals did come to engage in sexual relationships with members of the opposite sex, most resisted the label of “bisexual,” noting that their political identities (i.e. how they discursively expressed themselves) were distinct from their sexual practices.<sup>434</sup> While gay liberationists were often willing to discuss bisexuality in theoretical terms as part of their larger project of cultivating an anti-heterosexual social and political order based in sexual fluidity and heightened sexual agency, the political potency of *gay* and *lesbian* as discursive identities were assumed to carry more radical potentiality than bisexuality.<sup>435</sup> Bisexuality was perceived as a utopic goal that might be achieved in the future; however, it lacked the catalytic quality that gay and lesbian were presumed to possess that could mount an effective challenge to the prevailing heterosexual order.<sup>436</sup>

Though the prevailing position among gay liberationists was that of a political “bisexuality to come,” this did not prevent a minority of activists from articulating their identities as bisexual and organizing their own radical bisexuality organizations to accompany gay, lesbian, and trans ones. These included groups such as the National Bisexual Liberation Group in New York which formed in 1972 and expanded to more

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<sup>433</sup> Steven Seidman, *The Social Construction of Sexuality, 3<sup>rd</sup> Edition* (New York: W. W. Norton & Company, Inc., 2015), 75.

<sup>434</sup> Hobson, *Lavender and Red*, 10.

<sup>435</sup> Steven Angelides, *A History of Bisexuality* (Chicago, IL: University of Chicago Press, 2001), 118. Angelides notes here that the type of bisexuality gay liberationists had in mind was more akin to the Alfred Kinsey mode of bisexual potential rather than the Freudian notion of bisexual innateness.

<sup>436</sup> *Ibid.*, 123, 126-7.

than 5,500 members in ten U.S. chapters in its first three years.<sup>437</sup> On the other side of the country, the San Francisco Bisexual Center, a key institution in early bisexual activism, health, and counseling, was founded in 1976, which later gave rise in 1983 to BiPOL, the nation's first primarily politically-focused bisexual organization.<sup>438</sup> Those like activists Stephen Donaldson and Jefferson Poland of the Sexual Freedom League became key actors in organizations representing those who wished to identify as bisexuals—politically and personally—rather than waiting for some prophesized moment of a bisexual future. Donaldson, who believed that bisexuality possessed a radical essence in its challenge to the hetero-homo binary, found himself both working alongside and dating Martha Shelley who had previously led the New York DOB chapter and had gone on to co-found the Gay Liberation Front.<sup>439</sup> Others like lesbian feminist theorist Kate Millet came to publicly endorse bisexuality as she felt it needed defenses from both straight prejudices as well as from liberationists who felt it to be an inauthentic commitment to radical gay politics.<sup>440</sup>

Millet's decision to defend bisexuality sprung from vehement opposition within gay liberation and lesbian separatist organizations working against the idea that those practicing and identifying as bisexual could adequately challenge the heterosexual status quo. In its "Gay Manifesto," the GLF's Red Butterfly cell wrote that while bisexuality was a positive form of love and erotic expression, the time had not yet arrived where

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<sup>437</sup> BiNetUSA, "A Brief History of the Bisexual Movement," *BiNet USA*, (n.d.), <http://www.binetusa.org/bi-history> (Accessed February 22, 2016).

<sup>438</sup> *Ibid.*

<sup>439</sup> Stephen Donaldson, "The Bisexual Movement's Beginnings in the 70s: A Personal Retrospective," in *Bisexual Politics: Theories, Queries, and Visions*, ed. Naomi Tucker (Binghamton, NY: Haworth Press Inc., 1995): 31-45.

<sup>440</sup> *Ibid.*, 37-8.

bisexuality could in good conscience be championed by gay radicals.<sup>441</sup> This position came from three concerns: first, that homosexuality was the most antagonistic to the heterosexual majority and, therefore, it was the most potent discursive weapon against the normative prescription for an entirely straight society. Secondly, these radicals believed that sexism reigned far too dominant even in gay liberation and that bisexuality could only be entertained “when women’s liberation changes the nature of heterosexual relationships.”<sup>442</sup> The second stance here formed the basis for many lesbian feminist separatist organization’s denunciations of bisexuality as an ineffective means of pursuing women’s liberation. For example, the American Gay Revolution Party Women’s Caucus argued that bisexuality could only be a workable practice for the movement after the abolition of gender and sex roles; until the sexist social order was destabilized and overcome, no element of heterosexual love or sex could be permitted.<sup>443</sup> Lastly, there was a view among some liberationists that bisexual-identified persons chose their label as to avoid being branded as homosexual, a term many saw as loaded with insinuations of perversion.<sup>444</sup>

As the 1970s progressed, many bisexual activist groups folded. The ones that did persist such as the San Francisco Bisexual Center and other social and educational-focused bi groups stayed on the peripheries of the gay and lesbian movement, blocked out by leaders of gay and lesbian organizations intent on establishing more

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<sup>441</sup> Carl Wittman, “Refugees from Amerika: A Gay Manifesto,” 331.

<sup>442</sup> Ibid., 331.

<sup>443</sup> Gay Revolutionary Party Women’s Caucus, “Realesbians and Politicalesbians,” 178; See also, Paula C. Rust, *Bisexuality and the Challenge to Lesbian Politics: Sex, Loyalty, and Revolution* (New York: New York University Press, 1995).

<sup>444</sup> David Thorstad, “LGBT: A Dissection,” *CounterPunch* (July 15, 2016) <https://www.counterpunch.org/2016/07/15/lgbt-a-dissection/> (Accessed August 9, 2017)



straightforwardly gay identities. It was not until the late 1980s and early 1990s that the gay rights movement would see a significant push by bisexual activists for representation. As for their place in gay liberation though, bisexuality was condemned to the margins by those fearing that it would undermine their ultimate goals. Ironically, some of the most radical activists in gay liberation shunned their bisexual counterparts while simultaneously envisioning a future where such sexual and romantic relations might constitute a new social norm of desire.

*Waging War with the Psychiatric Establishment: Combatting Enemies and Installing Allies in the APA*

One of the most consequential moments for gay rights during this period was the direct targeting of the psychiatric establishment and the protests at several annual academic and professional conferences. These actions ultimately resulted in the American Psychiatric Association's (APA) 1973 decision to remove homosexuality from its diagnostic guide, thereby repudiating the assumption that gay men and women exhibited pathological sexualities. A wide-range of gay and lesbian activists engaged in sustained protests at annual APA conferences and a variety of other conventions and meetings where sexologists, psychiatrists, and psychologists met in part to discuss and promulgate their theories and treatments of sexual deviants. Members of the most conservative of the late-era homophile organizations to GLF radicals participated in rancorous, impassioned pleas and demands to eliminate the definition of homosexuality as a "sociopathic personality disturbance" from the Diagnostic Statistical Manual of

Mental Disorders (*DSM*) as well as to halt the practice of treating all same-sex attracted persons as mentally ill.<sup>445</sup>

While the literature on this pivotal moment provides engrossing, detailed accounts of the protests, panels, and backroom conversations that led to this early gay rights victory, there has been a tendency to collapse the gay rights activists involved into a monolith during these crucial several years of ideological and organizational shifts within gay and lesbian politics.<sup>446</sup> Due to their distinctive takes on scientific authority, it is essential to distinguish the homophiles and the more liberal gay rights activists from the gay radicals (and noting the latter's waning influence throughout) when recounting these protests. From the beginning of the first protests of the APA and the American Medical Association (AMA) conferences from 1968-1970 to the 1972 and 1973 conferences where political activists sat alongside psychiatric experts during official panel sessions, the GLF and other radical groups began to breakdown and fracture, giving rise to a new conglomeration of groups like the Gay Activist Alliance (GAA) and the National Gay Task Force. The Task Force especially came to unite the older militant homophiles with

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<sup>445</sup> In 1968, homosexuality and other forms of "sexual deviation" were given their own section separate from "sociopathic personality disorders"; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (Washington, D.C.: American Psychiatric Association, 1952), 38-9; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, 2nd ed.* (Washington, D.C.: American Psychiatric Press, 1968), 79.

<sup>446</sup> Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (New York: Basic Books, 1981); Jack Drescher, "A History of Homosexuality and Organized Psychoanalysis," *Journal of the American Academy of Psychoanalysis and Dynamic Psychiatry* 36, no.3 (2008): 443-60; For a few recent exceptions to the progressive narrative that collapses internal differences within the groups of actors and organizations involved see: Geeti Das, "Mostly Normal: American Psychiatric Taxonomy, Sexuality, and Neoliberal Mechanisms of Exclusion," *Sexuality Research and Social Policy* 13, no.4 (2016): 390-401; Abram J. Lewis, "We Are Certain of Our Own Insanity: Antipsychiatry and the Gay Liberation Movement, 1968-1980," *Journal of the History of Sexuality*, 25, no.1 (January 2016): 83-113; Regina Kunzel, "The Rise of Gay Rights and the Disavowal of Disability," in *The Oxford Handbook on Disability History*, eds. Catherine Kudlick, Kim Nielsen, Michael A. Rembis (New York and London: Oxford University Press, 2018), 459-76.

the least radical of the former gay liberationists into what would become the nascent liberal gay rights movement that dominates the contemporary politics of sexuality. In reexamining the developments that pushed an older, more conservative opinion on homosexuality out of relevance within the field of psychiatry, I aim to demonstrate how the consolidation of a new gay rights movement built on a liberal civil rights foundation facilitated new, stronger relationships with scientific and medical allies during these battles. The massive victory at the APA combined with the loss of the anti-scientific disposition of many gay liberationists created fertile grounds for a continued reliance on such experts in political and legal fights to come.

Before moving onto the more immediate events that led to the APA's reversal, it is instructive to briefly look at a few instances in which homophile and gay liberation groups had previously encountered and responded to their allies and sympathizers in the sciences. Most high-profile homophile leaders and organizations were generally comfortable collaborating with researchers and practitioners who were willing to use their expertise to challenge both the pathological model's dominance in their fields and the use of such science to legitimate the oppressive laws and practices of the state toward supposed sexual deviants. For instance, the Society for Individual Rights wrote a letter to the American Medical Association (AMA) in 1968 calling for them to host an interdisciplinary panel on homosexuality at their next national conference.<sup>447</sup> SIR leaders asked for a session in which homophiles might communicate alongside "anthropologists, sociologists, psychologists, zoologists, and psychiatrists of the non-sickness, as well as

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<sup>447</sup> Society for Individual Rights, "Annual Report," (February 1966). Collection 2011-075, Box 1, Folder 1, Society for Individual Rights (SIR) Records, ONE National Gay & Lesbian Archives, Los Angeles, CA.

the sickness school.”<sup>448</sup> ONE Inc. too expressed support for their allies in the sciences during this time, as evidenced in the 1971 coverage of the report on homosexuality produced by the Task Force on Homosexuality commissioned by the National Institute of Mental Health (NIMH).<sup>449</sup> The editorial board’s description of that report as the “American Wolfenden Report” (referring to British Parliament’s 1957 report calling for a decriminalization of homosexuality) and “a Magna Carta for homophiles” indicated a strong belief among these activists that building inroads with medical and psychiatric professionals presented a clear, historically-tested path to victory.<sup>450</sup>

Going into the years-long fight at the APA, gay liberationists had taken a decidedly different stance toward collaboration with these experts. While the SIR had gone as far as to even suggest inviting defenders of the pathological model to their proposed AMA panel, gay radicals did not trust even sympathetic experts to contribute to their project of expanding notions of sexuality and gender beyond the homosexual-heterosexual binary. For example, after the publication of the nonprofit National Association for Mental Health’s (NAMH) 1970 “Statement on Homosexuality,” which advocated for the decriminalization of homosexuality, the GLF-LA denounced the report as a trespassing of scientific authority into a domain in which gay activists should exercise total control.<sup>451</sup> The GLF-LA declared that the NAMH’s report was at best

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<sup>448</sup> Ibid.

<sup>449</sup> ONE Inc., “February 1971 Newsletter,” *ONE Inc.* (February 1971) Collection 2014-109, Box 1, Folder 21, Stanley Brossette Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>450</sup> Ibid.

<sup>451</sup> National Association for Mental Health, “Statement on Homosexuality,” (1970) Collection 3465, John E. Fryer Papers, Historical Society of Pennsylvania, Philadelphia, PA, [http://digitallibrary.hsp.org/index.php/Detail/Object/Show/object\\_id/13639](http://digitallibrary.hsp.org/index.php/Detail/Object/Show/object_id/13639)

“token liberalism” and that the organization had shown its latent sexism by not speaking to female sexuality at all.<sup>452</sup> Reasserting the right to define themselves, they wrote:

“WHO HAS GIVEN YOU THE RIGHT TO ESTABLISH THE DEFINITION OF OUR BEING? WHAT HOMOSEXUALS WERE CONSULTED CONCERNING THE VALIDITY OF YOUR POSITIONS. WHY WAS NO MENTION OF THE FEMALE HOMOSEXUAL MADE? Homosexuals in America are at last standing up and demanding the right to define their own humanity. No longer will we stand by passively and allow you to tell us who we are.”<sup>453</sup>

Whereas homophiles saw gains to be won against police violence and other forms of daily state-sanctioned discrimination through collaboration with scientific experts, gay radicals rejected what they perceived as a reformist route that led further away from their goal of redefining sexuality and transforming political and erotic relations more fundamentally. More simply put, liberationists did not tend to see the enemy of their enemy as a friend, but rather just another—albeit more sympathetic—elite attempting to define their identities for them.

The liberationists’ distrust of organized scientific institutions was not without merit during this time. Throughout the 1960s and into the 1970s, the psychiatric

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<sup>452</sup> Gay Liberation Front, Los Angeles, “To the National Association for Mental Health Re: Position Statement on Homosexuality and Mental Illness” (n.d.) Collection 2012.031, Box 1, Folder 22, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>453</sup> Ibid.

establishment was not particularly shy about its classification of gays and lesbians as deviants and its conservative orientation toward “managing” and “treating” homosexual behavior and inclinations like any other mental illness. Although Sigmund Freud himself did not consider homosexuality to be pathological, the adaptational school of neo-Freudians that came to steer the field of psychoanalysis through the 1940s-1960s were much more willing to see homosexuality as a treatable sexual disorder in their patients. Sandor Rado came to reject Freud’s theory of innate bisexuality as well as Alfred Kinsey’s studies that conceived of homosexuality as a “natural variation” of human sexuality by instead promoting the view that heterosexuality constituted a biological norm from which a psychologically healthy-minded person would not stray.<sup>454</sup>

Rado’s theories and his prescription to treat homosexuality therapeutically were in line with the national sex panics at the time, which tended to portray homosexuals as synonymous with child predators, psychopaths, weak-willed communists, or godless radicals opposed to the family.<sup>455</sup> Throughout the 1950s-60s, this theory was entrenched in psychiatric and psychoanalytic circles as evidenced in the classification of homosexuality as a sociopathic mental disorder in the 1952 first edition of the *DSM*.<sup>456</sup> The theory was given additional weight by Irving Bieber’s infamous 1962 report *Homosexuality: A Psychoanalytic Study of Male Homosexuals*, which employed the largest sample of self-identified homosexuals in American history to show that

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<sup>454</sup> Bayer, *Homosexuality and American Psychiatry*, 28-9; Drescher, “A History of Homosexuality and Organized Psychoanalysis”; Alfred C. Kinsey, *Sexual Behavior in the Human Male* (Bloomington, IN: Indiana University Press, 1998).

<sup>455</sup> Estelle B. Freedman, “Uncontrollable Desires: The Response to the Sexual Psychopath, 1920–1960,” *Journal of American History* 74 (June 1987): 83–106.

<sup>456</sup> American Psychological Association, *Diagnostic and Statistical Manual of Mental Disorders*.

homosexuality was caused mainly by disturbances in the maternal and paternal relationships of a male child during his crucial developmental years.<sup>457</sup> In 1965, psychiatrist and Bieber-collaborator Cornelia Wilbur extended this theory to female homosexuality too, arguing that lesbianism could be largely attributed to the impact of being raised in a household where the mother and father did not adhere to gender-based assumptions of proper femininity and masculinity respectively.<sup>458</sup>

By the late 1960s, a few small, mostly underground, groups of dissenters in psychiatry and related disciplines began planning quietly how to challenge the status quo of their fields, which had remained stalwartly conservative over the course of a decade of massive social change. Dr. Charles Socarides embodied this old guard approach as he rose to prominence in psychiatry as an ally of Bieber's. Working in a tradition that emphasized maternal influence as the cause of overly-effeminate young gay male children who had "failed" to develop a "mature gender identity" and developed same-sex attractions, Socarides made his name in both theoretical developments as well as his patient "cure rate."<sup>459</sup> In reaction to this older conservative generation's control of their discipline, a cabal of young liberal psychiatrists began meeting as the "Young Turks," an organization that would soon formalize as the Committee for Concerned Psychiatry (CCP).<sup>460</sup> These socially-conscious psychiatrists aimed to elect a new slate of APA governing officials as part of a larger effort to introduce a wide array of liberal

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<sup>457</sup> Irving Bieber et al., *Homosexuality: A Psychoanalytic Study of Male Homosexuals* (New York: Vintage Books, 1962).

<sup>458</sup> Terry, *An American Obsession*, 365.

<sup>459</sup> Bayer, *Homosexuality and American Psychiatry*, 34-7.

<sup>460</sup> Alexis Spiegel, "81 Words," *This American Life* (January 18, 2002) <https://www.thisamericanlife.org/radio-archives/episode/204/81-words> (Accessed July 27, 2017).

reforms.<sup>461</sup> As a large part of this agenda, they sought to challenge what they saw as outmoded and biased approaches to diagnosing and treating social behaviors and identities including homosexuality. At the same time, another group of more discreet, closeted gay psychiatrists began meeting as the “GAYPA” with the intention of pushing the APA Committee on Nomenclature to remove homosexuality from its place in the 1968 second edition of the *DSM* where it had migrated from the mental disorders section to a new separate taxonomy of “sexual deviations,” including pedophilia and fetishism as well as transvestitism, sadism, and masochism.<sup>462</sup> These new groups would prove to be essential in the homophiles’ collaborative approach to reforming the APA through both external pressure and from within the profession itself.

In 1968, militant homophile activists working with the North American Conference of Homophile Organizations (NACHO) showed up at the 1968 AMA conference in San Francisco to protest a talk given by Socarides. Not only did these homophiles pass out leaflets on the dangers of the psychotherapeutic practices Socarides was promoting, they also demanded representation on panels to advance their own understandings of their sexualities.<sup>463</sup> Two years later in the same city, homophile and gay liberation activists targeted the APA conference and staged a takeover of panels on which Bieber and other members of the pathological school were scheduled to speak. The aftermath of this protest proved to be even more politically consequential, however, as it moved the psychiatrist Kent Robinson to meet with SIR leader Larry Littlejohn who

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<sup>461</sup> Ibid.

<sup>462</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, 2nd ed.*, 79; Bayer, *Homosexuality and American Psychiatry*, 40.

<sup>463</sup> Bayer, *Homosexuality and American Psychiatry*, 42.



requested that homophiles be included in panel discussions on sexuality at future APA conferences.<sup>464</sup> Making good on his promise to do so at the 1971 annual meeting, Robinson set in motion this new form of collaboration among homophile allies in the sciences and activists, which led to panels at the next three APA conferences where militant homophile leaders such as Frank Kameny, Barbara Gittings, Del Martin, Lilli Vincenz, and Jack Baker sat alongside psychiatrist and future APA president Judd Marmor, psychiatrist and feminist Robert Seidenberg, and others who would come to be allies in the intense 1973 fight over homosexuality's place in the *DSM* and in future political and legal struggles.<sup>465</sup>

While the homophiles were jockeying for representation among the experts, members of the GLF were staging similar disruptions—sometimes alongside their homophile counterparts—and simultaneously rejecting the idea that scientists, even sympathetic ones, ought to be given a platform to discuss their sexualities. At the 1970 Second Behavior Modification Conference LA, for example, GLF members crashed a session on treatments to curb homosexual behavior, chanting things like “medieval torture!” and “barbarism!”<sup>466</sup> Unlike the homophiles, however, members of the GLF would only work with the experts in instances where they could direct the conversation such as in organizing small discussion groups in a conference room after a panel had been disrupted.<sup>467</sup> They did not see the merit in sitting down next to the experts to engage

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<sup>464</sup> Ibid., 103.

<sup>465</sup> Ibid., 104-9; As Bayer recounts, Robinson acted both out of a sense of duty to a budding civil rights struggle as well as a fear that activists attempt would to not only disrupt one panel but the entire next conference if homophile demands for representation were not met.

<sup>466</sup> Ibid., 99.

<sup>467</sup> Ibid.

in a dialogue about research and treatments. As exemplified in the protest of a shock therapy proponent at a behavioral health conference, GLF-LA members shouted “[y]ou’re going to talk to us as you’ve never talked to homosexuals before—as equals!”<sup>468</sup>

A rationale for this approach can be seen in Bay Area GLF member Gary Alinder’s essay, “Gay Liberation Meets the Shrinks,” in which Alinder disparaged the entire psychiatric profession by condemning the way that the experts “protected [themselves] from emotional involvement by a gibberishy vocabulary which translates humanity into ‘scientifically’ quantifiable and ‘objective’ terms.”<sup>469</sup> Alinder accused even the liberal psychiatrists of “be[ing] caught up in a sense of their unusual importance” and “hav[ing] no qualms about male chauvinism [as] they’ve never even thought about it.”<sup>470</sup> For Alinder and likeminded radicals, the sexist roots of the oppression of gays, lesbians, and other “sexual deviants” could not be adequately addressed by such a narrow-sighted, male-dominated profession.

Other writings like the Chicago Gay Liberation Front’s leaflets at the 1970 AMA conference posited that only “political organization and collective action” would bring about liberation and that, accordingly, all psychiatrists should “refer their homosexual

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<sup>468</sup> Tony DeRosa, “Off Dr. Feldman! (On Reconstituting as Psychologist’s Convention with Gay:Power),” (n.d.) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>469</sup> Gary Alinder, “Gay Liberation Meets the Shrinks,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 141-5.

<sup>470</sup> *Ibid.*, 141.

patients to gay liberation.”<sup>471</sup> Rather than engaging in sterile professional discussions with one another, the Chicago group implored the medical profession to “repudiate the adjustment approach as a solution to homosexual oppression and instead to further homosexual liberation by working in a variety of political ways [including] re-educating the public, supporting pickets, attending rallies, [and] promoting social events.”<sup>472</sup> And while the GLF flipped the homophile notion of working with these experts by instead demanding that they subordinate themselves to the direction of gay liberation, these radicals did believe that one portion of the population could still use psychiatric help—the rich and powerful who perpetuated their oppression. At the close of their AMA leaflet, GLF-Chicago wrote: “Once relieved of patients whose guilt is not deserved but imposed, psychiatrists will be able to devote all their effort to the rich—who do earn their guilt but not their wealth, and can best afford to pay psychiatrists’ fees.”<sup>473</sup>

As the protests at these conferences continued into the first few years of the 1970s, two concurrent developments led gay rights activism down the path of scientific collaboration and further away from the anti-expert ethos of gay liberation. The first of these is the fact that gay liberation’s existence as a national movement was a phenomenon that spanned only the first few years after the riot at Stonewall. As the fights at the APA raged on, internal debates and structural deficiencies within the GLF splintered the political front into pieces. Organizations like the Gay Activist Alliance and

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<sup>471</sup> Chicago Gay Liberation Front, “A Leaflet for the American Medical Association,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 145-7.

<sup>472</sup> *Ibid.*, 147.

<sup>473</sup> *Ibid.*

the National Gay Task Force—which were more single-issue gay-centric and less radical and political economy-minded than the GLF had been—continued to protest at these meetings of scientists but they quickly blended with the militant homophiles in their own fading organizations to establish a new gay politics that would spawn into early versions of the liberal gay rights advocacy groups that dominate the contemporary movement.

As actions were being planned among these activists for the 1972 conference circuit, the movement was well-positioned for the next key development: the establishment of several different alliances among high-ranked, and well-organized liberal psychiatrists within the APA. Having decided the previous year to mount a direct challenge to the *DSM's* classification of homosexuality, gay activists arrived at the 1972 APA conference in Dallas to conduct a panel titled "Psychiatry: Friend or Foe to Homosexuals?" with the aim of convincing potential allies that the status quo could not—and should not—hold.<sup>474</sup> This panel featured Barbara Gittings and Frank Kameny alongside Judd Marmor and—most famously—the then-closeted psychiatrist and GAYPA member Dr. John Fryer who hid his identity by adopting the moniker “Dr. H. Anonymous” and wearing a Richard Nixon mask, oversized business attire, and overcoat. Combining the theatrics of political protest with a serious and professional conference panel, Fryer stated at the beginning of the panel that “I am a homosexual. I am a psychiatrist,” and then implored his colleagues to consider the ways in the APA had become complicit in the oppression of mentally-healthy individuals who were only

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<sup>474</sup> LGBT Issues Committee of the Group for the Advancement of Psychiatry, “The Declassification of Homosexuality by the American Psychiatric Association,” *The Association of LGBTQ Psychiatrists*, [http://www.aglp.org/gap/1\\_history/#declassification](http://www.aglp.org/gap/1_history/#declassification) (Accessed August 3, 2017).

diagnosed and treated as ill by a backward, unscientific bias in their field.<sup>475</sup> The fact that a gay psychiatrist—albeit a masked one—could address the conference in this fashion was testament to the shifting culture and gradual reforms occurring throughout the APA. That same year, Marmor was elected vice president of the APA and the then-closeted liberal psychiatrist John Patrick Spiegel was elected to the Board of Trustees, thereby setting the stage for future liberal reforms.<sup>476</sup>

The catalyst for changing the *DSM* was also sparked that year by GAA activist and Task Force founding member Ronald Gold who came to work behind the scenes with reformist psychiatrists to mount a challenge to the APA's Committee on Nomenclature. Impressed by the GAA zaps at the 1972 Association for the Advancement of Behavior Therapy conference in New York, psychiatrist and APA Committee on Nomenclature member Robert Spitzer approached Gold to discuss how he might help propel the project forward. This led to Gold's well-known speech, "Stop It, You're Making Me Sick!," at the 1973 APA conference in Hawaii where he would later introduce Spitzer to the members of GAYPA, which led quickly to a draft proposal to the nomenclature committee to erase homosexuality from the list of sexual deviant disorders in the *DSM*.<sup>477</sup> Spitzer was eager to help as he viewed homosexuality not as pathological but instead a "suboptimal" disposition that could potentially cause subjective distress in a person but was not at its core a psychiatric disorder.<sup>478</sup> In fact, as Spitzer and others on the Council on Research and Development and Reference committees worked to move the proposed

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<sup>475</sup> Ibid.

<sup>476</sup> Spiegel, "81 Words."

<sup>477</sup> Ibid.

<sup>478</sup> Waidzunus, *The Straight Line*, 71-2.

change to the *DSM* through the APA's internal bureaucracy, a new diagnosis for those experiencing distress with their sexualities (termed "sexual orientation disturbance") was created to replace the older more oppressive one. By December of 1973, though, the APA had removed the pathological diagnosis from the *DSM*, thereby renouncing the notion that same-sex attraction and behavior were manifestations of a mental illness. Though Socarides and other psychoanalysts pushed back against what they saw as an undue politically-motivated reversal of their field's near-hundred-year tradition of pathologizing non-heterosexual behavior, a referendum of APA members voted 58% in favor of retaining the change to the *DSM*, thus fundamentally transforming the way scientists and practitioners in the science of sexuality approached homosexuality.<sup>479</sup>

The alliances that were forged among gay and liberal psychiatrists and the emerging liberal gay rights movement and their ultimate success in the fight over the *DSM* demonstrated to the latter that there were many other victories to be had through maintaining and building upon these institutional relationships. In political science parlance, this victory set in motion a path dependent structural feature to the gay rights movement as activists began to see positive political returns on their investments in these associations.<sup>480</sup> And with the demise of the GLF, the anti-scientific authority streak in the politics of sexuality disappeared with it. This explains why immediately after the *DSM* fight co-founder and president of the Task Force Bruce Voeller—a biologist himself—

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<sup>479</sup> LGBT Issues Committee of the Group for the Advancement of Psychiatry, "The Declassification of Homosexuality."

<sup>480</sup> Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *The American Political Science Review* 94, no. 2 (2000): 251-67.

proposed a plan for future partnerships with the APA.<sup>481</sup> Voeller sought to establish formal relations with the psychiatric community to jointly take on sodomy laws, military exclusion, onerous immigration laws and practices, and to pass anti-discrimination statutes. Although the APA leadership ultimately declined to sign on to Voeller's specific long-term plan, the executive committee of the APA and high-ranking members like Judd Marmor came to work with the nascent Task Force on a variety of court cases and legislative fights in the years to come. These relationships became symbiotic as gay and lesbian psychiatrists increasingly came out of the closet to their colleagues, formed internal associations such as the Gay, Lesbian, and Bisexual Caucus, and pushed the APA in an increasingly liberal reformist direction, which would then in turn bear influence on the future of gay politics.

*Conclusion: The Demise of Gay Liberation and the Future of Gay Rights*

By the mid-1970s, several broader political developments were creating the conditions for the rise of a liberal gay rights movement to replace the splintered homophile and gay liberation one. The demise of the New Left—to which gay liberation came late—the subsequent rise of the New Right, and the early days of neoliberalism all changed the political universe dramatically.<sup>482</sup> The tenuous coalitions of gay, lesbian, bisexual, transsexual, and Black Power organizations were quickly disintegrating as their constitutive groups fell apart due to state crackdowns, structural deficiencies, internal

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<sup>481</sup> Bayer, *Homosexuality and American Psychiatry*, 155.

<sup>482</sup> Elizabeth Armstrong, *Forging Gay Identities*, 115; David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005);

fighting, and—for some—a turn away from the realm of politics entirely.<sup>483</sup> Even the more left-leaning remnants of this era like the GAA had provisions in their constitutions forbidding political endorsements of or formal affiliations with organizations that were not singly-focused on issues of gay and lesbian rights.<sup>484</sup> As Dennis Altman wrote in the 1982 follow up to his book on gay liberation, the effects of consumer capitalism, the increasing normalization of gay life, and the new gender normative gay culture that sprang from these conditions facilitated the construction of a gay minority identity, lifestyle, and politics that presented little threat to the heterosexual order.<sup>485</sup> Upon reflecting on these political, cultural, and commercial changes, Altman and others realized that their musings on “the end of the homosexual” were premature and naïve. This liberal turn in gay politics coupled with the alliances made with scientific authorities prior to and throughout the APA fights, however, did not immediately engender a biological account of gay political identity. In an educational pamphlet produced by the GAA titled “20 Questions on Homosexuality,” activists continued to eschew a neat “nature versus choice” frame, arguing instead that questioning the origins of homosexuality was “just as useful [as asking] ‘[w]hat causes heterosexuality?’” and that

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<sup>483</sup> Emily Hobson’s book on the gay left argues convincingly that gay liberation groups persisted in some following the collapse of the GLF; however, my focus here is on the emergence of the liberal gay rights movement that eclipsed these generally more local-based organizations, which were not nearly as influential in constructing ideas of gay identity in legal, political, and cultural terms as the organizations I highlight here and in future chapters were.

<sup>484</sup> Gay Activists Alliance New York, “GAA Constitution” (July 16, 1970) Collection 2010.002 Box 1, Folder 1, Gay Activists Alliance New York Collection, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>485</sup> Dennis Altman, *The Homosexualization of America* (Boston, MA: Beacon Press, 1982); Alexandra Chasin, *Selling Out: The Gay and Lesbian Movement Goes to Market* (New York: Palgrave, 2000).



the answers were largely beside the point of their rights projects.<sup>486</sup> But as the GAA gave way to the Task Force and other liberal organizations emerged, drawing gay politics further away from the GLF's genealogy, the gay rights movement would come to adopt an ethnic minority model more akin to the militant homophile's "gay is good" version of political identity. This model came to be advanced with a strong emphasis on gay and lesbian identity as something innate and "true" to oneself rather than the homophile version that frame itself around a classification of those suffering from police harassment and other forms of state violence.<sup>487</sup> This reformulation of gay identity entailed a casting aside of the liberationist critiques of heterosexuality as an institution and instead focused on what they saw as the equal naturalness and goodness of gay and lesbian identities. As the next chapters show, this strengthening and expanding alignment with scientific and medical authorities would come to bear significant influence on the political and legal strategies and rhetoric of the liberal gay and lesbian rights movement's approach to articulating its identities going forward.

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<sup>486</sup> Gay Activists Alliance New York, "20 Questions on Homosexuality," (n.d.) Collection 2010.002 Box 1, Folder 8, Gay Activists Alliance New York Collection, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>487</sup> Roger Lancaster, "Identity Politics Can Only Get Us So Far," *Jacobin* (August 3, 2017), <https://jacobinmag.com/2017/08/identity-politics-gay-rights-neoliberalism-stonewall-feminism-race> (Accessed August 10, 2017).

## PART II: EVOLUTIONS

## CHAPTER 4: “Why is My Child Gay?”

### Co-Producing the Foundations of the ‘Born this Way’ Gay Political Identity

In this chapter, I focus on how the budding gay and lesbian movement’s project of making alliances with scientific and medical actors and institutions in the late 1970s and 1980s established the foundations of the “born this way” gay political identity that would come to define the movement’s articulation of gay identity. I argue that the use of scientific expertise in the movement’s political discourse facilitated the creation of a relatively conservative neoliberal version of gay politics that has defined the contemporary LGBTQ movement. Looking closely to the origins and development of the National Gay Task Force, an early leader in the liberal gay rights movement, and the family-based gay rights organization PFLAG, I demonstrate how these scientific alliances led the movement to adopt a narrow biodeterministic conception of what it means to be “gay,” therein limiting the bounds of queer politics and abandoning the more radical early 1970s gay liberation movement’s project of exposing heterosexuality and homosexuality as false and constraining social categories.

I am far from the first to mark this period as the birthplace of a more liberal, less radical gay politics in the U.S. In his 1982 book cited at the end of the last chapter, Dennis Altman checked the optimism of his previous prediction that the “end of the homosexual” was nearing and ushering in a more “polymorphous perverse” society where old biases and assumptions about sexual and gender differences would be traded in

for a freer state of social relations.<sup>488</sup> As Steven Epstein observed five years later, a split had emerged between a social constructionist camp who—often from their positions in academia—adhered to the more revolutionary spirit of gay liberation, whereas what might be thought of as the political and cultural “gay community” came to embrace the homo-hetero binary and a host of gendered assumptions that came with it.<sup>489</sup> Noting the irony of this situation, Epstein pointed to the gay and lesbian community’s adoption of an ethnic political identity model as an explanation. He theorized that the “hardening” of the categories homosexual and heterosexual came from this new common sense approach that gays and lesbians constituted a “distinct social group with their own political and social interests.”<sup>490</sup> I expand on Epstein’s observation here in contending that this hardening of categories was in large part facilitated by the Task Force, PFLAG, and similar organizations’ alliances with scientific expertise and their willingness to incorporate the language and logic of bioessentialism into their political programs. To make this case, I investigate archival materials including these organizations’ pamphlets, speeches given by their leaders, correspondence with scientific researchers, issue-based campaign training materials, and conference presentations to illustrate how the first set of national gay and lesbian rights organizations constructed what would be the institutional and ideational foundations of the “born this way” gay political identity.

At its core, this chapter is a case study in what Science and Technology Studies scholar Sheila Jasanoff terms *co-production*, a phenomenon in which scientific and

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<sup>488</sup> Dennis Altman, *The Homosexualization of America* (Boston, MA: Beacon Press, 1982).

<sup>489</sup> Steven Epstein, “Gay Politics, Ethnic Identity: The Limits of Social Construction,” *Social Review* 93-94 (May-August 1987): 9-54.

<sup>490</sup> *Ibid.*, 22.

political actors work in tandem to create a new logic of the social.<sup>491</sup> By tracing the political development of one of the major liberal gay rights organizations alongside developments within various scientific approaches to the science of sexuality, I illustrate the intertwined nature of their ideological conceptions of gay identity. As gay rights activists made significant gains against an older psychoanalytic paradigm that emphasized parental influences on a child's sexuality, new possibilities for biological understandings of homosexuality proliferated and were encouraged by a desire for experts to aid them in articulating sexuality as an inherent orientation, one that was natural, fixed, non-threatening to the social order, and—for the most part—de-sexualized. This new construction of homosexuality and its commitment to a politics of the family often entailed a self-conscious eschewing of the very notion of sexuality in favor of a de-sexualized gay subject whose orientation was best defined in biological or genetic terms rather than by one's desires or sexual behavior.

In taking account of factors such as the political orientation and incentives of the Task Force and PFLAG specifically as well as disciplinary developments in the sciences that are all constitutive components of this process of co-production, I pay special attention to the impact of the broader neoliberal political ideological context that matured along with these developments from the late 1970s onward. Scholars such as Lisa Duggan have described this period as one that laid the foundations for the 1990s “homonormative” turn in gay politics, which she defined as “a politics that does not contest dominant heteronormative assumptions and institutions but upholds and sustains

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<sup>491</sup> Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and the Social Order* (London: Routledge, 2006).

them while promising the possibility of a demobilized gay constituency and a privatized depoliticized gay culture anchored in domesticity and consumption.”<sup>492</sup> Lauren Berlant too has identified particularly conservative elements of neoliberalism where the idea of a “familial politics” became central to public discourse and the Reagan ideal of the family and its place in the private sphere as the most important realm of citizenry.<sup>493</sup> Lastly, Melinda Cooper most recently noted the ways in which neoliberal theorists and policymakers responded to the breakdown of the Fordist social order in ways that both sought to accommodate markets to new social arrangements while also “reestablish[ing] the private family as the primary source of economic security and a comprehensive alternative to the welfare state.”<sup>494</sup>

Along these lines, I show for instance how PFLAG especially began to employ a range of early neoliberal rhetoric regarding social welfare policy and the notion of “equal opportunity.” In their focus on familial relations and creating culture gay and lesbian children could avoid the “welfare rolls” and thrive as self-sustaining market actors just like their straight counterparts, PFLAG embodied the logic of a later utterance by Margaret Thatcher that there was no such thing as society, only individuals and families.<sup>495</sup> Accordingly, I look for the seeds of a neoliberal gay and lesbian politics here, observing how both gay rights organizations and their allies in the sciences came to

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<sup>492</sup> Lisa Duggan, “The New Homonormativity: The Sexual Politics of Neoliberalism” in *Materializing Democracy: Toward a Revitalized Cultural Politics*, edited by Russ Castronovo and Dana D. Nelson (Durham, NC: Duke University Press, 2002), 179; Lisa Duggan, *The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston, MA: Beacon Press, 2003).

<sup>493</sup> Lauren Berlant, *The Queen of America Goes to Washington City: Essays on Sex and Citizenship* (Durham, NC: Duke University Press, 1997).

<sup>494</sup> 9.

<sup>495</sup> Margaret Thatcher, “Interview for *Woman’s Own*,” (September 23, 1987), <https://www.margaretthatcher.org/document/106689> (Accessed January 25, 2018).

understand gay and lesbian identity in the context of considerations of the family, the welfare state, and the origins and natural functions of sexuality.<sup>496</sup>

It must be noted from the onset that there is very little specific mention of lesbian politics or lesbian identity as distinct from gay politics and gay identity in this chapter. The primary reason for this is that from its origins, the liberal gay rights program was not nearly as concerned with an attention to lesbian feminism in the way that gay liberation had been. As historian Amin Ghaziani observed, this was a period in which lesbian feminism was fading from this realm of politics. A new effort to illuminate and get rid of a male-bias in the notion of homosexuality was replacing it.<sup>497</sup> As then-Co-Executive Director of the Task Force Lucia Valeska declared to a gathering of the National Organization for Women (NOW) in 1980, “we are creating a well-defined agenda, which both women and men in the movement will support *over and above the differences*.”<sup>498</sup> And as HIV and AIDS devastated gay and lesbian communities in the following years, lesbian activists became less doctrinaire about how they engaged in coalitions with male-dominated gay rights organizations (though strategic downplaying of gender in this sense was also forced in ways that are all too familiar in the history of gay politics and culture).<sup>499</sup> Thus, as the gay rights movement became the “gay and lesbian rights movement” throughout the late 1970s and 1980s, the movement’s references to

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<sup>496</sup> For another “seeds of neoliberalism” perspective, see: Christina Hanhardt, *Safe Space: Gay Neighborhood History and the Politics of Violence* (Durham, NC: Duke University Press, 2013).

<sup>497</sup> Amin Ghaziani, *The Dividends of Dissent: How Conflict and Culture Work in Lesbian and Gay Marches on Washington* (Chicago, IL: University of Chicago Press, 2008), 27-9.

<sup>498</sup> Lucia Valeska, “NOW Speech October 4, 1980,” in *Speaking for Our Lives: Speeches and Rhetoric for Gay and Lesbian Rights (1892-2000)*, ed. Robert B. Marks Ridinger (Binghamton, NY: Harrington Park Press, 2004): 350-57 (352).

<sup>499</sup> Lillian Faderman, *Odd Girls and Twilight Lovers: A History of Lesbian Life in Twentieth-Century America* (New York: Columbia University Press, 2012), 280

etiologies of gay sexual identity came to implicitly refer to male and female sexual identities.<sup>500</sup>

As for the structure of what follows, I begin by describing the Task Force PFLAG as a liberal gay rights institution, paying attention to how the new liberal, more pluralistic ideology differed so drastically from previous instantiations of gay politics in the U.S. I then discuss the relationships between the Task Force and the Kinsey Institute as well as show how the 1973 success at the American Psychiatric Association to de-medicalize homosexuality created an opportunity for biological considerations to be taken more seriously. I note in these sections how the Task Force deployed this language and how PFLAG's early post-1973 claims concerning gay and lesbian identity were already rooted in strong statements about innateness and biologically-fixed notions in a time when most of their scientific allies were offering much more nuanced considerations regarding biology. The next section demonstrates the ways in which scientific developments came to produce evermore biodeterministic accounts of gay identity, which represented sharp turns from older, more sociologically-informed approaches taken by scientists with gay sympathies, such as those working at the Kinsey Institute. In the last section, I look at PFLAG documents and conference proceedings from the mid-to-late 1980s that showcase the ways in which scientific discourse and authority were deployed to further solidify claims about the immutable nature and biological origins of homosexuality. I conclude with a note on how these developments set up the liberal gay rights movement both to help engender as well as popularize and politicize the gay gene and gay brain studies of

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<sup>500</sup> This is despite the fact that the vast majority of these studies focused on gay men.



the 1990s. Those studies then came to figure prominently in legal and constitutional strategies as well as in popular discourse.

### *The Liberal Turn in Gay and Lesbian Politics*

Formed in 1973 out of remnant parts of the Gay Activist Alliance and the last standing homophile organizations—both of which housed those who had grown weary of gay liberation’s radicalism and what they perceived to be a bloated political agenda—the National Gay Task Force quickly became one of the preeminent institutions in liberal gay politics. Like the GAA, the Task Force considered itself to be primarily a civil rights-oriented gay rights organization with the aim of eliminating discrimination in housing, employment, and public accommodations, as well as challenging sodomy bans that were disproportionately applied to police gays and lesbians. Though the Task Force has been known for cultivating grassroots local and state-level campaigns and for its attention to issues of gender, race, and class in its advocacy in contrast to other more top-down gay rights interest groups that began to form in the late 1970s, the Task Force’s founding signaled a further step away from the more broad-based New Left era program and toward one that sought to carve out a space for gays and lesbians in the existing social and political order from which they had been unjustly excluded.<sup>501</sup> It traded what some have described as the chaotic style of operation that defined the de-centralized and anti-hierarchical post-Stonewall organizations like the Gay Liberation Front (and to some

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<sup>501</sup> See one historian and Task Force activist’s account of this shift away from gay liberation radicalism in John D’Emilio, “Organizational Tales: Interpreting the NGLTF Story,” in *The World Turned: Essays on Gay History, Politics, and Culture* (Durham, NC: Duke University Press, 2002): 99-199.

extent the GAA) for a more stable, national institutional presence with paid staff and professional political connections such as early gay rights supporters in the Democratic Party.

The founding members' own histories in gay rights politics, their ideological dispositions, and their relationships to scientific expertise and institutions are instructive for understanding how the Task Force would come to link together scientific expert testimony and political and constitutional claims to gay and lesbian civil rights. In looking through correspondence between activists and researchers, archived speeches and advocacy literature, and court records, I establish here the institutional and discursive developments that led the Task Force to make scientific and legal claims about the immutability of gay and lesbian identities. Among the founders were veteran homophile leaders Frank Kameny and Barbara Gittings, both of whom had been key figures in the more militant turn of that movement that emphasized celebrating gay and lesbian identity and using the courts to fight issues like federal employment discrimination. Most of the other original members—among them were Bruce Voeller, Ronald Gold, Nathalie Rockhill, Arthur Bell, and Martin Duberman—had all cut their organizing teeth in the post-Stonewall years (many had served in leadership roles in the GAA) and had since moved away from the radical liberation program and its organizational style. Notably absent from this lineup were the harsh critics of expertise and the liberal civil rights approach to politics who were pervasive in the Gay Liberation Front. Instead figures like Kameny and Gittings had long histories of fighting in the courts, and the former GAA

members too had spent several years in legislative politics urging city and federal officials alike to pass antidiscrimination statutes.

The incipient liberal ideology that the Task Force espoused can be seen in a 1974 speech Ronald Gold gave on this topic, along with a statement on the organization's early work written by Voeller which laid out what gay liberation meant for them after the demise of its revolutionary-minded adherents.<sup>502</sup> In a diagnosis of the problem of "ideological purity" in liberation politics, Gold advocated for a targeted approach that would not lose sight of the myriad of structural ails—those of patriarchy, capitalism, and imperialism—that previous radicals had attended to, but would ultimately focus on the specific issues that plagued the lives of gays and lesbians due primarily to their classification as such. To this effect, Gold expressed common ground in stating that "[w]ith some of our radical theorists, I am opposed to capitalism, racism and war, and I do see our movement as part of a broad cultural revolution. But I believe that the issues must be dealt with separately, both politically and in our own lives."<sup>503</sup> Taking this sentiment beyond a critique that merely pointed to the infeasibility of the daunting agenda that gay liberation had initially carved out for itself, Gold went on to fundamentally alter the ethos of liberation in declaring that "[g]ay liberation is a personal movement, and its 'state,' I think depends on each of ours. Personally I'm happy, and I'm becoming free."<sup>504</sup>

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<sup>502</sup> Ronald Gold, "Speech at the Third Anniversary Celebration of the Gay Activist Alliance of New Jersey," (September 27, 1974) Gebhard Era Correspondence 1970-1979 Part Two: A-Z, File Cabinet 5, Drawer 1, National Gay Task Force (Bruce Voeller- Executive Director), Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana.

<sup>503</sup> Ibid.

<sup>504</sup> Ibid.

This new theory of gay politics posited by Gold and Voeller offered a more manageable political project, one that concerned itself with discrete institutional instances of discrimination rather than attending to the whole range of left-wing politics. To this point, Voeller wrote that:

“[I]f we were to have a viable national movement, it would need to have meaning for all gay people, not just the largely counterculture left who had been so effective in beginning our movement—that group of people who dared to act and show the rest of us it worked. This group had, however, often given a cold shoulder to anyone in a suit or a tie, Blue denim elitism had founded our movement, but it had in fact also lessened its appeal to many talented people with skill in public relations, law, media, legislation, fund raising, etc. We needed, and continue to need, both militant activists and more conservative movement members.”<sup>505</sup>

Gold too challenged the consciousness-raising cultural practices of liberationists which had sought to align one’s individual habits and attitudes with the broader revolutionary project. In his rejection of this political mode, Gold called for activists to “accept the idea that, if we aren’t going to expend our energies by flagellating each other like a pack of Trotskyites, gay liberation can mean moving together, gradually, in different personal

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<sup>505</sup> Bruce Voeller, “NGTF: Our Past and Future,” *It’s Time: Newsletter of the National Gay Task Force Special Bonus Issue* (n.d.) Collection MC#001 Box 1127, Folder 31, Subgroup 2, Legal Case Files Series, American Civil Liberties Union Records, Seeley G. Mudd Manuscript Library at Princeton University, Princeton, New Jersey.

directions.”<sup>506</sup> This showcases a pluralist vision of gay politics where the uniting principle is one based on the idea of a common oppression shared by gays and lesbians that could be remedied most effectively through direct and sustained campaigns against its various institutional forms. There too is a touch of neoliberal sentiment at this early date evident in the emphasis on liberation as a “personal movement,” one by which an activist engaged in struggle might receive not only political victories but also an affective transactional benefit as well. For Gold, a pluralistic gay politics was intertwined with a conception of the personal goal of attaining happiness for the individual, which could take a variety of forms. Thus a gay political movement needed to be a place where figures ranging from “the radical theorist” to the “Minnesota Democratic Party worker” to the “activist capitalist in San Francisco” could come together to fight for their rights to live whatever sexual and romantic lives they wished.<sup>507</sup>

Founded in New York in 1973 by the parents of gay liberation activist Morty Manford, Parents of Gays (POG) was established initially as an educational and advocacy resource for parents who wished to better understand, accept, and support their gay and lesbian children. Jeanne Manford and her husband had always accepted their activist son Morty’s sexuality and his work in the Gay Activist Alliance (GAA) but after his beating at a protest in 1972 they took action in organizing themselves and other parents, noting an urgent need for straight society to assist their gay loved ones in their personal and political struggles. Like the Task Force, POG came into being during a time in which the

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<sup>506</sup> Ibid.

<sup>507</sup> Ibid.

radical left-wing gay liberation movement was in its dying days. Organizations like POG as well as the Task Force, the Gay Rights National Lobby, and the Human Rights Campaign Fund (HRCF) were representative of this turn toward an interest group-centered politics that sought to cultivate relationships with political elites within the Democratic Party and other mainstream political and cultural channels to fight for the social tolerance and the civil rights of gay and lesbians across the country.

Parents of Gays exemplified this trend as it was founded upon not only support for gays and lesbians but also a commitment to the family as a fundamental social and political unit and the idea that through collective effort, gay activists and their loved ones could carve out a space of belonging in the existing society. Historian Heather Murray described POG as comprised of “activists [who] affirmed not only that they were simply loving parents but also that they were, in fact, socially conservative: their heterosexuality, marriages, and families were intact, and they were not particularly left-leaning or sympathetic to radicalism.”<sup>508</sup> This “parents-and-citizens-for-gays” orientation led to rapid growth as POG expanded to twenty chapters across the country by 1980. The organization published advice and resource pamphlets, participated in campaigns against discriminatory policies and for civil rights legislation, and increasingly brought together a group of people who largely never imagined themselves as being involved in a gay and lesbian political movement.<sup>509</sup> By 1982, founder of the Los Angeles chapter Adele Starr took the organization national—renaming it Parents and Friends of Lesbians and Gays

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<sup>508</sup> Heather Murray, *Not in This Family: Gays and the Meaning of Kinship in Postwar North America* (Philadelphia, PA: University of Pennsylvania Press, 2010), 114.

<sup>509</sup> *Ibid.*, 108-9.

(PFLAG)—by attaining an official non-profit status and placing it among a growing number of liberal gay rights organizations across the country.<sup>510</sup>

In examining PFLAG’s early activism and its relationship with scientific experts and discourses regarding the nature of sexuality, it is important to highlight the ways in which the new gay rights politics constituted a sharp break with previous forms of gay politics. PFLAG differed in considerable ways from the early homophile activism of the 1950s and 1960s as well as the gay liberationists who built a radical gay alternative to the more conservative homophiles following the riot at Stonewall in 1969.<sup>511</sup> To be certain, PFLAG and other incipient liberal gay groups were not entirely divorced from the history—and for some, their own experiences in that history—of these previous iterations of gay political struggle. For instance, the gay liberation insistence that gays “come out” as a political act influenced PFLAG’s call for families to do the same. In a call for parents to follow their children out of the closet, an early POG newsletter read “IF THERE ARE MORE THAN 100,000 GAYS AND LESBIANS IN NEW YORK CITY – THERE SHOULD ALSO BE MORE THAN 200,00 PARENTS WHO HAVE “COME OUT.””<sup>512</sup> PFLAG also carried on the work of homophile activists in fighting for military inclusion, against employment discrimination and those who sought to pathologize homosexuality,

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<sup>510</sup> PFLAG, “Our Story,” <https://www.pflag.org/our-story> (Accessed September 26, 2017).

<sup>511</sup> For detailed accounts of these historical trends in U.S. gay politics see: John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970*, 2<sup>nd</sup> ed. (Chicago, IL: University of Chicago Press, 1998); Marc Stein, *City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia, 1945-1972* (Chicago, IL: University of Chicago Press, 2000); Marcia M. Gallo, *Different Daughters: A History of the Daughters of Bilitis and the Rise of the Lesbian Rights Movement* (New York: Carroll & Graf Publishers, 2006); Donn Teal, *The Gay Militants: How Gay Liberation Began in America, 1969-1971* (New York: St. Martin’s Press, 1995); Emily Hobson, *Lavender and Red: Liberation and Solidarity in the Gay and Lesbian Left* (Berkeley, CA: University of California Press, 2015).

<sup>512</sup> Parents of Gays, Newsletter (November 8, 1976) Collection 1857, Box 1, Folder 2, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

and various protective policies that were inspired by the Civil Rights Movement. Despite these continuities, however, PFLAG differed significantly from the homophiles and the liberationists due to both its founding ideological commitments as well as its historical situation in a post-New Left, increasingly conservative political era.

While the homophiles are often portrayed as an early conservative strain of the gay movement, especially after its respectability-oriented wing seized control of the movement's flagship organization, the Mattachine Society, from its communist founders in 1953, it is striking how much *more* these early activists emphasized sexuality and sexual behavior than PFLAG did.<sup>513</sup> The homophile movement worked primarily on issues like police brutality in the nascent gay bar scene as well as entrapment policies that targeted gay men having sex or arranging to have sex in public and semi-public spaces. Their attention was so focused on protecting men against charges of "lewd conduct" and other sex crimes, lesbian feminists among their ranks came to criticize the male-dominated movement in part for its disproportionate attention to issues regarding male sexual behavior.<sup>514</sup> In contrast, PFLAG's focus on gay children and the relationship between those children and their families led the issue of actual sexual acts to be sidelined. By attending to questions that parents had about the nature of sexuality, PFLAG spent its educational resources promoting the idea that a person's sexuality was formed at an early stage of child development years before puberty. In doing so, it

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<sup>513</sup> Martin Meeker, "Behind the Mask of Respectability: Reconsidering the Mattachine Society and Male Homophile Practice, 1950s and 1960s," *Journal of the History of Sexuality* 10, no.1 (January 2001): 78-116.

<sup>514</sup> Armstrong, *Forging Gay Identities*, 114.



represented sexuality as an endemic part of a person's constitution rather than as a way of speaking about sexual behavior.<sup>515</sup>

In many ways, PFLAG was nonetheless closer ideologically to the homophiles—especially with their focus on civil rights and liberties—than it was with the gay liberationists who directly preceded them. Whereas gay liberationists cast the heterosexual nuclear family as a historically-contingent social unit that largely existed to help perpetuate a patriarchal capitalist political order, PFLAG centered its advocacy on the idea that gay, lesbian, and straight identities existed as natural categories. Additionally, they placed their faith in the liberating role that the family—especially parents—could play in making a more tolerant liberal political world. In a correspondence between the Task Force and POG in 1978, activists decided that in their canvassing against a discriminatory bill in California they needed to reassure families that the new gay rights was not interested in undermining the family. The Task Force implored POG canvassers to “[b]e proud that you are good and loving parents. Assure people that homosexuality is not a threat to the family unit.”<sup>516</sup> Several years later, a coalition consisting of PFLAG, the ACLU, and the National Organization for Women (NOW) shifted the focus of sex abuse and sexual predators from gay men to male members of heterosexual families, noting that research indicated the latter were responsible for the majority of child abuse that resulted in destabilized families.<sup>517</sup>

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<sup>515</sup> Murray, *Not in This Family*, 118.

<sup>516</sup> National Gay Task Force, “Answers to a Parent’s Questions about Homosexuality,” (est. 1976) Collection 1857, Box 1, Folder 4, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>517</sup> Scott de Orio, “The Creation of the Modern Sex Offender,” in *The War on Sex*, eds. David M. Halperin and Trevor Hoppe (Durham, NC: Duke University Press, 2017), 247-67. de Orio makes the claim that this

Holding straight men accountable, they argued, was much more important for protecting the family than were policies that targeted innocent and harmless gays and lesbians who merely wished to exist in their own family households.

As a key component of its family-oriented politics, PFLAG portrayed the gay or lesbian child as a de-sexualized figure whose sexuality was best explained in terms of something deeply-rooted, a condition present from early childhood, rather than in reference to sexual acts and penchants. As Murray has noted, PFLAG promoted the idea of sexual innocence in children to avoid undermining the centrality of the family and its related heterosexual norms that allowed straight, often relatively conservative parents to speak on behalf of a minority sexual identity.<sup>518</sup> PFLAG and related organizations too had to defend themselves against conservatives who had developed a rhetoric of protecting innocent children from gay teachers and other adults whose predatory tendencies could corrupt and infect children with homosexuality. The language of the California Briggs Initiative exemplifies this strategy in its declaration that “[o]ne of the most fundamental interests of the State is the establishment and preservation of the family unit.”<sup>519</sup> In a letter to journalist Dan Rather regarding his reporting on young gay men and prostitution, Jean Smith drew a distinction between gay and lesbian children and teenage prostitutes, arguing that the latter were an unrepresentative group who engaged in

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constituted a significant shift in gays and lesbians going on the offensive regarding the heteronormative family. This framing, however, overstates the critique, as PFLAG was already committed ideologically to the family as a fundamental unit of society.

<sup>518</sup> Murray, *Not in This Family*, 127.

<sup>519</sup> California Voters Pamphlet General Election November 7, 1978 (November 7, 1978), [https://web.archive.org/web/20060818145437/http://library.uchastings.edu/ballot\\_pdf/1978g.pdf](https://web.archive.org/web/20060818145437/http://library.uchastings.edu/ballot_pdf/1978g.pdf) (Accessed October 3, 2017).

the practice “for fast, easy money.”<sup>520</sup> Smith must have felt the pressure to combat those like Save Our Children who suggested that all homosexual children were budding sexual deviants.<sup>521</sup> It is notable that she downplayed the idea that young gays and lesbians might turn to sex work after being evicted from discriminatory family homes in order to maintain a strict separation between innocuous children who happened to be gay and those she termed “the few who discredit all homosexuals” by being improperly sexual.<sup>522</sup>

Though the move to de-sexualize children as part of a gay rights group’s political advocacy might not strike contemporary readers as strange, some gay liberationists had challenged the trope of the innocent child only years before PFLAG made it a constitutive part of its politics. In Carl Wittman’s “A Gay Manifesto,” which was adopted by many Gay Liberation Front chapters across the country, he contended that “kids can take care of themselves, and are sexual beings way earlier than we’d like to admit. Those of us who began cruising in early adolescence know this, and we were doing the cruising, not being debauched by dirty old men.”<sup>523</sup> Gay liberation youth organizations also opposed the regulation of their sexual activity and often rallied against prohibitions of sex with minors and other age-based sexual regulations. For instance, at the 1970 National Student Gay Liberation Conference in San Francisco, delegates from a San Diego-based group stirred controversy in calling for the abolition of laws that regulated adult sexual

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<sup>520</sup> Jean Smith letter to Dan Rather, (May 17, 1977) Collection 1857, Box 1, Folder 3, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>521</sup> Roger N. Lancaster, *Sex Panic and the Punitive States* (Berkeley, CA: University of California Press 2011), 42-3.

<sup>522</sup> Ibid.

<sup>523</sup> Carl Wittman, “Refugees from Amerika: A Gay Manifesto,” in *Out of the Closets: Voices of Gay Liberation, Twentieth-Anniversary Edition*, eds. Karla Kay and Allen Young (New York: New York University Press, 1992), 338.

behavior but not youth-targeted ones. Many other activists at the conference drowned out the San Diego liberationists with rancorous cries, as they believed that non-adults ought to be afforded sexual autonomy as well.<sup>524</sup> Even after the heyday of gay liberation's influence, some continued to advocate for youth sexual rights. In 1979 at a national gay rights conference in Washington, D.C., the Gay Youth Caucus petitioned to revise age of consent laws across the country as a means of both affording rights to young gays and lesbians and pushing the punitive state's reach further from the gay community writ large.<sup>525</sup>

At the most extreme end of this debate was the infamous pro-pederasty gay liberation group called the North American Man/Boy Love Association (NAMBLA). The organization's co-founder David Thorstad declared that the spirit of the "Stonewall generation" was one of "pleasure-affirming impulses" and that its message was that "[s]ex is fun, homosexuality is fun, boy-love is fun, gay liberation is a movement for everyone's sexual liberation."<sup>526</sup> While NAMBLA became the subject of both police scrutiny and marginalization within gay rights politics almost as soon as it was formed, its founders were active in organizations like the Gay Activist Alliance, and they held forums through those groups to discuss the nuances of youth sexuality and the law's role in policing it.<sup>527</sup> As gay activism became more disconnected from pederasts and their

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<sup>524</sup> Donn Teal, *The Gay Militants: How Gay Liberation Began in America, 1969-1971* (New York: St. Martin's Press, 1995), 281-2.

<sup>525</sup> David Thorstad, "Man/Boy Love and the American Gay Movement," *Journal of Homosexuality* 20, no.1-2 (1991): 251-74.

<sup>526</sup> *Ibid.*, 251-2.

<sup>527</sup> Duddly Clendinen, "Group Promoting Man-Boy Love is the Focus of Police Inquiry," *New York Times* (January 1, 1983), <http://www.nytimes.com/1983/01/01/us/group-promoting-man-boy-love-is-the-focus-of-police-inquiry.html> (Accessed October 5, 2017); Thorstad, "Man/Boy Love," 252.

calls for age of consent legal reforms, Thorstad criticized PFLAG leaders for going into a defensive mode in response to those like Anita Bryant and John Briggs; he noted that “[i]t didn’t occur to gay spokespeople to draw a distinction between being raped and molested and enjoying sex.”<sup>528</sup> Thorstad lamented that by the late 1970s and the rise of the new gay rights movement, activists ceased “fighting to liberate youth [and instead] it became fashionable to argue that youth needed protection, especially from sex with men.”<sup>529</sup>

The demise of gay liberation’s more radical approach to identity politics not only altered the way in which gay rights activists articulated the nature of their identity, but it also led to new gays rights politics where parents and families articulated neoliberal concerns about preventing their gay and lesbian children from being “left behind” in a society defined by competition and a troubled social welfare state. Rather than taking a critical disposition toward the reigning social and political economic order, the new gay rights essentially accepted society as it was except for the fact of anti-gay discrimination. Considering PFLAG’s middle-class style of politics rooted in its material existence as an interest group that survived on donations, fundraisers, and corporate sponsors, this ideological disposition ought not be surprising. Thus, the gay rights movement lurched rightward with the rest of American politics during this period as the roots of neoliberalism spread and a new political reality characterized by increasing attacks on social welfare, labor, and the very idea of “the public” settled onto the political landscape. The advent of a homonormative gay politics can be detected in PFLAG’s

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<sup>528</sup> Thorstad, “Man/Boy Love,” 253-4.

<sup>529</sup> *Ibid.*, 254.

project of demonstrating how simple it would be to integrate gay and lesbian youth into the existing social categories and logics of the existing social and political context.

This attitude is evident in documents such as an early 1975 POG newsletter that proclaimed “the time is ripe to join together to appeal to the public conscience in order to achieve equal opportunities for our daughters and sons.”<sup>530</sup> POG often engaged in these appeals to the public on the principle of liberal fairness, with the demand that their sons and daughters be accepted in society as equal participants. In a stark example of this ideological temperament, Jean Smith stated in a 1977 letter to *Newsweek* that “[d]epriving homosexuals of their civil rights is not only unconstitutional and inhumane but it means we will be adding twenty million homosexuals to our overburdened welfare rolls if we do not permit them to be productive individuals.”<sup>531</sup> In this statement, one can hear the echo of similar statements made by Great Society era liberals to whom those like Judith Stein and Daniel Moak have attributed the foundations of neoliberal program on social welfare policy.<sup>532</sup> At this early moment, Smith exemplified the soon-to-be dominant neoliberal political belief that the U.S. social welfare system was nearing implosion and that “realist” solutions to the problems of the national debt and the “underserving poor” alike would need to be soon tackled.<sup>533</sup> PFLAG’s appeals to science

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<sup>530</sup> Parents of Gays, “Parents of Gays Speak Out,” (March 13, 1975) Collection 1857, Box 1, Folder 1, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>531</sup> Jean Smith letter to *Newsweek*,” (June 1, 1977) Collection 1857, Box 1, Folder 3, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>532</sup> Judith Stein, *Running Steel, Running America: Race, Economic Policy and the Decline of Liberalism* (Durham, NC: University of North Carolina Press, 1998), 87; Daniel Moak, “Supple-Side Education: Race, Inequality, and the Rise of the Punitive Education State,” PhD diss., University of Pennsylvania, 2016. ProQuest (10190601).

<sup>533</sup> Adolph Reed, Jr., “The ‘Underclass’ as Myth and Symbol: The Poverty of Discourse about Poverty,” in *Stirrings in the Jug: Black Politics in the Post-Segregation Era* (Minneapolis: University of Minnesota

and its rooting of sexuality in nature offered help in this integration into the burgeoning neoliberal hegemony by reconstituting gay political identity in a relatively de-sexualized idea of gay and lesbian youth, and the family as a fundamental organic unit in modern human society and economic systems. Gays and lesbians in this view were just like straights: their sexualities were not only benign and apolitical but also secondary to their roles as individuals willing to offer their labor as productive members of society, perfectly content with the world as it was.

*The Task Force, the Kinsey Institute, and the Love of Expertise*

Bringing with them both longstanding and new relationships with scientific researchers and institutions, the founders of the Task Force made a prominent place in their principles and practice for the role of scientific expertise.<sup>534</sup> Kameny and Gittings had previously led groups like the Mattachine Society and the Daughters of Bilitis, both of which had cultivated relationships with scientists who were opposed to the pathological model of homosexuality. As the previous chapter details, they and the younger members of the Task Force together sat on the panels and engaged in protests at the APA throughout the early 1970s to establish ties with liberal reformers who sought to chart a new course for the way that the APA treated gays and lesbians. Among the former GAA leaders, the first Task Force president Bruce Voeller was himself a trained

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Press, 1999), 179-96; Reed notes here how conservative discourse on the underclass and poverty was quickly adopted by liberals.

<sup>534</sup> National Gay Task Force, "Gay Civil Rights Support Statements and Resolutions Packet, (n.d) Collection MC#001 Box 1127, Folder 31, Subgroup 2, Legal Case Files Series, American Civil Liberties Union Records, Seeley G. Mudd Manuscript Library at Princeton University, Princeton, New Jersey.

<sup>534</sup> Ibid.

biologist. Ronald Gold had become a key intermediary between APA leaders like Robert Spitzer, the covert gay caucus in the APA, and the APA Committee on Nomenclature, which had been the crucial institution in removing homosexuality from the *DSM's* classification of mental disorders. Additionally, physician Dr. Howard Brown, who had served as the first New York City Health Services Administrator, was among the founding members and had made history in his coming out while serving in municipal office.<sup>535</sup>

Along with their allies in the APA, the early Task Force also had a steady stream of communication with Kinsey Institute Director Paul Gebhard and others at the academic sex research center. Throughout most of 1977, Voeller and Gold corresponded with Gebhard about how many homosexuals existed within the U.S. population.<sup>536</sup> As Gebhard was in the process of reworking the tabulations upon which the original Kinsey volumes had relied, the Task Force wanted to ensure that its own writings and campaign literature reflected the most up-to-date hypotheses concerning just how many gay and lesbians Americans there were. In what represented a significant ideological turn from the earlier gay liberation days where such head counting was seen as undercutting the idea that all persons had the propensity to experience same-sex desire, Gebhard, Voeller,

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<sup>535</sup> New York Times, "Dr. Howard J. Brown, 50, Dies: First City Health Services Chief," *New York Times* (February 3, 1975) <http://www.nytimes.com/1975/02/03/archives/dr-howard-j-brown-50-dies-first-city-health-services-chief-lindsay.html> (Accessed November 30, 2017).

<sup>536</sup> Paul Gebhard letter to Ronald Gold, (February 21, 1977) Gebhard Era Correspondence 1970-1979 Part Two: A-Z, File Cabinet 5, Drawer 1, National Gay Task Force (Bruce Voeller- Executive Director), Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana; Paul Gebhard letter to the National Gay Task Force, "Memorandum on the Incidence of Homosexuality in the United States," (March 18, 1977) Collection 7301, Box 166, Folder 39, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York; Paul Gebhard letter to National Gay Task Force, (June 29, 1977) Collection 7301, Box 166, Folder 39, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York.



and Gold traded statistical calculations back and forth, musing together on the correct way to scale up the survey data to make it reflect the entire population.

The Task Force was also keen on soliciting advice from the Kinsey Institute about how to deflect against the ascending Religious Right's casting of gays and lesbians as sexual predators. In 1977, the liberal gay rights movement was met with the beginnings of a conservative backlash when former Miss Oklahoma pageant winner Anita Bryant launched the "Save Our Children" campaign. It brought together groups in the new Religious Right to contest local ordinances protecting the housing and employment rights of gays and lesbians, as well as to disallow them from teaching in schools. In a letter responding to Voeller's request for help in combatting the Bryant campaign, Gebhard advised that the Task Force mention the fact that no study has ever demonstrated a relationship between adult homosexuality and pedophilia, and that gay adults do not affect the sexualities of children who admire them as role models or authority figures.<sup>537</sup> Gebhard wrote that "[t]he major causes of homosexuality are still being investigated, but we presently are in a position to say that role modelling with adults and seduction of children by adults are not among them."<sup>538</sup> At other times, the Task Force was overzealous in citing the Institute as a political ally. For example, in 1982 Gebhard wrote to Co-Director Lucia Valeska to ask kindly that the Task Force remove the Institute's name from campaign materials protesting the Family Protection Act, a law that would

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<sup>537</sup> Paul Gebhard letter to Bruce Voeller, (October 27, 1977) Gebhard Era Correspondence 1970-1979 Part Two: A-Z, File Cabinet 5, Drawer 1, National Gay Task Force (Bruce Voeller- Executive Director), Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana.

<sup>538</sup> Ibid.

have prohibited federal funds from being used to advocate or promote homosexuality as a “life style”, as it had not agreed to publicly come out against the measure.<sup>539</sup>

Turning to the Task Force’s more public speech on the matter of gay identity, two early pamphlets show how the organization attempted to reconcile its gay liberation past with its new scientific allies in ways that would lead them to consider increasingly biodeterministic frames for their identities. These documents also demonstrate how the Task Force responded to the nascent Religious Right’s dual attack that homosexuality was an immoral and unhealthy choice and that gay and lesbian adults were often sexual predators interested in “recruiting” innocent children to their perverse sexualities. In its 1979 pamphlet titled “Twenty Questions About Homosexuality,” the Task Force relied far less on early biological studies than they did arguments from gay liberation theorists like Dennis Altman, the anthropologists Ford and Beach, and Kinsey himself on the diversity of human sexuality and the effects of social pressures in repressing many gays and lesbians in American society.<sup>540</sup> These sources led the Task Force to articulate a conception of sexuality as “a continuum between exclusive heterosexuality and exclusive homosexuality on which every intermediate combination may be found.”<sup>541</sup> Additionally, they tied this claim to a denial of biological influences in asserting that “[b]ehavioral

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<sup>539</sup> Paul Gebhard letter to Lucia Valeska, (March 30, 1982) Collection 7301, Box 166, Folder 62, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York; Lucia Valeska letter to Paul Gebhard, (April 7, 1982) Collection 7301, Box 166, Folder 62, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York; 97<sup>th</sup> H.R. 3955, The Family Protection Act, (June 17, 1981) <https://www.govtrack.us/congress/bills/97/hr3955/details> (Accessed January 24, 2018).

<sup>540</sup> National Gay Task Force, “Twenty Questions About Homosexuality,” (n.d., est. 1979) Collection 1857, Box 2, Folder 12, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>541</sup> *Ibid.*, 1.

scientists reject the notion that either heterosexual or homosexual orientation is a simple matter of choice. The vast majority also rule out constitutional, genetic, glandular, or hormonal factors, asserting that human sexuality is unfocused at birth and that the development of either homosexual or heterosexual preferences is a matter of complex learning and experience.”<sup>542</sup>

These quotes appear to indicate a general opposition to the idea that science ought to have a say at all regarding the origins of homosexuality. However, other parts of the pamphlet show that this disposition arose more from a belief that scientific inquiries into the etiology of sexuality were generally done in bad faith by biased researchers. In an answer to this question about origins, the Task Force authors wrote that “[t]he most popular theories about the causes of homosexuality concern patterns of family relationships, particularly the dynamics between a mother and father or parents and child.”<sup>543</sup> Further, in a letter explaining the rationale for the pamphlet’s tone regarding this question, Barbara Gittings stated that the real problem was that “the research has been badly done. The studies don’t ask the legitimate question, [*sic*] What causes homosexuality?”<sup>544</sup>

And indeed, the Task Force did rely on certain scientific conceptions here after all. In a move to deflect accusations that gay and lesbian adults preyed on and recruited children, the authors of this pamphlet contended that “[a]lthough most researchers now

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<sup>542</sup> Ibid., 2.

<sup>543</sup> Ibid.

<sup>544</sup> Barbara Gittings to Susan Wallace R.N., (March 31, 1977) Collection 6397, Box 73, Folder 13, Barbara Gittings and Kay Tobin Lahusen Gay History Papers and Photographs 1855-2009, New York Public Library Archives & Manuscripts, New York, NY

acknowledge that the causes of both homosexual and heterosexual orientation are not known, many of them believe that basic sexual orientation is set at a very early age, probably by the time a child begins school. They believe that these primarily affectional inclinations may not be recognized and acknowledged by an individual for many years, but they are nevertheless established in early children and do not radically change.”<sup>545</sup> These scientifically-based assumptions about the origins of sexuality that prefigured an individual’s participation in actual sexual acts allowed the Task Force to rhetorically combat the Right, while also rooting sexuality in a more innocuous, rather-desexualized conception that would be amenable to their broader liberal audience.

Another 1979 pamphlet titled “Answers to a Parent’s Questions about Homosexuality” provides further evidence that the Task Force was only critical of scientific studies that they perceived to be biased rather than scientific expertise in total. Striking a much more sympathetic tone toward biological considerations than its “Twenty Questions” pamphlet, the Task Force noted that:

“Most researchers agree that the causes of both homosexuality and heterosexuality are as yet unknown. All they *do* know is that all human beings are born with the capacity for both homosexual and heterosexual responses and that somehow, probably as a result of very early childhood experiences and possibly genetic, hormonal, and environmental factors, one or the other *capacity for human*

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<sup>545</sup> National Gay Task Force, “Answers to a Parent’s Questions about Homosexuality,” (est. 1979) Collection 1857, Box 2, Folder 10, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

*loving* and sexual response becomes the predominant sexual *preference* or *orientation*.”<sup>546</sup>

Though the Task Force did not lean entirely on a biodeterministic conception here, at this early period its leaders were entertaining the notion that homosexuality was likely to be at least partially-rooted in biological phenomenon.

### *Rejecting Theories of Parental Influence and Re-naturalizing Sexual Identity*

Buttressed by the 1973 victory at the American Psychiatric Association (APA) where homosexuality was removed from its classification as a mental illness through the work of an alliance of gay activists and reformist psychiatric professionals, PFLAG could make the claim that previous neo-Freudian assumptions about parental causes of homosexuality were based in outdated science and the bigoted social biases of their adherents. Prior to the reforms, conservative psychiatrists, psychologists, and psychoanalysts dominated their disciplines’ approach to homosexuality, which rested on premises that long-term exposure to effeminate fathers and overbearing mothers were at the root of child’s homosexuality and that gays and lesbians could be “cured” of their deviant desires through therapy.<sup>547</sup> As we have seen, since the early days of the homophile movement in the 1950s, gay rights activists had been cultivating relationships

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<sup>546</sup> Ibid.

<sup>547</sup> Irving Bieber et al., *Homosexuality: A Psychoanalytic Study of Male Homosexuals* (New York: Vintage Books, 1962); For a broader history of the neo-Freudians see Bayer, *Homosexuality and American Psychiatry*, and Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago, IL: University of Chicago Press, 1999).

with Alfred Kinsey and affiliated researchers at the Kinsey Institute who first challenged the pathological account of homosexuality in the late 1940s and 1950s with their infamous studies on the hidden diversity of sexual practices and predilections of American adults.<sup>548</sup> Psychologists like Evelyn Hooker recruited homophile activists from their early organizations to serve as research subjects, which led to some of the first modern scientific accounts against the assumption that homosexuals suffered from curable mental illnesses.<sup>549</sup> These relationships—which continued to grow throughout the 1960s and 1970s—helped to build the foundation of the liberal gay rights movement’s ability to draw from the sciences in their legal and political advocacy and their educational work, especially as a number of their allies became leaders in their respective disciplines.

Thus, PFLAG activists and other liberal gay rights proponents came to interpret any reference to parental causes of a child’s sexuality to be intrinsically linked to conceptions of homosexuality as a sign of a corrupted mental state. Relying on a mix of older studies that the homophiles had contributed to as well as newer ones in that tradition, PFLAG members often pointed out that the parental upbringing thesis was based on studies of persons who were forced into the office of mental health practitioners against their will. It was likely that if there was any mental illness in a homosexual patient, it was the product of society’s ill treatment of them, rather than sign of anything

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<sup>548</sup> Alfred C. Kinsey, *Sexual Behavior in the Human Male* (Bloomington, IN: Indiana University Press, 1998); Alfred C. Kinsey, *Sexual Behavior in the Human Female* (Bloomington, IN: Indiana University Press, 1998).

<sup>549</sup> Evelyn Hooker, “A Preliminary Analysis of Group Behavior of Homosexuals,” *Journal of Psychology* 42 (1956): 219; Evelyn Hooker, “The Adjustment of the Male Overt Homosexual,” *Journal of Projective Techniques* 21 (1957): 18-31.

neurologically defective in the person. Gay and lesbian advocates also leaned heavily on studies published throughout the 1970s and 1980s demonstrating that queer parentage was not likely a significant causal factor in the development of child sexuality and that, as one Task Force pamphlet put it, “sexuality cannot be taught or learned.”<sup>550</sup> As the following examples demonstrate, this suspicion of any explanation of homosexuality that rested on factors within the family home led both PFLAG and their allies in science and medicine to begin entertaining ideas about homosexuality as something innate, deeply-held, and perhaps biological in nature.

The educational literature and political pamphlets produced by PFLAG during its initial political struggles against an ascendant New Right illustrate how scientific resources and language were deployed both to defend themselves and their children against discrimination as well as to ground their ideological commitments to the naturalness of homosexuality and the political role of the family in liberal gay politics. In reaction to the growing national threat from the Religious Right, PFLAG produced advocacy pamphlets and gave statements to the press that rested on the idea that homosexuality was “not a choice” but instead a benign and natural inclination.<sup>551</sup> When Anita Bryant teamed up with California State Senator John Briggs that same year to push an initiative that would have outlawed gays, lesbians, and their straight allies to teach or work in the California public school system, PFLAG distributed 150,000 copies of its

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<sup>550</sup> Marie-Amélie George, “The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents,” *Law and History Review* 34, no.2 (May 2016): 487-529; Gay Rights National Lobby, “If Your Constituents Ask...” (1980), Collection 7712, Box 30, Folder 46, Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.

<sup>551</sup> Murray, *Not in This Family*, 118-9.

“About Our Children” booklet to reassure California voters that, contrary to Briggs’s argument, homosexuality was not a contagion and in no way did gay children or gay adults present an assault on the family unit.<sup>552</sup>

In a series of letters to newspapers and magazine editors and reporters, members of the PFLAG executive committee demanded that the media cease portraying gays and lesbians as victims of their upbringings and instead to promote their own scientific understandings of homosexuality. In a letter to CBS News, executive committee member Lawrence Starr relied on scientific expertise to declare that “[t]he consensus of professional opinion of psychologists is that sexual preference is determined in very early childhood, that environment has little influence in determining sexual preference and that probably ten percent of all persons are homosexual.”<sup>553</sup> Thus, the family could not be held responsible for children’s sexuality, which was, rather than a mental illness, simply a natural part of sexuality in a human population where a certain fixed proportion of people are inherently homosexual.

In some instances, PFLAG leaders would use language that was even more forceful and assured about the innate quality of a person’s sexuality than the actual claims of scientists who tended to emphasize that biology *could* be one of many factors. Writing on behalf of the Los Angeles PFLAG chapter to Henry Gammill of the *National Observer* in 1977, Adele Starr criticized the paper for running an article titled “What if your child is gay?” which rested on the myth that parents were most responsible for

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<sup>552</sup> PFLAG, “Our Story.”

<sup>553</sup> Lawrence Starr letter to Jack Kilpatrick,” (June 6, 1977) Collection 1857, Box 1, Folder 3, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.



causing homosexuality in their children.<sup>554</sup> Starr complained that the paper did not reach out to any sympathetic experts such as their allies psychologists Evelyn Hooker and Judd Marmor, but instead chose to interview Irving Bieber, who clung to a pathological understanding of homosexuality even after the APA voted in 1973 against that model. If only journalists would contact these experts, Starr argued, they would see that “[a]nother truth, realization that is emerging is that it is natural for a gay person to be attracted to the same sex, just as it is natural for a non-gay person to be attracted to the opposite sex. It is not contagious. It is probably innate.”<sup>555</sup> The last line on sexuality-as-innate extended the theory that homosexuality was not contagious nor caused by parental factors. Rather, Starr posited that it was likely that this new trend in the science of sexuality would reveal that a new “truth” about the biologically-ingrained nature of homosexuality would soon be known.

In addition to appealing to journalists and editors, PFLAG leaders targeted the authors of popular advice columns to spread their message. In 1977 Florida chapter leader Jean Smith wrote to Ann Landers of the “Ask Ann” advice column to assist Landers in better addressing the concerns of parents and family friends of gay children. Smith offered scientific resources to Landers, noting that “I have articles stating that some psychiatrists suspect three factors: 1) genetic inclination, 2) personality makeup, 3) social stresses, and that some geneticists suspect biochemical or hormonal conditions

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<sup>554</sup> Adele Starr letter to Henry Gammill,” (April 27, 1977) Collection 1857, Box 1, Folder 3, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>555</sup> Ibid.

already present at birth.”<sup>556</sup> Several years later in 1981, Adele Starr repeated this move in writing to the author of the nationally-syndicated “Dear Abby” column and offering her resources to assist with families who found themselves struggling to understand homosexuality.<sup>557</sup> Abby not only enthusiastically referred her readers to PFLAG in her next column on the topic, but she also referenced the scientific knowledge that Starr had provided in advice to a mother who was struggling with her young lesbian daughter and the origins of her sexuality. Abby responded by dispelling myths about parental influences on children’s sexuality and reassured the mother that “sexual preference is not a matter of choice; it is determined at a very early age.”<sup>558</sup> Shortly after the column was published, 7,500 letters from other parents flooded Starr’s address, which PFLAG responded to individually in their quest to remake gay politics and the family in their own image.

*Learning from One Another: Gay Identity and the New Bioessentialism*

The liberal gay rights movement could rely on scientific allies in part due to massive shifts in the science of sexuality and the natural sciences more broadly that moved genetic and biological explanations for a slew of behaviors and identities to the fore.<sup>559</sup> Studies of sexuality—especially those conducted by researchers involved with the

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<sup>556</sup> Jean Smith letter to Ann Landers,” (September 8, 1977) Collection 1857, Box 1, Folder 3, Jeanne Manford Papers 1972-1995, New York Public Library Archives & Manuscripts, New York, NY.

<sup>557</sup> PFLAG, “Our Story.”

<sup>558</sup> Murray, *Not in This Family*, 119.

<sup>559</sup> Ruth Hubbard and Elijah Ward, *Exploding the Gene Myth: How Genetic Information Is Produced and Manipulated by Scientists, Physicians, Employers, Insurance Companies, Educators, and Law Enforcers, Second Edition* (Boston, MA: Beacon Press, 1999); Roger Lancaster, *The Trouble with Nature: Sex in Science and Pop Culture* (Berkeley, CA: University of California Press, 2003).

Kinsey Institute and others who had worked with gay rights activists or were sympathetic to their cause—moved further away from parental and environmental explanations for homosexuality and increasingly conducted their inquiries into the nature of sexuality with attention to hormonal, genetic, and neuroanatomical factors. Gay rights organizations then entrenched these allies through maneuvers such as serving in advisory roles for their studies, reserving time for researchers to speak at their annual national conferences, and making scientific insights and authority part of their educational literature and political advocacy. In this sense, the interactions between gay rights advocates and these researchers represent most clearly how these scientific and political forces worked to co-produce a new way of understanding sexuality. In this section, I outline the changes that were occurring in different fields of sexuality research, with attention to how these changes cannot be understood without reference to the gay rights movement's relationships with scientific actors. The shift from environmental understandings of sexuality melded well with the articulation of gay identity as something deeply-rooted and beyond the influence of any social factors.

In the post-1973 climate, researchers began turning to biological explanations for sexual identities due mainly to two factors. The first was the discrediting of many older theories that emphasized environmental factors and parental influences, as these were increasingly associated with a mix of the conservative old guard in psychiatry and evangelical Christians who focused on reparative therapies to convert homosexuals.<sup>560</sup>

The mix of activists and scientists that helped to move the APA away from the

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<sup>560</sup> Tom Waidzunus, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, MN: University of Minnesota Press, 2015).

pathological model in the 1970s came to share a suspicion of theories that leaned too heavily on parental factors. In reflecting back upon his own role in the APA fights, Judd Marmor remarked that although he had helped move the APA in a more progressive direction that benefited gay rights activists, it was the neo-Freudians and their pathological family-based accounts of homosexuality that were actually unscientific and unduly political.<sup>561</sup>

Secondly, the turn to biology was also in many ways not necessarily a brand new research trajectory as much as it was the reassertion of a previously more dominant one. As historians of sexuality have shown, biologically-laden assumptions about homosexuality were commonplace throughout the late-nineteenth to the mid-twentieth century in a range of scientific and medical circles—especially those encompassing researchers and policymakers enamored with eugenics. These theories featured a blend of the biological and environmental premises and often came in the form of Lamarckian-esque fears about how the degenerated physiological and mental constitutions of persons (often lower class and racialized) might “infect” others (often middle-to-upper class and white). Thus in some respects, the narrow focus on the environmental causes was a particular—albeit authoritative—strain of psychotherapy that dominated briefly in the mid-twentieth century.<sup>562</sup> Technological developments in the realms of genetic and hormone testing also enabled researchers to retest old hypotheses they had been previously criticized for pursuing with sloppy and inconclusive methodologies, as well as

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<sup>561</sup> Vernon A. Rosario, “An Interview with Judd Marmor, MD”, *Journal of Gay & Lesbian Psychotherapy*, 7, no.4 (2003): 27.

<sup>562</sup> Terry, *An American Obsession*, 92-3.

to formulate new ones regarding identities and behaviors.<sup>563</sup> This movement toward biological, genetic, and hormonal approaches to the study of human behavior and identities manifested both in changes in the research agendas of Kinsey-allied scientists and the production of a new cohort of scientists who were predisposed to search for the origins of human sexuality in genomic, neurological, and endocrinological aspects of a person.

In taking account of these factors, it is important also to consider how the broader political context of the moment and the ways in which dominant modes of thinking about the social influenced the scientists—as well as the political actors—of the time. Biologist Richard Lewontin has most famously argued that this shift toward biological explanations for human identities and behaviors cannot be separated from the “modern competitive individualist entrepreneurial” world from which contemporary biodeterminism emerged.<sup>564</sup> Lewontin noted that what he termed the “ideology of biological determinism” rested on three premises that could not be divorced from the political moment. These three ideas were that: “[human beings] differ in fundamental abilities because of innate differences, that those innate differences are biologically inherited, and that human nature guarantees the formation of a hierarchical society.”<sup>565</sup> Though he was primarily focused with the ways in which the unequal distribution of resources and life chances were being legitimated by this scientific paradigm, Lewontin

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<sup>563</sup> Aaron Panofsky, *Misbehaving Science: Controversy and Development of Behavior Genetics* (Chicago, IL: University of Chicago, 2014), 139-57; Richard C. Lewontin, *Biology as Ideology: The Doctrine of DNA* (New York: HarperCollins Publishers, 1993), 61.

<sup>564</sup> Lewontin, *Biology as Ideology*, 15.

<sup>565</sup> *Ibid.*, 23.

did discuss biodeterministic studies of homosexuality, indicating that these neoliberal-imbued scientific research agendas were primed to mistake contingent social and political phenomena for something written into the human genome.<sup>566</sup> This meant that assumptions about the evolutionary basis for all nodal points on the spectrum of sexuality (such as theories about how in the Pleistocene era<sup>567</sup>, the labor of homosexual male family members helped pass down the overall family unit's genetic material) came to overshadow more sociologically-informed theories that emphasized the malleability of sexual preference and the social conditioning that produced compulsory heterosexuality for most Americans. As liberal gay rights groups like PFLAG were fundamentally committed to the idea that social unit of the family was both rooted in nature and a moral good, its ideology was a near perfect match for these new studies.

In the rest of this section, I discuss changes in the research agendas of former President of the American Psychiatrist Association and reformer Judd Marmor, Kinsey Institute-affiliated researchers, new studies in hormonal research, and the creation of new fields of inquiry such as sociobiology and behavioral genetics, all of which contributed to the shifting of the scientific study of sexuality and identity in a biological direction. Looking to some examples of these changes in the thinking of influential individual scientists with ties to the gay rights movement, psychiatrist and physician Judd Marmor stands out as high-ranking scientific figure and ally of the movement whose studies became gradually more imbued with biological premises. Marmor was an early skeptic of

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<sup>566</sup> Ibid., 93.

<sup>567</sup> Sociobiology and evolutionary psychology both posit that human behaviors and norms generally emerge from this period of human evolution.

the pathological model and he wrestled with how to conceive of sexuality by editing the influential 1965 volume *Sexual Inversion: The Multiple Roots of Homosexuality*.<sup>568</sup> This book brought together researchers such as those who had developed the modern mental illness (pathological) model, zoologists who posited bisexuality to be the sexual norm in human beings, and Evelyn Hooker and others with ties to the Kinsey Institute who saw homosexuality as simply another natural variant of human sexuality.

In his introduction to the eclectic collection, Marmor presented his “multiple causes” thesis which held that “[scientists of sexuality] are probably dealing with a condition that is not only multiply determined by psychodynamic, sociocultural, biological, and situational factors but also reflects the significance of subtle temporal, qualitative, and quantitative variables.”<sup>569</sup> In a subsequent section titled “The Question of the Biological Factor,” Marmor reviewed older studies by geneticists such as Franz Kallmann, who boasted that his study of homosexual and heterosexual sets of twins (a common genetics research method) had found a 100% concordance rate in “overt homosexual behavior” in monozygotic twins versus dizygotic ones.<sup>570</sup> While Marmor ultimately found Kallmann’s and similar studies to be lacking both in methodological prowess and theoretical grounding—he suspected that Kallmann suffered from an “unconscious bias” and that his reputation for being a hardline proponent of genetic determinism put his “scientific objectivity...open to question”—he did believe that

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<sup>568</sup> Judd Marmor (ed.), *Sexual Inversion: The Multiple Roots of Homosexuality* (New York: Basic Books, 1965).

<sup>569</sup> *Ibid.*, 5.

<sup>570</sup> *Ibid.*, 6; Franz J. Kallmann, “Twin and Sibship Study of Overt Male Homosexuality,” *American Journal of Human Genetics* 4, no.2 (1952): 136-46.

evidence of a “chromosomal abnormality” might eventually be discovered as a primary determinant of homosexuality.<sup>571</sup>

Marmor’s experience as vice president and then president of the APA in the early 1970s during the APA battle over the classification of homosexuality and later as an expert witness in many cases for other gay rights organizations like the National Gay Task Force propelled him further away from the psychoanalytic old guard, whom he deemed to be unduly political and subjective in their insistence on seeing homosexuality as a manifestation of a diseased mental state.<sup>572</sup> In a second edited volume on sexuality published in 1980, Marmor repeated his faith in his multiple causes thesis by stating in the preface that “[i]t is my firm conviction that the complex issues surrounding the phenomenon of same-sex object-choice cannot be understood in terms of any unitary cause whether it be biological, psychological, or sociological.”<sup>573</sup> But in his introduction to this volume, Marmor appeared much more amenable to considering biological explanations for homosexuality than he had 15 years prior. In a review of newer studies that had been possible due to advances in areas like endocrinology which enhanced researchers’ ability to probe hormonal differences, Marmor saw a “strong possibility that predisposing factors in at least some obligatory homosexuals may be due to intrauterine or early postnatal influence.”<sup>574</sup>

In his musings on neurology, Marmor also posited that the hypothalamic centers of the male brain might be a promising frontier of research. This was significant, as one

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<sup>571</sup> Marmor, *Sexual Inversion*, 7-9.

<sup>572</sup> Rosario, “An Interview with Judd Marmor,” 23-34.

<sup>573</sup> Judd Marmor (ed.), *Homosexual Behavior: A Modern Reappraisal* (New York: Basic Books, 1980), xi.

<sup>574</sup> *Ibid.*, 8.



of the most infamous studies of the early 1990s would come to claim evidence of a “gay brain” based on an analysis of the hypothalamus in particular.<sup>575</sup> Though he became more and more convinced of the idea that the roots of homosexuality were biological in nature (in an interview conducted in 2002 the year before his death he had come fully around to the biological account, stating that “we now know that, to a great extent, variations in sexual orientation are determined by the degree of androgenization of the fetal midbrain at a critical period of intrauterine development”) he was not himself a biodeterminist in this period.<sup>576</sup> In some instances such as in a 1985 editorial piece in the *Harvard Medical School Mental Health Letter*, he refused to even consider homosexuality as a “unitary phenomenon or singular ‘condition,’” arguing that “[d]ifferent people with this [same-sex] sexual preference have different psychodynamic makeups, different behavior patterns, and different life experiences.”<sup>577</sup> Marmor did, however, open the door to increasingly biodeterministic conceptions of homosexuality in his amplifying of the voices of those pursuing this agenda, as well as by increasingly downplaying the theories of the conservative old guard who sought to keep homosexuality framed in neo-Freudian family dynamics.

In 1981, researchers at the Kinsey Institute published the long-awaited third installment in their series on human sexuality, which marked the first time one of the Institute’s major studies gave serious attention to the biological conception of

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<sup>575</sup> Ibid.

<sup>576</sup> Rosario, “An Interview with Judd Marmor,” 28.

<sup>577</sup> Judd Marmor, “Homosexuality: Nature or Nurture,” *Harvard Medical School Mental Health Letter* (October 1985): 5-6 Collection 2007-009, Box 1, Folder 5, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

homosexuality.<sup>578</sup> The research for the book, *Sexual Preference: Its Development in Men and Women*, was conducted by psychotherapist Alan P. Bell and sociologists Martin S. Weinberg and Sue Kiefer Hamersmith, who peered through data collected from face-to-face interviews with persons across the spectrum of sexuality in the San Francisco Bay Area in the late 1960s and early 1970s. Unlike the previous Kinsey studies which were more descriptive in nature, these researchers set out to test hypotheses, including Bieber's family background model. In a press release for the book, the authors touted that "parents have little influence on whether their children develop a homosexual orientation."<sup>579</sup> They explained to parents that "[y]ou may supply your sons with footballs and your daughters with dolls, but no one can guarantee that they will enjoy them."<sup>580</sup> Though this framing demonstrates that most researchers in the 1980s had not yet separated questions of gender identity and gender normativity from sexuality, the fact that the most prominent center for the study of sexuality in the country produced a study exonerating parents from their roles in their child's sexuality signaled that the post-1973 scientific climate would be defined by the sidelining of social considerations and the rise of biological ones. Accordingly, in their theorizing about this phenomenon, Bell, Weinberg, and Hamersmith reached for genetic and hormonal explanations, stating that "homosexuality may arise from a biological precursor (such as left-handedness and allergies, for example) that

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<sup>578</sup> Alan P. Bell, Martin S. Weinberg, and Sue K. Hamersmith, *Sexual Preference: Its Development in Men and Women* (Bloomington, IN: Indiana University Press, 1981).

<sup>579</sup> Indiana University Press, "Conclusions from Kinsey Study on Sexual Preference," *Indiana University Press Book News* (October 12, 1981) Collection 7301, Box 166, Folder 62, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York, 2.

<sup>580</sup> Indiana University Press, "New Kinsey Study Challenges Myths about Sexual Orientation," *Indiana University Press Book News* (October 12, 1981) Collection 7301, Box 166, Folder 62, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York, 2

parents cannot control.”<sup>581</sup> The press played its own part in hyping the biological element of the study, as evidenced in the *San Francisco Chronicle*’s coverage claiming the Kinsey researchers had discovered that “sexual preference is most likely the result of a deep-seated predisposition, probably biological in nature.”<sup>582</sup>

As some psychotherapists were becoming more receptive to biological assumptions, endocrinological work on hormones and human sexuality became more prevalent in broader scientific discussions about homosexuality. The idea that endocrine glands regulated a person’s personality, gender expression, and sexual preferences had existed since the late 1920s, but longstanding feuds between psychoanalysts and endocrinologists kept the two fields distant from one another for decades, as the former focused on mental state as the root of a condition like homosexuality, whereas the latter searched for a somatic origin.<sup>583</sup> The political-scientific shifts at the APA, however, gave new attention to those like Gunter Dörner. He published an influential 1976 book *Hormones and Brain Differentiation*, which posited that—inspired by his results from previous experiments on castrated mice—homosexual men had lower levels of testosterone and higher levels of estrogen than heterosexual men.<sup>584</sup> Dörner’s study demonstrated that endocrinology too did not distinguish gender nonconformity, transsexuality, and homosexuality from one another, but rather hypothesized their etiologies as being intrinsically tied to the nature of sex hormones that regulated an

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<sup>581</sup> Ibid.

<sup>582</sup> San Francisco Chronicle, “Report to Psychologists: Panel Says Gays Still Face Bias,” *San Francisco Chronicle* (August 25, 1981) Collection 7301, Box 153, Folder 21, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York.

<sup>583</sup> Terry, *An American Obsession*, 159; Bernice L. Hausman, *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (Durham, NC: Duke University Press, 1995), 27-9.

<sup>584</sup> Terry, *An American Obsession*, 372.

individual's physical characteristics as well as one's psychological qualities. This hormone-based work and others like it were quickly integrated into the writings of other sexologists as Bell, Weinberg, and Hamersmith cited the Dörner study to show that there might be a hormonal basis for homosexuality.<sup>585</sup>

Several years into these new investigations into the endocrine system, a research team led by psychoendocrinologist Brian Gladue and psychiatrists Richard Green and Ronald Hellman sought to put Dörner's sex hormone hypothesis to a more rigorous test.<sup>586</sup> The test involved administering Premarin, a strong dose of estrogen used to treat menopause and uterine bleeding, to self-identified homosexual and heterosexual men. It was hypothesized that because women's luteinizing hormone (LM) levels initially drop and then rise to double their original baseline, that homosexual men's baseline levels would rise as well. Once again, endocrinology's focus on sex hormones led to an assumption that homosexual men were essentially a hybrid species between gender normative, heterosexual men and women. The results showed that although none of the 17 heterosexual men experienced a rise in their LM baseline, 9 out of 14 of the homosexual men experienced a rise of about 35%, leading the researchers to conclude that there was significant evidence for the idea that hormonal factors had a causal impact on sexuality.<sup>587</sup>

Gladue, Green, and Hellman did attempt to nuance their results by reminding their peers that "[t]hese findings are based on a particular subset of homosexual men and may

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<sup>585</sup> Bell, Weinberg, and Hamersmith, *Sexual Preference*, 230.

<sup>586</sup> Brian Gladue, Richard Green, and Ronald Hellman, "Neuroendocrine Response to Estrogen and Sexual Orientation," *Science* 225, no.4669 (1984): 1496-9.

<sup>587</sup> *Ibid.*

not apply to all male homosexuals.”<sup>588</sup> However, their hedging here came primarily from a concern about different varieties of homosexual men, as they had been certain to capture “lifelong homosexuals” in their sample.<sup>589</sup> Citing the Kinsey scale, which places human beings on a spectrum ranging from exclusive heterosexuality to exclusive homosexuality, they allowed for the idea that less-than-exclusive homosexual men might respond differently to their treatment effects, and thus, “[w]hether a differential neuroendocrine response is present in men of less exclusive homosexual orientation is an open question.”<sup>590</sup> So for Gladue, Green, and Hellman, even if not all homosexual men’s sexual orientations could be described by this particular hormonal differentiation, it was possible that another biological mechanism might.<sup>591</sup> Upon this study’s publication, Task Force Executive Director Virginia Apuzzo issued a statement worth quoting heavily from:

“Gay men and lesbians have maintained that sexual orientation is not a ‘choice,’ as it is often charged by those campaigning against lesbian and gay rights. If the SUNY [referring here to Gladue’s university affiliation] study is valid, it would appear to support what we have said all along. And it would be yet another indication of the need for legislative and executive action to ensure protection against discrimination. If being gay or lesbian is biologically determined, then gay

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<sup>588</sup> Ibid.

<sup>589</sup> Ibid.

<sup>590</sup> Ibid.

<sup>591</sup> See also: N. McConaghy and A. Blaszczyński, “A Pair of Monozygotic Twins Discordant or Homosexuality: Sex-Dimorphic Behavior and Penile Volume Responses,” *Archives of Sexual Behavior* 9, no.123 (1980): 129-30.

men and lesbians clearly deserve the same civil rights guarantees afforded people on the basis of skin color, gender, or age.”<sup>592</sup>

The rise of new genetics-based disciplinary approaches to the study of human behavior and identities coupled with interdisciplinary scientific developments such as the founding of modern day behavioral genetics also contributed to the biodeterministic trend. During the late 1970s, the field of sociobiology, a progenitor of modern day evolutionary psychology, was founded by an entomologist named E.O. Wilson who sought to explain human behaviors and identities with reference to evolutionary theory. As biologist Richard Lewontin described the field of inquiry, sociobiology begins with traits we see in contemporary life and posits that those characteristics are relatively universal, can be traced down to the level of genetic code, and are the natural result of the process of human evolution. This theoretical framework presumes that a trait possesses an adaptive quality that can be theorized with reference to early hunter-gatherer society, which discounts any sociological account for the existence of an identity or behavior by rooting it in a story about human evolution.<sup>593</sup>

In addition to exploring the evolutionary nature of human behaviors such as altruism and racial animosity, Wilson directed his theory toward the origins of homosexuality.<sup>594</sup> Though he spoke of a “potential for bisexuality in the brain,” his

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<sup>592</sup> Virginia M. Apuzzo, “Statement on SUNY Study on Hormones,” (1984) Collection 7301, Box 188, Folder 63, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York.

<sup>593</sup> Lewontin, *Biology as Ideology*, 88-90.

<sup>594</sup> E. O. Wilson, *Sociobiology: The New Synthesis* (Cambridge, MA: Harvard University Press, 1975).

ultimate concerns were the twin phenomena of “full homosexuality” and “full heterosexuality,” particularly with regard to the former’s evolutionary origins.<sup>595</sup> In 1978, Wilson stated this hypothesis more starkly than many of his contemporaries by writing that “[t]he predisposition to be a homophile could have a genetic basis, and the genes might have spread in the early hunter-gatherer societies because of the advantage they conveyed to those who carried them.”<sup>596</sup> He explained that while early homosexual men would not have passed on their genetic material through reproduction themselves, they might have “taken the roles of seers, shamans, artists, and keepers of tribal knowledge” that enabled their immediate relatives to survive and reproduce at higher rates and, thus, pass on these “gay genes.”<sup>597</sup>

Sociobiologists were soon accompanied by another set of biological determinists in the formation of the field of behavioral genetics, a loose assemblage of geneticists, biologists, and psychologists. As historian of science Aaron Panofsky explained, this field was constructed by a new guard of geneticists who sought to re-establish ties with psychologists, psychiatrists, and other social scientists from which an older guard in genetics had separated themselves.<sup>598</sup> Behavioral geneticists were particularly influential in their defense of twin and sibling studies, which they spread throughout the social sciences in part by attacking those who harbored suspicions of the methodology as “anti-

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<sup>595</sup> E.O. Wilson, *On Human Nature, With a New Preface* (Cambridge, MA: Harvard University Press, 2004), 144.

<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*, 145; Wilson linked homosexuality to a broader consideration of the evolutionary character of altruism in human societies. He wrote that “[t]here is, I wish to suggest, a strong possibility that homosexuality is normal in a biological sense, that it is a distinctive beneficent behavior that evolved as an important element of early human social organization. Homosexuals may be the genetic carriers of some of mankind’s rare altruistic impulses” (p.143).

<sup>598</sup> Panofsky, *Misbehaving Science*, 139-41.

genetic,” unscientific reactionaries.<sup>599</sup> Though even those like E. O. Wilson had only cautiously endorsed the twin study methodology particularly—in his 1978 book, Wilson critiqued a twin study on homosexuality for “suffer[ing] from the usual defects that render twin analyses less than conclusive”—behavioral geneticists in the 1980s marched forward with their bold claims regarding the genetic origins of a slew of identities and behaviors.<sup>600</sup>

E.O. Wilson’s own student James Weinrich, for example, came to publish a number of genetics-based studies on sexuality including an influential study of homosexual and heterosexual brothers on heritability and homosexuality with his co-author Richard Pillard, the first openly gay psychiatrist in the U.S.<sup>601</sup> In that study, Pillard and Weinrich recruited a sample of fifty-one primarily homosexual men and fifty heterosexual men and demonstrated that the homosexual subjects were four times as likely to have a gay sibling compared to the heterosexual ones. This likelihood of having a gay sibling mapped onto assumptions about how gay siblings were distributed in the general population.<sup>602</sup> The last third of the fairly short paper was devoted to counterfactuals that might explain the increased incidence of homosexuality in the gay subjects, which ranged from assumptions about an increased tendency for gay men to know if their siblings were gay as well as issues in the recruitment methodology. However, Pillard and Weinrich concluded that they had accounted adequately for these

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<sup>599</sup> Ibid., 141.

<sup>600</sup> Wilson, *On Human Nature*, 145.

<sup>601</sup> Richard C. Pillard and James D. Weinrich, “Evidence of Familial Nature of Male Homosexuality,” *Archives of General Psychiatry* 4, no.8 (1986): 808-812, doi:10.1001/archpsyc.1986.01800080094012

<sup>602</sup> Ibid., 808.



scenarios and were convinced that their results showed that there was likely “a significant familial component to male homosexuality” and that it was possible that it was discoverable in a person’s genetic code.<sup>603</sup>

*Co-production in Motion: Evidence from PFLAG Conferences and Advocacy Literature*

As biological conceptions were coming to the fore in the science of sexuality, PFLAG was simultaneously deepening its relationship with these researchers by inviting them to their annual national conferences and by consulting them to create advocacy literature to teach parents, friends, skeptics, and gays and lesbians themselves about the likely origins of homosexuality. Though PFLAG had a longer history of inviting those to their meetings to dispel myths about the pathological model of homosexuality, the mid-to-late 1980s saw a noticeable shift in the types of researchers being brought to address the national membership. No longer were these scientists simply attacking neo-Freudian ideas about bad parenting and other sociological conditions that were presumed to corrupt a child’s sexuality. Instead, the scientists invited to conferences were increasingly engaged in the biological sciences and advanced new biodeterministic theories of the origins of sexuality as an alternative. Whereas activists in the liberationist and immediate post-liberationist moment were more likely to downplay the importance of searching for such origins (the rejoinder to the question of origin was often: “what are the origins of heterosexuality then?”), PFLAG’s ideological commitments made it a suitable political vessel for both the question of ontology and the new theories that sought to answer it.

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<sup>603</sup> Ibid.

During PFLAG's first national conferences in the 1980s, the researchers that were invited constituted a mix between those who had made careers on refuting the pathological model as well as those who were working on elements of the biological thesis. As for the former, Evelyn Hooker gave one of the early presentations titled "Facts and Misconceptions about Homosexuality," which offered reassurance to PFLAG members that gays and lesbians were not a deviant class of mentally ill persons.<sup>604</sup> A later presentation in 1989 titled "Future Directions for Sexuality: Beyond the Biology" featured public health and nursing scholar Sylvia S. Hacker who was known also for confronting myths about homosexuality but also for promoting a vision of sexuality as a spectrum rather than a binary.<sup>605</sup> But as evidenced in the Gladue, Green, and Hellman paper on the hormonal thesis, this perspective would not necessarily provide a bulwark against the development of a biological conception of gay identity. The biological account was proving capable of generating enough nuances and hedging to incorporate degrees on the Kinsey scale into its etiological assumptions (i.e. a variety of biological factors may be at play, each coding for a different degree on the spectrum of sexuality). As long as that was conceivable, the scientific foundation for a political and cultural disposition toward a "born this way" gay identity was possible.

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<sup>604</sup> Evelyn Hooker, "Facts and Misconceptions about Homosexuality," (1984), Collection 7616, Box 8: Folder 84-LBI: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>605</sup> Sylvia S. Hacker, "Future Directions for Sexuality: Beyond the Biology," (1989), Collection 7616, Box 10: Folder 89-23: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY

Sylvia S. Hacker, "Students' Questions about Sexuality Implications for Nurse Educators," *Nurse Educator* 9, no.4 (1984): 28-31; Cole Bertos, "Renowned U-M Professor of Human Sexuality Sylvia Hacker Dies at Age 90," *Ann Arbor News* (January 17, 2013), <http://www.annarbor.com/news/u-m-professor-of-human-sexuality-dies-in-her-sleep-at-age-90/> (Accessed May 22, 2019).

Other conference presenters during this same period gave talks that more closely resembled more heavily biodeterministic studies and political discourse that would come to dominate throughout the 1990s. Sociologist and coauthor of *Sexual Preference* Martin Weinberg, for example, gave a presentation in 1986 titled “Development of Sexual Orientation” modeled on his work that took seriously considerations that a combination of factors including biology contributed to a person’s sexuality.<sup>606</sup> Though Weinberg was not an uncompromising proponent of the biological thesis, his work with Bell and Hamersmith had come to be cited frequently by those considering biological explanations. C.A. Tripp, an older Kinsey-affiliated scholar who had been in correspondence with members of the homophile organization the Mattachine Society in the 1950s and 1960s, saw *Sexual Preference* as tossing aside nearly all psychological and social learning studies along with the pathological model (environmental influences were largely determinative in both of these) and leaving only biological ones to explain human sexuality.<sup>607</sup> While Weinberg would protest being cast as a biodeterminist, it is telling that here that an older gay rights scientific ally recognized the shift that Weinberg and others represented.

In 1987, one of the most bioessentialist of these conference presentations was delivered by the newly-appointed director of the Kinsey Institute, biologist June Reinisch. Her talk, titled “Biological Factors in Psychosexual Development,” echoed the new director’s project in moving the Institute in a more biomedical direction, a

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<sup>606</sup> Martin Weinberg, “Development of Sexual Orientation,” (1986), Collection 7616, Box 9: Folder 86-S: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>607</sup> C. A. Tripp, “Review of *Sexual Preference: Its Development in Men and Women*,” *Journal of Sex Research* 18, no.2 (1982): 183-6.

commitment that was reflected in her decision to change the Institute's name to the Kinsey Institute for Research in Sex, Gender and Reproduction.<sup>608</sup> Reinisch's work during the period was characterized by the assertion that gender differences in personality were rooted in genetic, prenatal, and postnatal factors. This research entailed investigations into the impact of in utero hormonal differences that Reinisch and her colleagues believed were at the root of masculine and feminine behaviors in males and females respectively, and that could be demonstrated in infant children.<sup>609</sup> Unsurprisingly, as gender differences—gender nonconformity in particular—were so heavily linked to homosexuality at this time (both in science and in culture), Reinisch also expressed the belief that prenatal factors such as hormone imbalances in the womb could alter a child's male hormone production in such a way that would predispose him to a homosexual orientation.<sup>610</sup>

By 1988, PFLAG had assembled eleven of these scientific allies and gathered their expert opinions into one document to disseminate among their members and supporters.<sup>611</sup> This pamphlet titled "Why is My Child Gay?" had the stated purpose of being a resource for readers "to learn how experts in the field (scientists, researchers)

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<sup>608</sup> June Reinisch, "Biological Factors in Psychosexual Development," (1987), Collection 7616, Box 9: Folder 87-27: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY; Giovanni Breu, "As Did Kinsey, June Reinisch Takes the Plain Brown Wrapper Off the Study of Sex," *People* (December 3, 1984), <http://people.com/archive/as-did-kinsey-june-reinisch-takes-the-plain-brown-wrapper-off-the-study-of-sex-vol-22-no-23/> (Accessed May 22, 2019).

<sup>609</sup> June Reinisch, Leonard Rosenblum, Donald Rubin, and M. Fini Schulsinger, "Sex Differences Emerge During the First Year of Life," in *Women, Men, and Gender: Ongoing Debates*, ed. Mary Roth Walsh (New Haven, CT: Yale University Press, 1997), 37-43; Linda L. Carli, "No: Biology Does Not Create Gender Differences in Personality," in *Women, Men, and Gender: Ongoing Debates*, ed. Mary Roth Walsh (New Haven, CT: Yale University Press, 1997), 44-54.

<sup>610</sup> Breu, "As Did Kinsey."

<sup>611</sup> PFLAG, "Why is My Child Gay?," (1988), Collection 7616, Box 17: Folder 28: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY).

answer the questions most commonly asked by parents and friends of gays and by homosexuals themselves.”<sup>612</sup> The experts consulted included a number of familiar names including: Alan Bell, Richard Green, Judd Marmor, Richard Pillard, June Reinisch, Martin Weinberg, James Weinrich, and Evelyn Hooker, all of whom with the exception of Hooker had entertained the biological thesis to some degree. Out of the remaining three researchers, only one, an anthropologist named Gilbert Herdt who studied gender identity development in Papua New Guinea through the lens of culture and semiotics, questioned the heavily-biological approach to sex/gender and sexuality.<sup>613</sup> Among the other two were the famous transsexuality and intersex sexologist John Money, who too considered hormonal determinants in sex, gender identity, and sexuality, and Lee Ellis, a sociologist who researched the neurohormonal causes of aggression, a decidedly biodeterministic enterprise.

Anticipating the query of why scientific experts ought to be the ones answering these questions, the next section asked rhetorically “[w]hy ponder the questions” and “[w]hy analyze facts we cannot change?”<sup>614</sup> PFLAG explained that for some “because of a natural curiosity, or as a means of coping with the fact that their child is gay in a heterosexual society—seek to explore the origins, prevalence, and history of male homosexuality or lesbianism before they can accept their child’s homosexuality or bisexuality as a reality.”<sup>615</sup> This answer reveals how the liberal gay rights movement was

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<sup>612</sup> Ibid., 1.

<sup>613</sup> Gilbert Herdt, *The Sambia: Ritual and Gender in New Guinea* (San Diego, CA: Harcourt Brace Jovanovich, 1987).

<sup>614</sup> PFLAG, “Why is My Child Gay?,” 1.

<sup>615</sup> Ibid.

becoming more amenable to the idea that gay and lesbian identity *was* an aberration from a heterosexual world that was divided into the gay-straight binary not because of any historical, sociological, or political economic developments, but rather because that was the natural order of things. And accompanying this move was an insistence that the term “sexual preference” be replaced with “sexual orientation” as “[a]fter 1982...scientists [have] found evidence that homosexuality and heterosexuality may not be a matter of free choice,” and thus, the rhetoric of the movement ought to reflect this new understanding how sexuality existed as a function of hormonal and genetic factors that were smaller parts of a grander—and “natural”—evolutionary ordering of sexuality in human societies writ large.<sup>616</sup>

The most striking part of the document was its cover, which was composed of the title of the pamphlet along with a series of the conclusions offered by a consensus of the experts surveyed. The results began with a hedged statement that granted that while “[t]he exact causes of heterosexuality and homosexuality are unknown...[they are] likely to be the result of an interaction of several different factors, including genetic, hormonal, and environmental factors.”<sup>617</sup> Following this claim was another that stated “[p]sychological and social influences alone cannot cause homosexuality,” which reveals both the move away from the pathological model that rested heavily on these methods but also the move toward a more biological thesis.<sup>618</sup> The latter element becomes more obvious when paired with the third conclusion that stated “[a] biological (genetic,

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<sup>616</sup> Ibid.

<sup>617</sup> Ibid., cover page.

<sup>618</sup> Ibid.

hormonal, neurological, other) predisposition toward a homosexual, bisexual, or heterosexual orientation is present at birth in all boys and girls.”<sup>619</sup> This represents one of the clearest and forceful articulations of the biological thesis of the time. And while the fourth conclusion offered a caveat that “[n]one of the contributing factors *alone* can cause homosexuality,” the pamphlet as a whole went forth to consider biological assumptions above all others.

A look to the individual statements given by these researchers in later pages confirms this assessment of the piece’s overall biological character. The first question posed to the researchers asked “[w]hat is the basis of sexual orientation/which factor or factors drives most?”<sup>620</sup> Whereas Hooker and Marmor offered their usual statements on biology being possibly one of many determining factors, most of the others replied with some restatement or explanation of the biological thesis. Weinberg’s response reiterated the premise that even if bisexuality and other degrees of sexuality did not fit neatly with biological studies focused on gays and lesbians at the far end of the Kinsey scale, that it was possible that other biological factors might explain those who did not fit the hetero-homo binary.<sup>621</sup> Bell, Ellis, and Money all gave answers that hinged on the link between gender nonconformity and homosexuality. Ellis’s comment in particular stands out as he asserted that “the most significant factors responsible for variation in sexual orientation appear to occur before birth.”<sup>622</sup> He continued on by discussing the brain’s hypothalamus,

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<sup>619</sup> Ibid.

<sup>620</sup> Ibid., 6; The other two questions posed to the researchers had more to do with reparative therapy than etiology specifically.

<sup>621</sup> Ibid., 9. Weinberg’s full response to the question was simply: “My guess: Biological factors for homosexuality and heterosexuality; conditioning for various degrees of bisexuality.”

<sup>622</sup> Ibid., 6.

citing that this “primary control center...not only appears to largely control sexual orientation, but has been shown to be organized differently for males and females (albeit to varying degrees, depending on the amount and timing of exposure to testosterone and other sex hormones).”<sup>623</sup>

Overall, this pamphlet helped introduce PFLAG members and others to these kinds of biological assumptions about gay identity and would be instrumental in crafting the movement’s approach to identity in the following decades.<sup>624</sup>

### *The Shape of Gay Political Identity to Come*

The preceding analysis has been an attempt at tracking the ways in which the liberal gay and lesbian rights movement and scientific and medical experts studying the nature and origins of homosexuality grew together, influencing one another along the way. Both groups were impacted not only by the writings and actions of one another, but they also matured together during the early days of neoliberalism. They were thus theorizing identity and science during a period of right-wing political ascendance to power, with an accompanying ideology that rationalized inequalities and existing social relations by reading their inevitability into human nature. The underlying premise to this argument is that the scientific and the political here cannot be understood as discrete assemblages of actors and ideas. Rather, they constituted one another in ways that can be

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<sup>623</sup> Ibid.

<sup>624</sup> By 1985, those like Marmor were taking hypothalamus-centered theories seriously and several years after that neurologist Simon LeVay’s “gay brain” study of the hypothalamus would come to feature prominently in debates about gay etiology; Judd Marmor, “Homosexuality: Nature or Nurture; Simon LeVay, “A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men,” *Science* 253, no. 5023 (1991): 1034-37.



teased out through the study of their institutional and ideological developmental trajectories, which were intrinsically intertwined.

## CHAPTER 5: Building Bioessentialism into Gay Rights Litigation

### Immutability Before the Gay Gene

The thesis of this chapter is that judicial and constitutional incentives matter a lot in determining one's approach to litigation. But in important ways, what matters even more is ideology and who one counts among their political allies and enemies. Looking first to the former set of factors, the Supreme Court's 1973 plurality opinion in *Frontiero v. Richardson* introduced the concept of "immutability" as one condition for achieving heightened judicial protections under the equal protection clause.<sup>625</sup> For obvious reasons, those seeking to understand why the gay and lesbian rights movement began to express their identities as immutable—especially before the courts—have looked to connections between the trajectory of equal protection clause jurisprudence and gay rights litigation since the last quarter of the twentieth century for an answer.<sup>626</sup> The well-rehearsed narrative is that the immutability factor combined with the lost cause of achieving equal rights through privacy right jurisprudence post-*Bowers v. Hardwick* in 1986 led the movement to rely heavily on new biodeterministic studies in the 1980s and early 1990s that claimed to prove that the origins of homosexuality could be pinned to a person's

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<sup>625</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973); Immutability of the characteristic or identity in question is one of four factors the Supreme Court has said can be considered in meriting heightened judicial scrutiny (the others being: a long history of discrimination, political powerlessness, and no relation between the characteristic and an ability to contribute to society).

<sup>626</sup> Paisley Currah, "Searching for Immutability: Homosexuality, Race and Rights Discourse," in *A Simple Matter of Justice?: Theorizing Lesbian and Gay Politics*, ed. Angelia R. Wilson (London: Cassell, 1995), 51-90; Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago, IL: University of Chicago Press, 1999), 393-4; Edward Stein, "Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights," *Chicago Kent Law Review* 89, no.597 (2014): 597-640; Lisa M. Diamond and Clifford J. Rosky, "Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities," *Journal of Sex Research* 53, no.4-5 (2016): 363-91; Mary Ziegler, "Perceiving Orientation: Defining Sexuality after Obergefell," *Duke Journal of Gender Law and Policy* 23, no.223 (2016): 224-61 (233).

genes, hormones, or brain. In this account, the constitutional incentives are often cast as determinative and all other factors are moved to the background. At their best, those reciting this narrative acknowledge that the gay and lesbian movement had become beholden to the idea of nature over nurture, but they do not interrogate from where this commitment emerged.<sup>627</sup> As a result, extra-constitutional considerations are often then defined more as contingencies (e.g. the gay gene study arrived just in time for an opportunistic gay rights movement to implement) than driving developmental forces.

My retelling of this story does not discount the role that the incentives provided by the equal protection clause played in these developments. Instead, I fold that important observation into an expansive, thicker account that tracks how political investments in scientific alliances and logic explain the gay and lesbian movement's increasing dependence on these ideas from the early 1970s through the mid-1980s. Rather than serving as the primary catalyst, the immutability condition (alongside provisions enabling expert witnesses to buttress scientific claims regarding immutability in their testimonies before trial courts or in citations to their work submitted to appellate ones) presented as the most convenient—but not the only—legal mechanism through which the liberal gay rights movement came to channel its increasingly biodeterministic conceptions of self. In other words, though jurisprudential and legal institutional factors surely played a constitutive role in the development of gay and lesbian rights litigation, one cannot begin

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<sup>627</sup> A common scholarly and popular notion is that the Right's insistence on the language of choice pushed gay and lesbian activists to adopt the biological frame (the claim I make here and in other chapters is that this largely reverses the equation).

to understand the entire story here without attention to broader institutional and ideological dynamics as they unfolded outside the courts.

To make this argument, I look at a range of cases spanning the gay liberation era through the maturing gay rights litigation community that began undertaking test cases, some of which ended up before the U.S. Supreme Court. The early gay liberation same-sex marriage cases, for instance, demonstrate a radically different approach to litigation and constitutional questions—even those concerning immutability directly—than the cases that would come after the liberal turn in gay rights politics. The cases pursued by liberationists tended to emphasize what they saw as the inherent sexist power dynamics laden in the marriage legal regime; they oftentimes used legal arguments and the judiciary mainly as a venue for enacting a radical, often disruptive politics that sought to bring attention to their ideological project.

As the liberal version of the movement displaced the short-lived radical moment, gay rights litigation was shaped by new ideological commitments, which were informed by deepening alliances with scientific and medical expertise. And as the liberal movement cultivated its relationships with scientific and medical actors and institutions throughout its first decade and a half, it was exposed to—and sometimes contributed to—the increasingly bioessentialist studies the latter were producing. Thus, while the trajectory of the following cases do evidence some shift in constitutional strategy away from conduct and behavioral distinctions (i.e. the realm of privacy right case law) and toward legal status claims (the purview of the equal protection clause) that appear more amenable to the language of immutable sexual identities, a closer look into *how* both

those legal framings were articulated with reference to scientific theories and expertise demonstrates that the question of identity and the ontological nature of gay identity were central to the gay rights movement's litigation and their broader politics rather than being merely a strategic legal approach.

*Gay Liberation in the Courts: The Law as Tactic in the Early Same-Sex Marriage Cases*

One of many ways that gay liberationists were distinct from their homophile predecessors and the liberals that would succeed them was their limited and peculiar use of the judicial system. Whereas homophile organizations like the Society for Individual Rights (SIR) and the Mattachine Society continued to pursue legal campaigns such as those against employment discrimination, liberationists tended to stage more extreme cases that were often motivated less by the assumption that they might actually win but instead by the broader political education, agitation, and consciousness-raising that they could advance through legal spectacles.<sup>628</sup> This is not to say that the issues at stake in the cases brought by gay liberationists were always mere tactical farces designed to transform the courts into a stage for political theater. Rather, many activists were sincere in their legal battles and at the least they sought to highlight the injustice of their denial of full and equal citizenship under the law, even if many of them were ultimately opposed to a liberal rights framework. Because gay liberationist's commitments were in their own more self-determined approach to identity rather than the older homophile reliance on scientific expert authority, these cases demonstrate how gay liberationist principles

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<sup>628</sup> *Society for Individual Rights, Inc., and Donald William Hickerson v. Robert Hampton, Chairman, United States Civil Service Commission, et al.*, 528 F. 2d 905 (9<sup>th</sup> Cir. 1973).

shaped their approach to litigation including concepts like immutability. Importantly, these cases demonstrate how a movement's ideology, strategy, and allies impact their engagement with legal institutions and discourses.

I focus here on the initial same-sex marriage cases brought by gay liberation activists in the early 1970s largely because these were among some of the very few cases that liberationists pursued as part of their political work. As legal scholar Michael Boucai has argued in his revisionist account of these cases, liberationist legal challenges are best understood not as precursors to the contemporary same-sex marriage saga, but instead as radical, polemical demonstrations of gay life and power and what a politics of gay liberation might portend.<sup>629</sup> While most scholars have either ignored these cases or have treated them as the actions of a small reactionary and fringe groups of radical activists divorced from a larger tendency, Boucai has shown that a variety of gay liberation activists and organizations were involved and committed to these cases for numerous strategic, tactical, and principled purposes.<sup>630</sup> For this reason, I look first to varied pronouncements on same-sex marriage within gay liberation circles, which ranged from vehement outrage at the call for inclusion into a liberal institution to calls to make marriage a less sexist, less patriarchal institution through such inclusion. Implicit in the latter's statements and actions too was a recognition that both the courts and the institution of marriage were important public venues and symbols through which to

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<sup>629</sup> Michael Boucai, "Glorious Precedents: When Gay Marriage Was Radical," *Yale Journal of Law & the Humanities* 27, no.1 (2015): 1-82; *Baehr v. Lewin*, 852 P.2d 44 (Hawaii 1993); *United States v. Windsor*, 570 U.S. \_\_\_\_ (2013); *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>630</sup> Boucai, "Glorious Precedents," 5, footnote 26; William N. Eskridge, Jr. and Darren R. Spedale, *Gay Marriage: for Better or for Worse?: What We've Learned from the Evidence* (New York: Oxford University Press, 2007); Michael Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 1999).

disseminate the tenets of their radical gay political ideology and to enlighten the public to the basic daily struggles of gay life. Upon delineating these responses to the question of marriage then, I turn to the cases themselves to demonstrate how gay liberation's political principles were translated into the law in ways that diverged significantly from arguments regarding same-sex marriage filed by relatively conservative homophile groups.

Many of the vocal opponents to the pursuit of same-sex marriage as a political issue were fueled by a dual critique of both the liberal reformist use of the courts to recognize gay rights without changing the broader system as well as the idea that marriage itself was a corrupt and rotten institution. Co-founder of ONE Inc. and activist in the Los Angeles GLF chapter Jim Kepner summed up the latter attitude in a 1970 essay titled "Ancient Gospels & New Life Styles," in which he implored radicals to explore new forms of relationships rather than attempting to square gay life with straight life.<sup>631</sup> He wrote that

"Marriage has been too much a procrustean bed for heterosexuals for homosexuals to take it up too unquestioningly—though those who strongly want it are not likely to be deferred by arguments such as these. But give it a thought. There are social, spiritual and economic reasons why heterosexual marriage takes the form that it does, and those reasons simply don't work the same for us.

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<sup>631</sup> Jim Kepner, "Ancient Gospels & New Life Styles" (April 1970) Collection 2012.031, Box 1, Folder 19, Gay Liberation Front LA Collection, ONE National Gay & Lesbian Archives, Los Angeles, CA.

Oughtn't we be seeking new forms instead of slavishly borrowing the very trap that has made life miserable for so many of our parents?"<sup>632</sup>

An even more passionate denunciation of marriage as both a personal and political project for gay liberationists can be found in a *Gay Power* essay penned by GLF-NY member and journalist Ralph Hall.<sup>633</sup> Hall described these early legal cases for same-sex marriage as pleas for inclusion and a submission "to the guidelines of so-called conventional rites [that] must be classed as reactionary." Hall articulated the dissatisfaction of many other liberationists who opposed using the courts in this manner and for anyone who would orient their radical movement toward a request to allow more equal access to an institution that reflected "the bad habits of our oppressors."<sup>634</sup>

While many in gay liberation organizations agreed with this principled stance against pursuing the right to marry, Boucai has brought to light the fact that many other gay liberation activists and organizations came to support their members' legal actions.<sup>635</sup> Whereas those like homophile activist Frank Kameny expressed the belief that heterosexuality and homosexuality were nearly identical in terms of their propensities for both physical lust and romantic affection, gay liberationists who supported same-sex marriage cases did so on the basis that gay life presented a fundamental break with

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<sup>632</sup> Ibid.

<sup>633</sup> Donn Teal, *The Gay Militants: How Gay Liberation Began in America, 1969-1971* (New York: St. Martin's Press, 1995), 270.

<sup>634</sup> Ibid.

<sup>635</sup> Boucai, "Glorious Precedents," 67-72.



straight life and that gay power might change what they saw to be a corrupt institution.<sup>636</sup>

For example, in its 1972 Gay Rights Platform, the National Coalition of Gay Organizations stated one of its goals to be the “repeal of all legislative provisions that restrict the sex or number of persons entering into a marriage unit and extension of legal benefits of marriage to all persons who cohabit regardless of sex or number.”<sup>637</sup> In the place of a call for simple inclusion, this coalition of gay liberation organizations championed an interpretation of marriage that expanded its legal benefits beyond the heterosexual nuclear family to cover arrangements not limited in size nor by sex.

In these marriage cases, the litigants involved embodied a confluence of these attitudes as they used the courts to both make legal arguments for inclusion while also denouncing the current state of heterosexual relations in the U.S. and demanding a gay alternative based in an anti-sexist/feminist ethos.<sup>638</sup> The most well-known of these came out of Minneapolis, Minnesota where in May of 1970, Jack Baker and Michael McConnell, with the aid of activists working with Fight Repression of Erotic Expression (FREE), began their legal fight by applying for a marriage license.<sup>639</sup> McConnell and Baker were interested personally in combatting what they perceived to be a procreation bias in marriage that contributed to the oppression of women by encouraging them to

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<sup>636</sup> Franklin Kameny, “Gay is Good,” in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, eds. Mark Blasius and Shane Phelan (New York: Routledge, 1997): 366-76 (368).

<sup>637</sup> Boucai, “Glorious Precedents,” 72.

<sup>638</sup> George Chauncey has made a similar point about the diversity of opinion regarding marriage in gay liberation circles; George Chauncey, *Why Marriage: The History Shaping Today's Debate Over Gay Equality* (New York: Basic Books, 2009).

<sup>639</sup> *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), aff'd, 409 U.S. 810 (1972); Stewart Van Cleve, *Land of 10,000 Loves: A History of Queer Minnesota* (Minneapolis, MN: University of Minnesota Press, 2009), 86-8.

bear and raise children.<sup>640</sup> Additionally, they argued that because the legal institution of marriage involved an assortment of privileges and rights that, consequently—regardless of whether gay liberationists wanted to have the option to marry—their denial of a marriage license was an indication that gay persons in the U.S. were systematically deprived of “full legal dignity.”<sup>641</sup> Lastly, McConnell and Baker brought their case for a tactical reason as well: McConnell had just been hired by the University of Minnesota library system, which had a history of firing persons based on their sexuality.<sup>642</sup> McConnell was indeed fired upon the university discovering his attempt to procure a marriage license, thereby giving FREE, Baker, and McConnell a means by which to pursue two legal cases, one of which was based in a consciousness-raising regarding marriage while also taking on a fight against employment discrimination.

The two other same-sex marriage cases from this era were also heavily influenced by an anti-sexist ideological commitment and a desire to critique the institution even while demanding expanded access to it. In *Singer v. Hara* (1974), Gay Liberation Front and Seattle Gay Alliance members John Singer and Paul Barwick sued the Seattle city government after being denied a marriage license.<sup>643</sup> Singer’s and Barwick’s case stands out for its tactical nature as they did not describe their relationship with one another as romantic; though close friends and occasional lovers, they were practitioners and advocates of communal living, collective sex, and a general ethos of “free love” that characterized the New Left opposition to traditional heterosexual living patterns (as

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<sup>640</sup> Teal, *The Gay Militants*, 263-4.

<sup>641</sup> *Ibid.*, 264.

<sup>642</sup> *Ibid.*, 265-6.

<sup>643</sup> *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), appeal denied, 84 Wash. 2d 1008 (1974).

many a feminist critic of this period has rightfully noted, however, free love was often anything but given the persistence of the male chauvinism and coercion that often attended such cultural practices and arrangements).<sup>644</sup> The only case involving a lesbian couple, which came out of Louisville, Kentucky, was also brought on these grounds. In *Jones v. Hallahan* (1973), Marjorie Jones and Tracy Knight pursued their case on the premise that it was important to ensure that the face of a gay liberation marriage struggle would not be solely represented by gay men.<sup>645</sup> Jones's and Knight's lesbian feminism was central to their pursuit of marriage and to their organizing in Louisville in general as they attempted to politically mobilize their gay scene, which they described as being more culturally-defined rather than the more overtly political GLF chapters on the coasts.

These gay liberationists did not abandon their radical political positions for a more cautious legal rhetoric. Rather, liberationist stances on marriage as well as the critique of heterosexual society writ large were central to the crafting of legal arguments for extending the right to marry. This influence exhibited itself in how radicals conducted their litigation. For example, for the most part they tended not to rely on citations to scientific studies or testimonies by expert witnesses in the way that previous homophile cases had been. Though in some cases such as *Jones* the litigants followed in that tradition by bringing expert witnesses to trial, these authorities included anthropologists who many gay liberationists were happy to have defend their claims that heterosexualism was a contemporary Western phenomenon and that reasonable alternatives to sex, gender,

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<sup>644</sup> Boucai, "Glorious Precedents," 41.

<sup>645</sup> *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); Boucai, "Glorious Precedents," 29-34; Catherine Fosl, "It Could Be Dangerous! Gay Liberation and Gay Marriage in Louisville, Kentucky, 1970," *Ohio Valley History* 12, no.1 (2012): 45-64.

and society existed concurrently with their own oppressive world. The sole expert witness for the liberationists in the *Jones* case also happened to be the university faculty sponsor for the sexuality-themed anthropology classes that activists taught in the evening at the University of Louisville.<sup>646</sup> This was quite a bit different than bringing aboard a well-renowned Kinsey-trained sexologist to testify. And with exception to the Minnesota Civil Liberties Union's unprecedented decision to hire an openly-gay attorney, Michael Wetherbee, to lead the *Baker* litigation, these cases tended to be represented less by mainstream civil rights organizations but rather by groups like the National Lawyers Guild, a left-wing legal collective that supported the *Singer* litigants.<sup>647</sup>

Some of the most prominent expressions of political principle into legal argument were the sex discrimination challenges brought in the *Baker* and *Singer* cases. True to their foundations in anti-sexism and feminism, litigants here argued that the equal protection clause was violated by prohibiting members of the same sex from marrying.<sup>648</sup> Additionally in *Baker*, Baker and McConnell reiterated their criticism of marriage as an institution narrowly defined by heterosexual procreation, which the court dismissed by invoking the Supreme Court's ruling that "[m]arriage and procreation are fundamental to the very existence and survival of the race" in the sterilization case *Skinner v. Oklahoma*

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<sup>646</sup> Fosl, "It Could Be Dangerous!," 53.

<sup>647</sup> Dick Hewetson, *History of the Gay Movement in Minnesota and the Role of the Minnesota Civil Liberties Union* (Minneapolis, MN: Friends of the Bill of Rights Foundation, 2013), 45, 107 [https://www.qlibrary.org/wordpress/wp-content/uploads/2014/04/MN\\_Gay\\_Movement\\_MCLU.pdf](https://www.qlibrary.org/wordpress/wp-content/uploads/2014/04/MN_Gay_Movement_MCLU.pdf);

Importantly, the national ACLU declined to support the litigation by stating that "[m]arriage is not a civil liberties issue."

<sup>648</sup> *Baker v. Nelson* (1971), 312; *Singer v. Hara* (1974), 12.

(1942).<sup>649</sup> The decision to base their arguments in the language of sex discrimination was, however, as much a strategic choice as it was a political one. Beginning in the late 1960s, the ACLU in particular had come to pursue equal protection clause cases regarding sex discrimination that would wind up as groundbreaking Supreme Court precedents for women's rights.<sup>650</sup> Additionally, these cases made reference to the right to privacy in *Griswold v. Connecticut* (1965) and the right to interracial marriage in *Loving v. Virginia* (1967) to argue that jurisprudential gains made by the civil rights movement and the reproductive rights movement ought to be extended to the progressive cause of making access to marriage more equal and opening the door to a broader transformation of the practice.<sup>651</sup> The litigants in the *Jones* case strangely did not make reference to these arguments but instead argued that the denial of a marriage license to two women constituted violations of the establishment clause as well as the rights to religious free exercise, the right to association, and the 8<sup>th</sup> Amendment protection against cruel and unusual punishment.<sup>652</sup> As Boucai has noted, Jones's and Knight's establishment clause argument that denounced the grounding of heterosexual marriage in "the religious teachings and beliefs of the Christian and Jewish faiths" was atypical of the more

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<sup>649</sup> *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L. ed. 1655, 1660 (1942).

<sup>650</sup> The most influential of these were: *Reed v. Reed*, 404 U.S. 71 (1971), *Frontiero v. Richardson*, 411 U.S. 677 (1973), and *Craig v. Boren*, 429 U.S. 190 (1976). As Boucai notes, the *Singer* litigation was most likely also influenced by the 1972 passage of an Equal Rights Amendment in Washington state.

<sup>651</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>652</sup> *Jones v. Hallahan* (1973), 588-9.

cautious gay rights legal demands of the time that tried to avoid chastising religious sentiments.<sup>653</sup>

One of the most innovative arguments made in any of these cases was the claim in *Singer* that “homosexuals” constituted a protected class under the equal protection clause on par with the legal status afforded to persons on the basis of their race or sex.<sup>654</sup> In addition to the usual justifications for suspect classification including a lack of political power and a history of discrimination, Singer and Barwick heeded the language in the recent Supreme Court opinion in *Frontiero v. Richardson* to argue that gay identity could be construed as an “immutable characteristic.”<sup>655</sup> Just as the impulse to draw a neat line between these and modern same-sex marriage cases is a fraught one, it would be a mistake to interpret this reference to immutability as an early biological conception of homosexuality or some other narrow conception of what it means to be gay that would be at odds with gay liberation’s attitude regarding the malleability of human sexuality. Preceding to the equal protection clause section in the *Singer* brief was a section on scientific theories on the origin of homosexuality. Here, the litigants acknowledged that while “[s]everal causes for homosexual behavior have been offered [including] hereditary, genetic constitution, glandular or other disequilibrium of body chemistry, psychiatric pathology, moral depravity, fixation of psychosexual growth, and others,” there was no evidence that indicated any one factor—physiological or environmental—

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<sup>653</sup> Boucai, “Glorious Precedents,” 46, quoting from Brief for Appellants *Jones v. Hallahan*, No. W-152-70 (Ky. Ct. App. 1973), 9, 45.

<sup>654</sup> John Singer and Paul Barwick, “A Legal Brief on the Legitimacy of Gay Marriage: *Singer & Barwick vs. Hara* (Seattle, Washington: 1972); The appeal was bound together as a pamphlet several years after the case. It is possible that it now exists only in this format.

<sup>655</sup> Singer and Barwick, 19.

could explain something as complex as human sexuality.<sup>656</sup> Upon reviewing the various theories and studies cited here—along with some evidence from the Kinsey reports to undermine the idea that heterosexuality and homosexuality were distinct, non-overlapping phenomena—the litigants pronounced that “[f]or legal purposes, the causation of homosexuality is immaterial.”<sup>657</sup>

Further along in their immutability argument, the *Singer* litigants cited a slew of citizenship cases from the 1940s to the 1960s showing that the Supreme Court had come to take seriously the unchanging qualities associated with a person’s race, religion, and sex that might merit them additional protections under the law.<sup>658</sup> In addressing immutability specifically, the brief stated:

“[T]heir [i.e. the plaintiffs] sexuality is unchangeable. Although there is continuing debate about the causes of homosexuality, as noted in Part I above at page 10, the best psychiatric and medical data to date indicates that for the vast majority of homosexuals their sexual orientation is not one which can be easily changed and for the most part is not a life style which is freely chosen... [The] studies cited support the conclusion that a basic sociological fact about same-sex orientation is its permanence, its resistance to therapeutic techniques aimed at

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<sup>656</sup> *Ibid.*, 10-1.

<sup>657</sup> *Ibid.*, 11.

<sup>658</sup> *Singer and Barwick*, 19; These included cases such as *Skinner v. State of Oklahoma, ex. rel. Williamson*, 316 U.S. 535 (1942), *Korematsu v. United States*, 323 U.S. 214 (1944), *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Loving v. Virginia*, 388 U.S. 1 (1967).

restructuring personality, and its invulnerability to change despite the stigma of societal forces.”<sup>659</sup>

Admittedly, the “freely chosen” line above does not on its face appear congruent with the gay liberation ideal of *choosing* to be gay or to be a lesbian as a radical act. However, a less simplistic read of gay liberation ideology entails recognizing that part of this ideal is the *embrace* of whatever “deviant” sexual desires one might feel in themselves coupled with a call for self-avowed heterosexuals to look within themselves and find the sublimated desires that lurked inside. In this litigation, “immutability” seemed to indicate only that gays and lesbians were not mentally ill and that they were not usually capable of nor willing to reorient their sexual desires.

Evidence for this reading can be found in fellow same-sex marriage litigant Jack Baker’s 1974 *Minneapolis Star* editorial where he wrote that gays and lesbians “have developed a profound spiritual love for a person of the same gender and this love is every bit as sacred, as immutable as any opposite-sex relationship.”<sup>660</sup> Rather than rooting this claim in scientific language or authority, Baker explained that the proper way to conceive of homosexuality was as a preference whereby “[t]he stress is on the affections, where it belongs.”<sup>661</sup> In true liberationist form, Baker declared that this perspective on sexuality illuminated the complexity of desire in ways that could not be so neatly defined as stable

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<sup>659</sup> Singer and Barwick, 19.

<sup>660</sup> Jack Baker, “Defining ‘Gayness’ Under the Law,” *The Minneapolis Star* (March 19, 1974), 8A Gebhard Era Correspondence 1970-1979 Part Two: A-Z, File Cabinet 4, Drawer 3, Jack Baker, Kinsey Institute for Research in Sex, Gender, and Reproduction, Bloomington, Indiana; In this piece, Baker was speaking specifically to an antidiscrimination municipal ordinance he had been instrumental in drafting.

<sup>661</sup> *Ibid.*



heterosexual and homosexual orientations. On this note, he wrote that: “This definition extends to many relationships not usually considered gay. All of us have emotional attachments to people of both genders. For some of us, same-gender relationships are more profound. From this perspective, we are all of us a little bit gay. In other words, gayness is an attribute like beauty: We all have some of it, only gays have more of it.”<sup>662</sup>

In contrast to gay liberation’s constitutional arguments, the amicus brief filed by the Ohio chapter of the Society of Individual Rights in *Jones* showcased a more moderate underlying political motive and rationale for engaging in the early legal battle for same-sex marriage.<sup>663</sup> To be sure, some of the SIR’s legal arguments were not entirely distinct from gay liberation ones: they included appeals to the 1<sup>st</sup> Amendment’s protections of free association and free religious exercise as well as a general right to marry through the due process clause of the 14<sup>th</sup> Amendment.<sup>664</sup> What distinguished them the most, however, was a heavy reliance on modern psychoanalytic theories to make the case that the heterosexual majority had nothing to fear from this call for marriage inclusion. The brief argued that these theories prove that family conditioning from an early age most likely explains the origins of homosexuality (a notably early instance of rooting sexual orientation’s development in young children) and that no credible expert believed that there was a causal link between gay and lesbian parents and gay and lesbian children.<sup>665</sup> Nowhere in this appeal is any sign of the gay liberationist dream of changing patriarchal

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<sup>662</sup> Ibid.

<sup>663</sup> Society of Individual Rights of Ohio Inc., “Amicus Brief for SIR of Ohio Inc. in *Jones and Knight v. James Hallahan*” (1970) Collection 2011-075, Box 1, Folder 7, Society for Individual Rights (SIR) Records, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>664</sup> Society of Individual Rights Ohio Inc., “Amicus Brief,” 1-4.

<sup>665</sup> Ibid., 39-40.

social relations and raising consciousness about the social construction of heterosexual desire. Instead, the brief depicts an accommodationist group deploying a scientific model to constrain the idea of what it means to be gay to make their case for legal inclusion.

Though many of the legal arguments made during this era were embryos of what they would eventually become the late 1970s and 1980s gay rights approach to constitutional rights claims, it is striking how avoidant gay liberation litigants were of a legal approach that emphasized the cause or causes of sexuality. Whereas the attempt to achieve suspect classification under the equal protection through immutability claims would eventually help lead liberal gay rights advocates down the biodeterminist path, at this early moment gay liberationists made no such move from this argument.

Liberationist litigation largely rejected scientific authority's final say over the nature of their sexualities. In the only instance in which any liberationists did cite the experts, the *Singer* litigants chose to selectively reference studies rejecting the pathological model and nothing more. Rather than speaking of natural and biologically-innate orientations and identities in their litigation, these activists tended to emphasize homosexual *behavior* and challenged the idea that heterosexual or homosexual were even coherent ways to understand the relationship between the actual behavior and desires of persons and the law.<sup>666</sup> This was a historical moment in which gay and lesbian litigation—even litigation that included a reference to immutability—featured a political will to eschew conventional sexual and gender roles and expressed their identities as reflections of their radical political principles.

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<sup>666</sup> Singer and Barwick, 10-11.

*Just How Malleable is Sexuality? Child Development Psychiatry and the Hardening of Gay and Lesbian Identities*

The remaining sections in this chapter address how liberal gay rights organizations' and their civil rights allies' reliance on scientific expertise came to bear on their legal strategies and constitutional argumentation. This influence can be seen in the decision of litigants to feature researchers as expert witnesses in a variety of cases as well as their increased propensity to make etiological theories the cornerstone of these testimonies. According to a 1979 document housed in the National Gay Task Force's legal archives, gay rights litigators began practicing a strategy of presenting scientific and medical experts before trial courts—especially in cases involving contact with children—to assure judges that homosexuality was neither a mental illness nor a communicable disease but rather a benign variant of normal human sexuality rooted in childhood.<sup>667</sup> The document implored attorneys to “[a]ddress the judge’s curiosity” and to ask and answer questions such as: “what is lesbianism? What is homosexuality? What causes it?”<sup>668</sup> Additionally, the document provided an extended bibliography of sources on homosexuality, many of which were primarily concerned with challenging the idea that a child’s sexuality can be changed due to environmental causes such as time spent with a

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<sup>667</sup> National Gay Task Force, “Expert Testimony in Child Custody Cases (1979), Collection 7301, Box 153, Folder 17, The National Gay and Lesbian Task Force Records, 1973-2000, Cornell University, Ithaca, NY; Though the document is concerned more narrowly with child custody cases, the liberal gay rights organizations appeared to adhere to these guidelines across an array of legal challenges to discriminatory statutes and policies.

<sup>668</sup> Ibid.

gay or lesbian parent or teacher.<sup>669</sup> The scientific expertise invoked in these cases often rooted sexual orientation early in childhood, thus separating it from both sexual acts themselves as well as from the supposed environmental influence projected from gay and lesbian adults onto the children they cared for or taught. Despite what previous generations of mental health practitioners and researchers had believed, studies published throughout the 1970s and 1980s continually affirmed that gay and lesbian parents did not pose a risk of “exposure” to their children, therein downplaying the emphasis on environmental effects and pushing hypotheses of causation further back into a child’s life (and away from the possibility of contagion).

Looking first to expert witness testimonies, liberal gay rights organizations carried on in the late homophile era tradition of bringing researchers and medical practitioners before the stand. What had changed in large part was that these researchers were no longer merely refuting the pathological model and asserting the normalcy of gay identity. Instead, they were grounding their political defenses of gay identity in etiological theories of sexual identity in large part to stave off accusations that gay and lesbian adults exercised considerable impact on the sexualities of children that they encountered.<sup>670</sup> This was in part due to the child-centric character of cases involving school teachers and parents seeking custody, but the shifts in the APA allowed the gay

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<sup>669</sup> For a thorough discussion of scientific expert witnesses in child custody cases see: Marie-Amélie George, “The Custody Crucible: The Development of Scientific Authority About Gay and Lesbian Parents,” *Law and History Review* 34, no.2 (May 2016): 487-529.

<sup>670</sup> The previous several decades had promoted the idea that most homosexual adults were essentially voracious sex predators in disguise. In an example from the latest period with which this chapter is concerned, judges were asking gay, lesbian, and bisexual parents wishing to adopt if their “interest in children includes an unnatural or abnormal sexual interest or intent.” *Matter of Appeal in Pima County Juvenile Action B-10489* 151 Ariz. 335 (Court of Appeals of Arizona, 1986), No. 2 CA-CIV 5548.

rights movement to make their arguments more forcefully than ever.<sup>671</sup> And as time went on, these cases went from entertaining a variety of causes—some biological and some more focused on environmental factors— to more direct assertions of immutability. Expert witnesses too became more likely to argue that preventing homosexuality in children was not likely to be a successful project and that creating a culture of understanding and tolerance was paramount.

As this became the dominant frame among gay rights litigators and their expert witnesses, opponents marshaled their own experts to counter any sense of assuredness coming from the former. The recurrent theme in these testimonies was one of caution: with the pathological model crumbling and a new paradigm forming in its place, these experts warned that the origins and causes of homosexuality were still relatively unknown and that precautions must be taken. It was especially important to these researchers that young children teetering toward homosexuality might be protected from the strains of being exposed to homosexual adults who might intensify a painful sense of uncertainty and stress stemming from their sexual orientations.

A look at one of these early cases demonstrates the nature of scientific and medical testimony in the courts during the paradigm shift within the APA and related fields in the study of psychology and human sexuality. In the 1973 case *Acanfora v. Board of Education of Montgomery County*, Joe Acanfora sued a Maryland school district that had removed him from his teaching duties upon discovering that he had been

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<sup>671</sup> For more on child custody cases, see George's article above and Alison L. Gash, *Below the Radar: How Silence Can Save Civil Rights* (New York: Oxford University Press, 2015), 97-102.

a member of a homophile student group while attending Penn State University.<sup>672</sup> Acanfora's case was assisted in part by the Washington Gay Activist Alliance, an organization that had ties to Task Force's founding members such as Frank Kameny (the Washington GAA ran his congressional campaign in 1971).<sup>673</sup> A significant part of Acanfora's trial centered around competing scientific and medical testimonies on homosexuality. Acanfora's legal team assembled a professor of pediatrics, a family psychiatrist, and famed sexologist John Money to provide testimony about the nature and origins of sexuality while the school board procured its own child psychology researchers to warn against the dangers of allowing a "publicly-avowed homosexual" to instruct adolescents.

In their support of the school board, expert witnesses Dr. Reginald Spencer Lourie, Professor of Child Health and Development at George Washington University and Dr. Felix P. Heald, Professor of Pediatrics, and Director of the Division of Adolescent Medicine at the University of Maryland School of Medicine, testified that Acafora's presence in the classroom presented students with the threat of

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<sup>672</sup> *Joseph Acanfora v. Board of Education of Montgomery County* No. 72-1136-Y (D. Md.) 359 F. Supp. 843 (1973); Similar cases like one pursued by the ACLU also featured experts in child psychiatry. It should be noted, however, that in these early years psychiatrists themselves were often still indebted to a paradigm that emphasized homosexuality as an aberration and something that could be correctly oriented toward heterosexuality. See for example the statement of one expert witness in the *Gaylord* case who explained that "homosexuality is acquired, not inherited, and that, while a student's sexual orientation was probably fixed by the time he got to high school, he still had a choice as to his behavior" and, accordingly, one could reorient one's sexuality with therapy if a person so desired; *Gaylord v. Tacoma School District* 85 Wn.2d 348 (1975) 535 P.2d 80).

<sup>673</sup> Following a national trend of sympathetic and supportive teachers' unions, the National Education Association provided Acanfora with legal funding. Also, the Washington GAA worked outside the courts too in successfully pushing the District of Columbia Board of Education to ban discriminating against employees due to their sexual orientations. GAA activists also pressed school board candidates at an open forum to endorse their support for equal rights; Jackie Blount, *Fit to Teach: Same-Sex Desire, Gender, and School Work in the Twentieth Century* (Albany, NY: State University of New York Press. 2004), 117.

overburdensome stress, mental and physical harm, and sexual contagion.<sup>674</sup> Quoting from a recent study published in the *Journal of the American Medical Association*, Dr. Heald noted that bisexual and homosexual teenage boys had much higher risks of attempted suicide and suicide and that the constant reminder of homosexuality in Acanfora's personhood would likely push these feelings to the surface for any male students struggling with their own sexual identities. This could eventually manifest in severe "homosexual panics" in these students, a clinical syndrome in which the anxiety and stress of one's sexual feelings causes them mental and physical anguish that can lead to suicide. Dr. Lourie's testimony warning of the contagious effect of a homosexual male teacher featured a "logic of caution" line of argument exemplified in a metaphor that compared the removal of Acanfora from his classroom with the practice of vaccination. Lourie testified that:

"When we have inoculation programs on a preventive basis for millions of individuals when only a handful of individuals could be protected, we are preventing a relatively handful of contagious diseases that could be fatal or damaging."

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<sup>674</sup> *Acanfora v. Board of Education*, "Testimony of Doctor Reginald Spencer Lourie," *The Case of Joe Acanfora*, (April 13, 1973), [http://www.joeacanfora.com/subpages/legalcases/testimony\\_lourie.html](http://www.joeacanfora.com/subpages/legalcases/testimony_lourie.html) (Accessed January 22, 2018); *Acanfora v. Board of Education*, "Testimony of Doctor Felix P. Heald," *The Case of Joe Acanfora* (April 13, 1973), [http://www.joeacanfora.com/subpages/legalcases/testimony\\_heald.html](http://www.joeacanfora.com/subpages/legalcases/testimony_heald.html) (Accessed January 22, 2018).

Although Lourie and Heald avoided overtly pathologizing Acanfora’s homosexuality explicitly, they directed attention to the harm, stress, and contagious effects that Acanfora presented his most vulnerable students. Lourie classified adolescent homosexual behavior as a normal “transitional stage” and that—along with the dangers anxiety and self-harm—Acanfora’s influence would be too deeply-felt in susceptible students who should be given a freer choice regarding their own sexual identities. Giving students the option to avoid the contagious effects of being instructed by an openly-gay male authority figure was of great importance as “one cannot escape the cultural definition of homosexuality as abnormal and the need to give children the utmost opportunity to be essentially normal in this important phase of life.”<sup>675</sup>

Among Acanfora’s three expert witnesses were the esteemed sexologist Dr. John Money as well as University of Rochester Professor of Pediatrics and Psychiatry Dr. Stanford Friedman and in Professor William Stayton of the School of Medicine Department of Psychiatry, Division of Family Studies and Director of the Center for the Study of Human Sexuality in Religion at the University of Pennsylvania.<sup>676</sup> Throughout the testimonies, Acanfora’s lawyer could be seen coaxing the witnesses to elaborate in detail under what conditions a child’s sexuality comes to form. The legal team’s strategy

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<sup>675</sup> *Joseph Acanfora v. Board of Education of Montgomery County*, 359 F. Supp. 843 (D. Md.1973).

<sup>676</sup> *Acafora v. Board of Education*, “Testimony of Doctor John William Money,” *The Case of Joe Acanfora*, (April 16, 1973), [http://www.joeacanfora.com/subpages/legalcases/testimony\\_money.html](http://www.joeacanfora.com/subpages/legalcases/testimony_money.html) (Accessed January 22, 2018); *Acafora v. Board of Education*, “Testimony of Doctor Stanford Friedman,” *The Case of Joe Acanfora*, (April 14, 1973), [http://www.joeacanfora.com/subpages/legalcases/testimony\\_friedman.html](http://www.joeacanfora.com/subpages/legalcases/testimony_friedman.html) (Accessed January 22, 2018); *Acafora v. Board of Education*, “Testimony of Doctor William Stayton,” *The Case of Joe Acanfora*, (April 14, 1973), [http://www.joeacanfora.com/subpages/legalcases/testimony\\_stayton.html](http://www.joeacanfora.com/subpages/legalcases/testimony_stayton.html) (Accessed January 22, 2018).



was to show how ingrained a person's sexuality is and how small of a window there is in one's life in which it is possible for an adult figure to make an impact.

Having just co-authored a field-defining book on gender identity and child development the previous year, John Money was the star witness for Acanfora's team.<sup>677</sup> When asked to define the thesis of his and Anke Ehrhardt's theory in their seminal *Man & Woman, Boy & Girl*, Money explained that they had explored "how a boy develops his concept of masculinity and a girl develops her personal identity concepts of femininity and it traces this process from the genes to all the learning experiences up through adulthood."<sup>678</sup> Like many of his contemporaries, Money did not always differentiate intersexuality, transsexuality, sexual orientation, and gender identity from one another in the ways that we tend to today. Rather, he believed that each person had a core, inner gender role that was male or female and that a person's gender identity was a manifestation of that core. By the age of eighteen months to five years (specific age ranges varied across texts and testimonies), a child was *imprinted* with a "gender awareness" that was essentially inalterable.<sup>679</sup> Prior to this period, Money believed that adults such as child's parents might play some determinative role, but by school-age—especially high school age—a person's core identity was set in stone, though certainly a

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<sup>677</sup> John Money and Anke Ehrhardt, *Man & Woman, Boy & Girl: The Differentiation and Dimorphism of Gender Identity from Conception to Maturity* (Baltimore, MD: Johns Hopkins University Press, 1972).

<sup>678</sup> "Testimony of Doctor John William Money."

<sup>679</sup> Bernice L. Hausman, *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (Durham, NC: Duke University Press, 1995), 79. 94-8; Suzanne Kessler, "The Medical Construction of Gender: Case Management of Intersexed Infants," *Signs* 16, no.1 (1990): 3-26.

person might experience psychological torment over that identity.<sup>680</sup> In their own testimonies, Friedman and Stayton deferred to Money on this theory, recognizing it was quickly becoming the new norm in the field.

Money and Stayton went beyond simply defending Acanfora from charges that he was causing his students undue mental—and potentially physical—anguish. They also supported a gender normative version of gay identity, explaining that certain homosexual men could comport themselves according to the gender and behavioral norms of straight society. They might even offer a positive role model to teenagers struggling with their own predilections and identities. On this point, Stayton stated that “my belief is that if there are good homosexual models in the society that [a gay or lesbian child] has contact with that are responsible, well respected, capable people, and if there are heterosexual models that [the child] comes in contact with that are responsible, with the same qualifications, it seems to me that this will help the individual to be more comfortable...in dealing with [the child’s] own personality and own sexual orientation.”<sup>681</sup> Contrary to the defenses’ attempts to paint a scenario in which troubled teenagers came into harm as a result of having a gay teacher, Stayton accepted that some students would already have same-sex attractions and that providing them an acceptable role model could be to their benefit. Stayton went even further when asked by the defense if the prevention of homosexuality in children was a priority in child psychiatry. While acknowledging that the National Institute of Mental Health Task Force had taken this line

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<sup>680</sup> Money too thought that an effeminate young boy could be reoriented with therapy to present as less feminine; however, this did not necessarily alter his inner sense of being, which could manifest in transsexuality or homosexuality.

<sup>681</sup> “Testimony of Doctor William Stayton.”

in the late 1960s, Stayton answered that prevention was misguided and that practitioners ought to spend more energy caring for the psyches and health of all children.

When Money was asked whether a homosexual male teacher posed any additional threat that a heterosexual male teacher did not, the sexologist responded that he would “twist it around the other way” saying that “the tolerant acceptance of a respectable homosexual is a good lesson for these wise and sophisticated youngsters of teaching them the degree of tolerance that we could stand more of in our society.”<sup>682</sup> This message of tolerance, however, came with a caveat that Money only approved of a certain construction of male homosexuality, one that could be a “role model within the school or within the church... non-monster-type - non-monstrous, freakish-type person, homosexual.”<sup>683</sup> He added that “even if [a person] were going to be stuck with themselves as homosexually-inclined, they at least could be a constructive and participating member of the human race and not some kind of derelict, discarded monster that nobody would be able to accept and approve of, if they knew.”<sup>684</sup> Money’s way of speaking about homosexuality led him to see deviations from sexual and gender norms as a kind of disability and that a role model would give some students “the courage to disclose their anxieties about themselves, sexually, instead of keeping them hidden where they become a source of continued destructive anxiety.”<sup>685</sup> Rather than expressing an early sentiment of liberal political tolerance, Money’s defense of Acanfora as a potential role model rested more in a desire to mitigate *additional* individual and social ills that

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<sup>682</sup> “Testimony of John William Money.”

<sup>683</sup> Ibid.

<sup>684</sup> Ibid.

<sup>685</sup> Ibid.

might result from what he often glibly referred to as the “problem” of homosexuality. Still, his approval of gay male teachers in the classroom, his theory of a relatively stable core sexual identity, and his fame in the study of sex and gender made Money a powerful ally in a case like *Acanfora*’s.

While federal district court judge J. H. Young was convinced of much of the plaintiff’s evidence and gave “special recognition” to Money’s research, Young ultimately believed that there was reason to exercise some caution.<sup>686</sup> Noting that while “[i]t is fair to state that factors present in the embryonic and early childhood stages appear to have the greatest impact,” Young concluded that “the book is by no means closed on the possible behavioral and sociocultural impact” that a homosexual male teacher might have on his students.<sup>687</sup> Similar to other cases involving the nexus between education and speech acts like *Acanfora*’s identification as gay, the court’s reasoning and decision was channeled through an application of First Amendment free speech doctrine. Young remarked that a proper analysis must recognize “to a degree that homosexuality is *sui generis* in contemporary America” in the context of the education and free speech.<sup>688</sup> He explained that it was unlike a slew of other recent cases dealing with issues like race relations, the wearing of anti-Vietnam War armbands, long hair and grooming standards, or a host of other recent questions about the extent to which free speech and expression could exist within the realm of education. Young ruled that although an out gay male teacher cannot be transferred out of the classroom merely for identifying as gay, “a sense

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<sup>686</sup> *Joseph Acanfora v. Board of Education of Montgomery County*.

<sup>687</sup> *Ibid.*

<sup>688</sup> *Ibid.*

of discretion and self-restraint must guide him to avoid speech or activity likely to spark the added public controversy which detracts from the educational process.”<sup>689</sup> Young explained that expert opinion such as the NIMH Task Force still seemed to advise preventing homosexuality in children even if psychiatry was coming to recognize the real problem lay in “the cultural stigma and repression” that accompanied gay and lesbian desires, rather than perceiving them as pathological in themselves.<sup>690</sup>

Though he ultimately ruled against Acanfora’s reinstatement based on what he deemed improper uses of media to expose his case to a larger audience and thereby making himself even more of a disruptive agent in the education process (Acanfora had taken to *60 Minutes* to plead his case to the public), the expert testimonies presented before Young did in part persuade him to rule that Acanfora had indeed been the victim of unconstitutional discrimination. On this front, Young’s decision exhibited a very short section on the equal protection clause and suspect classification in Acanfora’s situation. Young began by quoting from *Frontiero*’s language, speculating that sexuality—like race, national origin, and sex—might also feature “an immutable characteristic determined solely by the accident of birth” and that it too might “bear no relation to ability to perform or contribute to society.”<sup>691</sup> Young continued to write that even if such an analysis showed heightened scrutiny to be unwarranted in this case, Acanfora’s removal could not even survive a more limited rational basis review, as the school

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<sup>689</sup> Ibid.

<sup>690</sup> Ibid.

<sup>691</sup> Ibid. (quoting from *Frontiero* 4612).

board's actions were fundamentally arbitrary.<sup>692</sup> Even if Young was not convinced by all the plaintiff's expert claims, they did lead him to deem the removal of a gay teacher from his classroom to be unconstitutionally arbitrary, going against the grain of decades of previous fears concerning the proximity of homosexuals to impressionable children.

### *The Pre-Hardwick Sodomy Cases*

By the mid-1970s, state prohibitions against sodomy had become major targets for litigation-oriented gay rights and civil rights groups. As Ellen Andersen documented, the National Gay Task Force, Lambda Legal Defense and Education Fund, and the ACLU were confident that a window of opportunity was opening on the Supreme Court to strike a constitutional blow against sodomy bans across the entire country.<sup>693</sup>

Emboldened by the Court's willingness to invalidate the majority of state laws on abortion in its 1973 decision *Roe v. Wade*, Bruce Voeller and other Task Force members met with Justice William O. Douglas to discuss how precedents like *Roe v. Wade*, *Virginia v. Loving*, and the right to privacy might achieve similar results in a sodomy case.<sup>694</sup> Unfortunately, the Court took a different route in the Task Force's case *Doe v.*

*Commonwealth's Attorney of Richmond* (1976) in offering a brief summary affirmation of

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<sup>692</sup> Ibid. (applying *Reed v. Reed* 404 U.S. 71 (1971)).

<sup>693</sup> Ellen Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (Ann Arbor, MI: University of Michigan Press, 2005), 66-70; It is worth noting that a case brought by the National Gay Rights Advocates involving a bisexual teacher went to the Supreme Court only to be denied *certiorari* in 1984. An important dissent in that case before the 6<sup>th</sup> Circuit witnessed a federal judge rely on the works of Alfred Kinsey and Judd Marmor as well as the 1973 *DSM* changes to argue that modern scientific and medical opinion did not support discriminatory policies that kept gays, lesbians, and bisexuals out of the classroom. *Rowland v. Mad River Local School District*, 730 F.2d 444 (6<sup>th</sup> Cir. 1984), cert. denied, 470 U.S. 1009 (1985).

<sup>694</sup> Mary Zielger, "Perceiving Orientation: Defining Sexuality after Obergefell," *Duke Journal of Gender Law and Policy* 23 (2016): 223-261 (324).

the federal district court's decision upholding the Virginia sodomy ban.<sup>695</sup> This disappointment, however, did not prevent other organizations from continuing to present their cases before the courts. Lambda and the ACLU, for instance, persisted in litigation that had been ongoing at the time of the summary affirmance in *Doe*. Lambda in particular steamed ahead in advancing numerous retorts to the notion that *Doe* was determinative, especially considering the strange procedural route it had taken to the Court. And as opponents to these bans waged their campaigns, they began to bring more scientific experts and ideas about the origins and nature of sexuality into their litigation.

One such place to observe these dynamics was the Lambda and ACLU case, *Enslin v. North Carolina*, which was litigated from 1974 to 1978. Eugene Enslin had been the target of an entrapment scheme undertaken by Jacksonville detective Sam Hudson who admitted to wishing to “run [Enslin] out of town” for his sexuality.<sup>696</sup> Upon paying another man to proposition Enslin at an adult bookstore adjacent to Enslin's house, Hudson arrested him under a North Carolina sodomy ban that proscribed sexual acts construed as “crimes against nature.”<sup>697</sup> Noting the unfortunate absence of “expert testimony in the fields of psychiatry, psychology, sociology, and theology” presented in the *Doe* case,<sup>698</sup> Enslin's attorneys sought the aid of Kinsey Institute-affiliated sociologist Albert Klassen Jr. to construct a more thorough defense against the North Carolina

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<sup>695</sup> *Doe v. Commonwealth's Attorney of Richmond*, 425 U.S. 901 (1976).

<sup>696</sup> *Enslin* Brief For Appellant before the Fourth Circuit (May 6, 1977), 4.

<sup>697</sup> *Ibid.*, 4-5.

<sup>698</sup> W. Cecil Jones, “*Doe v. Commonwealth's Attorney*: Closing the Door to a Fundamental Right of Sexual Privacy,” *Denver Law Journal* 53 (1976): 553-76; Dr. Frank Kameny of the Task Force served as the only expert witness in *Doe*.

law.<sup>699</sup> Klassen's testimony spanned the range of scientific arguments presented before courts during this era. He contended with panicked ideas about predatory and pedophilic homosexuals with insatiable sex drives, explaining that they stemmed from pernicious myths that contributed to the isolation and loneliness of gays and lesbians.<sup>700</sup> He too dispelled fears that homosexuality represented an immediate threat to the institution of marriage and to the heterosexual family unit. Citing the APA and the NIMH reports, Klassen noted that forced rehabilitation was no longer seen by professionals as effective or appropriate and that there was no known negative association between a person's sexuality and their ability to perform their job adequately. Lastly, Klassen reassured the court that there was no evidence that children or adults could be converted to homosexuality and that the removal of criminal sanctions would not result in a proliferation of new gay and lesbians Americans.

Klassen's testimony helped litigators ground their constitutional arguments in the idea that a person's sexuality was benign and beyond the reach of social conditioning. Thus, they argued that discriminatory state action against gays and lesbians was motivated primarily by fear and disgust rather than any actual governing purpose. Though the district court judge decided the case on the narrow grounds that *Doe* had settled questions regarding the constitutionality of sodomy bans, Enslin's lawyers appealed to the Fourth Circuit—and to the Supreme Court after losing there—claiming that a variety of Enslin's constitutional rights had been violated including those protected

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<sup>699</sup> Order issued by Dupree in response to petitioner's habeas petition, No.76-0149-HC *Eugene Enslin v. Darryl Wallford, etc.*, (January 3, 1977).

<sup>700</sup> Abbreviated version of #73) Brief for 4<sup>th</sup> Circuit, 6-8.



by: the right to privacy, the equal protection clause, and the establishment clause.<sup>701</sup> The *Enslin* briefs too linked scientific evidence to equal protection clause claims. In what was quickly becoming a common refrain among legal advocates, Enslin’s legal team wrote that “although there is continuing debate and uncertainty in the scientific community concerning the causes of homosexuality, authorities are generally agreed that sexual orientation is determined early in life, and, once determined, is virtually impossible to alter.”<sup>702</sup>

Additionally, the brief also delved into establishment clause case law in arguing that religious bigotry rather than any rigorous scientific conception of “nature” motivated North Carolina’s ban. Klassen’s testimony, for instance, showed that sodomy laws had a basis in Christianity and Judaism, whereas 76 other societies without such religious heritage condoned homosexuality.<sup>703</sup> Pointing to the contested law’s use of the word “nature” specifically, Enslin’s team argued that a constitutionally-sound secular definition for nature would entail references to “considerations of a psychological, sociological, or medical basis” rather than allusions to a vague concept of natural human decency that was buttressed by religiously-inspired approaches to natural law or Biblical references.<sup>704</sup> The attorneys argued that “[t]he lack of any discussion of what constitutes unnatural sexual behavior in terms of modern scientific conceptions” illustrated a clear

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<sup>701</sup> Ibid.

<sup>702</sup> Ibid., 64.

<sup>703</sup> Ibid.

<sup>704</sup> Ibid., 52.

violation of the establishment clause.<sup>705</sup> Overall, Enslin’s case shows a general sentiment among gay rights organizations and their civil rights allies that science was on their side.

In November of 1979, the gay rights organization Texas Human Rights Foundation (THRF) filed suit on behalf of Donald F. Baker against the state of Texas for its ban on homosexual sodomy. The THRF’s plaintiff was in many ways the model for a liberal respectability politics challenge to something as taboo as sodomy. As the lengthy background section of Judge Jerry Buchmeyer’s federal district court opinion in *Baker v. Wade* (1982) delineates, Baker was a thirty-five-year-old Dallas school teacher, a Navy veteran, and an active churchgoer who happened to be only romantically and sexually attracted to men.<sup>706</sup> After a years-long struggle with his sexuality that nearly led him to suicide, Baker came out of the closet, found that he could reconcile his Christian faith with his sexual orientation, and became a member and leader in his local Dallas gay rights organization. Though Baker himself had not been arrested under the statute, his lawsuit against the discriminatory sodomy law—a law that had previously outlawed *all* forms of sodomy before a 1974 “reform” that singled out gays and lesbians—was directed at the stigma and danger that gays and lesbians incurred by allowing police the authority to arrest persons for engaging in private consensual sexual activity. Baker and his legal team argued that the ban encouraged police harassment in other situations and led employers, landlords, and judges in child custody cases to discriminate against gays and lesbians.<sup>707</sup>

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<sup>705</sup> Ibid., 54.

<sup>706</sup> *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tx. 1982).

<sup>707</sup> Ibid.

In addition to advancing a religious establishment clause challenge and a privacy right argument centered on the intimate, personal nature of consensual sex between adults, Baker's defense rested on an equal protection clause claim that the Texas statute unduly targeted gays and lesbians for a kind of sexual activity that remained legal for heterosexual couples. Based on the precedent set in *Frontiero v. Richardson*, Baker's team argued that the law merited intermediate scrutiny as it targeted the *sex* of the person or persons involved in a sexual act to determine whether the activity was proscribed or lawful. In establishing discrimination against homosexuality as inherently linked to unconstitutional classifications based on sex, Baker could claim that gays and lesbians ought to be considered a quasi-suspect class under the equal protection clause.

From its inception, Baker's legal challenge rested heavily on invoking scientific authority to buttress this equal protection argument, specifically the idea that gays and lesbians satisfied the immutability criteria spelled out in *Frontiero*. This led James Barber, Baker's lead attorney in the initial trial, to reach out to the Task Force's Bruce Voeller about the possibility that a gay rights ally in the sciences might testify on behalf of Baker. Voeller in turn referred Barber to psychiatrist, physician, and former APA president Judd Marmor, who as the last chapter noted, was becoming gradually more convinced of biodeterministic theories of gay identity. In his letter to Marmor, Barber wrote that he "would like to discuss with you the possibility of testifying as an expert

witness on the psychiatric and behavioral aspects of homosexual conduct, to show that homosexuality is basically fixed and immutable at an early age.”<sup>708</sup>

Marmor, along with the Kinsey Institute-affiliated sociologist William Simon, accepted Barber’s request to serve as expert witnesses.<sup>709</sup> The two researchers presented as evidence the APA’s changes to the *DSM* and similar stances taken by the American Anthropological Association, the American Bar Association, and the American Psychological Association showing that homosexuality was not a disease or mental illness that could be “cured” or altered. Most notably, they approached the issue of etiology by positing a much more biodeterministic view of sexuality than had been seen in previous cases. Judge Buchmeyer wrote that Marmor and Simon claimed that:

“[E]xclusive homosexuals’ did not choose to be homosexuals. Obligatory homosexuality is not a matter of choice: it is fixed at an early age — before one even begins to participate in sexual activities — and only a small minority can be changed or ‘cured,’ if at all. Although there are different theories about the ‘cause’ of homosexuality, the overwhelming majority of experts agree that individuals become homosexuals because of biological or genetic factors, or environmental conditioning, or a combination of these and other causes — and

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<sup>708</sup> James C. Barber letter to Judd Marmor, (October 6, 1980) Collection 2007-009, Box 2, Folder 1, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>709</sup> *Baker v. Wade* (1982); The plaintiffs also brought two other expert witnesses before the court. The first of these was theologian Victor Furnish who argued that Christianity does not condemn consensual same-sex conduct and the second was psychologist and Dallas school board member Dr. Harryette Ehrhardt (Furnish’s testimony is acknowledged in footnote 12 of Buchmeyer’s decision and Ehrhardt is absent from the decision).

that sexual orientation would be difficult and painful, if not impossible, to reverse by psychiatric treatment.”<sup>710</sup>

Evidenced in the above is Marmor’s “multiple causes” hypothesis, which he had updated to further emphasize genetic and biological studies of sexuality in an edited volume the previous year.<sup>711</sup> And though the comment that a small portion of gays and lesbians might be “curable” is a reminder that the conversion therapy had not yet been wholly discredited, the testimonies here marked a significant step forward in a biological direction.

It is obvious from the text of the decision that Judge Buchmeyer was compelled by the evidence and expertise brought forward by the plaintiffs and underwhelmed by the defendants’ witnesses.<sup>712</sup> Whereas Buchmeyer struck a sympathetic tone with Marmor and Simon (the judge even took time to have Marmor teach the Kinsey scale to the court), he was dissatisfied with the defenses’ witness, Dr. James Grigson.<sup>713</sup> An expert in the field of what he called “legal psychiatry,” Grigson was best known as “Dr. Death” in Texas for his assistance in the prosecution of 167 capital punishment cases, where he tended to characterize defendants as possessing inherently violent natures and needing

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<sup>710</sup> Ibid.

<sup>711</sup> Judd Marmor (ed.), *Homosexual Behavior: A Modern Reappraisal* (New York: Basic Books, 1980), xi.

<sup>712</sup> Prior to undertaking this analysis, Buchmeyer determined that neither the Supreme Court’s summary affirmance in *Doe* nor its denial of cert in *Onofre* precluded the court from deciding this case on its own merits.

<sup>713</sup> Testimony of Judd Marmor in *Baker v. Wade* (June 15, 1981) Collection 2007-009, Box 2, Folder 1, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

eradication from human society.<sup>714</sup> In this case, Grigson testified that the sodomy ban served to protect children’s “normal growth and behavioral patterns” (i.e. by not growing up to be gay) and to protect homosexuals from themselves, the majority of whom wish to be “cured.”<sup>715</sup> Psychiatrist Paul Cameron, who would be expelled from the APA on ethics grounds the following year, also testified that homosexuality could not possibly be innate as sexual desire is an “appetite” and appetites must be acquired.<sup>716</sup> Buchmeyer discounted these opinions as “directly contrary to those of the plaintiff’s experts—whose qualifications as experts in the field of homosexuality were outstanding and whose testimony was very credible — and to positions adopted by various medical and psychiatric associations.”<sup>717</sup> He added that Grigson’s statements “were flawed, inconsistent, and directly contrary to other credible evidence accepted by this Court.”<sup>718</sup> Buchmeyer’s disdain for what he perceived to be pseudoscience offered by the defense was noticeable even in subtleties such as the choice to label the section heading for Marmor and Simon’s testimonies as “The Plaintiff’s Experts” and opting for a less illustrious “The Defendants’ Witnesses” for Grigson’s and Cameron’s.<sup>719</sup>

Extending from these earlier evaluations of both sides’ expert witnesses, Buchmeyer applied much of Marmor’s testimony to his constitutional reasoning, which ultimately led him to rule in favor of Baker. As THRF founding member Mike Anglin

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<sup>714</sup> Mike Anglin, “The “Baker vs. Wade” Litigation,” (November 23, 2017), <http://www.thedallasway.org/stories/written/2017/11/23/baker-vs-wade> (Accessed February 5, 2018)

<sup>715</sup> *Baker v. Wade* (1982), 1132.

<sup>716</sup> Testimony of Paul Cameron in *Baker v. Wade*, (November, 1982) Collection 2007-009, Box 2, Folder 3, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>717</sup> *Baker v. Wade* (1982), 1132.

<sup>718</sup> *Ibid.*

<sup>719</sup> *Ibid.*, 1129, 1131.

recounted, Baker's case was filed in federal court to capitalize on the advances made in privacy rights jurisprudence by other liberal progressives.<sup>720</sup> This strategy proved successful as Buchmeyer announced that the right to privacy encompassed the right to engage in consensual "private homosexual conduct."<sup>721</sup> Drawing on Marmor's testimony, Buchmeyer wrote that there was no rational state interest—let alone a "compelling state interest, which is the standard the government must meet to override a person's right to privacy—to police private sexual activity among gays and lesbians. In addition to demonstrating that homosexuality was neither a mental illness nor communicable, Buchmeyer sided with the evidence that:

"Homosexuality is not a matter of choice. It is fixed at a very early age. Only a small percentage of homosexuals can be changed or 'cured' by psychiatric treatment. The numbers of homosexuals in society are not reduced by criminal laws like § 21.06 [the sodomy ban], nor would they be increased if such laws did not exist."<sup>722</sup>

In coming to the position that Texas had overstepped its constitutional bounds, Buchmeyer was guided by the idea that homosexuality was a benign and inalterable identity that manifested in a person far before the age of sexual maturity. Lastly, in adjudicating the equal protection argument, Buchmeyer bypassed Baker's call for

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<sup>720</sup> Anglin, "The "Baker vs. Wade" Litigation."

<sup>721</sup> *Baker v. Wade* (1982), 1140.

<sup>722</sup> *Ibid.*, 1143.

intermediate scrutiny by once again appealing to the plaintiff's evidence. Instead, Buchmeyer stated that there was not even a rational basis for the ban's distinction between homosexual and heterosexual sodomy and, therefore, the lowest form of judicial scrutiny was enough to strike it down.<sup>723</sup>

The strange turn that Baker's case took on its way to appeal demonstrates that some right-wing anti-gay rights political actors were beginning to sense that the shifting scientific terrain spelled a long-term problem for their reliance on the themes of sexual deviancy and pathology. Upon losing at the trial level, District Attorney of Dallas County Henry Wade, District Attorney for the City of Dallas Lee Holt, and State Attorney General Jim Mattox all decided not to appeal to the 5<sup>th</sup> Circuit, thereby allowing Buchmeyer's decision striking down the sodomy law to stand.<sup>724</sup> However, at least one local interest group, Dallas Doctors Against AIDS, voiced its opposition to this decision to simply abandon a defense of the sodomy ban.<sup>725</sup> Fueled by a fear of the early AIDS crisis and disturbed by the notion that gay and lesbian sexual activity would go unpoliced, District Attorney of Potter County Danny Hill began devising legal maneuvers to force an appeal—such as requesting the Texas Supreme Court to force Mattox to file an appeal—until he decided that the most straightforward route would be to file the appeal on behalf of his own DA office.

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<sup>723</sup> Ibid., 1143-5.

<sup>724</sup> Chronology of *Baker v. Wade* (n.d.) Donald F. Baker Collection (The Dallas Way) (AR0843), University of North Texas Special Collections, <https://digital.library.unt.edu/ark:/67531/metadc947630/m1/1/> (Accessed February 6, 2018).

<sup>725</sup> Lillian Faderman, *Gay Revolution: The Story of the Struggle* (New York: Simon & Schuster, 2015), 542.



As a crucial part of his appeal, Hill singled out Marmor and Simon, accusing the two of engaging in fraudulent testimony in their support of Baker. Relying on a procedural rule that allowed for the introduction of new evidence to the record, Hill asserted that “AIDS is new evidence” necessitating a reassessment of the evidence presented before the trial court.<sup>726</sup> Hill took on Simon first in declaring that the sociologist had erroneously “indicated that there was no evidence that homosexuality was a learned behavior.”<sup>727</sup> Hill saved the majority of his ire for Marmor, who he believed to have persuaded Buchmeyer with inaccurate and untenable theories and evidence concerning the nature of sexuality. He first attacked Marmor for supposedly misrepresenting the psychiatric community in claiming that homosexuality was no longer considered a mental illness. To the contrary, Hill cited a 1977 study that held 69% of APA members continued to believe that “homosexuality is a pathological adaptation as opposed to a normal variation” despite the official changes made within the APA in 1973.<sup>728</sup> Marmor was also accused of asserting that gays and lesbians were “born that way,” a claim that Hill found to be distorting the state of current research.<sup>729</sup> Though the record of Marmor’s testimony and a later affidavit filed in response to this accusation of fraud shows that he never used this language and was markedly more nuanced in his

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<sup>726</sup> Brief in Support of Motion to Set Aside Final Judgment and Reopen the Evidence, No. CA-3-79-1434-R filed by defendant Danny Hill in *Baker v. Wade* (April 25, 1983) Collection 2007-009, Box 2, Folder 4, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>727</sup> *Ibid.*, 12.

<sup>728</sup> *Ibid.*, 13-4; Harold Lief, “Sexual Survey #4: Current Thinking on Homosexuality,” *Medical Aspects of Human Sexuality* 11 (1977): 1171-81.

<sup>729</sup> Defendant’s Reply to the Plaintiff’s Brief in Opposition to Motion to Set Aside Final Judgment and Reopen the Evidence, and Brief in Support Thereof,” No. CA-3-79-1434-R filed by defendant Danny Hill in *Baker v. Wade* (June 10, 1983) Collection 2007-009, Box 2, Folder 7, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

discussion of the hypotheses and studies that pinned homosexuality's etiology on biological and genetic sources, Hill's machinations suggest a perception among gay rights opponents that losing the battle over legitimate scientific expertise would lead to losing the greater war over gay and lesbian rights.<sup>730</sup>

*Baker, Bowers, and Biology on Appeal*

At the same time as Baker's case proceeded to the 5<sup>th</sup> Circuit and was subsequently overturned by an *en banc* ruling against both his privacy and equal protection claims, many gay rights organizations came together to assess their various legal projects and strategize about how to pursue these fights more systemically. In 1985, Lambda Legal's legal director Abby Rubinfeld was instrumental in establishing the Ad-Hoc Task Force to Challenge Sodomy Bans (renamed the Gay Rights Litigators' Roundtable the following year), which brought together Lambda, national and state chapters of the ACLU, the National Gay Rights Advocates, and several other gay rights litigation-oriented groups to manage their multiple efforts against the discriminatory bans.<sup>731</sup> Just as Lambda had taken over the *Baker* case from the Texas Human Rights Foundation on appeal, the ACLU had adopted a similar case involving a sodomy ban in Georgia. In that case, Michael Hardwick was arrested by a police officer who had walked into Hardwick's home and had witnessed him engaging in oral sex with another man.

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<sup>730</sup> Judd Marmor Affidavit (July 5, 1983) Collection 2007-009, Box 2, Folder 8, Judd Marmor Papers, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>731</sup> William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America, 1861-2003* (New York: Viking, 2008); As Eskridge notes, this was possible partially due to a waning in lesbian activist opposition to sodomy challenges, which they saw as mostly a male-driven concern.

Sensing that both Hardwick's circumstances and *Baker* presented opportunities for promising test cases before the Supreme Court to strike down all such bans, the ACLU, Lambda, and others came together to strategize how to most effectively pursue these related constitutional challenges.

The founding of the Ad-Hoc Task Force marked not only a first in legal coordination within the movement, but it also invited prominent constitutional scholars and litigators into these legal battles in an unprecedented way. It offers another vantage from which to see the processes of co-production in motion as legally-minded actors theorized their constitutional approaches with particular discursive forms of gay identity in mind that scientists and other gay rights activists had created in tandem. The first significant decision by this coalition was to make Baker's and Hardwick's appeals conceptually about gay identity rather than sexual privacy. This is striking given that scholarly discussions about the *Bowers* case tend to focus on the constitutional privacy right element. This privileging of identity demonstrates how far removed these liberal gay rights leaders were from the days of the Sexual Freedom League and other sexual and gay liberation organizations who preferred a more encompassing notion of sexuality. Lambda participants in particular pushed for the gay identity frame.<sup>732</sup> Rubinfeld indicated that Lambda was planning to file a "Homo 101" brief to explain—with citations to expert academic and medical opinions—the nature of gay and lesbian identities and the

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<sup>732</sup> Minutes of Lambda Legal Defense and Education Fund meeting (November 16, 1985) Donald F. Baker Collection (The Dallas Way) (AR0843), University of North Texas Special Collections, <https://digital.library.unt.edu/ark:/67531/metadc947630/m1/1/> (Accessed February 12, 2018).

harm that these sodomy bans inflicted upon them.<sup>733</sup> This all complicates the view that *Bowers* was litigated with the narrow goal of defining homosexuality as private sexual behavior.<sup>734</sup>

Additionally, many participants believed initially that if the Ad-Hoc Task Force was going to prioritize one of the sodomy cases over the other based on its ability to highlight these kinds of arguments, *Baker* was the obvious choice to take to the Supreme Court. Because Georgia's sodomy law did not differentiate between heterosexual and homosexual sodomy the way that Texas's did, *Hardwick*'s case did not feature an equal protection clause argument in addition to its privacy right challenge. Some disagreed mainly on legal grounds. They feared that *Baker* presented the danger of taking too many constitutional arguments before the Court all at once, which could result in an even more devastating loss if they were unsuccessful (e.g. even future challenges under state constitutional equal protection clause provisions would then be automatically suspect). However, voices within the Task Force still championed *Baker* especially for its record that contained the testimonies of Marmor and Simon that had been so influential in district court. Jim Kellogg, a representative from the ACLU of Louisiana, expressed this opinion in stating that "*Baker* is a historic gold mine. It has all the arguments, facts, issues, etc. about homosexuality and homophobia are in the record."<sup>735</sup> Kellogg reminded his fellow litigators that if the Court demanded that they stick to the record of the cases as

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<sup>733</sup> *Ibid.*, 11.

<sup>734</sup> Stephen Engel, *Fragmented Citizenship: The Changing Landscape of Gay and Lesbian Lives* (New York: New York University Press, 2016), 123.

<sup>735</sup> Minutes of Lambda Legal Defense and Education Fund meeting (December 13, 1985) Donald F. Baker Collection (The Dallas Way) (AR0843), University of North Texas Special Collections, <https://texashistory.unt.edu/ark:/67531/metadc947237/m1/> (Accessed February 12, 2018).

they had proceeded thus far, *Baker* contained the necessary discussions and evidence about the nature of homosexuality that Hardwick's case did not.<sup>736</sup>

The Ad-Hoc Task Force's records also bring to light how gay rights litigators began linking the most biodeterministic sexuality studies with constitutional theory. Evidence for this can be found in the *Baker* appeal to the Supreme Court filed by Laurence Tribe, a Harvard law professor and Supreme Court litigator whom Lambda had hired to litigate both *Baker* and *Bowers*. Though the *Baker* appeal's equal protection argument was ultimately based on a sex classification argument, Tribe's referenced a *Harvard Law Review* note titled "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect-Classification" and noted that there was an immutability-based argument for homosexuality to be afforded suspect classification.<sup>737</sup> The note's author described immutability as a "cloudier issue [than] "the criterion of historical and continuing discrimination...because the origins and mutability of sexual preference are currently the subjects of vigorous debate."<sup>738</sup> While this piece ultimately encouraged a conception of homosexuality that focused on the discriminatory social status gays and lesbians had been relegated to rather than as an individual characteristic, this was just one contour of a discussion that centered on how to think about, evaluate, and deploy scientific expertise in gay rights jurisprudence. Later cases too would show that taking

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<sup>736</sup> Ibid., 6.

<sup>737</sup> Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect -Classification," *Harvard Law Review* 98, no.1303 (1985): 1285-309; Brief for *Baker's* Writ for Certiorari to SCOTUS Laurence Tribe, Kathleen Sullivan, Brian Koukoutchos, and James C. Barber (1985) University of Pennsylvania Law Microfiche.

<sup>738</sup> Note, "The Constitutional Status of Sexual Orientation," 1302.

account of the social status classification of gays and lesbians did not preclude legal theories that also rested on biodeterministic considerations of immutability.

The note that Tribe cited was not the only one of its kind either. Other similar pieces began appearing in law reviews with even more discussion of the scientific theories of sexuality's origins, therein demonstrating that, as a whole, the legal community was taking this position seriously and, thus, building on theories that gay rights activists and their scientific allies had been cultivating for years. Another note published in the *Southern California Law Review* cited the typical array of experts including Marmor, Money, Weinberg, Masters and Johnson, and others to legitimate arguments ranging from "The Acquisition of Homosexuality is not Subject to Control" to "Sexual Orientation is Immutable," all while making the case for heightened judicial scrutiny for policies aimed directly at the gay and lesbian population.<sup>739</sup> In addition to citing the evidence as it was presented and evaluated by Buchmeyer in *Baker* just as the Harvard piece did, this note made its case by linking various hormone studies to claims that a person's sexuality was essentially inalterable as "[n]o first hand record of an actual conversion of sexual orientation exists."<sup>740</sup>

All of this would seem to indicate that the equal protection clause was the main driving force of biodeterministic considerations in legal and constitutional theory and practice at this time. Put simply, the immutability criterion stemming from *Frontiero* combined with the proliferation of increasingly biodeterministic studies led the gay rights

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<sup>739</sup> Harris M. II. Miller, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality," *Southern California Law Review* 57, no.797 (1984): 797-836.

<sup>740</sup> *Ibid.*, 821.

movement in a biopolitical direction. Contrary to this seemingly logically-sound perspective, the briefs filed in *Bowers v. Hardwick* as the case appeared before the Supreme Court tell a different story. What is clear instead is that scientific influence had become so ingrained in the political practice and thought of the gay rights movement that its leaders relied on their expert allies in a case that was ultimately advanced and decided on right to privacy grounds, which presented no such inherent motivation to rely on etiological theories in the way that the concept of immutability did.

Members of Hardwick's legal team headed by Tribe, as well as organizations affiliated with the Ad-Hoc Task Force, submitted briefs that combined constitutional arguments for the right of gays and lesbians to engage in sexual activity in the privacy of one's home with ones that portrayed gay identity as something as unalterable and relatively innate. One of Tribe's briefs to the Court posited that homosexuality "may well be a biological condition" and that "in any event [it is] usually not a matter of choice and rarely subject to modification."<sup>741</sup> In an accompanying *amicus curiae* brief, Rubinfeld and Lambda Legal Director Evan Wolfson submitted what appears to be the "Homo 101" document mentioned in the Task Force's meeting records on behalf of Lambda, Gay and Lesbian Advocates and Defenders, the Bar Association for Human Rights of Greater New York, the Massachusetts Lesbian and Gay Bar Association, and the Gay & Lesbian Alliance Against Defamation, Inc.<sup>742</sup> In it, Rubinfeld and Wolfson made what were by

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<sup>741</sup> Currah, "Searching for Immutability," 57.

<sup>742</sup> Brief of *Amici Curiae* Abby R. Rubinfeld, Legal Director, Evan Wolfson, Cooperating Attorney, Lambda Legal Defense and Education Fund, Inc., Gay and Lesbian Advocates and Defenders (GLAD), the Bar Association for Human Rights of Greater New York, the Massachusetts Lesbian and Gay Bar Association, and the Gay & Lesbian Alliance Against Defamation, Inc., No. 85-140 in *Bowers v. Hardwick* (January 31, 1986) (Westlaw).

the mid-1980s typical references to scientific expertise such as Bell, Weinberg, and Smith's Kinsey report and Marmor's edited volume. They again found the origins of sexuality in childhood or even further back and they discredited the state's expert witness—Paul Cameron—as a disgraced hack promulgating outdated and biased theories.

Most significantly, Rubinfeld and Wolfson demonstrated how one could link an argument for the constitutional protection of sexual *behavior* to a conception of gay identity whose origins and nature were hypothesized to exist prior to and independent of such behavior. Citing case law spanning the trajectory of privacy rights jurisprudence, these litigators explained that the right “limits the extent to which government action and majority disfavor may infringe upon individual choice [and it] protects the individuals’ intimate personal choices, however popular or unpopular, unless actual harm is shown.”<sup>743</sup> Immediately following this discussion about individual choice and an additional reference to the First Amendment’s protection of intimate associations that allow a person to “define one's identity [which is] central to any concept of liberty,” Rubinfeld and Wolfson discussed the course of sexuality research beginning with Kinsey’s original studies through more contemporary works.<sup>744</sup> Upon doing so, they concluded that “[a]lthough it is unknown why some people have a same-sex orientation while others do not, the consensus of expert authority is that sexual orientation has already developed by a very early age, independent of isolated sexual experiences.”<sup>745</sup>

This language reveals that the privacy right’s protection of a gay or lesbian person’s

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<sup>743</sup> Ibid.

<sup>744</sup> Ibid.; The language concerning intimate associations comes from *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).

<sup>745</sup> Ibid.



*choice* to engage in what Georgia defined as criminal sodomy was legitimated by scientific demonstration that homosexuality did not present a threat to the public, was not a pathology nor a contagion, and was most likely rooted in childhood, therefore, existing prior to and independently of sexual activity. To sum the argument up, because gay identity is both benign and fixed, the right to privacy protects the choice to engage in one's preferred consensual sexual behavior with another adult.

Lastly, it is worth noting that a few lesbian feminist and feminist organizations offered an alternative framing to this narrative. The *amicus* brief filed by the Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project, and National Women's Law Center illustrates the longstanding influence of the lesbian feminist separatism and the women's movement that often perceived aspects of sexuality and gender as arising from political and cultural institutions rather than existing in one's biology.<sup>746</sup> To this point, the brief contains a citation to feminist philosopher Adrienne Rich on the idea that heterosexuality itself is an institution that shapes and polices the sexual desires of women.<sup>747</sup> The brief's only endorsements of medical authority were to those studies that dispelled the assertion that homosexuality was itself a pathology or a mental illness.<sup>748</sup>

In fact, these organizations made explicit that their legal, political, and moral arguments against Georgia's sodomy ban stood independent of the question of

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<sup>746</sup> Brief of Amici Curiae Lesbian Rights Project, Women's Legal Defense Fund, Equal Rights Advocates, Inc., Women's Law Project, and National Women's Law Center, No. 85-140 in *Bowers v. Hardwick* (January 29, 1986) (Westlaw); Though Rich and many of her contemporaries held their own essentialist views about womanhood, sex, and gender that spilled over into essentialist assumptions about female sexual desire.

<sup>747</sup> *Ibid*; The specific reference was to Rich's 1979 *Women and Honor: Some Notes on Lying*.

<sup>748</sup> *Ibid*.

homosexuality's origins. The brief's authors ran through a series of theories that defined homosexuality as a "compulsive activity...beyond free choice," an "outcome of a deliberate choice motivated by curiosity, opportunity, or caring for another person of the same sex," and a product of "physiological factors such as sex hormone levels."<sup>749</sup> However, rather than co-sign one or several of these to undercut the Right's choice narrative, they asserted that "the resolution of that interesting debate would be of little help to this Court in deciding this case."<sup>750</sup> They argued instead that even if homosexuality lacked roots in biology, punishing gays and lesbians would be still be unconstitutional in the same sense that attacking a benign, yet unpopular religious minority would be. They declared that "the constitutional right to privacy no more can be denied to gay and lesbian persons based on the ascription of their status than it can be withheld on the basis that gay persons choose to be gay."<sup>751</sup> Thus in sidestepping the nature versus volition debate that was quickly becoming a dominant frame in these conflicts, these lesbian feminist and feminist organizations offered an alternative to relying on scientific authority in their appeals to the judiciary.

### *The Constitutional Road Ahead*

With the defeat of its due process privacy right challenge in *Bowers v. Hardwick*, a major constitutional route toward the realization of gay and lesbian rights was closed off. For the next two decades until the Supreme Court revisited the question in 2003, the

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<sup>749</sup> Ibid.

<sup>750</sup> Ibid.

<sup>751</sup> Ibid.

movement was left with the equal protection clause as its main federal constitutional path forward. As the discussions within the Ad-Hoc Task Force and the subsequent historical record reveal, the defeat of the privacy right argument did indeed set gay rights advocates up to make equal protection clause claims grounded in large part by vigorously biodeterministic assertions of the immutability of gay and lesbian identities. However, as I hope to have shown, the post-1986 moment did *not* mark the entrance of discussions of homosexuality's etiology and bioessentialist language into gay rights litigation. To the contrary, from the inception of the liberal turn in gay rights politics, activists began building alliances with researchers and physicians and constructing an ideology around shared premises such as the binaristic distinction between heterosexuality and homosexuality and its purported origins in early childhood or in utero. Thus, while the courts were a crucial venue through which movement organizations could utilize their scientific allies and graft their insights onto legal and constitutional doctrine, the legal strategy was preceded and informed by a liberal gay rights ideology and political alliances with scientific and medical expertise that were chiefly responsible for this particular assertion of gay and lesbian political identity.

## PART III: MATURATION

## **CHAPTER 6: Rise of the Gay Gene**

### **Popularizing and Politicizing Bioessentialism**

The 1990s witnessed some of the best known and most controversial research claiming to have found proof of the biological nature of gay and lesbian identities. Though these studies gave life to the now ubiquitous, catch-all notion of a “gay gene,” research in the fields of genetics, neurology, and endocrinology proliferated in number and notoriety as the publication of each new article brought with it a flood of media attention and press releases. The studies themselves registered such extreme and polarized reactions among gay and lesbian rights advocates, liberal rights proponents, science journalists, and social conservatives that it is easy to understand why the period is oftentimes thought of as a unique one, where seemingly out of nowhere the entire American public became obsessed with the relationship between biology and sexual orientation. The publication and hype around these theories is often remembered as an aberrational moment when the nation was engrossed in an impassioned conversation about the nature and origins of homosexuality.

As the preceding chapters delineated, however, these provocative studies and the discussions that attended them are more fully understood as the end result of intertwined political and scientific developments that had been building upon one another for the better part of the previous two decades. Both their production and adoption as well as the political conflicts they left in their wake were long in the making by the time Americans could hardly turn on the nightly news or open a magazine without being confronted by discussions and debates concerning the etiology of sexual orientation. Thus, when the

“genomania” craze emanating from the Human Genome Project and related bioreductivist research agendas bent on proving a genetic origin for nearly every thinkable human trait hit the American public consciousness—a phenomena that was facilitated in part through a captivated media<sup>752</sup>—it should have been no surprise that among the most sensationalized and politically consequential of these studies would be those that ruminated on the question of sexual orientation.<sup>753</sup> These studies and their popularization and politicization were determined by processes of scientific and political co-production between researchers and movement actors which then interacted with larger scientific and political economic trends wherein massive public and private initiatives were established to mine, map, and disseminate truths about human identity that were supposedly buried deep within the human genome.<sup>754</sup>

Beyond the more direct message the gay and lesbian movement intended to send to the public and politicians about the connection between these scientific studies and their civil rights claims, this wave of research also reflected and reified the heteronormative political and cultural turn gay culture and politics had taken over the past several decades. Since the mid-1970s, many facets of gay culture had become steadily more gender-normative. As New Left visions of deconstructed binaries and uninhibited desire faded with the demise of most of the short-lived radical organizations

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<sup>752</sup> Sarah A. Wilcox, “Cultural Context and the Conventions of Science Journalism: Drama and Contradiction in Media Coverage of Biological Ideas about Sexuality,” *Critical Studies in Media Communication* 20, no. 3 (September 2003): 225–247.

<sup>753</sup> Ruth Hubbard and Elijah Wald, *Exploding the Gene Myth: How Genetic Information Is Produced and Manipulated by Scientists, Physicians, Employers, Insurance Companies, Educators, and Law Enforcers* (Boston, MA: Beacon Press, 1993).

<sup>754</sup> Rodney Loepky, *Encoding Capital: The Political Economy of the Human Genome Project* (London, UK: Routledge, 2004); Kaushik Sunder Rajan, *Biocapital: The Constitution of Postgenomic Life* (Durham, NC: Duke University Press, 2006).

that made up post-Stonewall gay liberation, cultural and political representations of gays and lesbians lost much of their previous critical edge.

The 1980s, for instance, saw the rise of “the clone”—gay men adorning plain white t-shirts, blue jeans, and, most importantly, a rugged masculine affect—and by the 1990s a consumer gay and lesbian lifestyle and aesthetic reigned.<sup>755</sup> Queer historian and theorist Lisa Duggan identified in this political-cultural shift a new “homonormative” ideal, one that not only embraced values such as the nuclear family and rigid gender norms, but also adopted a dual ethic of consumption and domesticity that was accompanied by—and in some ways facilitated—a larger depoliticization of gay culture.<sup>756</sup> This ideological orientation was entrenched by movement leaders and gay rights litigators through appeals to scientific evidence that promised to separate the causes of sexual orientation from their manifestation in particular sexual acts, therein providing a defense against conservative fears of sexual contagion. Lastly, the 1990s began the slow and uneven integration of bisexual and transgender identities into the mainstream liberal gay and lesbian movement. Along with this came a more self-conscious effort to differentiate these varying identities from one another in ways that separated sexual orientation from gender identity as distinct and disparate phenomena, therein breaking with past cultural and sexological understandings that linked the two

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<sup>755</sup> Dennis Altman, *The Homosexualization of America: The Americanization of the Homosexual* (New York: St. Martin's Press, 1982); Jeffrey Escoffier, *American Homo: Community and Perversity* (Berkeley, CA: University of California Press, 1998).

<sup>756</sup> Lisa Duggan, “The New Homonormativity: The Sexual Politics of Neoliberalism,” in *Materializing Democracy: Toward a Revitalized Cultural Politics* eds. Russ Castronovo and Dana D. Nelson (Durham, NC: Duke University Press, 2002): 175-94 (179).

more tightly to one another (though as it will become clear, contradictions abounded within these new representations).

In the pursuit of a comprehensive understanding of these developments, this chapter tracks the ways in which national gay and lesbian organizations and their allies incorporated bioessentialism into their political messaging, campaigns, and litigation. In doing so, it illustrates how and why framings such as “orientation vs. choice” and “nature vs. nurture” came to be attached to unequivocal attacks upon or defenses of the belief that gay and lesbian Americans deserved legal rights and cultural toleration. It too sheds light on the various ways that scientific authority and bioessentialist logic came to play a significant role in battles for military inclusion and antidiscrimination policies.

This is not meant to suggest, however, that there were not instances in which movement actors disagreed about how and when to invoke bioessentialism, whether in response to a specific study or some strategic calculation about a particular legal case. There was certainly a degree of contingency at work that was most visible at the level of individual legal cases or decisions about how to respond to each new study. The existence of path dependent institutional alliances among scientific and political forces—powerful as they may have been—should not be construed as predetermining the adoption of the bioessentialist frame at any given moment. However, the influence of these institutional relationships and a co-constructed ideology did bear heavily upon internal deliberations and political decision-making. As a result, the following depicts movement actors ranging from the country’s most prominent gay and lesbian rights litigators and leaders to local activist groups choosing again and again to make explicit



connections between the latest biological research and their appeals for their civil rights and against social and political prejudice.

Lastly, on the subject of dissent, not every sexual or gender minority was satisfied with the all-pervasiveness of the “gay gene.” Radical queer organizations emerged from older ones such as ACT UP and came to oppose bioessentialism for what it was: a highly-effective tool for the very liberal assimilationist politics that they positioned themselves against. Groups like Queer Nation and Queer By Choice, for example, spent this decade fighting essentialist notions of identity, sometimes outside of and sometimes internally within national organizations, as they advanced postmodern theories of sexuality and gender through a politics centered mostly in direct actions, local community organizing, and academic debate. The efforts of these radical queers were, however, mostly futile in the face of growing national political profiles of the major gay and lesbian organizations. Those suspicious of the role of scientific authority in queer politics remained jeering on the sidelines, largely ignored by a mainstream movement that had moved further than ever before into the realm of national politics, media, and cultural conversation. It was in this domain that the bioessentialist logic came to dominate.

### *Gay Genomania: Political Dimensions and Heritage*

This first section details how the processes that produced the biological narrative played out with special attention to archival evidence showing how closely involved movement organizations were in both the production and dissemination of the bioessentialist narrative. It focuses too on how these studies reflected a growing cultural

understanding that sexual orientation and gender identity (i.e. transgender identity and transsexuality) were wholly distinct from one another. This was an important means by which the gay and lesbian movement came to promote its constituents as committed to political and cultural assimilation into a world of normative gender roles and stable sexual identities (or at least until these organizations could wrestle with internally how to integrate trans and bisexual identities more fully into their advocacy). Though my agenda here is primarily to trace the processes of co-production as they unfolded, I would be remiss if I did not at times deviate from this primary focus to examine some of the following studies' theoretical and methodological limitations in addition to their social and political dimensions.

Looking first to the studies themselves, researchers emphasized genetic and neurological causes primarily, though they addressed their shared biodeterministic hypothesis from a few different disciplinary angles. Harvard medical professor and neurologist Simon LeVay's 1991 study into the neuroanatomical nature of gay male sexual orientation published in *Science* was the first in this era to receive massive media attention and to prompt gay and lesbian spokespersons to endorse such evidence in their messaging. In what came to be referred to as the "gay brain" study, LeVay claimed to discover that a particular brain structure—the interstitial nucleus of the anterior hypothalamus to be exact—was on average smaller in the brains of gay men than in heterosexual males.<sup>757</sup> By studying the cadavers of nineteen men of whom he surmised to be gay along with sixteen men and six women presumed to have been heterosexual,

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<sup>757</sup> Simon LeVay, "A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men," *Science* 253, no.5023 (August 30, 1991): 1034-1037.

LeVay demonstrated that the hypothalami of his gay male subjects were on average similar in size to the female ones than those coded as heterosexual males.<sup>758</sup>

Though the methodology and premises of the study were deemed significantly flawed by critics—LeVay, for instance, had obtained his data from cadavers of men who had died from HIV or AIDS, diseases for which medical treatment can significantly impact brain structures—the paper’s conclusion that the evidence “suggests that sexual orientation has a biological substrate” instantly found its way into the mainstream press.<sup>759</sup> Writing in the *New York Times*, science journalist Natalie Angler interviewed a number of gay and lesbian movement spokespersons as well as a handful of scientists in an article titled “The Biology of What It Means to be Gay.”<sup>760</sup> The piece featured several quotes from those like the enthusiastic gay rights activist and commissioner on New York City’s Human Rights Commission Andrew J. Humm who explained that “[t]he fact that the report talks about homosexual orientation as something innate is good, because that’s what most of us experience.”<sup>761</sup> A spokesperson for the Lambda Legal Defense Fund was also quoted stating that “if, as some have suggested, there is a biological basis for homosexuality, it is difficult to fathom on what moral, ethical or religious basis one can reasonably discriminate against homosexuals.”<sup>762</sup>

In a separate press release for the LeVay study, the Task Force commented that “if [u]sed ethically, the study’s conclusions can shed light on human sexuality and prove

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<sup>758</sup> Ibid.

<sup>759</sup> Ibid., 1034; Lancaster, *The Trouble with Nature*, 242.

<sup>760</sup> Natalie Angler, “The Biology of What It Means to be Gay: Will A New Scientific Study Further Homosexual Rights or Homophobia?” *New York Times* (September 1, 1991), E1.

<sup>761</sup> Ibid.

<sup>762</sup> Ibid.

what we have believed all along—that being gay or lesbian is not necessarily a matter of choice. The only choice we have is to live openly as gay people or live in the silence and shame of the closet.”<sup>763</sup> And although some like psychologist John P. DeCecco and assistant director for Gay Men’s Crisis Network David Barr noted disturbing links to the history of eugenics as well as the belief that—biology aside—the real matter at hand was about political tolerance and acceptance, the most prominent gay and lesbian movement leaders largely sidestepped questions about the validity of LeVay’s experiment, choosing instead to highlight the potential positive effects that the studies might have.<sup>764</sup>

LeVay’s statements on his personal life as a gay man and its connection to his work add a new dimension to understanding the processes of co-production. As the relationship between liberal rights advocates and scientific researchers matured, legal and cultural gains reduced a longstanding stigma against openly gay and lesbian scientists and physicians. Less than two decades prior to the LeVay study’s publication, gay and lesbian members of the APA held clandestine meetings as they discussed their plans to reform the profession.<sup>765</sup> At a time when homosexuality was still formally classified as a mental pathology, it was no wonder that these researchers and therapists feared for their careers should they be outed. Following the 1973 reforms at the APA and subsequent developments across other professional associations, however, the worlds of psychiatry and medicine gradually became much more accepting of gay scientists. Many

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<sup>763</sup> National Gay and Lesbian Task Force, “Statement on Salk Institute Study on ‘Biological Basis for Sexual Orientation,’” (August 29, 1991) Collection 7301, Box 207, National Gay and Lesbian Task Force, Cornell University, Ithaca, New York.

<sup>764</sup> Angler, “The Biology of What It Means to be Gay,” E1, E4.

<sup>765</sup> Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (New York: Basic Books, 1981).

professional and academic associations even began to form internal committees and caucuses dedicated to studying gay and lesbian-specific issues and promoting the careers of gay and lesbian researchers. Thus by 1991, LeVay was in a relatively comfortable position when he admitted that if he had not been able to find evidence for his innatist conception of sexual orientation in neuroanatomical features, he would have renounced his scientific career altogether.<sup>766</sup> Whereas earlier bioessentialist explorations into human sexuality had been fueled by sympathetic scientists working in conjunction with gay and lesbian activists, LeVay's statement demonstrates the emergence of a new force that contributed to the production of such research: the openly gay scientist who—with no direct affiliation with the movement—drew from an ideological commitment to gay rights in designing and conducting biodeterministic studies.<sup>767</sup>

Just a few months after LeVay's article was published, a similarly-themed study appeared in the *Archives of General Psychiatry*. Northwestern psychologist J. Michael Bailey and Boston University psychiatrist Richard Pillard's article titled "A Genetic Study of Male Sexual Orientation" came out of a broader trend in the growing cross-disciplinary field of behavioral genetics in which the twin study methodology they employed was a staple for measuring the genetic basis of a variety of human traits.<sup>768</sup> Bailey, who had been trained by behavioral geneticist Lee Willerman, a scholar renowned for his work on the hereditary nature of personality and intelligence, was

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<sup>766</sup> Lancaster, *The Trouble with Nature*, 242.

<sup>767</sup> For parallels in more modern studies concerning race and biology, see: Catherine Bliss, "Racial Taxonomy in Genomics," *Social Science & Medicine* 73 (2011): 1019-27.

<sup>768</sup> Michael Bailey and Richard Pillard "A Genetic Study of Male Sexual Orientation," *Archives of General Psychiatry* 48, no.12 (December 1991): 1089-96.

invested in bioreductivism as a theoretical enterprise but had no sustained contact or interaction with the gay and lesbian movement nor any discernible political motive for applying his methods to sexual identity.<sup>769</sup> His co-author Pillard, however, had a longer standing personal and political commitment to the project. He had come out publicly as one of the first gay psychiatrists in the early 1970s at the prodding of Dr. Howard Brown, a co-founder of the Task Force.<sup>770</sup> Shortly after he and his wife divorced and he began to live openly as a gay man, Pillard shifted his work from the study of drug use, addiction, and anxiety to the hormonal and genetic causes of homosexuality.<sup>771</sup> Throughout the late 1970s and 1980s, Pillard co-authored sociobiological and early behavioral genetics papers with those like James Weinrich, whose work came to be cited frequently by those like PFLAG.<sup>772</sup>

As for the study itself, Pillard and Bailey followed the standard protocol of soliciting pairs of monozygotic (identical) and dizygotic (fraternal) twin pairs as well as non-twin brothers and adoptive brothers to observe how many of the pairs featured two gay men. The assumption that undergirds this measure is that the monozygotic pairs (i.e. those with identical genomes) will exhibit the highest concordance rate (i.e. proportion of pairs that share the observed trait) if there is a probable genetic basis to a given trait.

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<sup>769</sup> Karen Freeman, "Lee Willerman, 57, Authority On Genes' Role in Intelligence," *New York Times* (January 31, 1997), <https://www.nytimes.com/1997/01/31/us/lee-willerman-57-authority-on-genes-role-in-intelligence.html> (Accessed May 22, 2019).

<sup>770</sup> Paul E. Lynch, "An Interview with Richard C. Pillard, MD," in *American Psychiatry and Homosexuality: An Oral History*, eds. Jack Drescher and Joseph P. Merlino (Binghamton, New York: Harrington Park Press, 2007): 237-46 (p.240).

<sup>771</sup> For an example of his early work in this area, see: Richard Pillard, Rose, Sherwood, "Plasma Testosterone Levels in Homosexual Men," *Archives Sexual of Behavior* 3 no.5 (1974): 453-8.

<sup>772</sup> Richard C. Pillard and James D. Weinrich, "Evidence of Familial Nature of Male Homosexuality," *Archives of General Psychiatry* 4, no.8 (1986): 808-812, doi:10.1001/archpsyc.1986.01800080094012.

Though Pillard and Bailey's study did find a higher concordance rate among the monozygotic twins than any other pairs and, accordingly, was championed as another sure sign of the biological causation, the results were anything but definitive proof of that thesis. Writing shortly after its publication, the biologist Ruth Hubbard and writer Elijah Wald noted that in addition to the high concordance rate for identical twin pairs, the fraternal pairs too were much more likely to both identify as gay men than the pairs of biological brothers, a finding that suggested some social relationship rather than a biological one.<sup>773</sup> Additionally, anthropologist Roger Lancaster has observed that because only half the monozygotic pairs were sexually concordant, one could also draw the conclusion that sexual orientation actually had no relation to genetics and that social factors pertaining to the fact that the twin pairs in this study actually had grown up together in the same household might have played a determinative role.<sup>774</sup> Lastly, psychiatrist Miron Baron's review of the Pillard and Bailey's study found an undermining logic in the findings that adoptive brothers were more likely to both be gay than biological siblings, again indicating that environmental factors could not be ruled out.<sup>775</sup>

Despite these and other criticisms of the study's methodology and premises, the most biodeterministic reading of Pillard and Bailey's conclusions were trumpeted by the media and welcomed by gay and lesbian movement figures. Newspapers like the *Chicago Tribune* reported that the research "provide[d] some of the strongest suggestions to date

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<sup>773</sup> Hubbard and Wald, *Exploding the Gene Myth*, 97.

<sup>774</sup> Lancaster, *The Trouble with Nature*, 246.

<sup>775</sup> Miron Baron, "Genetic Linkage and Male Sexual Orientation," *British Medical Journal* 307, no.6900 (Aug 7, 1993): 337-8.

that sexual orientation is determined in large part by genetics factors.”<sup>776</sup> The *New York Times* even ran an op-ed by the authors in which they expressed the political belief that “a biological explanation is good news for homosexuals and their advocates.”<sup>777</sup> In that piece, Bailey and Pillard also attempted to assuage those who feared the science would be turned against them in a neo-eugenic mode by explaining that related inquiries into the genetic basis for traits such as intelligence, which “no one considers to be [a] negative” proposition (this sentiment of course betrays the race scientific origins and history of intelligence measurements).<sup>778</sup> They highlighted not only the potential political benefits of their efforts, but also what some of their research subjects expressed to them as “the value of discovery, particularly self-discovery” of what hereditary phenomena might be directing their sense of sexual desire and self.<sup>779</sup>

Gay and lesbian movement spokespersons also quickly adapted the study’s logic to their political messaging. Ivy Young, director of the families project at the National Gay and Lesbian Task Force, commented that a “study like this, if used ethically, not only sheds light on human sexuality but reinforces what many in the lesbian and gay community have said for years: That homosexuality is not a choice.”<sup>780</sup> When Bailey and Pillard and two additional researchers published a follow-up study applying the same

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<sup>776</sup> Jean Latz Griffin, “Twin Study Suggests Sex Preference Genetic,” *Chicago Tribune* (December 16, 1991), <http://www.chicagotribune.com/news/ct-xpm-1991-12-16-9104230051-story.html> (Accessed May 22, 2019).

<sup>777</sup> Michael Bailey and Richard Pillard, “Are Some People Born Gay?,” *New York Times* (December 17, 1991), <https://www.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/nature-nurture/bailey-pillard.html> (Accessed May 22, 2019).

<sup>778</sup> Ibid.

<sup>779</sup> Ibid.

<sup>780</sup> Griffin, “Twin Study Suggests Sex Preference Genetic.”



methodology to lesbian pairs, activists and leaders again found the findings attractive.<sup>781</sup> In a statement to the *New York Times* on the utility of this evidence, legal director for Lambda Legal Paula Ettelbrick remarked that “[f]rom a legal perspective, [the study] could make it easier to present the argument that lesbianism isn’t a matter of choice, and therefore lesbians should not be discriminated against simply on the basis of sexual orientation.” It may help lessen the stigma against gay people.”<sup>782</sup> Though the movement and these scientific investigations both tended to forefront gay male identities and issues at the expense of female ones, the expansion of this science into lesbian identity and the promotion of such work coincided with the movement’s limited progress in expanding female leadership and representation.<sup>783</sup>

To the chagrin of bioessentialism’s critics, studies like LeVay’s and Bailey and Pillard’s gained further traction throughout the early 1990s as activists, the media, and the American public became increasingly enthralled by each subsequent bioreductive proclamation that the mystery of sexuality had nearly been pinned down. A dismayed Columbia University neurologist lamented that “[t]he public is now getting the impression that there’s this mountain of evidence being built to support the idea that homosexuality is biological, but in fact what we’re seeing is a stream of zeros being added together.”<sup>784</sup> It is in this light that National Institutes of Health (NIH) geneticist

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<sup>781</sup> J. Michael Bailey, Richard Pillard, Michael C. Neale, Yvonne Agyei, “Heritable Factors Influence Sexual Orientation in Women,” *Archives of General Psychiatry* 50, no.3 (1993): 217-23.

<sup>782</sup> Natalie Angier, “Study Suggests Genes Sway Lesbians’ Sexual Orientation,” *New York Times* (March 12, 1993), A11

<sup>783</sup> For another example of this bioessentialist research into lesbian identity, see: The Associated Press, “Link to Lesbianism Found,” *New York Times* (March 3, 1998), <https://www.nytimes.com/1998/03/03/science/link-to-lesbianism-found.html> (Accessed May 22, 2019).

<sup>784</sup> *Ibid.*

Dean Hamer's foray into the human genome and his self-professed discovery of the genetic origins of sexual orientation is best understood. Through an analysis of forty pairs of gay brothers, Hamer and his team discovered that eighty-two percent of the pairs shared the Xq28 DNA marker on their X chromosomes, which indicated to them that there was a strong possibility that there was a specific gene responsible for male homosexuality in that particular genomic vicinity. Though there has been no shortage of critical biological and anthropological accounts spelling out the various ways that Hamer's methodology, premises, and general theory were fatally-flawed from the outset, this study was almost immediately heralded as definitive proof that homosexuality's origins were embedded in the human genome.<sup>785</sup>

The processes of co-production operated in at least three distinct ways to give rise to Hamer's gay gene study and the attention it generated.<sup>786</sup> First, Hamer was clearly inspired by those like LeVay, Pillard, Bailey, and others who had popularized such modern biodeterministic studies; noting that he had grown weary of his own area of specialization (metallothionein protein-based cancer research), he pounced on the opportunity to approach sexology—a field in which he had no prior professional experience—through his own training in genetic technologies and genomic theories.<sup>787</sup> In a book titled *The Science of Desire* published to capitalize on the popularity of his

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<sup>785</sup> For example: Richard C. Lewontin, *Biology as Ideology: The Doctrine of DNA* (New York: HarperCollins Publishers, 1993); Edward Stein, *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation* (Oxford, UK: Oxford University Press, 2001); Lancaster, *The Trouble with Nature*.

<sup>786</sup> Dean H. Hamer, Stella Hu, Victoria L. Magnuson, Nan Hu, Angela M. L. Pattatucci, "A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation," *Science* 261, no.5119 (July 16, 1993): 321-7.

<sup>787</sup> Dean Hamer and Peter Copeland, *The Science of Desire: The Search for the Gay Gene and the Biology of Behavior* (New York: Simon & Schuster, 1994), 19-20.

research, Hamer describes becoming an amateur expert in sexology and being inspired by accounts of reform-minded scientists whose work had been deployed to depathologize and decriminalize previously stigmatized sexual and gender behaviors and identities.<sup>788</sup> He also consulted Pillard and Bailey personally. They advised him on methodological techniques such as how to recruit gay-identified twin pairs by placing advertisements in gay and lesbian newspapers, as well as how to conceptualize the varying concordance rates found in the twin studies research into sexuality thus far.<sup>789</sup>

Second, Hamer has been explicit about the role that the political and legal battles over anti-gay and lesbian discrimination played in his desire to conduct his research. Hamer noted in his book that the study had immediate relevance to debates over military exclusion, a policy that President Bill Clinton had championed in his 1992 general election campaign. The logic here, he conjectured, was that an innatist theory of sexual orientation would buttress attempts to overturn discriminatory policies that had their origins in fears of sexual contagion.<sup>790</sup> Hamer too linked his evidence to legal arguments for gay rights, especially those concerned with equal protection and immutability. He explained that “[m]any legal experts felt the evidence for a genetic link to homosexuality would strengthen the evidence for immutability and therefore cause tighter scrutiny of laws that permitted discrimination against gays and lesbians in housing, employment, or participation in the political process.”<sup>791</sup> While Hamer hedged his argument about whether biology would necessarily translate so neatly into legal protections, it is clear

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<sup>788</sup> Ibid.

<sup>789</sup> Ibid., 27-31.

<sup>790</sup> Ibid., 19-20.

<sup>791</sup> Ibid., 22.

from his expert testimony before a trial court in Colorado over its discriminatory state constitutional amendment that he believed he could put some scientific weight behind gay rights litigators' immutability claims.<sup>792</sup>

Finally, the gay and lesbian movement's direct involvement with Hamer's study as it was being conducted is perhaps the most obvious indication that his search for the gay gene was a process of political and scientific co-production. As part of a preliminary research proposal, Hamer assembled an advisory committee to address the "ethical, social, religious, and political issues that might arise as a result of the study."<sup>793</sup> Participants on this committee included scientific experts with gay and lesbian political community ties such as James Weinrich and the Whitman Walker Clinic's Medical Director Peter Hawley, as well as gay and lesbian movement leaders like the Executive Director of the Human Rights Campaign Fund Timothy McFeeley and an unnamed representative of PFLAG.<sup>794</sup> The proposal explained that the purpose of assembling such a group to oversee the study was an acknowledgement that:

"There is continuing conflict between those who regard homosexual orientation as an illness or moral choice and those who view it as one of a spectrum of naturally occurring preferences. Learning about the biology of sexual orientation will

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<sup>792</sup> Ibid., 210.

<sup>793</sup> Dean Hamer, "Research Proposal: Biological Determinants of Sexual Orientation" (May 28, 1991) Collection 7301, Box 127, Folder 48, National Gay and Lesbian Task Force, Cornell University, Ithaca, New York.

<sup>794</sup> The other committee members were Reverend Jeanne Mackenzie of the Westminster Presbyterian Church and Judge Pauline Newman of the Court of Appeals of the Federal Circuit, the latter of whom was most likely asked to serve for her expertise in patent law and related legal issues of science and technology rather than any connection to civil rights law.

increase our understanding of this issue and help people with different preferences to understand one another...Growing scientific evidence suggests that people don't choose their orientation, whether they are homosexual or heterosexual. However, regardless of whether sexual orientation is chosen or not, everyone in America deserves the same basic rights.”<sup>795</sup>

Additionally, Hamer recounted in his book that his team had initially drawn from PFLAG's membership to search for research subjects who had at least one gay male family member before opting for a sample of gay brothers solicited through gay community newspapers instead.<sup>796</sup> Just as Evelyn Hooker drew from her homophile acquaintances in putting together the first modern research program against the pathological model, Hamer continued in this tradition of relying on gay men curious about the nature of their desire (and perhaps even more so, the benefits of being able to explain that desire to others). This all suggests that movement leaders and ordinary members of these gay and lesbian organizations alike were heavily invested in both guiding the production and political use of this research. Upon the study's publication in the summer of 1993, Human Rights Campaign Fund spokesperson Gregory King expressed his organization's support, stating that “[w]e find the study very relevant, and what's most relevant is that it's one more piece of evidence that sexual orientation is not chosen.”<sup>797</sup>

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<sup>795</sup> Ibid.

<sup>796</sup> Hamer and Copeland, *The Science of Desire*, 48-9.

<sup>797</sup> Ibid., 210.

Taken together, these studies not only provided the gay and lesbian movement its most powerful and persuasive evidence for bioessentialism yet. They also reflected important changes in both conceptual and commonsense cultural understandings of the relationships between sexual orientation and gender normativity. On this front, these researchers often distinguished their theoretical approaches and understandings of the biological substrates at work in ways very differently than their predecessors had. Hamer, for instance, aimed to correct the notion among sexologists that gay men are “like women” and lesbians are “like men,” or more specifically that they are biological hybridizations of heterosexual males and females.<sup>798</sup> To test this premise, Hamer’s team applied their findings about Xq28 to their sample and found that none of the brothers they studied exhibited a trend of gender-atypical behavior, therein dispelling the “sissy thesis” that linked such gender presentation and behavior with same-sex desire.<sup>799</sup> Contrast this with the influential 1981 Kinsey Institute-funded study discussed in Chapter 4 that counseled parents against attempting to reorient their effeminate sons’ and masculine daughters’ “homosexual orientations” through forcing them into competitive sports and buying them dolls respectively.<sup>800</sup>

In an interview in *The Atlantic*, Pillard likewise attempted to distance his and Bailey’s research from the idea that at the furthest end of the homosexuality-heterosexuality spectrum sat transsexuals, those he described as being thought of as “the

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<sup>798</sup> Hamer and Copeland, *The Science of Desire*, 150-1.

<sup>799</sup> *Ibid.*, 166-8.

<sup>800</sup> Indiana University Press, “New Kinsey Study Challenges Myths about Sexual Orientation,” *Indiana University Press Book News* (October 12, 1981) Collection 7301, Box 166, Folder 62, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York, 2

gayest of the gay.”<sup>801</sup> This insight led Pillard and his collaborator Weinrich to begin theorizing how gay sexual orientation and transgender identity develop according to different biological processes. LeVay too noted this distinction and devoted the final substantive chapter of his 1993 book *The Sexual Brain* to the same question and expressed a similar enthusiasm for continued exploration into both.<sup>802</sup> The inevitable result of reading the two as distinct from one another was that other researchers began to publish studies on gender identity that were then promoted in a similarly sensational, reductive manner.<sup>803</sup> As I detail in a later chapter, this laid the foundation for transgender identity to be articulated through these kinds of bioessentialist framings as trans rights became a more fundamental focus of the movement in the second decade of the twenty-first century.

It would be easy to overemphasize these changes and gloss over the very real ways that much of this research continued to rely on premises that reified sex and gender in biological terms. Though Hamer believed he had provided evidence against the so-called sissy thesis, he also hypothesized that other behavior often codified as gender-atypical behavior, such as the likelihood that a gay man prefers to bottom during sex, might be linked to some biological process of feminization.<sup>804</sup> In the same interview in which Pillard distinguished transsexuality from homosexuality in biological terms, he went on to question whether gay male identity emerged from an incomplete process of

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<sup>801</sup> Chandler Burr, “Homosexuality and Biology,” *The Atlantic Monthly* (March 1993), 60.

<sup>802</sup> LeVay, *The Sexual Brain*, 131-5.

<sup>803</sup> Natalie Angier, “Study Links Brain to Transsexuality,” *New York Times* (November 2, 1995), <https://www.nytimes.com/1995/11/02/us/study-links-brain-to-transsexuality.html> (Accessed May 22, 2019).

<sup>804</sup> Hamer and Copeland, *The Science of Desire*, 168-9.

*defeminization* during gestation, a process that he believed might result in a brain organizational pattern he termed “psychosexual androgyny”—i.e. a biologically female makeup mixed with a male one.<sup>805</sup> Finally, LeVay’s research shared the most commonalities with past theoretical frameworks in that it understood sexual orientation and gender atypicality as intrinsically-related to one another. This can be seen in his decision to define his supposedly homosexual brains as those with hypothalami in between the typical size of heterosexual male and female ones.<sup>806</sup>

Though each of these studies was linked to a broader cultural and political narrative about gay identity that was increasingly divorced from an older association with cultural and scientific ideas about gender’s relationship to sex, the underlying foundation of the studies continued to rest upon theories of biological sex and gender that reified both according to reigning vernacular understandings.<sup>807</sup> Thus, this moment made clear that while scientific, political, and cultural forces constructed new visions of identity that attempted to differentiate along new lines of conceptualizing sex/gender and sexuality, the underlying basis of many of these claims remained fixed to longstanding binaristic and sexed notions of human biology.

*Politicizing the Gay Gene: Movement and Opposition Discourses on Science, Sexual Orientation, and Rights*

A look at gay and lesbian movement organizations’ press releases, advocacy literature, and internal strategy documents reveals how central these new studies were to

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<sup>805</sup> Burr, “Homosexuality and Biology,” 60, 62.

<sup>806</sup> Lancaster, *The Trouble with Nature*, 240-2.

<sup>807</sup> *Ibid.*, 19.



discussions of gay and lesbian rights throughout the 1990s. This evidence from the dominant national gay and lesbian organizations as well as examples from autonomous local and regional ones showcases a field of political advocates wrestling with how to both use the political opportunity these studies opened up as well as to manage the risks that attend any sudden national conversation about a controversial political and social issue. These incentives and pressures influenced how and when organizations were likely to either boisterously champion such research or engage in more tempered and nuanced discussions about the findings and political implications of such studies. This section concludes with a brief look to instances where the Religious Right collaborated with those scientists and professionals who established new institutions as more traditional ones such as the American Psychiatric Association, the American Medical Association, and others became increasingly hostile toward reparative “conversion” therapies. Placed in this context, it is clear that rather than pushing the gay and lesbian movement into adopting bioessentialist rhetoric as a defensive move, the Right and its allies among conversion advocates were actually *reacting* to developments that had been long in motion.

Regardless of the position one of these organizations took during this moment, the gay gene and the language and logic it had crystallized around were omnipresent. Even when spokespersons hedged against the critics of the new bioessentialism, their rhetoric was imbued with notions of gay and lesbian identities as fixed, essential types. They spoke in terms of how much science has revealed in terms of the truth, while sometimes acknowledging the limitations of such truth to convince a hateful opposition. Yet, gay

and lesbian advocates rarely ever considered out loud that this particular project of truth-seeking held within it any conceptual flaws about the nature of homosexuality itself as a stable minority referent to a heterosexual majority. Thus, after two decades of collaborating with scientific researchers to construct narratives about sexuality as best understood as an *orientation* (i.e. distinct in some nontrivial sense from sexual *behavior* or erotic experience itself), the gay and lesbian rights movement was well-positioned to assert that they represented a static population of sexual minorities with innate, non-contagious sexual identities and, therefore, could be safely integrated into the social and political order.

One such organization motivated to discuss the research in these terms was PFLAG. Practices that PFLAG had instituted during the previous wave of biodeterministic studies such as bringing researchers to speak at their national conferences and publishing their findings in organization publications continued throughout the 1990s. Conference attendees gathered to hear talks titled “Genetics: How Our Jewels Are Set into the Crown” and “Gay Genes: Homosexuality and Biology.”<sup>808</sup> These talks were not always ringing endorsements of every new study, but rather they invited members to consider how to manage both their skepticism and intrigue. A 1995 presentation on biology and sexuality, for instance, framed the gay genetics studies as inconclusive and in need of being discussed in terms of actual findings and limitations.

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<sup>808</sup> Ruth Abramson, “Genetics: How Our Jewels Are Set into the Crown,” (1991), Collection 7616, Box 11: Folder 91-24: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY; PFLAG, “Gay Genes: Homosexuality and Biology,” (1995), Collection 7616, Box 15: Folder 95-P32: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

As the publication of each new study brought discussions about biology and homosexuality further into the spotlight where the research could be analyzed and picked apart more publicly than ever before, PFLAG found itself wading through controversies as it sought to present the studies as offering legitimation of gay and lesbian identities, while also recognizing that the science itself needed close and careful inspection so that it might continue to be able to deliver the *truth* about sexual identity rather than mere hype.

This balancing effort was evident in PFLAG's 1995 publication, "Why Ask Why?" Addressing the Research on Homosexuality and Biology," which offered a detailed analysis and discussion of the gay brain and genetics studies as they related both to standards of scientific evidence and potential political implications.<sup>809</sup> According to its 1993 annual report, PFLAG received a \$25,000 matching gift from an anonymous donor with the intention of establishing a homosexuality and biology education fund to "finance a PFLAG publication...that will analyze and disseminate current research findings on genetic links of homosexuality."<sup>810</sup> Meeting minutes note that the main justification for doing so was to ensure that "PFLAG will play an important role in an area in which technology and human rights are becoming increasingly entwined."<sup>811</sup>

The resulting thirty-three-page publication features a tour through the Hamer, LeVay, Pillard and Bailey studies along with reflections on the political talking points that they had engendered. Throughout the booklet, PFLAG counseled its members and

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<sup>809</sup> PFLAG, "Why Ask Why?" Addressing the Research on Homosexuality and Biology," (1995), Collection 7616, Box 43: Folder 50: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>810</sup> PFLAG, "Celebrating Real Family Values: 1993 Annual Report, October 1, 1992 to September 30, 1993," (1994), Collection 7616, Box 49: Folder 2: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>811</sup> *Ibid.*, 12.

other interested readers on how and when to use scientific narratives, how to hedge these narratives in light of other political considerations, and how to interpret the science in a more rigorous manner than they had likely encountered in newspaper coverage and nightly news broadcasts. This was done partially through a long, technical parsing through of the studies themselves, highlighting methodological and even some conceptual shortcomings along the way.<sup>812</sup> The tone of the document vacillates between statements on genetic evidence being “an important piece in challenging certain forms of homophobia” and those such as geneticist and famed skeptic of biodeterministic research Ruth Hubbard’s warning that societal prejudice will not be overcome simply because biology has purported homosexuality to be natural.<sup>813</sup> This latter citation was linked to the broader sentiment that such evidence would be useless in the face of committed homophobes and that rights advocates ought to appeal also to philosophical arguments emphasizing equality and historical ones that invoked an American tradition of antidiscrimination.

Hedging and nuance aside, it is clear that the authors of “Why Ask Why?” were concerned about reforming the project of “asking why” rather than abandoning it entirely as a fraught endeavor. One major criticism levied against the existing state of the research was that its binaristic starting point could not account for bisexuality or transsexuality. On this front, the authors described the research agenda as “incomplete,” noting that “biological research on homosexuality, for example, does have implications for our

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<sup>812</sup> PFLAG, “Why Ask Why?,” 12-8.

<sup>813</sup> *Ibid.*, 7-8.

understanding of transsexuality.”<sup>814</sup> They deplored that scientists “ha[d] not addressed these connections because the biological research on homosexuality has, for the most part, specifically excluded those people who identify as transsexual or transgendered.”<sup>815</sup> Later in the booklet, the authors cautioned researchers to attend to the cultural dimensions of gender as they lambasted certain studies for assuming gender atypicality to be an inherent feature of gay and lesbian sexual orientation.<sup>816</sup> This, however, was less motivated by a suspicion of the science itself but instead emanated from the ideological imperative to construct heteronormative gay and lesbian cultural representations as well as incorporating bisexual and trans persons into the movement.

Just as it published this inward-facing attempt to encourage nuance in the face of hype and controversy, PFLAG was simultaneously developing outward-facing campaign rhetoric and mobilizing strategies that traded heavily in bioessentialist terminology and explanations of identity. In 1994, PFLAG’s national leadership contracted EDK Associates, Inc. to help plan a nationwide public education and antidiscrimination program titled “Project Open Mind.”<sup>817</sup> The research this joint venture compiled from conducting interviews in Tulsa, Atlanta, and Houston indicated that “[m]ost people believe that homosexuality is innate, and this provides an opening for addressing the issue and setting up the argument for tolerance.”<sup>818</sup> Undertaking this strategy involved a few steps, first of which was to assure straight Americans that acceptance of gays and

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<sup>814</sup> Ibid., 9.

<sup>815</sup> Ibid.

<sup>816</sup> Ibid., 21-2.

<sup>817</sup> PFLAG, “Project Open Mind: Messages for a Public Education Campaign Report,” (1995), Collection 7616, Box 19: Folder 16: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>818</sup> Ibid., 9.

lesbians would in no way threaten their own sexualities. To this point, the research stated that:

“Explaining’ the source of homosexuality allows straight people to reassure themselves that sexuality is a given...If sexuality were a matter of choice, or even contained some degree of choice and ambiguity, people would have to think about a volatile and complex dimension of human experience.”<sup>819</sup>

Additionally, the bioessentialist thesis provided a weapon against those who understood the notion that sexual orientation might have environmental causes as suggesting that non-heterosexual practices and desires were a contagion.<sup>820</sup> The authors of the report advised that advocates avoid any notion of “choice” when discussing children, as the fear of contagion was so strong that even when respondents accepted the validity of the biological evidence they continued to suspect that television coverage of gay rights, for instance, might have an adverse effect on their child’s sexuality.<sup>821</sup>

The takeaway from these interviews was obvious: asserting the innateness of sexual orientation creates tolerance in that it promised to “resolve’ the public discussion about the nature of sexuality” and to establish “social peace.”<sup>822</sup> In a campaign manual based on this research, PFLAG instructed its canvassers to respond to talking points such as “[g]ay people can’t reproduce—they recruit” by explaining that “[a]lthough no one

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<sup>819</sup> Ibid., 22.

<sup>820</sup> Ibid., 24.

<sup>821</sup> Ibid., 27-8.

<sup>822</sup> Ibid., 30.

exactly knows why people are gay, scientific studies have shown that sexual orientation may be in part genetically-based...If social pressure could actually influence people's sexual orientation, then everyone would be straight – the social pressure to be heterosexual is immense.”<sup>823</sup> However, PFLAG and EDK analysts cautioned that while this approach bred a certain level of tolerance, it did not necessarily lead people to reform their prejudices that being gay or lesbian was a tragic condition to find oneself in, even a disability of sorts. They warned that “to the extent that we publicly ‘accept’ and build on the notion that being gay is involuntary, it is critical not to unintentionally reinforce the perception that being gay is undesirable or unfortunate.”<sup>824</sup> For example, when interviewers posed a hypothetical situation to a middle-aged male respondent involving a gay son asking to bring his partner to Thanksgiving dinner, the man reconsidered his original position of hostility after discussing the possibility that the son had no control over his attraction and could not be willed into bringing a female date.<sup>825</sup> What the bioessentialist argument could not change, though, was the belief that there was still something to pity or despair in this situation. Transcending these biases, analysts argued, would require building from the foundations of the born this way narrative by connecting it to a message about liberal rights and antidiscrimination.

The Human Rights Campaign was among the most enthusiastic promoters of the new bioessentialist studies. Even prior to the genomania of the 1990s, the HRC often

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<sup>823</sup> PFLAG, “Project Open Mind Campaign Manual: Telling the Truth About Lesbians and Gays,” (1995), Collection 7616, Box 19: Folder 1: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>824</sup> PFLAG, “Project Open Mind: Messages for a Public Education Campaign Report,” 30.

<sup>825</sup> *Ibid.*, 47.

took the most deterministic interpretation of previous research into the origins of sexual orientation. An internal memo circulated among staff in 1989 encouraged advocates to speak against right-wing fearmongering by explaining that “[i]t is not possible, however, to ‘promote’ or ‘encourage’ [homosexuality] because sexuality is deeply rooted in one’s personality and is formed so early in life that it cannot be influenced in any direction by other people’s conscious efforts.”<sup>826</sup> In addition to their often glowing praise of those like Hamer’s research, the HRC made early use of the studies in their political advocacy. Shortly after *The Atlantic* ran journalist Chandler Burr’s front-page article on “Homosexuality and Biology” in 1993, HRC members lobbied members of Congress to support antidiscrimination legislation by distributing copies of the essay on Capitol Hill.<sup>827</sup>

The HRC was perhaps the most eager to spread these ideas among its membership, as evidenced in numerous advocacy pamphlets the organization published throughout the 1990s and early 2000s. In a 1998 National Coming Out Day resource guide, the HRC devised the slogan “Homosexuality is Not a Choice; Homosexuality Chooses You.”<sup>828</sup> The guide went on to compare sexual identity to other genetically-determined traits in explaining that:

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<sup>826</sup> Human Rights Campaign Fund, “Promoting Homosexuality,” (1989), Collection 7712, Box 154: Folder 46; Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.

<sup>827</sup> Burr, “Homosexuality and Biology; Lancaster, *The Trouble With Nature*, 275.

<sup>828</sup> Human Rights Campaign Fund, “National Coming Out Day: Resource Guide to Coming Out,” (1998), Collection 7712, Box 30: Folder 32; Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.



“Some people say that homosexuality is a choice to discourage you from being in a gay or lesbian relationship. But think about it for a minute. Did you *choose* to have feelings of same sex attraction? Why would you? The fact is: Homosexuality is not a choice any more than being left-handed or having blue eyes is a choice. It is an orientation, a part of who you are. The choice is in deciding how to live your life.”<sup>829</sup>

Two years later in another pamphlet titled “Equality: A Winning Message,” the HRC again countered those peddling the line that homosexuality was a “chosen lifestyle” by asserting that “[g]rowing scientific evidence suggests that people don’t choose their orientation, whether they are homosexual or heterosexual.”<sup>830</sup> Like PFLAG, the HRC too sometimes combined these ideas with an addendum that “regardless of whether sexual orientation is chosen or not, everyone in America deserves the same basic rights.”<sup>831</sup> And yet again, bioessentialism served as the edifice upon which the rest of the organization’s claims for recognition and rights was built.

The National Gay and Lesbian Task Force wrestled most with how and when to incorporate the new bioessentialist studies into their work. Though the Task Force had maintained close relationships with the Kinsey Institute and affiliated researchers since their founding in the early 1970s, by the 1990s the organization was home to multiple political tendencies, some of whom were less sympathetic to the bioessentialist project

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<sup>829</sup> Ibid.

<sup>830</sup> Human Rights Campaign Fund, “Equality: A Winning Message,” (2000), Collection 7712, Box 30: Folder 32: Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.

<sup>831</sup> Ibid.

than others. This stemmed in part from the fact that the Task Force was less straightforwardly-organized than narrowly-focused political action committees like the HRC. The Task Force instead attempted to do both the work of a large national non-profit interest group while also being attentive to a diffuse network of grassroots activists and campaigns, the latter of which were sometimes styled as more radical and less top-down than the organization's work in D.C. As historian and co-founder of the Task Force's Policy Institute John D'Emilio described, the organization had come to play an insider and outsider role; it supported acts of civil disobedience while also lobbying in the halls of Congress.<sup>832</sup> This had consequences regarding the biological narrative as counter narratives about the fluidity of gender and unstable nature of sexual expression and its related identities were coming into vogue among more radical queer activists and theorists.

Nevertheless, given its longstanding ties to the scientific community and its position within a national coalition of other organizations sympathetic to the gay gene idea, the Task Force was in the end a relatively vocal supporter of the new studies. In a statement on LeVay's 1991 study, Task Force spokesperson Robert Bray told *USA Today* that the findings "support what we've always believed - being gay is not a choice ... it may even be determined before birth."<sup>833</sup> In a press release regarding Hamer's 1993 research, Deputy Director of Public Policy Jude Radecic remarked that "[t]he NIH Study is an important addition to the growing body of evidence indicating a genetic basis for

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<sup>832</sup> John D'Emilio, *The World Turned: Essays on Gay History, Politics, and Culture* (Durham, NC: Duke University Press, 2002), 100-2.

<sup>833</sup> Marilyn Elias, "Difference Seen in Brains of Gay Men," *USA Today* (August 3, 1992), 8D.

homosexuality in some people...[a]nd it shows that homosexuality is a naturally occurring and common variation among humans—a fact that gay and lesbian people have known all along.”<sup>834</sup> Like PFLAG and the HRC occasionally did, the Task Force followed this up with a statement urging caution against those who might use genetics technology for discriminatory aims and emphasizing that “[r]egardless of the origins of homosexuality, however, discrimination based on sexual orientation is wrong and must end.”<sup>835</sup> Yet again, it was the very logic of these studies—in addition to the processes of co-production that had paved the way for them—that the appeal for expanded rights had been constructed.

The influence of these studies and the ideological content they expressed were so strong that bioessentialist logic crept into language about sexual identities even when the science itself was not being discussed. As Roger Lancaster notes, Executive Director Urvashi Vaid exemplified this in an appearance on ABC’s *Good Morning America* in which she stated that “[s]exuality is deep-seated, it’s fundamental...And that’s part of our nature.”<sup>836</sup> Vaid made these remarks in opposition to fellow guest “ex-gay” preacher Stephen Black who had argued that his “true” nature was a God-given heterosexual one. What is important about this is that Vaid did not reach for an argument that would deconstruct Black’s claims about a discoverable, stable, and authentic sexual orientation but instead retorted with language that reflected the movement’s investment in such

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<sup>834</sup> National Gay and Lesbian Task Force, “Press Release: NGLTF Statement on NIH Genetics Study,” (July 15, 1993), Collection 7301, Box 208, National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York.

<sup>835</sup> Ibid.

<sup>836</sup> Lancaster, *The Trouble with Nature*, 21-2.

ideas. Vaid's words too were not a mere strategic adoption of a counternarrative posed by Black, but instead an articulation of an idea about sexual orientation with its own "deep roots" in the LGBTQ movement.

Outside of the orbit of Washington, D.C.-based LGBTQ organizations, regional and local groups too began to incorporate the new studies into their advocacy. In a 1994 pamphlet circulated among members of the Oregon Speaks Out Project (OSOP), organizers advised how to embed references to scientific authority when responding to a skeptic who believed that sexual orientation was a choice.<sup>837</sup> Citations to Simon LeVay, Richard Pillard, Richard Green, and Michael Bailey are all provided in the pamphlet, which urges OSOP members to explain that these researchers "suggest that sexual orientation is a genetic or biologically determined orientation and is not a choice."<sup>838</sup> It also cautioned not to "allow an opposing speaker to get away with smearing Simon LeVay as a 'gay militant.'" OSOP advocated that members "[p]oint] out that these studies were published in a prominent journal only after critical review by scientists, and, that other, independent scientists are making similar discoveries."<sup>839</sup> The Gainesville Area Human Rights Campaign's 1992 "Information Packet on Sexual Orientation and Human Rights" too provided similar resources and rhetorical advice for activists doing organizing work in Florida.<sup>840</sup> The packet's section on "Choice and Sexual Orientation"

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<sup>837</sup> Oregon Speaks Out Project, "Questions and Answers on Gay and Lesbian Issues," (August 25, 1994) Collection 2008-063, Box 1, Folder 29, William E. Weinberger Collection on the Law and Gay and Lesbian Rights, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>838</sup> *Ibid.*, 6.

<sup>839</sup> *Ibid.*

<sup>840</sup> Gainesville Area Human Rights Campaign, "Information Packet on Sexual Orientation and Human Rights," (1992), Collection 7712, Box 9: Folder 1: Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.

included a research paper “demonstrating the fixed nature of homosexual orientation as opposed to homosexuality being a personal, mutable choice,” as well as an extensive bibliography of sources supporting this thesis.<sup>841</sup>

So, while this all goes to show that the right-wing religious opposition to gay and lesbian rights did not play the determinative role in pushing the movement to adopt the “nature over nurture” defense, this coalition helped to give bioessentialist narratives a prominent place in conflicts over equal rights by vigorously championing the idea of choice in their opposition. Shortly after the American Psychiatric Association (APA) demedicalized homosexuality in 1973, politically right-wing Christian organizations began to form ex-gay ministries to provide an alternative theological message to combat what they believed to be a dangerous precedent set by the APA.<sup>842</sup> These ministries relied heavily on testimonial narratives to assure those feeling conflicted about their sexual desires that there was hope for their reorientation if they turned to Christianity.<sup>843</sup> At the same time, researchers and practitioners who remained devoted to the pathological model and reparative therapeutic practices were being increasingly forced out of their professional associations and the domain of respectable scientific research and medicine. As early biodeterministic studies proliferated throughout the 1980s and the idea of a stable and fixed sexual orientation gained more purchase, religious and scientific opponents of homosexuality became increasingly aligned with one another in the

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<sup>841</sup> Ibid.

<sup>842</sup> Cynthia Burack, *Sin, Sex, and Democracy: Antigay Rhetoric and the Christian Right* (Albany, NY: State University of New York Press, 2008), 69.

<sup>843</sup> Tom Waidzunas, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, MN: University of Minnesota Press, 2015), 77.

promotion of therapeutic alternatives and a broader message that gay and lesbian identities were not necessarily innate nor were they unable to be overcome.

This concurrent process of co-production—one in which conservative political forces helped to create a constituency and allies for outsider scientific projects—aligned these disparate groups as they formed new religious and scientific institutions to challenge an emergent consensus in traditional psychiatric, psychological, and medical associations that sexual orientation was grounded in congenital factors. Organizations like the National Association for Research & Therapy of Homosexuality (NARTH) were formed by defectors from more established psychiatric institutions in order to continue espousing the science and benefits of conversion therapy. These institutions found allies in the Religious Right such as Focus on the Family, its policy arm the Family Research Council, and other conservative evangelical organizations that defined homosexuality as a sinful lifestyle choice. Even in the rare moments when the latter conceded that there might be some biological element to sexual orientation, they argued that spiritual and medical authorities could help a person overcome—or at least refuse to act upon—their sinful orientations.<sup>844</sup> Other more targeted ally groups sprung up during this time too such as Parents and Friends of Ex-Gays and Gays (an obvious riff on PFLAG’s name and mission), which positioned itself explicitly against the biological thesis.<sup>845</sup>

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<sup>844</sup> Burack, *Sin, Sex, and Democracy*, 75-7.

<sup>845</sup> The organization continues to retain a page with links to its various counter reports on bioessentialist studies and even those like Evelyn Hooker’s which refuted the pathological model: Parents and Friends of Ex-Gays and Gays, “Setting the Record Straight on the Science,” *Parents of Friends and Ex-Gays and Gays* (March 22, 2015), <http://pfox-exgays.blogspot.com/2015/03/setting-record-straight-on-science.html> (Accessed December 7, 2018)

By the 1990s, the LGBTQ movement's commitment to bioessentialism and its right-wing opposition forced the debate into the broader national political discourse. The 1992 presidential primary and general election campaigns featured an unprecedented amount of attention on gay and lesbian issues, ranging from military inclusion to national HIV/AIDS funding. Bill Clinton in particular had made gains in the Democratic Party primaries by employing David Mixner, an openly gay corporate consultant, to attract campaign contributions from wealthy gay and lesbian donors as well as broader LGBTQ political support across national organizations and activists.<sup>846</sup> Vice President Dan Quayle, who had been deployed by the George H.W. Bush reelection campaign effort to shore up conservative evangelical votes from a base that was skeptical of Bush's commitment to their cause, responded to this upsurge in attention to gay and lesbian rights by coming out in opposition to bioessentialist theories. In a number of speeches and interviews, Quayle denied the validity of the new biological studies and denounced same-sex attraction as an immoral and "wrong choice."<sup>847</sup> In an interview with the *ABC News* program "The Week," the vice president stated plainly that "[m]y viewpoint is that it's more of a choice than a biological situation."<sup>848</sup>

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<sup>846</sup> John Gallagher and Chris Bull, *Perfect Enemies: The Battle Between the Religious Right and the Gay Movement, Updated Edition* (Lanham, Maryland: Madison Books, 2001), 73-8; Jeffrey Schmalz, "The 1992 Elections: The States – The Gay Issues; Gay Areas Are Jubilant Over Clinton," (November 5, 1992) *New York Times* <https://www.nytimes.com/1992/11/05/nyregion/the-1992-elections-the-states-the-gay-issues-gay-areas-are-jubilant-over-clinton.html> (Accessed December 7, 2018).

<sup>847</sup> Wilcox, "Cultural Context and the Conventions of Science Journalism," 233.

<sup>848</sup> Karen De Witt, "The 1992 Campaign: The Vice President; Quayle Contends Homosexuality Is a Matter of Choice, Not Biology," *New York Times*, (September 14, 1992), <https://www.nytimes.com/1992/09/14/us/1992-campaign-vice-president-quayle-contends-homosexuality-matter-choice-not.html> (Accessed December 7, 2018).

It is from this vantage point that the Right's adoption of the nurture over nature formulation can be seen as a defensive move against the advent of the mature form of the bioessentialist logic in the LGBTQ movement and its growing array of national political power and allies. As the next two sections delineate, the terrain of debate would center on these competing claims based in scientific authority across a range of venues from the media to legislatures and courts, as the Right pushed back against what they rightfully perceived as a growing understanding and acceptance of the bioessentialist idea throughout American politics and culture.

*From Preference to Orientation: Solidifying Sexual Identities in Legislative and Media Discourses*

As the movement steeped itself further in bioessentialist notions of sexuality as a stable orientation, these developments came to have a significant impact on the language of identity in legislative venues as well as in popular media. In the early days of the liberal gay and lesbian movement, organizations across the country lobbied for antidiscrimination municipal ordinances, state laws and even a national bill using the language of “affectional or sexual preference.”<sup>849</sup> As legal historian Mary Zeigler notes, this language was initially adopted by a Minneapolis-St. Paul based organization to emphasize the non-static and fluid nature of gay relationships and desires. It promised to protect not only a person based on their sexual *status* but also, as one activist explain, “for publicly expressing their affection...or even for projecting an imagine which society

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<sup>849</sup> Sexual Law Reporter, “Legislation,” *Sexual Law Reporter* 1 (January 1976): 5-6, <http://www.unmarriedamerica.org/Archives/1974-1979-Sexual-Law-Reporter/1975-Sexual-Law-Reporter.pdf> (Accessed December 3, 2018).



does not usually associate with ‘masculine’ or ‘feminine’ roles.’<sup>850</sup> There were strategic reasons as well as ideological ones to lean on the language of preference over orientation. In lobbying U.S. Representative Bella Abzug to help amend Title VII of the Civil Rights Act to prohibit discrimination “on the basis of sex, sexual orientation, or marital status,” these Minnesota activists along with Task Force President Bruce Voeller insisted on changing the language to “preference” in order to protect conduct in public such as holding hands that might not be covered by an amendment that in practice might only protect “private sexual orientation,” a phrase that had found its way into similar proposals.<sup>851</sup>

Though some organizations settled on the language of orientation in these early legislative efforts, it is clear that in the 1970s the term had not yet come to be imbued with the logic of bioessentialism. For example, in 1971 the Task Force’s progenitor, the New York-based Gay Activist Alliance (GAA), lobbied the New York City Council to pass an employment antidiscrimination law that protected persons based on their sexual orientation.<sup>852</sup> Ziegler here too has unearthed archival evidence demonstrating that these references were based on a definition of orientation as “the choice of sexual partner according to gender” and had nothing to do whether orientation was innate or fixed.<sup>853</sup>

This period was one of such remarkable flux, however, that even “preference” was used

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<sup>850</sup> Mary Ziegler, “Perceiving Orientation: Defining Sexuality after Obergefell,” *Duke Journal of Gender Law and Policy* 23, no.2 (2016): 223-261 (228-9).

<sup>851</sup> *Ibid.*, 228, 233.

<sup>852</sup> Gay Rights Activists, “The Fight for a Gay Civil Rights Law in New York City,” (New York: Gay Activists Alliance Inc., 1975) Collection 2010.002, Box 1, Folder 8, Gay Activists Alliance New York, ONE National Gay & Lesbian Archives, Los Angeles, CA; Gay Rights Activists, “Legislative History of the Homosexual Bill,” (January 22, 1986) Collection 061, Box 1, Folder 43, Coalition for Lesbian and Gay Rights Records, The LGBT Community Center National History Archive, New York City, NY.

<sup>853</sup> Ziegler, “Perceiving Orientation,” 227.

by researchers at the Kinsey Institute to signify “a deep-seated predisposition, probably biological in nature.”<sup>854</sup>

That would come to change throughout the late 1970s and 1980s as the term orientation—which increasingly denoted the supposed stability of sexual identity—came to be used more frequently in legislative proposals. It is no coincidence that during this period gay and lesbian organizations were eagerly introducing a new array of scientific experts to legislatures in their advocacy for antidiscrimination bills. The Gay Rights National Lobby (GRNL), for instance, published advocacy pamphlets demonstrating their reliance on those like psychologist Judd Marmor who testified frequently on his theories that sexual orientation stabilized by the time a person reached the age of three or four years old.<sup>855</sup> Marmor and researchers’ work was also put to use in a resource guide titled “If Your Constituents Ask...,” which counseled sympathetic legislators on how to respond to voters who were dismayed by their representative supporting equal rights for gays and lesbians.<sup>856</sup> Those like the Kinsey Institute’s Martin Weinberg were even brought before Congress to testify on behalf of bills that would prohibit employment discrimination on the basis of sexual orientation.<sup>857</sup> It would not be until the several years

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<sup>854</sup> San Francisco Chronicle, “Report to Psychologists: Panel Says Gays Still Face Bias,” *San Francisco Chronicle* (August 25, 1981) Collection 7301, Box 153, Folder 21 National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York.

<sup>855</sup> Gay Rights National Lobby, “Congressional Hearings: Gay Civil Rights Legislation,” (1981) Collection 2011.053, Box 1, Folder 2, Gay Rights National Lobby, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>856</sup> Gay Rights National Lobby, “If Your Constituents Ask...,” (1980) Collection 2011.053, Box 1, Folder 2, Gay Rights National Lobby, ONE National Gay & Lesbian Archives, Los Angeles, CA

<sup>857</sup> Gay Civil Rights Hearing before House Employment Opportunities Subcommittee on H.R. 1454, (January 27, 1982) Collection 2011.053, Box 1, Folder 2, Gay Rights National Lobby, ONE National Gay & Lesbian Archives, Los Angeles, CA

later that scientific researchers themselves would come to settle on the orientation vs. preference frame, wherein the former applied to bioessentialist theories.<sup>858</sup>

Even when an organization pushed to include protections based on behavior to accompany the language of orientation, they did not do so based on the belief that orientation did not entail stability or that homosexuality was best defined with reference to one's actions rather than essence. Rather, this was a legal means by which to ensure that forms of innocuous physical expression in public such as dancing at a night club were covered by the law. For example, in 1985 the GRNL issued a statement calling for protections based on behavior to be included in antidiscrimination ordinances and laws.<sup>859</sup> The GRNL argued that "[t]o leave unaddressed the matter of homosexual sexual conduct (or other arguably homosexual conduct) or to protect only the status leaves a gaping wide loophole which WILL be (ab)used extensively and will render the Gay Rights law a dead letter to all practical intents and purposes."<sup>860</sup> Though it is often erroneously suspected that the legal conflict over protections based on status vs. those based on behavior are analogous to debates over nature vs. conceptions of sexuality as more fluid or at least are not properly understood as being constitutive of one's inner being, there was no logical incongruence between the theory of orientation as stable and the practical necessity of protecting manifestations of that orientation.

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<sup>858</sup> John C. Gonsiorek and James D. Weinrich, "The Definition and Scope of Sexual Orientation," in *Homosexuality: Research Implications for Public Policy*, eds. James Weinrich and John Gonsiorek (Newbury Park, CA: Sage, 1991): 1-12.

<sup>859</sup> Gay Rights National Lobby, "The Need for Explicit Protection of Behavior as Well as Tendencies or Status, in Gay Rights Legislation" (1984-5) Collection 7712, Box 5, Folder 62: Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.

<sup>860</sup> *Ibid.*, 3.

As bioessentialism grew in influence throughout the 1980s and into the 1990s, however, organizations began to make explicit shifts from the language of preference to orientation. This shift occurred not only in the legislative realm but in popular media and the broader cultural discourse as well. The national media-oriented Gay & Lesbian Alliance Against Defamation (GLAAD) made its mission to eradicate the use of terms like preference, choice, and lifestyle and to replace them with orientation. In a stylebook sent to CNN in 1993, GLAAD recommended the use of “sexual orientation” over “sexual preference,” noting that the latter had come to be the position of right-wing opposition to gay and lesbian rights.<sup>861</sup> A brochure disseminated by GLAAD that same year to combat a discriminatory constitutional referendum in Colorado stated that sexual orientation was the scientific community’s preferred language and understanding of sexual identity and, therefore, ought to be used in the place of other terminology.<sup>862</sup>

The term orientation and its bioessentialist undertones came to dominate the rhetoric of proposed laws and in legislative hearings during this time as well. In the process of drafting the federal Equality Non-Discrimination Act (ENDA) in 1994, a policy representative for the Sexuality Information and Education Council of the United States (SEICUS) advised senior legislative representative of the ACLU’s Gay and Lesbian Rights and HIV/AIDS Programs Alexander Robinson that using the term “affectional” over orientation was “politically unworkable,” a clear reflection that the latter had come to carry with it connotations of tolerance and the proper mode through

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<sup>861</sup> John McLendon and Barry Bryant, “Letter to Alyssa Levy about CNN and GLAAD Stylebook,” (May 26, 1993) Collection 7669, Box 15, GLAAD Records, 1985-2001, Cornell University, Ithaca, NY.

<sup>862</sup> GLAAD, “Civil /Rights, Democracy, & Amendment 2,” (1993) Collection 7669, Box 15, GLAAD Records, 1985-2001, Cornell University, Ithaca, NY.

which to conceive of gay and lesbian identities.<sup>863</sup> When introduced in the House of Representatives that year, the bill's stated intent was "[t]o prohibit employment discrimination on the basis of sexual orientation."<sup>864</sup> Contra political scientists Gary Mucciaroni and Mary Lou Killian who have argued that scientific authority did not play a major role in legislative debates, the term orientation and attendant discussions of sexual identity as they occurred throughout debates in Congress, state legislatures, and city halls should be understood as encapsulating bioessentialist notions themselves.<sup>865</sup> Even when gay rights advocates gave speeches in favor of antidiscrimination laws without specific mentions of scientific evidence (which Mucciaroni and Killian find they actually did 17% of the time), they were speaking in a language of orientation, immutability, and fixity that already by this point had been translated into "just so" understandings of sexuality from a political, cultural, and media environment saturated with such discussions of biological etiology.<sup>866</sup>

### *Conduct, Status, and Immutability in the Courts*

In the wake of *Bowers v. Hardwick* (1986), the substantive due process\privacy route to expanded gay and lesbian rights at the national level was for the time being foreclosed. This left equal protection clause litigation as movement litigators' most potent

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<sup>863</sup> Alan E. Gambrell (of SIECUS) to Alexander Robinson (ACLU) Re: L/G Civil Rights Bill (December 21, 1992) Collection Subseries 5C Washington D.C. Office on Legislation, Box 4383, American Civil Liberties Union Records, Princeton University, Princeton, NJ.

<sup>864</sup> U.S. Congress, House, *Employment Non-Discrimination Act of 1994*. HR 4636. 103<sup>rd</sup> Cong. 2d session., introduced in House June 23, 1994, <https://www.congress.gov/bill/103rd-congress/house-bill/4636/text>

<sup>865</sup> Gary Mucciaroni and Mary Lou Killian, "Immutability, Science and Legislative Debate Over Gay, Lesbian and Bisexual Rights," *Journal of Homosexuality* 47 no.1, (2004): 53-77

<sup>866</sup> *Ibid.*, 61.

constitutional weapon. With the flourishing of these legal challenges came also the incentive to prove that gay and lesbian identities were immutable as a condition for achieving strengthened judicial protections from discrimination. Thus, as had been the case throughout the 1980s, litigators were quick to integrate the latest biodeterministic research into their arguments for immutability. Importantly, however, there was a long tradition of using such research to buttress constitutional arguments which did *not* require a demonstration of immutability. Just as had been the case in the preceding decades, scientific evidence and authority was put to use for a range of legal and constitutional projects. What united these legal appeals was an underlying emphasis on the assimilable qualities of gay and lesbian sexual orientation. By the early 1990s, citations to the new studies peppered litigation briefs and the researchers themselves such as LeVay and Hamer became frequent expert witnesses before trial courts.

Again, however, it is important to differentiate constitutional developments and incentives as much as possible from those concurrent developments that both produced the gay gene, brain, and hormones studies and made them so ideologically-enticing to movement actors, including those involved in crafting and executing litigation strategy. Movement litigators after all had nearly advanced a sodomy test case, *Baker v. Wade*, with an equal protection argument as well as a due process privacy right one before the Supreme Court.<sup>867</sup> Though no one can be sure that the new bioessentialist studies would or would not have ultimately made their way into litigation in an altered universe where the Court heard *Baker* instead of *Bowers*, there is little reason to assume that the studies

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<sup>867</sup> See Chapter 5 for an account of the jurisprudential developments in sodomy ban challenges up through *Bowers*.

would not have overtaken the movement and the general public's imagination the way that gay genomania had even without incentives to make it a hallmark of gay rights legal strategy. Distinct developments in the realms of constitutional law on one hand and the forces of scientific and political co-production on the other, therefore, coincided at this moment in ways that have led many to believe that the latter were prefigured by the former, that constitutional incentives pulled biodeterministic studies into the gay and lesbian movement's work almost entirely due to a desire for heightened judicial scrutiny under the equal protection clause. The reality is that movement litigators engaged in strategic decision-making throughout the late 1980s and 1990s as they decided how and when to deploy bioessentialist evidence that movement actors had already been helped to produce, popularize, and politicize. As the following tour through military inclusion and antidiscrimination litigation shows, this entailed negotiating when and where it was *legally* advantageous to rely on scientific authority as well as to avoid where it made sense to leave strong assertions of genetic heritage to other domains.

Military inclusion cases were a pillar of the movement's litigation agenda throughout this era of liberal legal assimilationism. Legal challenges to the U.S. military's discriminatory policies on homosexuality have a long legacy within gay rights history extending back to the modern movement's origins. As early as the 1960s, homophile organizations and their allies litigated dishonorable discharges and other issues of discrimination in federal employment as part of their approach to political and social integration. Just as the homophiles mobilized their own Kinsey-affiliated experts as expert witnesses in their litigation, gay and lesbian lawyers too brought scientific

evidence to bear upon their challenges to the notion that homosexuality presented—among other things—the danger of contagion to presumably heterosexual service members.

In the post-*Bowers* constitutional landscape, litigators brought a series of equal protection clause challenges to these exclusionary military policies. One of the hurdles they faced early on in these cases was the assumption that homosexuality was a status condition defined by conduct deemed to be unprotected by the Constitution. Some judges reasoned that the logic in *Bowers* barred the equal protection clause from conferring special protections to gays and lesbians facing discrimination because their very being was constituted by an engagement in legally-unprotected actions.<sup>868</sup> In cases like *Woodward v. United States*, federal courts ruled that “homosexuality is primarily behavioral in nature” and unlike other categories like race and sex, which had come to be seen primarily as status conditions.<sup>869</sup> To combat this notion, litigators brought scientific experts before federal courts then not only to advance a theory of why gays and lesbians deserved heightened judicial protections. They did so as well to assert that sexual orientation existed beyond the domain of mere sexual activity and instead was an essential quality of a person and one that likely owed itself to biological causes.

As legal scholar Janet Halley documented in her seminal 1994 article on the use of these bioessentialist studies in the courts, movement litigators paraded their expert

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<sup>868</sup> Patricia A. Cain, *Litigating or Lesbian and Gay Rights: A Legal History*, *Virginia Law Review* 79, no. 7, (1993): 1551-641; Janet Halley, “Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability,” *Stanford Law Review* 46, no.3 (February 1994): 503-68 (511-2); Emily R. Gill, “Beyond Immutability: Sexuality and Constitute Choice,” *Review of Politics* 76, no.1 (Winter 2014): 93-117.

<sup>869</sup> *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), 1076.



witnesses and citations to bioessentialist studies before courts as judges decided a variety of gay and lesbian civil rights claims including military ones.<sup>870</sup> In *Dahl v. Secretary of the United States Navy* (1993), a federal district court in Florida heard a case involving a plaintiff who—in a strategic move to get around the *Bowers* conduct-as-status problem—identified as a “stated homosexual” who had abstained from homosexual conduct upon enlisting.<sup>871</sup> To buttress this claim to homosexuality as an identity divorced from sexual activity itself, Dahl and his attorneys brought forth evidence by Pillard, Bailey, and LeVay as well as law reviews by attorneys who had been granted funding from the National Center for Human Genome Research of the National Institutes of Health to expound on the legal ramifications of what they termed “genetic essentialism.”<sup>872</sup> Dahl’s attorneys concluded that because “complex combinations of genetic, hormonal, neurological and environmental factors operating prior to birth largely determines what an individual’s sexual orientation will be,” Dahl should not have been discharged for something he *was* rather than for violating the Navy’s code of conduct.<sup>873</sup>

Lawyers representing plaintiffs in other cases similarly rested their legal arguments in what they called “conclusive” evidence about the nature and origins of homosexuality.<sup>874</sup> Some, such as in Sergeant Ben-Shalom’s case for reinstatement in the U.S. Army, were assisted by those like the American Psychological Association, which filed an amicus brief detailing the field’s understanding of sexual orientation and its

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<sup>870</sup> Halley, “Sexual Orientation and the Politics of Biology,” 514.

<sup>871</sup> *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319 (M.D. Fla. 1993).

<sup>872</sup> *Ibid.*; Rochelle Cooper Dreyfuss and Dorothy Nelkin, “The Jurisprudence of Genetics,” *Vanderbilt Law Review* 45, no.2 (March 1992): 313-48.

<sup>873</sup> *Dahl v. Secretary of the United States Navy*, 1324.

<sup>874</sup> Halley, “Sexual Orientation and the Politics of Biology,” (citing *Steffan v. Aspin*, 8 F.3d 57, 64-68, (D.C. Cir. 1993), 62 U.S.L.W. 2309 (D.C. Cir. Jan 7, 1994).

support for ending legal discrimination.<sup>875</sup> Groups of individual researchers like Richard Green and Gregory Herek too weighed in with their own amicus briefs in cases such as *Steffan v. Cheney* in which they defended Joseph Steffan’s right to reenlist in the Navy based on the fact that his sexual orientation was “not consciously chosen but rather... [is] a basic part of an individual’s psyche.”<sup>876</sup>

It cannot be overstated that litigators and judges alike did *not* believe that strong bioessentialist evidence was constitutionally required for gay and lesbian service members to win their cases against the military. Even in considering immutability in the context of equal protection clause arguments, judges as early as the late 1980s explained that immutability was just one factor among many that courts could consult in determining whether sexual orientation merited heightened scrutiny, and that a trait or characteristic did not need to be biologically-determined in order to qualify as immutable. In a concurring opinion in *Watkins v. U.S. Army* (1989), Ninth Circuit Court of Appeals Judge William A. Norris delivered the most comprehensive version of this argument to date.<sup>877</sup> Upon providing examples in which a range of protected categories including immigrant status, legal parentage, and even gender, race, and sex are potentially mutable ones, Norris wrote that:

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<sup>875</sup> American Psychological Association, “Brief for Amicus Curiae,” *Ben-Shalom v. Secretary of the U.S. Army* (7<sup>th</sup> Cir.) (April 1989), <https://www.apa.org/about/offices/ogc/amicus/benshalom.pdf> (Accessed December 27, 2018).

<sup>876</sup> Joseph Steffan, “Memorandum of Law in Support of Plaintiff’s Cross-Motion for Summary Judgement and in Opposition to Defendants’ Motion for Summary Judgment,” *Steffan v. Cheney* (District Court for the District of Columbia) (1989) Collection 2008-063, Box 1, Folder 25, William E. Weinberger Collection on the Law and Gay and Lesbian Rights, ONE National Gay & Lesbian Archives, Los Angeles, CA.

<sup>877</sup> *Watkins v. U.S. Army*, 875 F.2d 69 (9<sup>th</sup> Circ., 1989).

“At a minimum, then, the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity. Reading the case law in a more capacious manner, ‘immutability’ may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.”<sup>878</sup>

Accordingly, Norris contended that “sexual orientation is immutable for the purposes of equal protection doctrine.”<sup>879</sup> What is fascinating about this example, however, is that in arguing against the necessity of bioessentialist evidence, Norris actually drew from references to scientific studies and authority to establish that sexual identity would be difficult or painful to alter. He reinforced his legal analysis by noting that “[a]lthough the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change.”<sup>880</sup> In this statement, he included a reference to a *Southern California Law Review* article from 1984 which contained a “who’s who” of research institutions and individual scientists with whom the gay and lesbian movement had established relationships by that point.<sup>881</sup> Thus, in what was the first major

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<sup>878</sup> Ibid.

<sup>879</sup> Ibid.

<sup>880</sup> Ibid.

<sup>881</sup> Harris M. II. Miller, “An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality,” *Southern California Law Review* 57, no.797 (1984): 797-836.

articulation of this theory of immutability in a federal appeals case, the “weak” immutability argument (i.e. the one that downplayed the significance of etiology and biological evidence) appeared to be based on anything but. Norris’s immutability standard was ironically built upon references to scientific authority and the decidedly bioessentialist premises and conclusions of many of the studies cited. Even in instances where bioessentialism was deemed irrelevant to expanded legal rights, its ideological predominance lay at the foundation of a supposedly alternative approach.

Unfortunately for the plaintiffs and the wider movement, the federal courts repeatedly upheld the discriminatory regime within the armed forces. Though some service members won reinstatements based on idiosyncratic criteria, the courts refused to acknowledge a general right for gays and lesbians to serve. Gay and lesbian investment in Bill Clinton’s 1992 presidential campaign, however, appeared to pay off as one of his first moves in office was to reform the military’s discriminatory practices. The result was the Clinton administration’s 1993 Don’t Ask Don’t Tell (DADT) policy, which in theory offered expanded protections by shifting the focus of policing to conduct and away from status.<sup>882</sup> In this formulation, closeted gay, lesbian, and bisexual persons were protected from discrimination unless they were found to have engaged in or solicited sex from a person of the same gender, though openly gay service members were seen as “an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>883</sup>

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<sup>882</sup> Don’t Ask, Don’t Tell, Don’t Pursue, Pub. L. 103–160, div. A, title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670.

<sup>883</sup> Ibid.

Not only was this received as a disappointing half-measure toward equal rights, its premise did not make the military more lenient than it had previously been. As Janet Halley notes in her book on DADT, the reform was pitched as fair in that it punished a person for what they did rather than who they were.<sup>884</sup> The military's logic reflected changes both in the law as well as in the prevailing understanding of homosexuality. On the legal front, DADT was based in part on *Bowers v. Hardwick* in that it did not recognize a right to conduct but left open protections based on status. Ideologically, this policy was rooted in the notion that it was the orientation element of homosexuality that was worthy of protection, rather than the overt expression of sexuality itself. Halley explains that the policy ironically made it easier to infer homosexual conduct from a supposed status. A service member who made a pro-gay statement, cut their hair in a certain way, or exhibited non-sex stereotyped fashion was often deemed to indicate one's homosexual identity and from there to infer punishable conduct.<sup>885</sup> Thus Don't Ask Don't Tell encapsulated the convergence of constitutional and politico-scientific logics constituting a reform policy that was in principle at odds with sexual freedom and autonomy as well as in practice a failure on all accounts.

In the wake of the Clinton reform, some legal advocates elided the status/conduct distinction entirely in their arguments, choosing instead to argue that the act of disclosure itself was protected by the First Amendment.<sup>886</sup> Rather than litigating on the premise that

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<sup>884</sup> Janet Halley, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Durham, NC: Duke University Press, 1999), 5-7.

<sup>885</sup> *Ibid.*, 2.

<sup>886</sup> Chai R. Feldblum, "Sexual Orientation, Morality, and the Law: Devlin Revisited," *University of Pittsburgh Law Review* 57, no. 237 (1995-1996): 237-336; *Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Philips v. Hunger* (No. 95-35293) (9th Cir. 1995).

orientation was independent from conduct entirely, these litigators argued that gay and lesbian identities were defined by much more than sodomy as construed by *Bowers*: they were made up of a range of emotions, desires, and actions.<sup>887</sup> Yet, no matter the litigation strategy, legal briefs continued to feature references to scientific authority. In the Human Rights Campaign’s brief in *Able v. Perry* (1995), one of the ACLU and Lambda’s major cases challenging DADT, attorneys relied on immutability arguments stressing that the “scientific consensus” was on their side.<sup>888</sup> The HRC asserted that “we do not assume heterosexuals can easily shift the object of their sexual desires to persons of the same sex,” as well as “abstain from heterosexual activity.” Science and medicine indicate the same is true of homosexuals. Thus, sexual orientation per se is not a characteristic over which an individual has had responsibility in acquiring.”<sup>889</sup>

Advocates for military inclusion outside the courts often relied on allusions to scientific logic as well. A training manual for legislative lobbying produced by the Military Freedom Project in 1993, for example, included a copy of Chandler Burr’s “Homosexuality and Biology” article for lobbyists to consult.<sup>890</sup> A document published by the National Gay and Lesbian Task Force’s Military Freedom Initiative also provided readers with language to challenge assertions that racial integration in the military was dissimilar to the gay and lesbian struggle because race was a “non-behavioral

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<sup>887</sup> Feldblum, “Sexual Orientation, Morality, and the Law,” 297-8.

<sup>888</sup> Human Rights Campaign Fund and the National Organization for Women., “Amici Curiae Brief of the Human Right Campaign Fund et al., in Support of Appellees,” *Able v. United States* (No. 95-6111) (2d Cir. 1995).

<sup>889</sup> *Ibid.*

<sup>890</sup> Military Freedom Project, “Training Manual,” (1993), Collection 7616, Box 29: Folder 57, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

characteristic” whereas sexual orientation indicated a “behavioral choice.”<sup>891</sup> These examples further demonstrate that the appeal to scientific logic and authority was not confined to the domain of the courts and equal protection clause jurisprudence alone; rather, it was a cornerstone of the movement’s strategy for attaining an equal right to serve.

Antidiscrimination cases involving local and state ordinances and ballot initiatives were another major site of legal conflict throughout the 1990s. Like military exclusion, these fights often centered on equal protection clause claims and featured similar combinations of immutability arguments and biological evidence. In a 1991 Kansas case involving a male schoolteacher suspected of “homosexual tendencies,” a federal district court judge ruled that the “available scientific evidence...strongly supports the view that sexual orientation is not easily mutable.”<sup>892</sup> Two years later when the city of Cincinnati passed a local initiative ballot stating that “no special class status may be granted based upon sexual orientation, conduct or relationships,” Lambda took a constitutional fight up to the Sixth Circuit Court of Appeals in pursuit of suspect classification for gays and lesbians.<sup>893</sup> In that case, advocacy groups and allied ones like the American Psychological Association again filed briefs on the nature, development, and inalterability of sexual orientation.<sup>894</sup>

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<sup>891</sup> National Gay and Lesbian Task Force Military Freedom Initiative, “Countering Military Arguments Against Gay and Lesbian Service Members: Questions and Answers,” (February 1993) Collection 7301, Box 208, National Gay and Lesbian Task Force, Cornell University, Ithaca, New York.

<sup>892</sup> *Jantz v. Muci* 759 F. Supp. 1543, 1548 (D. Kan. 1991)

<sup>893</sup> *Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* 54 F.3d 261 (6th Cir. 1995).

<sup>894</sup> American Psychological Association, the National Association of Social Workers, and the Ohio Psychological Association, “Amici Curiae Brief in Support of Plaintiffs-Appellees,” *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati* (Nos. 94-3855, 94-3973) (6<sup>th</sup> Cir. 1994).

Though bioessentialism was featured prominently throughout much of this litigation, the decision to adopt it for a particular case was not predetermined, but rather always the result of calculation, negotiation, and sometimes even internal conflict among the litigants themselves. In *Romer v. Evans*, a case in which Lambda and the ACLU fought to overturn a Colorado constitutional amendment prohibiting municipalities from implementing antidiscrimination laws, lawyers from the national organizations sparred with local activists over whether to make the case for immutability the central part of their equal protection clause challenge. Having recently lost so many military cases making the bioessentialist argument for immutability, attorneys for the ACLU and Lambda planned to combat the discriminatory amendment by arguing that gays and lesbians had an equal ability to participate in society comparable to heterosexual Americans.<sup>895</sup> However, attorneys and activists working for the Colorado Legal Initiatives Project, which had taken the lead in the litigation, were intent on making the scientific studies and expert witnesses a key part of both their trial strategy and constitutional arguments.<sup>896</sup> Ultimately, lead attorney and former Colorado Supreme Court justice Jean Dubofsky sided with the local advocates and brought expert witnesses including Richard Green, Judd Marmor, and Dean Hamer to testify on the immutable nature of sexual orientation.<sup>897</sup>

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<sup>895</sup> Lisa Keen and Suzanne B. Goldberg, *Strangers to the Law: Gay People on Trial* (Ann Arbor, MI: University of Michigan Press, 2000), 37-8; American Civil Liberties Union, Sexual Orientation Discrimination 1994 in Subseries 5C: Washington D.C. Office of Legislation," (1994) Call Number MC001.03.05\_c09326, Box 4383, American Civil Liberties Union Records, Seeley G. Mudd Manuscript Library at Princeton University, Princeton, New Jersey.

<sup>896</sup> Keen and Goldberg, *Strangers to the Law* 38.

<sup>897</sup> *Ibid.*, 43-73.



*“The Gay Gene Will Not Protect You”*: Queer Refusals of Scientific Authority

Though bioessentialism was beginning its assumption into the heavenly chorus of hegemonic ordering ideas in American politics, there was no shortage of those from the marginalized sidelines of queer politics and culture denouncing the notion. Even some of those in the leadership of national gay and lesbian organizations had expressed skepticism within the safety of their internal ranks. John D’Emilio, an historian, activist, and founder of the Task Force’s Policy Institute, led a discussion titled “Nature or Nurture: Are We Not Queer?” before a 1993 meeting of the Task Force’s Board of Directors.<sup>898</sup> D’Emilio’s caution against bioessentialism was representative of more social constructionist and Marxist thought concerning queer desire and identity that had once been more prominent in movement circles but since the 1980s especially had moved inward into the academy. Whereas organizations like the Gay Academic Union (of which D’Emilio was a founding member) and others like it had fought in the 1970s to bring more liberationist understandings into then-resistant university settings, by the 1990s scholars in the humanities—which were at that point fully immersed in a variety of postmodern theories and scholarship—were among those who found innatist conceptions to be ahistorical and theoretically flawed ways of interpreting sexual identities.<sup>899</sup> The vestiges of gay liberation and its doubts concerning the medical gaze’s accuracy lived on

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<sup>898</sup> John D’Emilio, Task Force, “Minutes of the Meeting of the Board of Directors National Gay and Lesbian Task Force Policy Institute National Gay and Lesbian Task Force,” (January 22-24, 1993) Collection 7301, Box 3, Folder 40 National Gay and Lesbian Task Force Records, 1973-2008, Cornell University, Ithaca, New York; John D’Emilio, “Born Gay?,” in *The World Turned: Essays on Gay History, Politics, and Culture* (Durham, NC: Duke University Press, 2002): 154-64; Though the archived meeting minutes only indicate that a “John D.” gave this presentation, the first footnote in D’Emilio’s “Born Gay?” essay notes that he delivered an earlier version of this essay to the Task Force’s Board of Directors.

<sup>899</sup> For a tour through the debates of this moment, see: David M. Halperin, *How to Do the History of Homosexuality* (Chicago, IL: University of Chicago Press, 2002).

mostly within these academic circles as the larger culture grew to increasingly accept the biological narrative.<sup>900</sup>

The most politically outward-facing criticism of the gay gene and its political logic, however, came not from the universities but instead from street protest and direct action organizations promoting a new radical queer politics. Groups like Queer Nation, Lesbian Avengers, and Transgender Nation bloomed from the garden bed of queer organizing in ACT UP, which had originally formed in response to the HIV/AIDS crisis.<sup>901</sup> Like their liberationist forebears, these radicals protested and critiqued existing power structures including governmental and scientific ones and even their assimilation-minded gay and lesbian counterparts, who they saw as politically and morally-compromised by their entrenchment in national political parties and institutions. Armed with queer theory principles of unstable, unruly, and fluid desires and bodies, queers of this era felt particularly hostile toward the growing acceptance of the bioessentialist narrative, which they perceived as both theoretically incoherent as well as a tool for establishing a certain skewed notion of sexual identities oriented more toward tepid liberal pluralism and increasingly domesticated and consumer-based middle class gay and lesbian population.

The queer opposition to the mainstream movement on this front was not without merit. The Human Rights Campaign, for instance, was willing to endorse just about any politician that voiced support for gay and lesbian issues, which was taken to its extreme

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<sup>900</sup> Steven Epstein, "Gay Politics, Ethnic Identity: The Limits of Social Construction," *Social Review* 93-94 (May-August 1987): 9-54.

<sup>901</sup> Craig Rimmerman, *The Lesbian and Gay Movements: Assimilation or Liberation?*, Second Edition (Boulder, CO: Westview Press, 2014), 58-9.

in 1998 when it endorsed a Republican candidate for U.S. Senate in New York.<sup>902</sup> The next year, the conservative gay and lesbian organization the Log Cabin Republicans hosted a bipartisan event where representatives of the HRC, the Task Force, and the Gay and Lesbian Victory Fund met alongside New York City mayor Rudolph Giuliani and other conservative politicians and writers.<sup>903</sup> The character and frequency of these happenings undoubtedly disturbed radical queer-minded persons and activists who felt that their political organizing ought to be concerned with the most vulnerable and marginalized, rather than attempting to attain a seat for gays and lesbians at the table of the elites.

Not only did the bioessentialist narrative hold promise for an assimilation project pushed most forcefully by centrist liberals, a number of high-profile openly gay conservative writers and intellectuals seized on the studies to advance their own assimilationist narrative while also punching down at queers who opposed it as they accused them of being *de facto* collaborators with the homophobic right-wing's rhetoric of deviancy and choice.<sup>904</sup> For example, then editor of *The New Republic* Andrew Sullivan wedded the nature argument to a conservative agenda based in natural law theory and denounced ACT UP and Queer Nation as akin to religious fundamentalists.<sup>905</sup> In his book-length argument on the matter, Sullivan even wrote against antidiscrimination policies to protect gays and lesbians in the private sphere (as opposed to public

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<sup>902</sup> Human Rights Campaign, "The D'Amato Endorsement," (1998) Collection 7712, Box 117: Folder 48: Human Rights Campaign Records, 1975-2015, Cornell University, Ithaca, NY.

<sup>903</sup> Lisa Duggan, "The New Homonormativity," 175.

<sup>904</sup> Paul Robinson, *Queer Wars: The New Gay Right and its Critics* (Chicago, IL: University of Chicago Press, 2005).

<sup>905</sup> Andrew Sullivan, "The Politics of Homosexuality," *New Republic* (May 10, 1993), <https://newrepublic.com/article/122044/gay-politics-collide-personal-life> (Accessed December 10, 2018).

prohibitions of formal discrimination which he endorsed) by claiming that such laws only served to reify inequalities and that—echoing Milton Friedman’s black baker example—the classical liberal notion of the freedom to contract offered more effective protection to sexual minorities than state interventions could.<sup>906</sup> Conservative cultural critic Bruce Bawer too argued in his 1994 *A Place at the Table* that the bioessentialist proof of innateness was a means by which gays and lesbians might be incorporated into a classical liberal political order.<sup>907</sup> Like Sullivan, Bawer demonstrated how readily applicable the bioessentialist idea was to even more conservative visions of individualism and small government than it had been generally used for in the mainstream liberal movement.

In response to these developments, radical queer organizations and individuals posed challenges to scientific authority’s enshrined place in the national movement in the years following the politicization of the gay gene. Lesbian radicals were among the most vocal critics of the gay gene, as they drew from a long history of lesbian feminist rhetoric of choice and an antagonism to the perceived patriarchal trappings of heterosexuality as an institution. The New Left era feminist collective “off our backs” published a condemnation of the Human Rights Campaign in 1998 in which Victoria Stanhope linked a criticism of the HRC’s political maneuverings to its acceptance of the bioessentialist narrative.<sup>908</sup> Stanhope wrote that:

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<sup>906</sup> Andrew Sullivan, *Virtually Normal: An Argument About Homosexuality* (London: Picador., 1996), 171; Milton Friedman, *Capitalism and Freedom: 40<sup>th</sup> Anniversary Edition* (Chicago, IL: University of Chicago Press, 2002).

<sup>907</sup> Bruce Bawer, *A Place at the Table: The Gay Individual in American Society* (Delran, NJ: Simon & Schuster, 1994).

<sup>908</sup> Victoria Stanhope, “Where to Now? The Gay Rights Movement,” *off our backs* 28, no.11 (1998): 6.

“The gay rights movement has even failed to embrace the idea of choice in its own movement. So limited by present deterministic and religious thinking, the main line of defense for a homosexual lifestyle has been based on ‘we are born like this, we can’t help it, so it is unfair to discriminate against us.’”<sup>909</sup>

Noting that this may be “the line of least resistance,” Stanhope expressed concern that the biological thesis would unduly “exclude the many who fail to fit into the either gay or straight model” and that the resort to a de-sexualized conception of what it meant to be queer would ensure that the general public would remain locked in their conservative and prudish biases against anything other than the blandest of textbook sexual behavior.<sup>910</sup>

Even more mainstream variants of lesbian political activism produced some skeptical comments about bioessentialism during this period. In giving a comment to the *Los Angeles Times*’s coverage of Pillard and Bailey’s 1993 study of lesbian twin pairs, a spokesperson for the National Center for Lesbian Rights (NCLR) stated that although the research had some positive implications because “it is awful to be invisible,” the study ultimately worked against the need for lesbianism “to be recognized and protected as a valid associational and lifestyle choice, whether it is genetically based or not.”<sup>911</sup> The long reaching influence of the kind of lesbian feminism that animated more radical groups like off our backs can be partially held to account for this lukewarm response

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<sup>909</sup> Ibid.

<sup>910</sup> Ibid.

<sup>911</sup> Thomas H. Maugh II, “Genetic Component Found in Lesbianism, Study Says : Science: Research on Twins Shows That Environment Also Plays a Role, Although Unclear, in Sexual Orientation,” *Los Angeles Times* (March 12, 1993), [http://articles.latimes.com/1993-03-12/news/mn-10187\\_1\\_female-sexual-orientation](http://articles.latimes.com/1993-03-12/news/mn-10187_1_female-sexual-orientation) (Accessed December 11, 2018).

from the largest legal advocate for lesbian rights in the country. After all, lesbian identity had rarely been thought to be as stable as male homosexuality had been presumed to be. The bioessentialist research agenda too had been denounced by some as having a gendered preoccupation with male homosexuality that has been translated into heightened visibility within the media and the actual movement, itself a frequent target of well-founded criticisms of its focus on gay male representations. So, for the time being (as the NCLR would come to be one of the strongest proponents of bioessentialism in courts cases in the ensuing decades), even a mainstream liberal legal institution like the National Center for Lesbian Rights could take a position against the bioessentialist current.

Members of ACT UP have also historically taken an adversarial position toward the gay gene. This orientation is best exemplified in a pamphlet distributed at the New York City Gay Pride Parade in 2005 with a section titled “We Will Not Protect You.”<sup>912</sup> Settled alongside exhortations of the mainstream movement’s agenda re marriage equality, representation in the media, and queer consumerism, was a page devoted to the idea that “The Gay Gene Will Not Protect You.” Here, ACT UP decried the reach for genetics, arguing that:

“The question of whether we were born gay should have no meaning: we are entitled to be who we are, regardless. We deserve to be out and given legal

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<sup>912</sup> ACT UP New York, “We Will Not Protect You,” *actupny.org* (2005), <http://www.actupny.org/documents/PINKTANK/index.html> (Accessed December 11, 2018).

protection no matter how we walk, talk, look or what we do sexually... We need no permission to be who we are.”<sup>913</sup>

This critique was accompanied by an extended bullet-point tour through the history of race science, noting along the way how laws such as the eugenic-based Virginia's Racial Integrity Act of 1924 were the ancestors of modern day racist and sexist biodeterministic theories manifested in books like Richard Herrnstein and Charles Murray's infamous *The Bell Curve* and then-President of Harvard University Larry Summers's hypothesis that there were fewer women employed in the STEM fields due to genetic inferiority. The point of this exercise, the authors explained, was to demonstrate that appeals to genetics were historically the domain of oppressors and that “genes will not save you when someone with power wants to keep you down or to eliminate you.”<sup>914</sup> This mini-essay on the gay gene ended with the rallying cry: “Quit explaining. Start expanding. This time it's personal. It's survival. Arguing Choice or Birth will not save us.”<sup>915</sup> For ACT UP and many other radical queers, asking for assimilation via genetic deterministic narratives was not an option; rather, they took a self-determination line on both political organizing as well as their sense of identity.

One particular challenge levied by the organization Queer by Choice, a small non-mainstream gay and lesbian group consisting of only a handful of individuals, is worth noting not for its political efficacy or strength but rather for a look into how its target,

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<sup>913</sup> Ibid., 5.

<sup>914</sup> Ibid.

<sup>915</sup> Ibid.

PFLAG, reacted to a public attack on its promotion of bioessentialism. Queer by Choice began shortly after its founder Tom Aqueno met Mark Gonzales at a national PFLAG conference in 1999 where they attended a panel titled “Homosexuality: Choice or Biology?”<sup>916</sup> Aqueno and Gonzales—both of whom experienced their sexual orientations as a matter of their own choosing—had been disturbed by the talk, which they described as “wholly on the side of biology, and spoke mockingly of choice, claiming that only a homophobe could believe anyone chose to be gay.”<sup>917</sup> They were also alarmed to learn that PFLAG had adopted a statement endorsing the biological thesis in which it derided the choice narrative as rightwing propaganda.<sup>918</sup> Shortly after this discovery, the two men teamed up with Gayle Madwin, who hosted a website devoted to the idea one could choose to be gay or lesbian and that choosing to do so was a legitimate moral act, who went about contacting over 200 PFLAG affiliates across the country as well as the national organization’s leadership to protest PFLAG’s statement and to educate its members about the limitations of the gay brain and gene studies and to implore them to accept the idea of choice as a legitimate one.

This sparked an immediate internal conversation among the PFLAG Board of Directors about how to contain what they feared could spiral into a crisis quickly if their political opponents were informed of the dispute on these terms. The leadership’s fear is evident in the archived email exchanges among Executive Director Kirsten Kingdon and

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<sup>916</sup> Queer by Choice, “Timeline of Our PFLAG Protest,” (February 7, 2001) Collection 7616, Box 43: Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

<sup>917</sup> Ibid.

<sup>918</sup> PFLAG, “Queer by Choice Questionnaire,” (August 22, 2000) Collection 7616, Box 43, Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.



the other board members. Kingdon wrote to her colleagues, fretting that “[t]his is an issue the right wing would love to use against us. I am more worried about moving too quickly to revise our policy than I am about any negative publicity we might get from the Queer by Choice group.”<sup>919</sup> The leadership ultimately decided to solicit a questionnaire to their affiliates to collect their members’ views on the controversy as they decided if and how to revise the national statement in question. Unsurprisingly, the responses sent back to the board reflected a common sentiment even if bioessentialist studies could not prove definitively that homosexuality was innate, it was best described as something deeply-held, stable, and anything but a conscious choice.<sup>920</sup>

Incoming PFLAG President and medical doctor Arnold Drake took this moment to formulate a new statement on PFLAG’s understanding of sexual orientation and the scientific search for its origins as part of his presidential inauguration speech. In an early draft circulated to other members of the board, Drake wrote that “PFLAG believes that this is a biological phenomenon. There is scientific evidence for genetic, anatomic, and environmental (prenatal and postnatal) influences on sexual orientation.”<sup>921</sup> This unequivocal endorsement of recent bioessentialist studies, however, provoked a minor backlash from those board members who wished to hedge their support for the studies themselves, especially given the fact that as the studies aged and were no longer caught

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<sup>919</sup> Kirsten Kingdon, “Email to bmckew, cyn, Michael Anderson, Jay Heavner, Heather Wright,” (May 24, 2000) Collection 7616, Box 43: Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

<sup>920</sup> PFLAG, “Queer by Choice Questionnaire,” (August 22, 2000) Collection 7616, Box 43: Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

<sup>921</sup> Dora B. Goldstein, “Email Subject: Gay by choice draft,” (June 15, 2000) Collection 7616, Box 43: Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

up in the media hype, they had come under increasing scrutiny for what they could and could not establish.<sup>922</sup> Marion Hamer, for instance, was dismayed that the draft went against the tempered, careful approach of previous PFLAG discussions of the scientific record such as “Why Ask Why?” Others like Kingdon cautioned that “we know less about lesbians than we do about gays—and we don’t know a lot about gays.”<sup>923</sup> Notably, Kingdon did not appear to mean this as a slight against the scientific inquiry into sexual orientation, as she followed up this concern by noting that Dean Hamer had begun recently to recruit lesbians from PFLAG’s membership for a new study into the origins of sexuality.

Ultimately, Drake did temper his chest thumping about the biological evidence in his inauguration speech delivered on October 28, 2000, though he did maintain that “choice” was an inadequate means of comprehending how most gays and lesbians felt about their sexualities.<sup>924</sup> He explained that for “[m]ost of our family members feel that they had no conscious choice in their sexual orientation, and we believe them.”<sup>925</sup> As for the scientific studies themselves, Drake wrote that “[t]he exact scientific cause of sexual orientation is unknown, and is not our major concern. Science has determined that genetics probably plays a part in sexual orientation; how this happens, and to what extent,

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<sup>922</sup> Cynthia Newcomer, “Email Subject: RE: Statement on Choice,” (June 16, 2000) Collection 7616, Box 43: Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

<sup>923</sup> Ibid.

<sup>924</sup> PFLAG, “Diversity – Rescinded 10/20/00, (October 28, 2000), *PFLAG.org*, <http://web.archive.org/web/20011218052616/http://www.pflag.org/about/diversity.html> (Accessed December 12, 2018).

<sup>925</sup> Ibid.

is unknown.”<sup>926</sup> Throughout the speech, Drake delicately reconciled his own confidence in the scientific research and PFLAG’s historic investment in the bioessentialist narrative while also emphasizing that individuals may vary in their own personal experience of their sexual orientations and no gay and lesbian organization ought to dictate how they ought to express that experience. A subsequent correspondence with former Task Force co-founder Ronald Gold on the inaugural speech bears this interpretation out.<sup>927</sup> In that exchange, Drake hammered home his belief in the biological thesis with allusions to various scientific findings and declarations of his belief that even if the evidence could not conclusively establish sexual orientation’s origins and nature in the present moment, it was likely that in several generations scientists likely will have pinned down the truth. And consistent with the organization’s engagement with its critics in *Queer By Choice* and its larger message, Drake continually stressed that sexual *orientation* was best understood as something distinct from sexual predilections or preferences. He argued that while “[w]e all DO have choices in what we do with our ‘preferences:’ whether to act on them, whether to suppress them, whether to deny that they exist,” orientation itself was something different, something more stable, deeply-held, and constitutive of a person’s very being.<sup>928</sup>

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<sup>926</sup> Ibid.

<sup>927</sup> President Arnold M. Drake, M.D., “Email to Ronald Gold,” (December 27, 2000) Collection 7616, Box 43: Folder 22, PFLAG (Parents, Families and Friends of Lesbians and Gays) Records, Cornell University, Ithaca, NY.

<sup>928</sup> Ibid.

### *Whither the Gay Gene?*

For much of the 1990s, bioessentialism dominated discussions of gay and lesbian identity in venues ranging from nightly broadcast news to the witness stand in federal courthouses across the country. The gay gene, the gay brain, and the gay hormone profile were all inescapable notions as Americans debated nature versus nurture, choice versus immutable orientation, and the political and cultural implications of either position. Yet toward the end of the decade, skepticism began to settle in, especially as it became increasingly clear that its proponents had overpromised how close the scientific community was to being able to offer definitive proof of an actual genetic or other biological cause of homosexuality, apart from the largely correlative evidence the most famous studies had offered. Dean Hamer's gay gene study itself came under attack from within the ranks of geneticists as researchers at the University of Western Ontario in 1999 failed to replicate Hamer's work, therein casting doubt over whether there was even a known genetic location on the X chromosome for male homosexuality, let alone a specific gene responsible for it.<sup>929</sup>

The gay gene was not the only bioreductive explanation for a complex behavioral human trait or identity being called into question at this time. As critics in the study of culture as well as biology and genetics alike had cautioned since the beginnings of this research program, the search for a single gene for homosexuality, alcoholism, or any other social phenomenon was always a fraught endeavor that ran more on creative

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<sup>929</sup> George Rice, Carol Anderson, Neil Risch, and George Ebers, "Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28," *Science* 284, no.5414 (April 23, 1999): 665-7.

storytelling and promises of evidence to come than conclusive empirical results.<sup>930</sup> These cautionary voices were increasingly resonant as the new millennium brought with it conclusions from the Human Genome Project that undermined the very “just-so” evolutionary narratives its proponents had bolstered.<sup>931</sup> Rather than producing evidence of hundreds of thousands of genes coding for individual proteins (and thus, behaviors and identities), researchers instead discovered that only a mere 20,000 to 25,000 or so genes were directly responsible for the so-called mysteries of human life, far too few for the gene-protein-trait hypothesis to hold.<sup>932</sup> So, while this was anything but the end of the road for biodeterminism either as a political or a scientific project, it did for the time being rupture the illusion of scientific consensus on the matter.

These developments across the sciences gave pause to some in the movement who had hitherto been keen on the bioessentialist idea. Though behind the scenes leaders like those in the Task Force complained about the “bogus science [used] to discredit Hamer,” in public they came to distance themselves from the studies.<sup>933</sup> In a response to the Western Ontario replication paper, a spokesperson for the Human Rights Campaign explained that “we don't believe these studies should have a significant influence in the public policy debate on whether to treat gay and lesbian people fairly and equally,

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<sup>930</sup> Roger N. Lancaster, “Sex, Science, and Pseudoscience in the Public Sphere,” *Identities: Global Studies in Culture and Power* 13, no. 1 (2006): 101-38.

<sup>931</sup> Roger N. Lancaster, “Sex and Race in the Long Shadow of the Human Genome Project,” *Social Science Research Council Race and Genomics Forum* (June 7, 2006), <http://raceandgenomics.ssrc.org/Lancaster/index.html#e13>

<sup>932</sup> Ibid.

<sup>933</sup> National Gay and Lesbian Task Force, “Email FW: Hamer Hammered by New Scientific Study, FRC Says,” (March 22, 1999) Collection 7301, Box 266 National Gay and Lesbian Task Force, Cornell University, Ithaca, New York.

whether they conclusively prove a ‘gay gene’ or not.”<sup>934</sup> Though the movement’s investment in the science was such that organizations were unwilling to cede the point that there might not be a biological basis for sexual identity at all, this discursive sidestep represented a shift from bolder endorsements that had characterized movement rhetoric just a few years earlier.

Developments in the sciences merged with political and legal ones that also encouraged gay and lesbian organizations to further temper their biological rhetoric. As early as 1993, the ACLU was reconsidering the strategy of combatting discriminatory laws by educating the public about the nature and origins of sexual orientation. In a reflection on its participation in challenging Colorado’s anti-gay ballot initiative to amend its constitution in 1992, the ACLU reasoned that such campaigns were “not the time to get people to understand and approve of homosexuality.”<sup>935</sup> Instead, the authors of this analysis encouraged movement organizations to challenge the notion that such laws were the best way to preserve “family values” when they appeared to be motivated by little other than vitriol.

Constitutional developments such as the Supreme Court’s decisions in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003) also provided incentives to gay and lesbian organizations to fashion their arguments according to themes of liberty and constitutionally-impermissible displays of outgroup animus in ways that sidelined their

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<sup>934</sup> Erica Goode, “Study Questions Gene Influence on Male Homosexuality,” *New York Times* (April 23, 1999), <https://www.nytimes.com/1999/04/23/us/study-questions-gene-influence-on-male-homosexuality.html> (Accessed May 22, 2019).

<sup>935</sup> American Civil Liberties Union, “Anti-Gay Ballot Initiatives: An Analysis of Colorado’s Amendment 2 – Strategies to Defeat Other Initiatives,” (1993) Collection 2007013, Box 19, Folder 2, American Civil Liberties Union of Southern California, ONE National Gay & Lesbian Archives, Los Angeles, CA.

approaches involving immutability claims or biological evidence and scientific authority altogether.<sup>936</sup> In his majority opinion in *Romer v. Evans*, Justice Anthony Kennedy circumvented the issue of suspect classification—and the sweeping changes that attend raising judicial scrutiny across the board—by declaring that Colorado’s constitutional amendment prohibiting cities from passing antidiscrimination laws for gays, lesbians, and bisexuals violated the equal protection clause because it was motivated by animus. According to this reasoning, laws that were motivated by animus were unconstitutional because they lacked a legitimate government interest, a requirement necessary for a law to meet the lower standards of a rational basis review. Kennedy’s opinion in *Lawrence*, which reversed *Bowers* in striking down a Texas sodomy ban, too evaded questions of status and instead pushed litigators to argue in terms of liberty, privacy, and animus in future cases rather than seek suspect classification.<sup>937</sup>

Lastly, internal tensions and conflicts within the expanding gay and lesbian movement brought along new political actors and organizations—particularly bisexual and transgender ones—who were sometimes opposed to biological taxonomies. Political scientist Zein Murib recounts a debate over this issue at the 1998 meeting of the newly-formed National Policy Roundtable, which brought together organization leaders from established gay and lesbian organizations with bisexual and trans ones that were beginning to integrate into what would become the contemporary LGBTQ movement.<sup>938</sup>

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<sup>936</sup> *Lawrence v. Texas* 539 U.S. 558 (2003).

<sup>937</sup> Though as the next chapter shows, not even a decade later an emboldened LGBT movement would once again begin to use bioessentialism arguments in pursuit of suspect classification in later same-sex marriage cases.

<sup>938</sup> Zein Murib, “Trumpism, Citizenship, and the Future of the LGBTQ Movement,” *Politics & Gender* 14, no.4 (2018): 649-72.

Murib notes a tension between those such as HRC litigator Chai Feldblum, who pushed back against those who wished to discard bioessentialist messaging, and others who balked at the idea that bisexual and transgender identities could be as readily and neatly packaged into this framing as gender normative versions of gay and lesbian identity had been.<sup>939</sup> These groups urged the movement to consider how heterosexism and gender normativity were the real culprits of their shared oppression, and that the immutability frame threatened to assimilate some at the expense of the larger whole that they were at that moment attempting to stitch together.<sup>940</sup>

These various developments across scientific, political, and legal domains had the effect of dampening the genomania that had been seemingly all-pervasive over the previous decade. As the next chapters show, however, the movement would not entirely give up its commitment to bioessentialism. Though spokespersons came to soften their rhetoric when discussing the latest research with the press, their commitment to what would come to be known as the “born this way” narrative continued throughout political and legal campaigns for same-sex marriage and military inclusion. As organizations contested reparative “conversion” therapies by lobbying state legislatures to outlaw their abusive practices, they persisted in relying on scientific authority to prove that sexual orientation was an innate and fixed characteristic.

Given the historic and deeply-intertwined nature of the relationship between the scientific and political institutions and discourses that animated the gay gene craze, it would be easy to overstate how much these developments actually pushed the movement

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<sup>939</sup> Ibid., 663-5.

<sup>940</sup> Ibid., 665.



away from bioessentialist conceptions of their identities in the long-term. After all, even if particular scientific studies came under fire and legal incentives sometimes shifted in ways that positioned litigators away from immutability arguments, the logic of bioessentialism had already spread and burrowed deep into everything from funding for further scientific research to the ways in which many gays and lesbians began to understand themselves.<sup>941</sup> Even during this relative low point for boisterous endorsements of individual studies, national organization leaders still found themselves reacting to new studies by recognizing that a number of their constituents “argue very strenuously that their sexual orientation is very well defined and biological” and, therefore, such findings ought to be taken seriously.<sup>942</sup> And rather than bisexual and transgender identities presenting an impasse for the idea’s utility in an expanding LGBT coalitional movement, bioessentialism’s prowess would prove to be more adaptable than most had ever imagined as researchers and movement activists alike found new and creative ways to incorporate these identities into their biological visions of human behavior, identity, and desire. At the dawn of the twenty-first century, bioessentialism was anything but a fading concept in queer politics and culture: it was merely preparing for its second act.

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<sup>941</sup> Patricia McBroom, “Press Release: UC Berkeley Psychologist Finds Evidence that Male Hormones in the Womb Affect Sexual Orientation,” *University of California, Berkeley Campus News* (March 29, 2000), <https://www.berkeley.edu/news/media/releases/2000/03/03-29-2000a.html> (Accessed January 21, 2019); Dani Doughton, “Born Gay? How Biology May Drive Orientation,” *Seattle Times* (June 15, 2005), <https://www.seattletimes.com/seattle-news/born-gay-how-biology-may-drive-orientation/> (Accessed January 21, 2019).

<sup>942</sup> Jeff Donn, “Fingers of Gays, Lesbians Said to Reveal Masculine Trait,” *Associated Press* (March 29, 2000).

## CHAPTER 7: Reign of the Gay Gene

### The Power and Limits of Scientific Authority

One of the dominant narratives in gay and lesbian politics in the early twenty-first century has been one of speed. No previously-maligned minority group perhaps in all of U.S. history, commentators and scholars declare, has ever made such remarkable political and cultural gains in such an accelerated fashion.<sup>943</sup> For just one marker of this progress, see the Gallup Poll's tracking of attitudes toward adult same-sex relations since 1979, which shows that opinion has shifted in a favorable direction steadily since the late 1980s before skyrocketing in the mid-2000s.<sup>944</sup> By 2018, three quarters of those living in the U.S. responded with some degree of tolerance or even total acceptance of gay and lesbian persons and their relationships.<sup>945</sup> In those years too, gay and lesbian Americans made significant strides in their political and legal campaigns across an array of issues including same-sex marriage, military inclusion, banning conversion therapy especially for minors, loosening adoption restrictions, and passing antidiscrimination laws.

Those who have tried to explain these unprecedented gains have looked to changing perceptions of gays and lesbians to track how so many Americans went from being feared as monstrous deviants and scapegoats for many of society's ills to just another minority group among others in a liberal pluralist society. Some highlight the role of major events like the HIV/AIDS crisis and the way in which gay and lesbian

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<sup>943</sup> Nate Silver, "Change Doesn't Usually Come This Fast," *FiveThirtyEight* (June 26, 2015), <https://fivethirtyeight.com/features/change-doesnt-usually-come-this-fast/> (Accessed February 28, 2019); Jeremiah J. Garretson, *The Path to Gay Rights: How Activism and Coming Out Changed Public Opinion* (New York: New York University Press, 2018).

<sup>944</sup> Gallup Poll, "Gay and Lesbian Rights," *Gallup Poll* (2018), <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (Accessed February 28, 2019).

<sup>945</sup> *Ibid.*

organizations were able to use it to portray themselves sympathetically to politicians and the media, as well as its role in allowing people to come out to their families and loved ones.<sup>946</sup> Others point to the increasing mainstream qualities of gay and lesbian life, both its integration into consumer culture and its association with the values of domesticity and monogamous coupling.<sup>947</sup> These changes were ultimately all downstream from the political organizing and projects pursued by the mainstream liberal gay and lesbian movement. In doing that work, this confederation of nonprofit organizations and litigation firms has constructed and promoted assimilable representations of gay and lesbian identities targeted at policy reforms that have posed little threat to the overall social order and reigning political economic arrangements beyond mere integration.<sup>948</sup>

What I believe is missing from this account and what I have attempted to piece together over the past six chapters is the *centrality* of scientific authority and the attendant unending search for the biological origins of sexual identity to this developmental story. Unlike some versions of this history which have gestured to discrete moments at which scientific institutions or knowledge came to bear upon gay and lesbian politics, my assertion here is that these institutions, ideas, and individual actors ought not to be thought of as existing as independent of or on the outside of the gay and lesbian

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<sup>946</sup> Garretson, *The Path to Gay Rights*.

<sup>947</sup> Amy Guckman and Betsy Reed, *Homo Economics: Capitalism, Community, and Lesbian and Gay Life* (London: Routledge, 1997); Alexandra Chasin, *Selling Out: The Gay and Lesbian Movement Goes to Market* (New York: Palgrave Macmillan, 2000); Lisa Duggan, *The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston, MA: Beacon Press, 2003); Ryan Conrad, *Against Equality: Queer Revolution, Not Mere Inclusion* (Chicago, CA: AK Press, 2014).

<sup>948</sup> Craig A. Rimmerman, *The Lesbian and Gay Movements: Assimilation or Liberation? 2<sup>nd</sup> Edition* (New York: Routledge, 2014); Stephen Engel, *Fragmented Citizenship: The Changing Landscape of Gay and Lesbian Lives* (New York: New York University Press, 2016); Matthew Dean Hindman, *Political Advocacy and Its Interested Citizens: Neoliberalism, Postpluralism, and LGBT Organizations* (Philadelphia, PA: University of Pennsylvania Press, 2018).

movement's struggles for civil rights and cultural recognition, tolerance, and acceptance. Rather, scientific authority has played a constitutive role in this politics since its beginnings in the early 1950s through the present moment. Though the relevant academic disciplines, individual researchers and their labs, pools of grant money, journals, and professional associations operate according to their own various internal logics and incentive structures, their work has shaped and been shaped by sexual politics and the universe of social movement organizations and governmental institutions that constitute it.

In the second decade of the twenty-first century, these relationships between the major political institutions of the movement and their scientific allies now range between thirty to forty years old (notwithstanding the origins of these alliances even further back in the homophile and early lesbian organizations), and in that time they have only deepened and expanded. These institutions form a symbiotic relationship wherein collaboration between the two garners new scientific studies and results which are then incorporated into campaign rhetoric and strategy as well as the cultural discourse and the media in ways that are beneficial to all involved. State institutions too have been primed to hear from scientific authorities speaking on behalf of the movement as judges, legislators, and bureaucrats have looked favorably upon the credibility of professional associations and elite university researchers and increasingly expect them to provide the *truth* so that they might legislate and adjudicate accordingly. Thus, in nearly every LGBTQ movement campaign today, one can find statements and endorsements from groups like the American Psychological Association, the American Medical Association,

and the American Pediatric Association among others peppered throughout everything from canvassing materials and website FAQs to legal briefs. The latter institutions orbit around the former, erecting a reliable layer of defense against assaults on the civil rights and characters of these identity categories as well as providing resources for offensive political maneuvers in the pursuit of expanded rights and recognition.

What has been wrought by placing scientific authority at the center of matters concerning LGBTQ identities? Holding off on the newer additions to the acronym for the moment, it is clear that at least for gay and lesbian identities there is no louder message than the one that sexual identity is an inborn trait, one impervious to change either before conception or shortly thereafter and powerless in the face of even the strongest will to abandon it. As gay and lesbian political issues became more and more of a staple of national Democratic Party politics, so too did bioessentialist understandings and rhetoric. In a 2007 Human Rights Campaign-sponsored forum for Democratic Party presidential hopefuls, for example, panelist Melissa Etheridge asked candidates to address whether they believed homosexuality to be the result of biology or choice.<sup>949</sup> When New Mexico Gov. Bill Richardson misunderstood the normative valence around the question and answered that choice could play some role, he was roundly chastised for what was explained later in an apology to have been a misinterpretation of the question.<sup>950</sup> Several years after that, Lady Gaga's massive pop cultural hit "Born This Way" entered into the liberal lexicon and was roused to the support of those advocating the repeal of the

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<sup>949</sup> Ina Jaffe, "Democratic Candidates Share in Gay Rights Forum," *National Public Radio* (August 10, 2007), <https://www.npr.org/templates/story/story.php?storyId=12668652> (Accessed March 4, 2019).

<sup>950</sup> *Ibid.*

military's exclusionary Don't Ask Don't Tell policy.<sup>951</sup> In popular political discourse, the message has in some ways transcended the need for specific studies to buttress it; rather than being connected to an individual piece of research or authoritative body, the bioessentialist idea is now often taken to be common sense, especially among those who understand it to be the carrier of the normative ideal of acceptance.<sup>952</sup>

This chapter is concerned with how this message and the scientific authority that informs it has been at the heart of some of the LGBTQ movement's most significant victories in recent years. On the same-sex marriage front, bioessentialist notions have circulated among the legal briefs and constitutional debates over whether gay and lesbian identities are immutable and thus deserving of heightened judicial protections that would enable courts to strike down laws and state constitutional provisions barring same-sex couples from marrying. This vision of sexual orientation has been at the foundation of a broader biopolitical strategy that involves expert witnesses, amicus briefs, and public statements attesting to the ability of gay and lesbian couples to form healthy heteronormative nuclear families that are suitable sites for rearing children. It is an example of how the movement has pioneered a particular form of biopolitical citizenship that ties liberal rights and recognition claims closely to biopolitical means of legitimation, making the rights-bearing subject dependent upon scientific and medical authority. It too provides a clear demonstration of how bioessentialism and scientific authority are often put into the service of legitimating a style of politics and policy preferences that benefit a

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<sup>951</sup> Lady Gaga, "A Message From Lady Gaga to the Senate Sept 16 2010," (September 16, 2010) *YouTube*, <https://www.youtube.com/watch?v=GG5VK2lquEc> (Accessed March 4, 2019).

<sup>952</sup> Elizabeth Suhay and Jeremiah Garretson, "Science, Sexuality, and Civil Rights: Does Information on the Causes of Sexual Orientation Change Attitudes?," *Journal of Politics* 80, no.2 (2018): 692-96.

middle-to-upper class strata of assimilation-minded gay and lesbians. Lastly, it casts a particular representative image of that rights-bearing subject—i.e. the heteronormative monogamous nuclear gay or lesbian family—in a scientific mold that in turn naturalizes it.

The second half of the chapter turns to movement attempts to ban sexual orientation and gender identity conversion therapy, especially for minors, at both state and federal levels. In pursuing legislative prohibitions on licensed mental health professionals engaging in conversion (sometimes called “reparative”) therapy, many LGBTQ organizations have begun nationwide campaigns to mobilize the now firmly-established consensus that such practices are discredited and dangerous. Again, in a strategy that relies heavily both on bioessentialist notions and relevant scientific and professional medical authorities, the National Center for Lesbian Rights (NCLR) has launched a campaign called “Born Perfect,” a decidedly bioessentialist notion especially when combined with the logo of a rainbow-colored fingerprint, while also collaborating with the HRC on a related venture called “Just As They Are.”<sup>953</sup> In both of these operations, the NCLR and the HRC have marshalled their allies in pediatric mental health care, psychiatric and psychological professional associations, and various medical organizations in educative campaigns and legal and political fights to end these therapeutic practices.

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<sup>953</sup> National Center for Lesbian Rights, “Born Perfect: The Campaign to End Conversion Therapy,” *NCLRights.org* (2014), <http://www.nclrights.org/our-work/bornperfect/> (Accessed March 5, 2019); Human Rights Campaign and the National Center for Lesbian Rights, “Just As They Are,” *HRC.org* (2017) <https://www.hrc.org/resources/just-as-they-are> (Accessed March 5, 2019).

These campaigns present a case in which the limits of a biopolitical citizenship approach to rights come into sharp relief. According to a Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy report from 2018, despite the recent achievements made in passing numerous bans on conversion therapy at the state level and the recent introduction of a similar ban in Congress, such bans do not extend to the realm of religious counselors and clergy who are still free to offer such services.<sup>954</sup> In fact, religious liberty-based challenges to conversion therapy restrictions are part of a larger constellation of 1<sup>st</sup> Amendment free exercise claims against certain rights protections, especially LGBTQ ones. Just as social conservatives and other defenders of religious liberty have made these types of arguments against the requirement of merchants to provide wedding services to gay and lesbian couples, to restrict the extent of protections in the American Disabilities Act (ADA), and to avoid federal regulations pertaining to employer health insurance coverage, such claims have become central to limiting the scope of these bans.<sup>955</sup>

These bans are further limited by the appeals of those who assert that despite possibly possessing an interior, deeply-rooted non-hetero sexual orientation, they seek such therapy in order to control their behavior. As autonomous individuals in a liberal pluralistic society, they argue, adults at the very least and potentially children by right of their parents' authority ought to have access to these choices as they are offered. Lastly,

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<sup>954</sup> Christy Mallory, Taylor N.T. Brown, and Kerith J. Conron, "Conversion Therapy and LGBT Youth," *Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy* (January 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf> (Accessed March 5, 2019).

<sup>955</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. \_\_\_\_ (2018); *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012); *Burwell v. Hobby Lobby*, 573 U.S. \_\_\_\_ (2014).



the bioessentialist premises upon which scientific and medical authorities tend to rest their opposition to conversion therapy have been challenged by proponents who have mobilized competing scientific theories of sexual fluidity and neuroplasticity.<sup>956</sup> These researchers and practitioners suggest that the frontier of neurological knowledge points in the opposite direction of innate, immutable, and unchanging sexual orientation and instead toward the possibility of reorientation for those who pursue it. Whereas in the past the gay and lesbian argument against such therapies rested in large part on the coercive nature by which many of them came to experience them (either by their parents, other loved ones, and even further back, the state itself), the script has been flipped in that proponents now loudly demand their freedom to have these options made available to them and not to have their choice unduly restricted.

Fully comprehending the limits of the LGBTQ movement's version of biopolitical citizenship entails understanding the ways in which it comes into conflict with other rights claims. In that sense, it involves a pursuit of rights and protections that are restricted by the limits inherent to a liberal pluralistic polity that in principle functions to promote and to protect both religious liberty and the life, liberty, and pursuit of happiness of minority populations within its citizenry. Such a political society is thus beholden both to the individual who asserts that their autonomy and human flourishing depends upon access to practices like conversion therapy as well as the individual who makes a compelling case that the availability of those same practices presents an existential threat to their own flourishing. The latter's biopolitical claims, however, serve to shift the

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<sup>956</sup> Reintegrative Therapy Association, "The Science," *Reintegrativetherapy.com* (2018), <https://www.reintegrativetherapy.com/the-science> (Accessed March 5, 2019).

balance in their favor by using scientific authority to paint a picture of society according to their own theories of ontology that undermine the former's, sometimes in ways that protect individuals from coercion, but at other times strike down the autonomy of individuals to define their own experiences of gender and sexuality (an effect of the former's strong bioessentialist commitments). As a scientific and medical consensus has formed around the notion that sexual orientation—and now gender identity—are inalterable and that attempts at reorientation are now taken to constitute a form of mental health malpractice, it is no surprise that the challenge to the biopolitical rights project have now taken the form of both religious liberty-themed attempts to push hard on an appeal to pluralism as well as an alternative scientific one oriented toward shifting the balance of power back to conversion therapy-friendly scientists and practitioners whose authority has steadily shrunk since the late 1970s to its present shriveled state.

*The Persistence of Immutability in the Same-Sex Marriage Cases*

As the legal fight for same-sex marriage has been a staple of the movement's struggle for equal rights since the 1990s, it is unsurprising that bioessentialist articulations of gay and lesbian identity have been an integral part of its discursive repertoire in these challenges. In 2003, for example, the American Civil Liberties Union's (ACLU) canvassing materials encouraged activists to explain that same-sex marriage would not persuade young people to be abandon heterosexuality because

“[b]eing gay is not a matter of choice. It is something you are born with.”<sup>957</sup> Marriage rights litigation too has been steeped in discussions about the supposedly immutable nature of gay and lesbian identities and the consequences that idea has for competing visions about what legally recognizing same-sex partnerships and families might have for the broader state and reproduction of the American nuclear family.

In the first half of this chapter, I probe how this litigation worked to reorient reigning biopolitical defenses of exclusionary marriage policies to a novel biopolitical argument in favor of extending marriage rights to non-heterosexual couples. The biopolitical underpinnings of the marriage litigation enabled proponents to successfully combat arguments about the adverse impact that gay and lesbian households had on children. On the offensive front, it aided movement actors in asserting that gay and lesbian integration into state institutions of marriage would not undermine the family unit or its attendant ideologies emphasizing reproduction and monogamous love, but rather it would help perpetuate these features of American social life.<sup>958</sup> This was in large part facilitated by bioessentialist ideas that helped ground the nature of gay and lesbian identities in a nonthreatening logic, making them an assimilable other rather than a threat to existing social, cultural, and political practices. Essential to that project has been litigation that utilized the immutability standard in equal protection clause jurisprudence

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<sup>957</sup> American Civil Liberties Union, “ACLU Message Points for Same-Sex Couples and the Federal Marriage Amendment,” (2003) (Copy available from the author).

<sup>958</sup> My arguments here accord with recent works on the same-sex marriage cases by those such as: Joe Rollins, *Legally Straight: Sexuality, Childhood, and the Cultural Value of Marriage* (New York: New York University Press, 2018), 131; Cyril Ghosh, “Marriage Equality and the Injunction to Assimilate: Romantic Love, Children, Monogamy, and Parenting in *Obergefell v. Hodges*,” *Polity* 50, no. 2 (2018): 275-99.

as a means of grounding that larger biopolitical conception in a scientific claim about the biological innateness of gay and lesbian identity.

In detailing these biopolitical developments as they occurred throughout the modern same-sex marriage legal battles in the U.S., I begin by discussing immutability and its place in the LGBTQ movement's attempts to achieve suspect or quasi-suspect classification. This entails both a look at how the movement returned to what some had assumed was a dead-end constitutional project as well as how the role of immutability has transformed in equal protection clause jurisprudence over the past several decades. Here, I puzzle through how the immutability concept came to move from a stronger to a weaker standard of proof and how this impacted the various ways that LGBTQ organizations and their allies in science and medicine approached claims about the nature of gay and lesbian sexual orientations in their litigation briefs. From there I turn to empirics, tracking the development of weak and strong immutability arguments as they moved through state and federal courts, eventually culminating in a series of state supreme court decisions in favor of same-sex marriage as well as the Supreme Court's decision striking down the Defense of Marriage Act in *Windsor v. U.S.* The following section picks up from there, tracing various immutability arguments as they moved through the cases that consolidated under *Obergefell v. Hodges* in 2015. I close this section with a reading of Justice Anthony Kennedy's majority opinion that illustrates how tightly-intertwined biopolitical defenses of same-sex marriage came to be to ideas about the nature of sexual identity as a stable, consistent, and immutable trait. I conclude by tying my analysis back to a larger normative explication of how biopolitical citizenship

claims are constructed and how they are linked to both the larger array of material institutional conditions within LGBTQ politics and the ideological imperatives that emerge from those conditions.

The concept of immutability in equal protection clause jurisprudence has been an important conduit for bioessentialist articulation of LGBTQ identities in the courts.<sup>959</sup> On its face, it is undoubtedly the most amenable legal concept to the logic of bioessentialist framings of identity as it makes the expansion of judicial protection contingent in part on establishing a defining trait or characteristic as either innate or incredibly difficult to alter. While the equal protection clause has neither been the only successful legal or constitutional route taken by LGBTQ rights litigators nor has it been the only kind of litigation that has inspired the use of bioessentialist evidence and argumentation, it has become one of the most important ways that same-sex marriage cases have been advanced and it has proven to be a suitable carrier for a host of bioessentialist and biopolitical ideas.<sup>960</sup> In this pursuit of suspect or quasi-suspect classification protections (i.e. those akin to existing protections for race and sex respectively), litigators have sought to present gays and lesbians as possessing an “immutable characteristic,” one of

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<sup>959</sup> The concept derives from an equal protection clause case concerning sex discrimination: *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>960</sup> Other scholars who have remarked upon the immutability requirement in equal protection clause jurisprudence include: Paisley Currah, “Searching for Immutability: Homosexuality, Race and Rights Discourse,” in *A Simple Matter of Justice?: Theorizing Lesbian and Gay Politics*, ed. Angelia R. Wilson (London: Cassell, 1995), 51-90; Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago, IL: University of Chicago Press, 1999), 393-4; Edward Stein, “Immutability and Innateness Arguments about Lesbian, Gay, and Bisexual Rights,” *Chicago Kent Law Review* 89, no.597 (2014): 597-640; Lisa M. Diamond & Clifford J. Rosky, “Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities,” *Journal of Sex Research* 53, no.4-5 (2016): 363-91; Mary Ziegler, “Perceiving Orientation: Defining Sexuality after Obergefell,” *Duke Journal of Gender Law and Policy* 23, no.223 (2016): 224-61 (233).

four considerations that courts have typically made when deciding whether to grant an identity or characteristic heightened judicial scrutiny.<sup>961</sup> There are at least two reasons for why movement arguments concerning immutability demonstrate both a notable legal and constitutional development as well as one that shows how articulations of the bioessentialist idea have made their way back into these kinds of legal formulations.

First, as discussed previously, LGBTQ litigators attempted to achieve heightened scrutiny for gay, lesbian, and bisexual identities throughout the late 1980s and early-to-mid 1990s with these kinds of claims about the immutability of sexual identity, but they ultimately failed to convince courts to deem them a suspect or quasi-suspect class.<sup>962</sup> In the years before *Windsor* and *Obergefell*, it had become a common trope that the Supreme Court was unlikely to ever afford gays and lesbian identity heightened scrutiny. As early as 1985, the Court had closed the door off to those with mental disabilities from claiming suspect classification even though their conditions were granted to be immutable.<sup>963</sup> Since then, the Court has historically treated immutability as a significant factor but not necessarily a strict requirement for increased protection.<sup>964</sup> Based on this development and the fact that the Court was more likely to grant protections to gays and lesbians through simple rational basis review (the lowest level of scrutiny provided under the equal protection clause), scholars like Evan Gerstmann came to argue that the Court

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<sup>961</sup> The other requirements include: a long history of discrimination, their equal ability in contributing to society, and their position as a small and politically vulnerable group.

<sup>962</sup> These included military exclusion cases such as *High Tech Gays, et al. v. Defense Industrial Security Clearance Office*, et al., 895 F.2d 563 (9<sup>th</sup> Cir. 1990) as well as state-level discriminations like *Romer v. Evans* (1996).

<sup>963</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

<sup>964</sup> Janet Halley, "Sexual Orientation and the Politics of Biology," *Stanford Law Review* 46, no.3 (February 1994): 503-68.

was unlikely to ever raise the level of scrutiny for gays and lesbians or for that matter any historically-discriminated against minority population.<sup>965</sup>

More recently on this front, scholars have observed that the Court has instead turned toward arguments concerning human dignity over suspect classification ones.<sup>966</sup> Those who see the dignity frame as the path forward for rights and recognition have joined others who contended that alternative routes such as those based in sex discrimination (i.e. the denial of same-sex marriage rights is akin to sex discrimination because it targets the sex/gender of persons seeking to marry) or the right to privacy ought to be pursued.<sup>967</sup> Yet, with hindsight this all appears to be prelude as litigants have in the past several years been more likely than ever to convince federal courts to take seriously their arguments for suspect classification or at least some modified form of it, noting that even the Supreme Court's jurisprudence has been covertly trending in that direction since the *Windsor* decision in 2013. As a result, bioessentialist logic has come along with these ever-increasing calls for the Court to consider raising its level of scrutiny for gay and lesbian identities.

Second, immutability has been downplayed in equal protection clause jurisprudence in ways that make it easier to assert the inalterability of a given trait or characteristic.<sup>968</sup> In the wake of the first deployment of bioessentialist immutability arguments by gay and lesbian rights litigants, courts began to note that immutability does

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<sup>965</sup> Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (Chicago, IL: University of Chicago, 1999).

<sup>966</sup> Stephen Engel, *Fragmented Citizenship: The Changing Landscape of Gay and Lesbian Lives* (New York: New York University Press, 2016), 278, 302-8.

<sup>967</sup> Andrew Koppelman, *Gay Rights Question in Contemporary American Law* (Chicago, IL: University of Chicago Press, 2002).

<sup>968</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

not necessarily require that the trait at hand be biologically-determined. Though the immutability standard grew from earlier cases regarding race and sex, which are defined by characteristics considered by most judges and justices to be immutable, courts have also afforded heightened scrutiny to categories like immigration status or religious belief, deeming these qualities to be “sufficiently immutable” in that they are so deeply-held or beyond the realm of something easily modified that it would be cruel or unjust to expect a person to change them.<sup>969</sup> Judges writing for lower federal courts have since conjectured that the immutability standard for gays and lesbians might then be met by a lower standard of proof. As Chapter 6 explained, the source of this standard can be found in Ninth Circuit Court of Appeals Judge William A. Norris’s concurring opinion in the military exclusion case *Watkins v. U.S. Army* (1989), in which he argued that immutability does not necessarily require biological evidence but rather it refers more broadly to “those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.”<sup>970</sup> Thus, there now appears to be a legally viable “weak immutability” standard that does not require litigants make the stronger version of the argument that had been thought by some to necessitate evidence that sexuality was rooted in biology.<sup>971</sup>

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<sup>969</sup> Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964); *Plyler v. Doe*, 457 U.S. 202 (1982). See also: Laycock, “Taking Constitutions Seriously: A Theory of Judicial Review,” *Texas Law Review* 59, no. 2 (February 1981): 343-94.

<sup>970</sup> *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (Norris concurring).

<sup>971</sup> For example, see the argument made by the Gay & Lesbian Advocates & Defenders (GLAD) in the Massachusetts case *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2004): “What is clear is that this court need not resolve the complex (and perhaps unanswerable) question of whether sexual orientation derives from nature or nurture in order to resolve this case.” See: GLAD, Memorandum in



What has this all meant for the way that the LGBTQ movement and its civil rights allies have framed the substance of their immutability arguments? After all, it appears contradictory that bioessentialism would automatically accompany this resurgence in equal protection clause-based litigation when the standards of immutability have been lowered in a way that does not seem to require such strongly-asserted and highly-controversial biodeterministic theories and evidence. There are clear examples, however, in which prominent LGBTQ rights organizations have continued to reach for the strongest versions of the immutability argument, therein introducing the latest biological, genetic, hormonal, and neurological studies to the courts. Though these endorsements have been more hedged and nuanced than those made during the initial moment of genomania in the 1990s, they have not disappeared: one can still find references to the “biologically innate” nature of sexual identity scattered throughout movement litigation. This appears to be due to a combination of factors involving both the lowered standard for immutability as well as the movement’s experience in championing specific biodeterministic studies that later came under heavy scrutiny for the dubious nature of their claims and methodologies.<sup>972</sup> Whereas spokespersons for prominent LGBTQ litigation and advocacy organizations are still likely to champion the “born this way” narrative, they are less likely to lean on citations to specific studies, preferring instead to

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Support of Plaintiffs’ Motion for Summary Judgement,” No. 01-1647-A, Massachusetts Superior Court County of Suffolk (August 20, 2001), <https://www.glad.org/wp-content/uploads/2003/11/2001-08-20-goodridge-plaintiffs-sj-memo.pdf> (Accessed August 13, 2018).

<sup>972</sup> Michael Abrams, “The Real Story on Gay Genes,” *Discover Magazine* (June 5, 2007), <http://discovermagazine.com/2007/jun/born-gay> (Accessed August 8, 2018); Bonnie Spanier, “Biological Determinism and Homosexuality,” In *Same-Sex Cultures and Sexualities: An Anthropological Reader*, ed. Jennifer Roberston, (Boston, MA: Blackwell Publishing Ltd. 2005): 33-47.

loosely gesture toward them (and the likelihood that more definitive proof will be found eventually) but to avoid endorsing any one study as providing definitive evidence.<sup>973</sup>

When litigators have leaned on the weaker version of immutability (i.e. that it would be cruel or nearly impossible to reorient one's sexuality), they have done so with the assistance of their allies in the sciences and medicine through a mix of expert testimonies at the trial level, citations to studies and statements, and amicus briefs filed by relevant professional organizations. This has ensured that all immutability arguments remain closely connected to biopolitical means of legitimation wherein researchers and medical practitioners lend their authority to make politically-expedient claims about the nature of queer identities. This has all been possible because the LGBTQ movement has largely won out against its opponents in the scientific realm after decades of cultivating support within these institutions and their research paradigms. LGBTQ rights activists' longstanding collaboration and alliance-building with sympathetic researchers and practitioners has resulted in an extensive network of psychological, psychiatric, medical, and mental health and social welfare organizations that are quick to provide the resources to defend those discriminated against for their sexualities (and increasingly their gender identities).

What the same-sex marriage cases have revealed is that although LGBTQ organizations and their allies in these professional organizations have been less likely to

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<sup>973</sup> Brynne Tannahill, "Is Research Into Gender Identity a Necessary Evil?" *INTO* (June 11, 2018), <https://www.intomore.com/impact/is-research-into-gender-identity-a-necessary-evil> (Accessed August 9, 2018). Compare the defense of the broader born this way notion in the above link to the more hedged statement issued by the Human Rights Campaign regarding a 2014 gay twins study purporting to demonstrate the a genetic basis for homosexuality: Hayley Miller, "Study Attempts to Connect Genealogy to Sexual Orientation," *HRC Blog*, (November 17, 2014) <http://www.hrc.org/blog/entry/study-attempts-to-connect-genealogy-to-sexual-orientation> (Accessed August 9, 2018).

rely on the strongest version of immutability in their litigation than in the past, the weaker immutability argument is never far removed from the stronger bioessentialist version. Due to the both the political cultural resonance of the “born this way” idea and its independent existence from the legal realm, bioessentialist versions of LGBTQ identity often curiously find their way back into legal deliberations and court decisions in which the idea had been ostensibly tabled in favor of a less controversial and easier to prove notion of immutability. Bioessentialism, however, lurks within these weaker immutability arguments as it subsists within a broader arrangement of political, cultural, and scientific forces that continually sustain it. Additionally, both forms of the immutability argument understand sexuality at its core to be about status, orientation, and identity in ways that reify and stabilize the hetero-homo binary, thereby also supporting the biopolitical importance of marriage among heterosexual or same-sex couples. This intertwined nature between theories of immutability, their relationship to bioessentialist visions, and the biopolitical imperatives of the state concerning marriage, the family, and reproduction are at the heart of biopolitical LGBTQ citizenship. As a result, deterministic claims about the nature and origins of sexual identity have resurfaced in surprising ways such as in Justice Kennedy’s *Obergefell* decision, thus demonstrating both the staying power of the idea outside the courts as well as the channels through which it can reemerge for consideration in legal venues.<sup>974</sup>

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<sup>974</sup> *Obergefell v. Hodges*, 4, 8. “Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment... Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”

The following examination of same-sex marriages cases illuminates a key dynamic in the development of biopolitical LGBTQ citizenship. In this undertaking, I hope to show that there is no one single factor that can be isolated to understand the persistence of the bioessentialist framing as it has been considered by judges and justices. This is a necessary corrective for those who might falsely assume that equal protection clause jurisprudence or the Right's insistence on the rhetoric of "choice" and "nurture" are neat and tidy explanations for the reliance on and the resonance of these claims. As I note in an earlier chapter on early liberal gay and lesbian rights litigation in the 1970s and 1980s, rather than serving as the primary catalyst, immutability has tended to be the most direct and convenient—but not the only—legal mechanism through which the liberal gay rights movement came to channel its increasingly biodeterministic conceptions of self.<sup>975</sup> Accordingly, immutability is but one factor here as well. It is an important one that provides an incentive as well as a channel to articulate a variety of claims about identity that are linked to bioessentialist notions, but it cannot be fully comprehended without attention to the longstanding relationships and alliances that constitute the modern coalition among liberal LGBTQ movement organizations and scientific and medical researchers and associations.

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<sup>975</sup> For example, see the arguments made in cases such as: *Joseph Acanfora v. Board of Education of Montgomery County* No. 72-1136-Y (D. Md.) 359 F. Supp. 843 (1973); *Enslin v. North Carolina*, 425 U.S. 903 (1976); *Baker v. Wade*, 553 F.Supp. 1121 (N.D. Tx. 1982); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

*The Same-Sex Marriage Cases Through Windsor v. U.S.*

Though not every early same-sex marriage case was pursued on equal protection grounds, a number of high-profile state and federal-level courts did hear these challenges and puzzled through whether to extend suspect or quasi-suspect classification to gays and lesbians.<sup>976</sup> The start of the 2000s in particular witnessed both litigants advancing these equal protection arguments and courts that took them seriously. For example, in 2006 the New Jersey Supreme Court ruled that gays and lesbians exhibited the qualities of a distinct class of people that had been discriminated against in a manner that violated the state's equal protection clause.<sup>977</sup> As Stephen Engel notes, this case combined a number of other constitutional arguments including the *Romer v. Evans*-inspired notion that only animus or irrational prejudice could explain the state's willingness to recognize that gays and lesbians have protections from discrimination in their private affairs while denying them public recognition of their relationships in marriage.<sup>978</sup> The end result was that the New Jersey court charted a path toward suspect classification in declaring that gays and lesbians did indeed constitute a legal class that might merit heightened scrutiny.

In cases that reached the highest courts in California, New York, and Connecticut in the following years, state courts began to wrestle with equal protection clause arguments for suspect classification and the accompanying debates regarding immutability. In a case brought by Equality California, Lambda Legal, the ACLU, and the NCLR that originated with a challenge to San Francisco's decision in 2004 to begin

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<sup>976</sup> Many cases were also deliberated on various combinations of sex discrimination, due process liberty, animus (a slightly separate equal protection clause issue) grounds.

<sup>977</sup> *Lewis v. Harris*, 188 N.J. 415; 908 A.2d 196 (N.J. 2006).

<sup>978</sup> Engel, *Fragmented Citizenship*, 259-61; *Romer v. Evans*, 517 U.S. 620 (1996).

issuing marriage licenses to same-sex couples, litigants expounded the weak immutability argument in their pleas for heightened scrutiny.<sup>979</sup> At the start of a long section on immutability, lawyers for this coalition confronted arguments advanced by the Knights of Columbus, a Catholic organization that strongly opposed expanding marriage rights, that granting suspect classification to gays and lesbians necessitated strong evidence of biological immutability (i.e. the strong immutability standard).<sup>980</sup> Following the script for the weak immutability argument, litigants argued that courts did not require a person's religious belief to be hardwired in order to merit judicial protections on that basis. Additionally, they indicated that courts recognize now that race is legally and socially constructed rather than being a biological or genetic reality.<sup>981</sup>

Upon establishing this version of immutability in case law, however, the lawyers pivoted immediately to scientific authority as a basis for heightened scrutiny. They wrote that:

“Moreover, even if [strong] immutability were a prerequisite for strict scrutiny, sexual orientation is immutable, as that term is used in suspect classification analysis. The overwhelming weight of current scientific knowledge and mental

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<sup>979</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>980</sup> Equality California, “Respondents’ Consolidated Answer to Amicus Curiae Briefs,” First Appellate District, Division Three Nos. A110449, A110450, A110451, A110463, A110651, A110652 San Francisco Superior Court Nos. JCCP4365, 429539, 429548, 504038 Los Angeles Superior Court No. BC088506 (November 14, 2007); Joshua J. McElwee, “Knights of Columbus key contributor against same-sex marriage,” *National Catholic Reporter* (October 19, 2012), <https://www.ncronline.org/news/accountability/knights-columbus-key-contributor-against-same-sex-marriage> (Accessed August 13, 2018).

<sup>981</sup> Equality California et al., “Brief,” 16, 19.

health practice recognizes that, for the great majority of people - gay and straight alike - sexual orientation is not subject to voluntary change or control.”<sup>982</sup>

Citing a brief submitted by the American Psychological Association (APA), the litigants cemented their position by both appealing to the APA and other scientific bodies that found sexual identity as “deeply ingrained and a “basic component of a person's core identity.”<sup>983</sup> In a Connecticut case, the HRC, NCLR, the National Gay and Lesbian Task Force, PFLAG and other LGBTQ rights organizations similarly argued that “[t]here is broad consensus in the scientific community that, regardless of whether an individual's sexual orientation is caused by genetic makeup, hormonal factors, social environment, or a combination of the three, none of these factors is under an individual's control - and none supports the notion that an individual chooses sexual orientation. Simply put: ‘Human beings cannot choose to be either gay or straight.’”<sup>984</sup> Again, these groups performed the double move of insisting that biodeterministic evidence was unnecessary to meet the requirements for heightened scrutiny while gesturing toward their allies in psychology and medicine to affirm their notion of immutability.

A look at an amicus brief filed by the American Psychological Association and the American Psychiatric Association in one of these cases illuminates more about the

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<sup>982</sup> Ibid., 17-8.

<sup>983</sup> Ibid., 19.

<sup>984</sup> Human Rights Campaign, Human Rights Campaign Foundation, Equal Justice Society, National Center for Lesbian Rights National Gay and Lesbian Task Force, “Brief for Amicus Curiae,” *Kerrigan v. Commissioner of Public Health* (S.C. Connecticut 17716) (January 11, 2007).

content of this version of immutability to which LGBTQ organizations have appealed.<sup>985</sup> The brief begins with a recounting of the American Psychiatric Association's contentious decision in 1973 to declassify homosexuality as a mental illness, followed up by more recent studies on the mental and physical damage that repressing one's sexuality can inflict on a person.<sup>986</sup> From there, it links this idea of a deeply-rooted sexual identity (one that may not be determined by biological but has been proven to be nearly impossible to change through biomedical or psychiatric intervention) to social, psychological, and medical benefits of marriage for gays and lesbians as well as their children.<sup>987</sup> The connection between the nature of sexuality and children in particular has been a longstanding one in psychological and psychiatric circles and one too that gay and lesbian movement actors have deployed to convince courts and the broader public that gay and lesbian parents, guardians, and teachers would not corrupt the children for whom they were responsible, nor would they endanger mental health or well-being in any other sense.<sup>988</sup> The logic goes that if one's sexuality is deeply rooted (either in very early childhood, in utero, or in one's genetic code), queer adults present no threat of contagion.

True to form here, the brief cites evidence that these children do not encounter problems with adopting the "wrong" gender identity or gender social role (a decidedly anti-queer and pro-gender-conformity sentiment) though the mark of some progressive

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<sup>985</sup> American Psychological Association, American Psychiatric Association, and the New York State Psychiatric Association, "Brief of Amicus Curiae," No.1967-04 (State of New York Court of Appeals, (April 11, 2006).

<sup>986</sup> *Ibid.*, 11-5.

<sup>987</sup> *Ibid.*, 18, 34.

<sup>988</sup> Eve Kosofsky Sedgwick, "How to Bring Your Kids Up Gay," *Social Text*, no. 29 (1991): 18-27; Clifford Rosky, "Fear of the Queer Child." *Buffalo Law Review*, 61, no.3 (2013): 607-97; Carlos A. Ball, *Same-Sex Marriage and Children: A Tale of History, Social Science, and Law* (New York: Oxford University Press, 2014), 83-102.



social values is evident in the statement that homosexuality is not a mental illness or undesirable trait. Therefore, it does not truly matter if gay and lesbian parents are more likely to have queer children (though the evidence they cite states that they do not).<sup>989</sup> Ultimately, the significance of this brief is that it ties scientific claims about the nature of gay and lesbian identity to biopolitical considerations of marriage, parenting, and children. In efforts to achieve increased legal protections, its authors present themselves as the definitive medical and scientific experts who can assure an anxious biopolitical state that the sexual identities of parents in a marriage present neither a threat to their children's health or "proper" gender identity nor the nuclear family unit, all of which are ostensibly preconditions for state recognition of same-sex marriages.

These type of immutability arguments were met with mixed reaction when presented to appellate state courts. In lower courts of appeals such as in California, judges left the resolution of the debate open, citing that a trial court would have to hear much more factual evidence of immutability (e.g. scientific testimony) to determine the extent to which these assertions immutability could be verified.<sup>990</sup> The state supreme courts in California and Connecticut, however, were becoming more receptive to the weak immutability argument in the marriage cases as evidenced in their incorporation of it in their opinions granting suspect classification to gay and lesbian identities. In California, the state supreme court held that sexual orientation had already been proven to be

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<sup>989</sup> Ibid., 38-40.

<sup>990</sup> Citing the previous decision made by the Court of Appeal for California's First District, the California Supreme Court wrote that "whether sexual orientation is immutable presents a factual question' as to which an adequate record had not been presented in the trial court." *In re Marriage Cases*, 97.

immutable in previous cases where scientific authority was invoked. Thus, this line of precedent extending back to Norris's *Watkins* concurrence in combination with the arguments presented to the court by Equality California meant that heightened scrutiny ought to be applied to state attempts to prevent gays and lesbians from obtaining marriage licenses.<sup>991</sup>

The Connecticut Supreme Court similarly deliberated the immutability notion with reference to the standard as laid out in *Watkins* and to scientific authority.<sup>992</sup> The majority wrote that “[a]lthough we do not doubt that sexual orientation — heterosexual or homosexual — is highly resistant to change, it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin and gender are immutable, because, even if it is not, the plaintiffs nonetheless have established that they fully satisfy this consideration.”<sup>993</sup> The court also cited a discussion of immutability in a separate gay rights decision from a 1991 federal district court case recognizing that gay and lesbian identities had been shown to be immutable in their role as a “central defining [trait] of personhood,” a claim that was buttressed by lengthy citations to scientific evidence that convinced the district court that “[s]exual orientation becomes fixed during early childhood, [and] it is not a matter of conscious or controllable choice.”<sup>994</sup> Thus, on the basis of both the lower threshold of the

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<sup>991</sup> *Ibid.*, 98 (citing *Hernandez-Montiel v. I.N.S.* (9th Cir. 2000) 225 F.3d 1084).

<sup>992</sup> Though a judge in CT told GLAD attorneys not to bother with the heightened scrutiny argument, they continued to push for it explaining that: “[w]e stayed the course because it was correct and because it reflected the real bias at the root of marriage exclusion.”; Mary L. Bonauto, “The Litigation: First Judicial Victories in Vermont, Massachusetts, and Connecticut,” in *Love Unites Us: Winning the Freedom to Marry in America*, eds. Kevin Cathcart and Leslie Gabel-Brett (New York: The New Press, 2016): 73-89 (p.89).

<sup>993</sup> *Kerrigan v. Commissioner of Public Health*, 957 A. 2d 407 (Conn: Supreme Court 2008), at 437.

<sup>994</sup> *Jantz v. Muci*, 759 F.Supp. 1543 (D. Kans. 1991), at 1547-8 and footnote #4.

weak immutability argument and past and current scientific evidence, state courts were becoming increasingly willing to apply heightened scrutiny based in part on this biopolitical rationale.

Looking to federal judiciary, the district trial court in *Hollingsworth v. Perry*, a legal challenge to California's Proposition 8 which had imposed a constitutional ban on same-sex marriage shortly after the state supreme court upheld it as a fundamental right, exemplifies the battle over scientific expertise that proponents and opponents of marriage equality waged.<sup>995</sup> In deciding the American Foundation for Equal Rights' (AFER) challenge to the constitutional amendment, Judge Vaughn Walker heard testimony not only on the nature and origins of sexual orientation but also from a range of experts including the history of marriage, historical patterns of discrimination, mental health trends, and economic data on gays and lesbians.

Though Walker heard experts testifying for and against Prop 8 across these various fields, his opinion is notable in that it singled out David Blankenhorn, founder and president of the Institute for American Values, for not being a legitimate expert due to his lack of professional affiliation and the fact that his work had not been peer-reviewed.<sup>996</sup> Decades prior to this case, opponents of gay rights shored up expert witnesses from the fields of psychology, psychiatry, and medicine to present evidence that homosexuality was a mental illness, that it was pathological, potentially contagious, and a threat to the gay or lesbian person and the other members of society with whom he

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<sup>995</sup> *Perry v. Hollingsworth*, No.3:09-cv-02292-VRW (N.D. Cal. 2011).

<sup>996</sup> *Ibid.*, 39-49.

or she came into contact.<sup>997</sup> After the 1973 diagnostic reforms within the American Psychiatric Association and parallel ones in similar medical and scientific associations, researchers and therapists focused on the supposed harms that homosexuality were increasingly pushed out of respectable professional circles and began to work in their own more marginal organizations.<sup>998</sup> Walker's opinion reflected this delegitimation of more conservative research in his characterization of Blankenhorn's testimony, which cast studies on the adverse effects of same-sex marriage on the "ideal family structure," as "unreliable and entitled to essentially no weight."<sup>999</sup>

Expert witnesses for the AFER, however, were presumed to be authorities within their given fields as evinced by their membership in professional associations and involvement in university and clinical work. One such testimony was given by Gregory Herek, a social psychologist specializing in sexual orientation and stigma. Herek offered a range of opinions including those on the nature of sexual orientation as understood in his field, the possibility of reorienting a person's sexuality through intervention, and the role of stigma as it related to Proposition 8. What is most fascinating about Herek's testimony is that it demonstrates that a psychologist who purportedly believed that sexual orientation was a social construction ultimately remained wedded in key ways to the logic of essentialism in his testimony before the court. In cross-examination, Herek was pushed by Howard Neilson, an attorney for Proposition 8's proponents, to undermine the

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<sup>997</sup> Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999).

<sup>998</sup> Tom Waidzunus, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, MN: University of Minnesota Press, 2015).

<sup>999</sup> *Perry v. Hollingsworth*, 49.

immutability argument by remarking that contemporary psychological studies tended to “conceive of sexual orientation as a complex, multi-faceted phenomenon, and operationalize it in a variety of ways.”<sup>1000</sup> In this stunning reassociation of ideas about sexuality, a lawyer affiliated with the conservative opposition to marriage equality cited those like Alfred Kinsey and other famed sexologists to demonstrate that sexuality is best understood as a continuum, rather than an innate disposition or character. To make this argument, Neilson introduced evidence that sexuality was mutable across the lifespan of an individual and was best understood as existing in the in-between space between exclusive homosexuality and heterosexuality.<sup>1001</sup>

In attempts to salvage the opposition’s immutability argument, Herek found himself sliding back into binaristic terms of debate and, in doing so, revealing that allegedly social construction-minded social scientists could still exhibit a tendency to reify sexual orientation as something stable, internally-coherent inner truth, an “either-or” disposition that ironically erases many of the complexities of sexuality as understood outside the strictures of the identity/status conception. In explicating social construction theory’s tenets, Herek explained that the view accepts that sexual identity is a cultural gloss that builds on the “raw material” of individuals’ sexualities, which tend to be defined by their stability and the sense that an individual has “no choice” regarding the direction of their sexual desire.<sup>1002</sup> Though he admitted that no one knows the specific

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<sup>1000</sup> Cross-Examination of Gregor Herek, *Perry v. Hollingsworth*, No.3:09-cv-02292-VRW (N.D. Cal. 2011) (January 22, 2010).

<sup>1001</sup> *Ibid.*, 2124, 2282; Neilson also invoked the theory of “erotic plasticity,” an approach to female sexuality that emphasized the mutability of female sexual desire.

<sup>1002</sup> *Ibid.*, 2177, 2258.

causes of sexuality, Herek exhibited an investment in the idea that sexual identity is a deeply-rooted “core” element of one’s self. Tellingly, when presented with a statement by the American Psychiatric Association that there to date had been no replicated studies of sexual orientation proving there to be some biodeterministic element of sexuality, Herek stated that although he had not prepared for such questioning that he had “a sense that there might be some” that actually had been replicated.<sup>1003</sup>

These theoretical beliefs were most clearly articulated in Herek’s example of a person who marries someone of the opposite gender not knowing if they are *truly* gay or suppressing the truth of their sexual orientation. This example relies on the logic that one’s sexuality is not likely to change according to circumstance but rather one *discovers* an inner truth about their sexual identity that has apparently laid dormant within them until the moment of its unearthing.<sup>1004</sup> Motivated by a political and legal duty to preserve the immutability argument as well as a theoretical commitment to sexuality being best conceptualized as a core defining feature of a person’s inner sense of self, Herek ultimately gave authority to a conception of sexual orientation that read out the complexities of sexual desire and behavior he originally seemed to believe were of equal consideration in understanding human sexuality. Most importantly, his testimony displayed the easy slippage between weaker claims about immutability and stronger,

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<sup>1003</sup> Ibid., 2296.

<sup>1004</sup> Ibid., 2043; For a similar reading of this section of Herek’s testimony (though one that I believe mistakenly labels Herek a biodeterminist rather than seeing the essentialist core of Herek’s purported social constructionism), see: Shannon Weber, “What’s Wrong with Be(com)ing Queer? Biological Determinism as Discursive Queer Hegemony,” *Sexualities* 15, no.5/6 (2012): 679–701 (p.689).

more deterministic ones, a move that has proven especially likely to occur within the context of an equal protection clause case.

Though Judge Walker eventually ruled that Proposition 8 did not even meet the standards of rational basis review, thus making the discussion of immutability moot, the district court's decision in favor of Proposition 8's proponents was clearly informed by a number of biopolitical and essentialist themes drawn from these expert testimonies. Walker wrote that sexual orientation was "fundamental to person's identity and is a distinguishing characteristic that defines gays and lesbians as a discrete group" with reference to Herek's testimony on sexuality being best understood in practice as core feature of a person's identity.<sup>1005</sup> Due to its stable nature and its place at the center of a person's selfhood, Walker was convinced by other testimonies that marriage ought to be expanded beyond its traditional heterosexual boundaries. Additionally, Walker blended this understanding of sexual identity with biopolitical testimony from other expert witnesses who provided public health statistics to show that marriage was beneficial for the wellbeing of children and was also correlated with lower levels of drinking, smoking, anxiety, depression, and other factors that the state had an interest in promoting.<sup>1006</sup> While those like sociologist Suzanna Walters have perhaps overstated the case in describing the scene in *Perry* as one where "gay marriage advocates embraced all manner of biological determinism in the rush to use immutability as the legally and morally persuasive tool to gain civil rights," essentialist and biopolitical logics did find

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<sup>1005</sup> *Perry v. Hollingsworth*, No.3:09-cv-02292-VRW (N.D. Cal. 2011), 964-5.

<sup>1006</sup> *Ibid.*, 962.

their way into much of this legal sparring.<sup>1007</sup> The opponents of Proposition 8 demonstrate that even in attempts to hedge and be nuanced about etiological claims, gay rights proponents ironically still ended up asserting a variety of interrelated biopolitical and essentialist ideas about gay and lesbian identities. In other words, the biopolitical nature of the questions asked of scientific and medical experts concerning marriage and sexual identity, coupled with proponents' attempts to achieve heightened scrutiny, produced a habitable climate for bio-inflected essentialist notions about identity to persist.

In *Windsor v. U.S.*, the constitutional challenge to the federal Defense of Marriage Act (DOMA) that made its way to the Supreme Court in 2013, LGBTQ movement litigants continued to argue for heightened scrutiny using the weak immutability formulation.<sup>1008</sup> By the time *Windsor* came before the Second Circuit Court of Appeals, Solicitor General Donald Verrilli Jr. was making the same case on behalf of the Obama administration.<sup>1009</sup> As was typical by this point, the conservative opposition, as represented by the Republican-controlled House of Representatives acting through the Bipartisan Legal Advisory Group (BLAG), contested both the idea that gays and lesbians ought to be designated a constitutionally-protected class and, accordingly, that sexual identities had been proven to be immutable in any meaningful sense.<sup>1010</sup>

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<sup>1007</sup> Walters, *The Tolerance Trap*, 185.

<sup>1008</sup> *Windsor v. United States*, No. 12-2335 (2d Cir. 2012).

<sup>1009</sup> Donald Verilli Jr., "Supplemental Brief for the United States," *United States v. Windsor* No. 12-307 (October 2012), <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/DOMA-12-307-US-supp-brief.pdf>

<sup>1010</sup> *Windsor v. United States* (2d Cir.).



Though the terms of debate among the central cast of litigants centered around the weak immutability standard, some LGBTQ movement allies were intent on bringing biodeterministic evidence back onto legal terrain. The Gay and Lesbian Medical Association's (GLMA) amicus brief, which was written by GLMA Executive Director Hector Vargas, an attorney who had previously worked for Lambda Legal and before that the National LGBTQ Task Force, was devoted entirely to bioessentialist theories of immutability.<sup>1011</sup> The GLMA stated that the purpose of the brief was "to make clear the scientific and clinical record concerning sexual orientation. Put simply, sexual orientation is an innate human characteristic that is treated unequally in the discrimination against same-sex marriage by the Defense of Marriage Act."<sup>1012</sup> Noting decades of research on the possible genetic, hormonal, and neurological bases for sexual orientation in addition to the discrediting of conversion therapy programs, the organization argued that discrimination against LGBT persons was persecution against "a group of Americans solely on the basis of something about themselves that is fundamentally determined."<sup>1013</sup>

Turning attention to the implications for their constitutional argument, the GLMA argued like most other marriage rights proponents that case law did not demand immutability for heightened scrutiny; however, they also asserted that researchers across a variety of scientific disciplines had demonstrated definitively that biodeterministic evidence did exist for the stronger immutability argument if that was the legal standard

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<sup>1011</sup> Gay and Lesbian Medical Association, "Amicus Curiae Brief GLMA: Health Professionals Advancing LGBT Equality (Gay and Lesbian Medical Association) Concerning the Immutability of Sexual Orientation in Support of Affirmance on the Merits," *United States v. Windsor* No. 12-307 (February 26, 2013).

<sup>1012</sup> *Ibid.*, 3.

<sup>1013</sup> *Ibid.*, 4.

required.<sup>1014</sup> Contesting longstanding arguments that sexuality was best conceived as a behavioral characteristic rather than a status, therefore foreclosing gay and lesbian identity off from suspect or quasi-suspect class distinction, the GLMA declared this position to be “badly dated by virtue of the clinical research” that they had cited in the previous section.<sup>1015</sup> In doing so, the GLMA opposed briefs filed by right-wing scientists like Johns Hopkins psychiatrist Paul McHugh and the BLAG, which cited scientific evidence concluding that sexuality ought to be understood as a pattern of behavior rather than a biologically-ingrained orientation.<sup>1016</sup> Whereas the opposition attempted to cast doubt by citing studies and opinions that the cause or causes of sexuality were unknown, the GLMA stated instead that “the fact that scientists have not yet discovered exactly how sexual orientation is determined does not mean that there is any scientific debate about whether it is changeable.”<sup>1017</sup> For the GLMA and other supporters of the bioessentialist narrative, the absence of definitive proof did not discount the accumulation of evidence across studies of etiology that pointed in the direction of determinism. The GLMA’s brief in *Windsor* and their engagement with their conservative interlocutors thus made clear that the move toward the weak immutability standard’s dominance over the stronger version was neither total nor permanent. With an eye toward the potential political and legal wins that would accompany a resolution of the matter, neither side was willing to give up the nature vs. nurture frame of debate.

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<sup>1014</sup> Ibid., 5-8.

<sup>1015</sup> Ibid., 10 footnote #6.

<sup>1016</sup> Ibid., 32.

<sup>1017</sup> Ibid., 39.

*The Path to Obergefell and Justice Kennedy's Curious Embrace of Immutability*

Though Justice Anthony Kennedy's majority opinion in *Windsor* ignored litigants who strove for heightened scrutiny, instead sidestepping the question in favor of an argument based on the due process clause and human dignity, the quest for increased judicial protections continued in other same-sex marriage litigation. This stemmed in large part from the fact that some federal district and circuit courts of appeal began to interpret *Windsor* as actually pointing beyond the standard rational basis review "with a bite" standard (i.e. a stronger application of rational basis review) and toward suspect or quasi-suspect classification.<sup>1018</sup> Sensing that heightened scrutiny still might be achieved in a future Supreme Court case, LGBTQ litigants and their allies continued to make their case for immutability before federal courts as they challenged the constitutionality of state-level statutory and constitutional bans on same-sex marriage.

Whereas most of these cases continued to feature debates over the weak immutability argument, 7<sup>th</sup> Circuit Court of Appeals Judge Richard Posner's decision in *Baskin v. Bogan*, a case concerning Indiana's statutory ban and Wisconsin's constitutional ban that would eventually be consolidated with *Obergefell* before the Supreme Court, is notable for its in-depth consideration of the stronger biodeterministic one.<sup>1019</sup> Though the district court in *Baskin* did not take up the immutability issue,

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<sup>1018</sup> Engel, *Fragmented Citizenship*, 277-8; For example, see the 9<sup>th</sup> Circuit Court of Appeals' decision in *SmithKline Beecham Corporation v. Abbott Laboratories*, No. 11-17357 (9<sup>th</sup> Cir. 2014).

<sup>1019</sup> Brief for the Leadership Conference on Civil and Human Rights, Nos. 14-1341; 3057; 3464; 5291; 5297; 5818 *DeBoer v. Snyder*, *Obergefell v. Hodges*, *Henry v. Hodges*, *Bourke v. Beshear*, (6<sup>th</sup> Cir. 2014) (unknown date); *Baskin v. Bogan*, 766 F.3d 648 (7<sup>th</sup> Cir. 2014).

lawyers for Lambda Legal and the ACLU saw an opportunity to bring bioessentialist evidence before the 7<sup>th</sup> Circuit for good reason. Well-known for being a prolific writer off the court, Posner’s scholarly writings have often entertained sociobiological, evolutionary psychological, and other biodeterminism-inflected theories, including ones on the etiology of homosexuality. In his 1992 book *Sex and Reason*, Posner endorsed neurological studies of sexual orientation that purported to locate its origins in neuroanatomical structures as proof against the view that homosexuality can be “acquired.”<sup>1020</sup> Writing on the most famous “gay brain” study of the time as well as a slew of sociobiological research, Posner found that “[t]he recent evidence of physical differences between the brains of homosexual and heterosexual men will, if confirmed by further research, strongly reinforce the view that homosexual preference is innate rather than cultural.”<sup>1021</sup>

By 2014 when he was tasked with writing the 7<sup>th</sup> Circuit’s opinion declaring Indiana’s ban unconstitutional, Posner appeared to have been persuaded by biodeterministic research that had been conducted over the past two decades. In the past, the judge had not applied these theories of immutability to heightened scrutiny; shortly after the publication of *Sex and Reason*, he had even penned a book review rejecting the view that courts ought to provide marriage rights to same-sex couples.<sup>1022</sup> Having

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<sup>1020</sup> Richard A. Posner, *Sex and Reason* (Cambridge, MA: Harvard University Press, 1992). For a longer discussion of Posner’s predilection for biodeterminism, see: Susan McKinnon, *Neo-Liberal Genetics: The Myths and Moral Tales of Evolutionary Psychology* (Chicago, IL: Prickly Paradigm Press, 2005).

<sup>1021</sup> Posner, *Sex and Reason*, 105 footnote #50.

<sup>1022</sup> Richard A. Posner, “Should There Be Homosexual Marriage? If So, Who Should Decide?,” *Michigan Law Review* 1578, no.95 (1997).

changed his mind due largely to the massive swing in public opinion between the 1990s and the 2010s, Posner began his equal protection analysis by declaring that:

“Our pair of cases is rich in detail but ultimately straight-forward to decide. The challenged laws discriminate against a minority defined by an immutable characteristic, and the only rationale that the states put forth with any conviction—that same-sex couples and their children don’t *need* marriage because same-sex couples can’t *produce* children, intended or unintended—is so full of holes that it cannot be taken seriously.”<sup>1023</sup>

Upon reviewing a 2008 American Psychological Association’s 2008 pamphlet titled “Answers to Your Questions: For a Better Understanding of Sexual Orientation & Homosexuality” that discredited psychotherapeutic attempts to reorient one’s sexual orientation, Posner dove into the biodeterministic evidence, which spanned studies published when he first began writing on issues of sexuality to more contemporary ones.<sup>1024</sup> In an unequivocal endorsement of this line of research, Posner stated that “[t]he leading scientific theories of the causes of homosexuality are genetic and neuroendocrine theories, the latter being theories that sexual orientation is shaped by a fetus’s exposure to certain hormones.”<sup>1025</sup> He too drew from evolutionary biological “just so” stories in the scientific literature such as the “helper in the nest theory” that posited gay men owed

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<sup>1023</sup> Ibid.

<sup>1024</sup> Ibid., 9.

<sup>1025</sup> Ibid., 9-10.

their existence to an adaptive sexual trait that benefited their larger procreative family structure.<sup>1026</sup> Striking what he obviously felt to be both a legal and scientific fatal blow to conservative opposition, Posner wrote that “there is little doubt that sexual orientation, the ground of the discrimination, is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice.”<sup>1027</sup>

Posner’s decision provides one of the most lucid examples of how biodeterministic understandings of sexual identity are so suitable to crafting biopolitical defenses of same-sex marriage based on child-rearing. Wisconsin’s Attorney General had defended the state’s constitutional ban by casting doubt that same-sex marriage was as grounded in the reproductive functions of the institution, noting that there was a danger in “shifting the public understanding of marriage away from a largely child-centric institution to an adult-centric institution focused on emotion.”<sup>1028</sup> Posner, like other defenders of same-sex marriage, did not disagree with this conception of marriage. He agreed that marriage was fundamentally about “enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together.”<sup>1029</sup> As LGBTQ litigants argued throughout this saga, there was copious evidence that gays and lesbians families were perfectly capable of creating healthy and happy children and, more directly to the root of the controversy, reproducing civil society as is.

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<sup>1026</sup> Ibid., 10.

<sup>1027</sup> Ibid., 9.

<sup>1028</sup> Ibid., 28.

<sup>1029</sup> Ibid., 17.

The year after same-sex marriage proponents won their appeal in *Baskin*, several other challenges to state bans were consolidated under the case *Obergefell v. Hodges* before the Supreme Court. Once again, litigants and their allies presented a mix of weak and strong immutability claims in pursuit of suspect or quasi-suspect classification. And as usual, the majority of the briefs filed in favor of marriage rights took the position that while case law did not require strict immutability, gay and lesbian identity had been proven to be a stable, deeply-rooted, non-contagious, and difficult if not impossible to change. A stronger biodeterministic argument did, however, make its way to the Court in a brief submitted by the Leadership Conference on Civil and Human Rights, a coalition included organizations including the Human Rights Campaign, Lambda Legal, the Task Force, the ACLU, and dozens of other civil rights groups.<sup>1030</sup> Establishing first that the overwhelming consensus of scientific and medical authorities deemed sexual orientation immutable by any definition, the Leadership Conference quoted Posner's line on sexual orientation being "innate, in the sense of in-born" trait."<sup>1031</sup> With these arguments and others before the Court, LGBTQ Americans and lawyers and legal scholars alike waited anxiously to see how and if the Court would modify its equal protection clause jurisprudence to afford new rights to same-sex couples.

No shortage of scholars, analysts, and other commentators have opined on the strange jurisprudential moves Justice Kennedy made in his majority opinion striking down same-sex marriage bans across the country. A great many of these observations

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<sup>1030</sup> Brief for the Leadership Conference on Civil and Human Rights, Nos. 14-556, 14-562, 14-571 and 14-574 (U.S. 2015) (filed March 6, 2015).

<sup>1031</sup> *Ibid.*, 28.

have focused on the legal role that Kennedy's notion of human dignity played in *Obergefell*, a concept that Stephen Engel described as a jurisprudential shift that evaded defining gays and lesbians as a suspect class in favor of an anti-discrimination doctrine that the right to marry lies in the universal dignity of all persons, gay or straight.<sup>1032</sup> Delving a bit into the weeds, legal scholars have wrestled with what exact combination of equality and liberty and the freedom to choose one's sexual or married partner (stemming from substantive due process jurisprudence) Kennedy has concocted throughout his decisions on LGBTQ rights extending back to *Lawrence v. Texas* (2003).<sup>1033</sup> Others have employed queer theoretical perspectives to identify and critique Kennedy's philosophical musings on dyadic romantic love, the nuclear family, and its relation to marriage, a central part of his justification for imbuing this right to marry with substantive due process clause protections.<sup>1034</sup> Lastly, some have pointed out the child-centric heteronormativity on display in both the *Obergefell* and *Windsor* decisions' talk of the affront to the dignity of the children themselves when their parents are barred from state-sanctioned marriage.<sup>1035</sup>

While these accounts—and the various debates within them—are crucial for understanding the multiple dimensions of a highly unorthodox opinion on the frontier of American constitutional development, what they tend to gloss over or dismiss is Kennedy's strange, yet anything but meaningless references to immutability. Though he

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<sup>1032</sup> Engel, *Fragmented Citizenship*, 278.

<sup>1033</sup> Connor Ewing, "With Dignity and Justice for All: The Jurisprudence of 'Equal Dignity' and the Partial Convergence of Liberty and Equality in American Constitutional Law," *International Journal of Constitutional Law* (forthcoming); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>1034</sup> Cyril Ghosh, "Marriage Equality and the Injunction to Assimilate;

<sup>1035</sup> Clifford Rosky, "Same-Sex Marriage Litigation and the Children's Right to be Queer," *GLQ: A Journal of Gay and Lesbian Studies* 22, no.4 (2016): 541-68; Rollins, *Legally Straight*, 125-8.



did not rely upon a complete equal protection clause analysis, Kennedy did invoke two of the prongs: immutability as well as evidence of a long history of invidious discrimination. In a passage fending off those who believed that same-sex couples would undermine the institution, Kennedy wrote that: “[f]ar from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.”<sup>1036</sup> A few pages later, Kennedy linked scientific authority to this conception in stating that “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”<sup>1037</sup>

In these passages, Kennedy flipped the biopolitical script in arguing that not only would same-sex couples not present any threat to the reproductive family unit, they would instead buttress it. And they would do so precisely because of what he deemed their “immutable natures,” which led gays and lesbians to seek out lifelong, monogamous, childrearing family units. Thus, discussions such as the one by Lisa Diamond and Clifford Rosky that characterized Kennedy’s immutability allusions as “puzzling and pointless” miss how they are linked to the broader ideological grounding for his decision.<sup>1038</sup> The immutability references draw from the various weak and strong arguments advanced by litigants who harvested the fruits of the LGBTQ movement’s decades-long cultivation of allies in the sciences and medicine. The notion of immutable

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<sup>1036</sup> *Obergefell v. Hodges*, 4.

<sup>1037</sup> *Ibid.*, 8.

<sup>1038</sup> Lisa M. Diamond and Clifford J. Rosky, “Scrutinizing Immutability,” 379.

gay and lesbian natures as Kennedy terms them are both constituted by biopolitical authority as well as blend with the other central biopolitical themes regarding the family and children. Back during the beginning of the same-sex marriage battles in the early 2000s, political scientist Jonathon Goldberg-Hiller observed how the opposition framed its position in terms of sovereignty, asserting that the state reserved the family unit for citizens who were heterosexual and had been proven by tradition and scientific authority to be suited to the task of reproducing civil society through the family formation (the foundation of the modern biopolitical state).<sup>1039</sup> Thirteen years later, the Supreme Court turned this argument upside down in favor of gays and lesbians seeking to enter into legal marriages, doing so by constructing them as biopolitical citizens.

The immutability standard has been just one, albeit a significant one, for facilitating this biopolitical development in the legal domain. It has offered an incentive for movement actors to present their scientific allies before courts to testify on the nature and origins of sexual identity and to provide a normative and empirical basis for extending constitutional protections to gays and lesbians. As legal scholar Jessica Clarke has argued, more recent formulations of immutability have moved from being descriptive in content and normative only in the conclusion that follows (i.e. because an individual did not choose a defining trait then it must not be the basis for discrimination) to one wherein “a certain trait should not be the basis for discrimination because it is a normatively acceptable, protected exercise of individual liberty or expression of

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<sup>1039</sup> Jonathan Goldberg-Hiller, *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights* (Ann Arbor, MI: University of Michigan Press, 2002), 101-2.

personality.”<sup>1040</sup> Kennedy’s language in *Obergefell* exemplified this shift as he posited that gay and lesbian persons’ immutable natures *dictated* their desire for marital arrangements that are deemed normative moral goods in American political culture.<sup>1041</sup> While the forces that have led to this bioessentialist articulation and legitimation of identity exist outside the courts and equal protection clause jurisprudence, these cases demonstrate how such ideas work through case law—modifying it along the way—and produce new understandings of citizenship and rights founded upon biopolitical notions.

### *Conversion Therapy Bans: From Pathology to “Born Perfect”*

As previous chapters have illustrated, conflict over conversion therapy practices extends back to the origins of the modern movement during the homophile and early lesbian era. Since then, debates over the efficacy or appropriateness of such therapies have been at the core of discussions and debates concerning sexuality’s etiology. Though reorientation theories and techniques were well-regarded in the realms of psychoanalysis and psychiatry and their practitioners often sat at the heads of their respective professional associations, activist and reformers alike waged sustained efforts against conversion therapy’s harmful and dehumanizing effects. These early alliances resulted in major victories such as the American Psychiatric Association’s 1973 decision to

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<sup>1040</sup> Jessica A. Clarke, “Against Immutability,” 125 *Yale Law Journal* 125, no.1 (2015): 2-102.

<sup>1041</sup> *Obergefell vs. Hodges*, 4.

depathologize homosexuality, which compounded into subsequent triumphs in similar organizations throughout the following decades.<sup>1042</sup>

By the 1980s, the lines were sharply drawn between two groups. On one side there were those sexuality researchers allied with the nascent gay and lesbian movement who were both beginning to entertain biological theories of sexuality, and on the other was an old guard of psychologists, sexologists, and mental health professionals who were being increasingly pushed to the margins of legitimate scientific inquiry and acceptable therapeutic care. As sociologist Tom Waidzunas has documented in his work on how the latter moved to the fringes, the practitioners of conversion therapy formed an alternative network of institutions that sometimes coordinated with ex-gay religious ones, but which were ultimately committed to the notion that their enterprise was a legitimate scientific one.<sup>1043</sup> Among the most prominent of these was the National Association for Research and Therapy of Homosexuality (NARTH), formed in 1992 by clinical psychologist Joseph Nicolosi, psychoanalyst Charles Socarides, and psychiatrist Benjamin Kaufman, all of whom were longtime champions of reparative therapy.<sup>1044</sup>

After hitting its peak in the late 1990s, the ex-gay movement started a downward spiral toward irrelevance in the 2000s as major leaders in both the religious and scientific branches abandoned their efforts. Outspoken religious proponents of conversion sometimes fell into disgrace as was the case of the Reverend Ted Haggard, who found

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<sup>1042</sup> Ronald Bayer, *Homosexuality and American Psychiatry: The Politics of Diagnosis* (New York: Basic Books, 1981); Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society* (Chicago, IL: University of Chicago Press, 1999).

<sup>1043</sup> Tom Waidzunas, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, MN: University of Minnesota Press, 2015).

<sup>1044</sup> *Ibid.*, 86-7.

himself in a scandal surrounding his solicitation of male sex workers and use of methamphetamines.<sup>1045</sup> Others like Exodus International President Alan Chambers closed their organizations' doors upon renouncing reparative therapy as without merit.<sup>1046</sup> The ex-gay institutional network was left tattered to pieces in a world where nearly every mental health or research institution working on matters of health and sexuality in the U.S. came to issue statements against conversion therapy practices. Those groups that persisted were denounced more and more frequently as new organizations like Truth Wins Out (itself a reaction to Focus on the Family's Love Won Out ex-gay campaign) formed to collect and augment the voices of the new consensus.<sup>1047</sup>

In 2009, the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation released its report declaring that sexual orientation change efforts (SOCE) were intrinsically harmful and wrongfully cast homosexuality as an illness to be cured rather than a normal variant of human sexuality.<sup>1048</sup> Notably, NARTH, one of the last standing of those nominally scientific institutions promoting conversion therapy, was sidelined in the production of the report.<sup>1049</sup> Even though the report made an exception for those practitioners working with patients struggling with reconciling their sexual identities and their moral beliefs under the pretense that such work would promote identity *exploration* rather than the work from the outset toward reorientation, the APA affirmed the notion that sexual orientation was

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<sup>1045</sup> Ibid., 129.

<sup>1046</sup> Ibid., 149.

<sup>1047</sup> Truth Wins Out, "Medical Professionals," *Truthwinsout.org* (2019), <https://truthwinsout.org/category/videos/medical-professionals/> (Accessed March 13, 2019).

<sup>1048</sup> Ibid., 150-1.

<sup>1049</sup> Ibid.

at its roots a stable, fixed quality. As its authors wrote, sexual orientation was to be conceived as “tied to physiological drives and biological systems that are beyond conscious choice and involve[s] profound emotional feelings, such as ‘falling in love.’”<sup>1050</sup>

This section attends to the politics that have come in the wake of the APA’s compromise position on SOCE. Though the APA’s report only contains recommendations and, therefore, does not prohibit practitioners from promising complete reorientation to patients, LGBTQ movement organizations have turned to the law in attempts to limit the availability and legality of a wider array of practices. These laws have taken the form of municipal and state bans in addition to a proposed federal one that proscribe any attempt or promise by a mental health professional to reorient a person’s sexuality; though many of the existing laws only ban such therapy offered to minors, some including the bill in the U.S. Senate prohibit providers from working with adults as well.<sup>1051</sup>

What follows is an examination of specific campaigns in which movement organizations have flexed their bioessentialist muscle and deployed their scientific and medical allies in the pursuit of eradicating as much conversion therapy practice as possible. Upon detailing the various campaigns, tactics, and rhetoric that constitute this

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<sup>1050</sup> American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, (Washington, D.C.: American Psychological Association, 2009), 30.

<sup>1051</sup> McDermott Will & Emery LLP for the Mattachine Society of Washington, DC., “The Pernicious Myth of Conversion Therapy: How Love in Action Perpetrated a Fraud on America,” *stopconversiontherapy.org* (October 12, 2018), <https://stopconversiontherapy.org/white-paper/> (Accessed March 7, 2019); Therapeutic Fraud Prevention Act of 2017 (S.B. 928), <https://www.congress.gov/bill/115th-congress/senate-bill/928/text?format=txt> (Accessed March 7, 2019).

project in general, I turn to a closer look at one such series of legislative conflict and litigation in California. In the debate over this state ban, religious opponents appealed to religious liberty protections to limit the extent to which the state could deny religious counselors and clergy to engage in conversations and counseling about reorienting one's sexuality. This is significant because even with existing bans in place, the Williams Institute estimates that 57,000 American youth between the ages of 13 and 17 will receive some form of conversion therapy from a religious counselor or clergy member before they turn 18.<sup>1052</sup> This case provides a fine-grain look into how the LGBTQ movement and its political allies have responded to such a challenge. It too demonstrates how the form of this religious opposition reveals some of the limits to the LGBTQ movement's otherwise formidable biopolitical assertions of political power. I close on a discussion of the incommensurable ideological differences between pro-conversion therapy religious as well as scientific and medical organizations and the LGBTQ movement and what has become the mainstream scientific and medical consensus on the nature of sexuality and gender identity.

Among the most active LGBTQ organizations in the fight to end conversion therapy nationwide are the National Center for Lesbian Rights, the Human Rights Campaign, and the Trevor Project, the last of which provides crisis intervention and suicide prevention to LGBTQ youth and advocates for antidiscrimination and related

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<sup>1052</sup> Mallory, Brown, and Conron, "Conversion Therapy and LGBT Youth," 1.

policies.<sup>1053</sup> In their respective campaigns, these organizations have employed a mix of legislation, litigation, and public education to fight for ordinances, to defend them from lawsuits, and to put their materials on the harms of conversion therapy into the hands of counselors, teachers, administrators, school nurses, and social workers. In doing so, each of these organizations has also relied heavily on mental health expertise and related sexological authorities to persuade the uninformed and skeptical as well as to undermine the credibility of those ex-gay religious and scientific institutions who champion the continued use of such practices.

The NCLR's "Born Perfect" campaign wears the movement's bioessentialist influence most visibly both in its name and logo, a fingerprint in which each alternating swirl dons a different color of the rainbow.<sup>1054</sup> Predictably, one of the first citations featured on the resources section of Born Perfect's website is to an article published in the *Archives of Sexual Behavior* on conversion therapy that recites the immutability thesis as laid out by Simon LeVay in his 2011 *Gay, Straight, and the Reason Why: The Science of Sexual Orientation*.<sup>1055</sup> The article's author psychologist A. Lee Beckstead explained that there was significant evidence for biological immutability that might discourage the use of conversion therapy techniques, and that regardless orientation did not even need to be immutable in a biological sense for it to be unresponsive to efforts to change it. Again,

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<sup>1053</sup> The Trevor Project, "50 Bills 50 States: About Our Campaign," *The Trevor Project* (2019), <https://www.thetrevorproject.org/get-involved/trevor-advocacy/50-bills-50-states/about-our-campaign/#sm.0001pm1c4mgpdxsqhji7dy2ozox> (Accessed March 11, 2019).

<sup>1054</sup> National Center for Lesbian Rights, "Born Perfect: The Campaign to End Conversion Therapy," *NCLRights.org* (2019), <http://www.ncrights.org/our-work/bornperfect/> (Accessed March 11, 2019)

<sup>1055</sup> A. Lee Beckstead, "Can We Change Sexual Orientation?," *Archives of Sexual Behavior* 41, no.1 (2012): 122-34; Simon LeVay, *Gay, Straight, and the Reason Why: The Science of Sexual Orientation* (New York: Oxford University Press, 2011).



this example demonstrates the longstanding commitment among scientific and medical professionals and LGBTQ advocates alike that orientation is an intrinsic feature of a person's core selfhood, one that is resistant to change due to biological and psychological wiring that is laid out as early as in utero or at the latest the first few years of childhood.

Since its founding in June 2014, the Born Perfect campaign has helped to secure legislative bans in 14 states, the District of Columbia, and multiple municipalities and it has done so largely by mobilizing a wide array of mental health care professionals to buttress its political and legal pursuits. The campaign's advisory committee is made up of a mix of ex-gay survivors, faith leaders, civil rights attorneys, and mental health professionals, the last of which constitute a solid majority of the committee. In its own campaigns as well as its collaborative work with both the Trevor Project and the HRC's "Just As They Are" educational campaign, the NCLR has assembled studies, statements, and testimonies by dozens of professional associations including major therapy, counseling, psychiatric, medicine, and social work organizations highlighting the general impossibility of altering one's sexual orientation and the harm that results in attempts to do so.<sup>1056</sup> These authorities make multiple appearances throughout a document linked to on the Born Perfect's resources page detailing the Obama administration's response to a 2015 petition campaign pleading for the president to come out in favor of conversion therapy bans.<sup>1057</sup> In the attached letter penned by senior advisor Valerie Jarrett, the administration based its decision to side with the petitioners in the "certified medical

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<sup>1056</sup> Ibid.

<sup>1057</sup> Valerie Jarrett, "Petition Response: On Conversion Therapy," *The White House* (April 8, 2015), <https://obamawhitehouse.archives.gov/blog/2015/04/08/petition-response-conversion-therapy> (Accessed March 12, 2019).

experts” who have proven that the “overwhelming scientific evidence demonstrates that conversion therapy, especially when it is practiced on young people, is neither medically nor ethically appropriate and can cause substantial harm.”<sup>1058</sup> Here, the occupant of the highest political office in the country endorsed the fight against conversion therapy by making explicit reference to scientific authorities who made the beneficiaries of such a statement (in this case, LGBTQ youth) legible and worthy of protection.

Few conversion therapy bans have lived through as much litigation and legislative controversy in such a short span of time as California’s law has. In 2012, a coalition led by Lambda Legal, Equality California, the National Center for Lesbian Rights, Mental Health America of Northern California and Gaylesta, the Psychotherapist Association for Gender and Sexual Diversity, were successful in persuading the state to pass a law outlawing conversion practices involving minors.<sup>1059</sup> Celebrating what was then the first state law of its kind in the country, NCLR executive director Kate Kendell commended state lawmakers for recognizing that such therapeutic practices were now “universally condemned by mainstream medical experts” due to their inefficacy and the harm that they cause patients.<sup>1060</sup> It is evident from statements made by supportive politicians that this scientific consensus frame played a crucial component in their advocacy. State senator and author of the original senate version of the bill Ted Lieu explained that his support stemmed from a belief that ex-gay therapists should not be permitted to “engage

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<sup>1058</sup> Ibid.

<sup>1059</sup> Lambda Legal, “Lambda Legal Applauds Law Banning 'Reparative Therapy' for California Minors,” *Lambda Legal* (August 29, 2012), [https://www.lambdalegal.org/news/ca\\_2012\\_lambda-legal-applauds-law](https://www.lambdalegal.org/news/ca_2012_lambda-legal-applauds-law) (Accessed March 13, 2019).

<sup>1060</sup> Patrick McGreevy, “Gov. Jerry Brown Bans Gay-to-Straight Therapy For Minors,” *Los Angeles Times* (September 30, 2012), <https://latimesblogs.latimes.com/california-politics/2012/09/governor-jerry-brown-gay-therapy-minors.html> (Accessed March 13, 2019).

in a (medical) practice that the medical community itself has disavowed.”<sup>1061</sup> Upon signing the ban into law, then governor Jerry Brown similarly stated that “[t]his bill bans non-scientific ‘therapies’ that have driven young people to depression and suicide. These practices have no basis in science or medicine and they will now be relegated to the dustbin of quackery.”<sup>1062</sup>

For the first five years of the ban’s existence, ex-gay proponents ranging from Christian conservative legal organizations including the Pacific Justice Institute and practitioners of conversion therapy such as NARTH fought the law in federal court. Throughout their challenges, the ex-gay coalition advanced a number of constitutional arguments in favor of the free speech rights of mental health practitioners, the right of parents to dictate what care their child does or does not receive, and the religious liberty rights of professionally licensed religious ministers and counselors to continue practicing techniques that qualify as conversion therapy under the California law. Free speech rights and the rights of parents were central to the first wave of litigation fought out in two separate federal district court trials and then a final ruling by the Ninth Circuit Court of Appeals. In the first district-level case, Judge William B. Shubb of the Eastern District of California ruled in favor of three plaintiffs challenging the law on the grounds that there were legitimate free speech concerns about the ban’s application.<sup>1063</sup> Shubb too questioned if what he saw to be mere anecdotal evidence of conversion therapy’s harms

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<sup>1061</sup> Don Frances, “Bill by Torrance lawmaker Ted Lieu banning ‘conversion’ of gay teens clears committee,” 89.3 KKPC (May 9, 2012), <https://www.scpr.org/blogs/news/2012/05/09/6031/bill-torrance-lawmaker-ted-lieu-banning-conversion/> (Accessed March 13, 2019).

<sup>1062</sup> McGreevy, “Gov. Jerry Brown Bans Gay-to-Straight Therapy.”

<sup>1063</sup> Erik Eckholm, “Clashing Rulings Complicate Path of Gay ‘Conversion Therapy’ Law,” *New York Times* (December 4, 2012), <https://www.nytimes.com/2012/12/05/us/judge-blocks-california-conversion-therapies-law.html?mtrref=www.google.com&mtrref=undefined> (Accessed March 13, 2019).

was actually indicative of a more generalizable scientific assessment. The following day, Judge Kimberly J. Mueller also of the Eastern District of California ruled in favor of the state's power to regulate medical care and against the claim that clinicians' right to free speech was unconstitutionally abridged by such regulation.<sup>1064</sup>

These constitutional disagreements over the reach of First Amendment protections and parental rights as well as related empirical ones over the scientific validity of conversion therapy made their way to the Ninth Circuit Court of Appeals in October 2013, where Judge Susan P. Graber penned a decision upholding the ban.<sup>1065</sup> In a move suiting for a case that pitted the leaders of NARTH and their patients against the Brown administration and NCLR attorney Shannon Minter, Graber devoted the beginning of her majority opinion to a history of homosexuality's trajectory from pathology to the current scientific consensus that same-sex attraction was a normal variant of human sexuality. Additionally, Graber noted that the California legislature had justified the law in the "well-documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those have experienced it."<sup>1066</sup> Graber followed this quote with a list of ten specific professional associations upon which legislators had relied in coming to this conclusion. Upon establishing this context and authority, Graber proceeded to adjudicate NARTH's freedom of speech challenge by noting that even

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<sup>1064</sup> Ibid.

<sup>1065</sup> *David H. Pickup et al. v. Edmund G. Brown Jr. et al.*, No. 12-17681 (9<sup>th</sup> Cir. 2013); The court also ruled on—and ultimately against—two other constitutional challenges over the law's supposed vagueness and overbroad nature.

<sup>1066</sup> Ibid., 13.

though professional speech is constitutionally-protected, it is not immune to state regulations to ensure the public’s health, safety, and welfare.<sup>1067</sup> Accordingly, the majority ruled that this regulation benefited minors in protecting them from discredited practices. Similarly, Graber noted that while parents did retain some constitutionally-mandated rights over their children, those rights did not extend to a “fundamental right to choose a mental health professional with specific training,” especially not one offering services deemed harmful and out of the mainstream.<sup>1068</sup>

Not content with losing this case along with the denial of their subsequent appeal to the U.S. Supreme Court the following year, opponents of the ban filed an additional challenge based in the First Amendment’s establishment and free exercise clauses and the substantive due process-based right to privacy.<sup>1069</sup> These rights claims made their way back up to the Ninth Circuit in 2016, where Judge Graber once again wrote a majority opinion supporting the ban against what she deemed to be ill-founded complaints. Beginning with the two establishment clause challenges, Graber found that the ban neither presented an excessive entanglement between church and state nor did it have the principal or primary effect of advancing or inhibiting religion.<sup>1070</sup> In explaining the former, Graber noted that California had not stepped into the realm of spiritual counseling and guidance when it prevented licensed mental health professionals in both secular and religious institutions from engaging in SOCE. The only conduct that fell under the purview of state regulation was *professional* conduct within the confines of the

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<sup>1067</sup> Ibid., 17-8.

<sup>1068</sup> Ibid. 35.

<sup>1069</sup> *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016).

<sup>1070</sup> Ibid., 1044-5.

counselor-client relationship and not any related spiritual conversations between clergy or a religious counselor and a member of a particular church. Likewise, Graber found that there was no direct attempt to inhibit religion precisely because the law targeted mental health care and the well-established deficiencies of conversion therapy.

The Ninth Circuit too struck down free exercise and right to privacy arguments against the ban. Basing much of the analysis in references to particular scientific and medical authorities, Graber wrote that though the law did prevent some seeking SOCE for religious purposes, the legislative history and text of the law itself revealed its basis not in curbing religious liberty but in regulating sanctioned mental healthcare practices according to the expertise of those who do the sanctioning.<sup>1071</sup> Furthermore, the majority ruled that because the law was neutral with respect to any particular religious institution's practices, it did not violate the free exercise clause, which does not disallow the government from regulating conduct even if religious institutions happen to be more likely to engage in that conduct than secular ones.<sup>1072</sup> Lastly, Graber addressed the privacy right argument with reference back to a similar substantive due process argument based in parental rights in the 2013 challenge to the ban. Graber reiterated that no one—neither parents of minor or in this case a minor themselves—has a substantive due process right to access whatever kind of treatment or healthcare provider they wish if that provider or treatment deemed to be medically unsound.<sup>1073</sup> Though the Pacific Justice

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<sup>1071</sup> Ibid., 1045-7.

<sup>1072</sup> Ibid., 1047.

<sup>1073</sup> Ibid., 1047-8.

Institute appealed this decision to the Supreme Court, the ban's opponents were once again denied their petition for certiorari in 2017.<sup>1074</sup>

Emboldened by the federal courts' refusal to overturn any part of California's ban, lawmakers in 2018 pursued even stronger legislation that would have barred legal adults from accessing conversion therapy through a licensed professional. Styled as a measure against fraudulent business practices, California Senator Evan Low introduced AB 2943: Unlawful Business Practices: Sexual Orientation Change Efforts in February 2018.<sup>1075</sup> The first several pages of the bill recounted over a dozen pronouncements made by various scientific, medical, and social work organizations condemning reorientation efforts.<sup>1076</sup> Upon this scientific authority, Low crafted a bill that make it unlawful under the state's Consumer Legal Remedies Act to advertise or to sell SOCE-based services to adults on the basis that such treatments are deceptive in nature.

Despite there being no mention of religion throughout the bill's text, this attempt at an expanded SOCE ban courted controversy immediately from organized religious and socially conservative institutions claiming that such an expansion presented a direct threat to religious liberty. At the helm of this opposition was the California Family Council, a state affiliate of the Family Research Council, which assembled a coalition of

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<sup>1074</sup> Kevin T. Snyder and Matthew B. McReynolds, "Petition For A Writ Of Certiorari to the U.S. Supreme Court," No.16-845 (January 3, 2017), <https://www.scotusblog.com/wp-content/uploads/2017/01/16-845-cert-petition.pdf> (Accessed March 16, 2019).

<sup>1075</sup> California 2943, AB Unlawful Business Practices: Sexual Orientation Change Efforts (introduced February 16, 2018), [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB2943](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2943) (Accessed March 18, 2019).

<sup>1076</sup> Ibid.

local, state, and national organizations against AB 2943.<sup>1077</sup> Arguments against the proposed legislation ranged from those who feared that the vagueness of the law would lead to a host of negative consequences for those engaged in spiritual counseling to those committed to a defense of reorientation efforts and who have condemned the state's repeated assault on such practices as presenting an inherent threat to the freedom of the individual to deal with "unwanted same-sex desires or gender confusion."<sup>1078</sup> Evangelical megachurch pastors and the California Catholic Association, for instance, spoke out against what they saw to be an undue intrusion into their realms of spiritual counsel. Pastor Dan Carroll of the 7,500 member Water of Life Community Church, interpreted the bill as a "direct threat" to his church's mission to "bring hope, healing, and transformation to individuals through the power of the Gospel, including those who struggle with same sex attraction and gender confusion."<sup>1079</sup> The California Catholic Conference's letter opposing the new ban drew from a larger normative concern with the individual's freedom of choice to decide how to reckon with one's sexuality or gender identity.<sup>1080</sup> This ban, CAA leaders argued, would impede the exercise of that constitutive part of what it means to be an individual in a free society.

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<sup>1077</sup> California Family Council, "AB 2943," (2018), <https://californiafamily.org/oppose-ca-ab-2943-ab-1779-and-ab-2119-reference-materials/> (Accessed March 18, 2019).

<sup>1078</sup> Greg Burt, "New CA Bill Outlaws Helping Anyone with Unwanted Same-Sex Desires or Gender Confusion," *California Family Council* (March 14, 2018), <https://californiafamily.org/2018/new-ca-bill-outlaws-helping-anyone-with-unwanted-same-sex-desires-or-gender-confusion/> (Accessed March 18, 2019).

<sup>1079</sup> Greg Burt, "CA Pastor Talks Politics for the First Time to Defend Gospel: State Legislators Take Notice," *California Family Council*, (July 26, 2018), <https://californiafamily.org/2018/pastor-speak-first-time-to-speak-about-politics-to-defend-the-gospel/> (Accessed March 18, 2019).

<sup>1080</sup> J.D. Flynn, "Could a California Bill Ban Christian Teaching on Homosexuality?," *Catholic News Agency* (April 22, 2018), <https://www.catholicnewsagency.com/news/could-a-california-bill-ban-christian-teaching-on-homosexuality-59038> (March 18, 2019).



In a 2018 legal memorandum, the Alliance Defending Freedom (ADF), the most well-funded Christian conservative legal organization in the country, spelled out the coalition against AB 2943's plan to fight the constitutionality of the bill if it were to be signed into law.<sup>1081</sup> ADF attorneys laid out the litigation group's challenges based in the freedom of speech, the freedom to exercise one's religious beliefs, and the freedom to hear and receive information. As for the speech claims, the ADF argued that AB 2943 impermissibly outlawed a certain kind of speech by targeting its content, conversion therapy practices, and attempting to censor discussions of them.<sup>1082</sup> The sale of religious books or the ticketing of events where reorientation was discussed could potentially be regulated under the law and, thus, would extend far beyond the offices of licensed mental health practitioners.<sup>1083</sup> Similarly, the ADF asserted that the free exercise of religion was also at peril in that teaching about the sinfulness of homosexuality and gender nonconformity could too fall under the ban. This fear was based in a recent example in which a Michigan legislator called upon the state attorney general to investigate whether a particular ministry violated its consumer protection act when it held SOCE workshops.<sup>1084</sup> For this reason, the ADF posited that AB 2943 was anything but neutral or generally applicable, but rather presented a danger to anyone who adhered to a religious sect that endorsed SOCE-style remedies to forbidden sexual behavior or gender

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<sup>1081</sup> Alliance Defending Freedom, "Legal Analysis of California AB 2943," (March 8, 2018), <https://drive.google.com/file/d/0B9njBaZTrCfSMFJfRGMzX2ZQeFh0R0U3bFVMS2ZYWU11M2VF/view> (Accessed March 18, 2019).

<sup>1082</sup> *Ibid.*, 1, 3-4.

<sup>1083</sup> *Ibid.*, 3.

<sup>1084</sup> *Ibid.*, 3, Appendix.

expression.<sup>1085</sup> Lastly, the ADF argued that the ban would unconstitutionally limit an individual's right to access "the spectrum of available knowledge," which was interpreted as encompassing speech about reorientation techniques as they occurred within the context of the counselor-client relationship.<sup>1086</sup>

While it might be easy to dismiss some of these claims—take for example the ADF's assertion that because the majority of Californians self-classify as an adherent of either Christianity, Judaism, or Islam that they are, therefore, discriminated against by this bill's targeting of their religious doctrines concerning gender and sexuality—many others found favor among some unlikely political allies. For instance, a statement published by the *Los Angeles Times's* editorial board advised lawmakers to "target 'gay conversion therapy,' not religion."<sup>1087</sup> While the editorial board recognized that the law certainly would not have barred the sale of the Bible as some suggested, what they did fear was that the ambiguities of the law would indeed be used to inhibit the exercise of religious freedom. The board noted first that religious opponents feared that because the existing consumer fraud law prevented the sale and advertisement of books and other media deemed deceptive, that conversion-themed materials too might be censored by the law. In the most extreme case, opponents conjectured that a minister or religious counselor might be found criminally liable for suggesting the purchase of such media or the recommendation that a church member pay for access to a religious seminar on the theme. Citing an argument published in the conservative magazine the *National Review*,

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<sup>1085</sup> Ibid., 4-5.

<sup>1086</sup> Ibid., 5.

<sup>1087</sup> Los Angeles Times Editorial Board, "Target 'Gay Conversion Therapy,' Not Religion," *Los Angeles Times* (May 7, 2018).

the editorial board also raised the concern that in addition to eradicating more traditional conversion therapy, the bill might also curb therapies offered to gay and lesbian persons who, despite feeling their sexual orientations to be deeply-rooted and immutable, are interested in how to achieve celibacy.<sup>1088</sup>

Senator Low and many of his colleagues fought against what they perceived as misrepresentations of the scope and intentions of AB 2943. Low and co-sponsor Scott Wiener defended the bill's balancing of LGBTQ equality with religious and free speech concerns by noting that only relationships that involved the exchange of money for services would fall under state regulation.<sup>1089</sup> On the floor of the state senate, an exasperated Wiener insisted that the law would not prohibit the sale of the Bible nor would it interfere with a religious counselor's ability to speak freely as long as no money is exchanged or goods sold.<sup>1090</sup> The purpose of the bill, Wiener declared, was not to erode the rights of the religious or the individual but simply to protect people from fraud.<sup>1091</sup> Others in the chamber disagreed vehemently. In a testimony delivered to the assembly, self-described ex-gay pastor Jim Domen gestured to a portrait of his wife and children in asserting that in the eyes of AB 2943 supporters his family was a "fraud."<sup>1092</sup> In a sentiment couched in pluralist logic, Domen explained that "[t]here is nothing wrong

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<sup>1088</sup> Ibid.; David French, "Yes, California Is on the Verge of Banning Some Christian Books, Here's How," *National Review* (April 23, 2018), <https://www.nationalreview.com/corner/california-bill-threatens-christian-books-and-booksellers/> (Accessed March 18, 2019).

<sup>1089</sup> Robbie Short, "Emotional Fight Over Conversion Therapy: Should California Limit Services Meant to Turn Gay People Straight?," *CALmatters* (June 24, 2018), <https://calmatters.org/articles/gay-conversion-therapy-california-bill/> (Accessed March 18, 2019).

<sup>1090</sup> Karen Ocamb, "Conversion Therapy' Fraud Bill Passed by California Senate," *Los Angeles Blade* (August 16, 2018), <https://www.losangelesblade.com/2018/08/16/conversion-therapy-fraud-bill-passed-by-california-senate/> (Accessed March 19, 2019).

<sup>1091</sup> Ibid.

<sup>1092</sup> Short, "Emotional Fight Over Conversion Therapy."

with me [and] there is nothing wrong with members of the LGBT community.”<sup>1093</sup>

According to this formulation, the bill struck no such balance of rights and equality as reasoned by Low and Wiener; rather, it denied the autonomy and self-conception of one person’s experience with their sexuality or gender (and criminally targeted those assisting in realizing that self-conception) by favoring another’s (i.e. the organized LGBTQ political community and the reigning scientific consensus).

Even after winning a vote handily on the senate floor, Low ultimately shelved the measure shortly thereafter. Low did so after embarking on a state-wide listening tour to hear out the religious opposition in an attempt to understand why he and other supporters had failed to mollify their anger and fear. Expressing his relief with Low’s decision, Jonathan Keller, president of the California Family Council, celebrated the tabling of a bill that he believed would have “tragically limited our ability to offer compassionate support related to sexual orientation and gender identity, and even to preach Jesus’ message of unconditional love and life transformation.”<sup>1094</sup> In a more recent statement, however, Low cautioned against the notion that a new version of the expanded ban would contain anything akin to a religious exemption. In an allusion to religious liberty arguments that have emerged in the context of cases like *Masterpiece Cakeshop*, Low stated that lawmakers would “not provide a religious license to discriminate...[j]ust like there should not be a religious exemption to deny me from being served in a restaurant,

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<sup>1093</sup> Ibid.

<sup>1094</sup> Don Thompson, “California Gay Conversion Therapy Bill Dropped,” *VC Star* (August 31, 2018), <https://www.vcstar.com/story/news/2018/08/31/california-gay-conversion-therapy-bill-dropped/1163752002/> (Accessed March 19, 2018).

we will not provide a blanket guide to discriminate.”<sup>1095</sup> Though Low made clear his intention was to build a broad basis of support for his legislation, his optimism going forward sprang from conversations that he had with religious leaders who denounced conversion therapy and acknowledged the harm that such illegitimate mental health practices presented to precarious populations.<sup>1096</sup>

### *Incommensurate Ideologies and Ontological Disagreement*

What do conflicts over bans such as California’s portend for the future of struggles between those championing the rights and protection of LGBTQ persons and those religious institutions whose leadership and members fear the erosion of their right to put into practice their beliefs regarding non-heterosexual sexualities and gender nonconformity? Though only future legislative and litigatory developments can answer the empirical dimension of that question, what can be explored in the present is how many of these religious institutions as well as an array of alternative scientific and medical ones—unlike some of the religious leaders Low spoke with—do not appear to seek some balance between religious free exercise and LGBTQ rights. Instead, these institutions continue to assert a competing and incommensurate ideological position that sexuality and gender identity are in fact *not* beyond the realm of reorientation and that it is a political imperative to regain to ground that they have lost over the decades since

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<sup>1095</sup> Matthew S. Bajko, “Low Rules Out Religious Exemption in Conversion Therapy Ban,” *Bay Area Reporter* (January 11, 2019), [https://www.ebar.com/news/latest\\_news/270745](https://www.ebar.com/news/latest_news/270745) (Accessed March 19, 2019).

<sup>1096</sup> Evan Low, “Assemblymember Low Statement on Assembly Bill 2943,” *Evan Low District 28* (August 31, 2018), <https://a28.asmdc.org/press-release/assemblymember-low-statement-assembly-bill-2943> (Accessed March 19, 2019).

1973. Though the tide continues to change according to recent polls demonstrating a steady rise in acceptance of gay, lesbian, and bisexual persons among members of a variety of once relatively hostile faiths, there still exist politically organized groups of socially conservative religious Americans and scientific and medical ones operating on and outside the margins of professionally-sanctioned healthcare that have made it their missions to undermine the bioessentialist thesis and its normative underpinnings.<sup>1097</sup>

While these religious leaders have vacillated between theological arguments and the language of civil rights and the state, what they share in common is a fundamental ideological disagreement with the increasingly dominant political cultural narrative. Latent in the opposition to AB 2943, for instance, were position takings on the pliable nature of sexuality and gender identity. Peter Sprigg, a Senior Fellow for Policy Studies at the Family Research Council, argued that while both sides could agree that it is wrong to coerce a person into undergoing conversion therapy, the law was ultimately based on “opposition to the idea of someone changing their sexual orientation—even voluntarily, and even when that only means changing external behaviors.”<sup>1098</sup> This was at odds with Sprigg’s and the FRC’s conception of sexual orientation as something that, even if deeply-rooted in some mysterious way, could be controlled by a willing adult whose religious beliefs led them to yearn for the eradication of that desire, or at least a way of

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<sup>1097</sup> Pew Research Center, “Views About Homosexuality,” *Pew Research Center: Religion & Public Life* (2014), <https://www.pewforum.org/religious-landscape-study/views-about-homosexuality/> (Accessed March 19, 2019); Alex Vandermaas-Peeler, Daniel Cox, Molly Fisch-Friedman, Rob Griffin, and Robert P. Jones, “Emerging Consensus on LGBT Issues: Findings from the 2017 American Values Atlas,” *Public Religion Research Institute* (May 1, 2018), <https://www.prii.org/research/emerging-consensus-on-lgbt-issues-findings-from-the-2017-american-values-atlas/> (Accessed March 19, 2019).

<sup>1098</sup> Peter Sprigg, “California’s Effort to Ban ‘Conversion Therapy’ Failed. Here’s a Better Path We Can All Agree On,” *Family Research Council* (September 14, 2018), <https://www.frc.org/op-eds/californias-effort-to-ban-conversion-therapy-failed-heres-a-better-path-we-can-all-agree-on> (Accessed March 19, 2019).

suppressing the will to act upon such impulses. Even the Alliance Defending Freedom’s legal memorandum on AB 2943, which true to its purpose framed its opposition in mainly constitutional terms, contained within it the notion that “confusion” or dissatisfaction with one’s sexual orientation or gender identity could be best served by mental health practitioners and religious leaders who worked to manage and suppress what they conceived of as aberrant desires.<sup>1099</sup> Again, this is at odds with the belief that such patterns of desire and self-conception are so ingrained that it is always harmful or even violent to attempt anything other than actualizing, or at the very least acknowledging and coming to peace, with them.

As for theological statements, representatives of various Christian sects, especially Protestant evangelical and Baptist ones, have issued decrees on conversion bans and, more broadly, the trend of increased acceptance of LGBTQ persons in the U.S. Writing for the Southern Baptist Convention’s Ethics & Liberty Commission, Joe Carter characterized AB 2943 as a “secular form of religious establishment” wherein the belief that sexuality and gender are immutable and harmful to suppress is “a matter of orthodoxy” against which one is barred from dissenting.<sup>1100</sup> Though it was not taken up for procedural reasons, a resolution introduced before the 2018 meeting of the Southern Baptist Convention called on Baptist leaders and adherents to the faith to oppose conversion therapy bans on the basis that their doctrines stood in contrast to the inherent

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<sup>1099</sup> Alliance Defending Freedom, “Legal Analysis of California AB 2943.”

<sup>1100</sup> Joe Carter, “California’s latest threat to religious liberty and free speech,” *Ethics & Religious Liberty Commission* (April 24, 2018), <https://erlc.com/resource-library/articles/californias-latest-threat-to-religious-liberty-and-free-speech> (Accessed March 20, 2019).

“essentialism” that undergird such political interventions.<sup>1101</sup> Since its unveiling in September 2017, over 22,000 pastors and religious leaders have signed onto the Council for Biblical Manhood and Womanhood’s Nashville Statement, a document that also trades in the assumption that sexuality has a singular purpose within a heterosexual marriage and that one’s gender identity must be oriented toward one’s biological sex.<sup>1102</sup> These positions on conversion therapy bans and the logics that inform them indicate an ideological chasm which a scientific consensus, despite how powerful and influential, cannot bridge, at least on its own. For those who believe that the issue is not only one of legislative overreach but rather a fundamentally disparate understanding of these qualities of human experience, there is no balance to be struck, because the theological understanding of what is possible regarding the ontology of human sexuality is opposed to mainstream scientific thought.

A collection of conservative professional medical associations have also joined coalitions against bans like AB 2943 and, in doing so, have articulated their own alternative scientific theories on gender and sexuality. Take for example the American College of Pediatricians (ACP), an explicitly conservative organization founded in 2002 after breaking away from the well-established American Academy of Pediatrics (AAP) in

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<sup>1101</sup> Robert O. Lopez, “Resolution On Ministry and Counseling to Lead People from Homosexuality to Heterosexuality,” *Southern Baptist Convention* (May 21, 2018), <https://www.massresistance.org/docs/gen3/18b/MR-TX-SBC-Resolution/images/Lopez-SBC-Resolution.pdf> (Accessed March 20, 2019); Michael Gryboski, “SBC Resolution on Rejecting Gay Therapy Bans Fails to Come Up for Vote,” *Christian Post* (June 14, 2018), <https://www.christianpost.com/news/sbc-resolution-on-rejecting-gay-therapy-bans-fails-to-come-up-for-vote.html> (Accessed March 20, 2019).

<sup>1102</sup> Council for Biblical Manhood and Womanhood, “Nashville Statement,” (September 2018) <https://cbmw.org/nashville-statement/> (Accessed March 20, 2019).



protest of a measure supporting second-parent adoptions by gay and lesbian couples.<sup>1103</sup> Whereas the AAP represents over 67,000 professionals in the field, the ACP counts around 500 as members.<sup>1104</sup> The ACP has by virtue of its professional-sounding name garnered an outsized influence, especially in the media where it has broadcast its various stances against LGBTQ adoption and same-sex marriage rights.<sup>1105</sup> It too promotes sensationalized interpretations of research to fearmonger about the use of hormone therapies and increased cancer risks as part of a sustained opposition to reproductive healthcare regimens and official standards of care for transgender persons.<sup>1106</sup>

It is then no surprise that the American College of Pediatricians has been such a vocal adversary of conversion bans, and that it has based its opposition in alternative theories regarding the ontology of gender and sexuality and the policy prescriptions that flow from such explanations. In a statement against AB 2943, Co-Chair of the ACP's Committee on Adolescent Sexuality Andre Van Mol defended modern therapeutic techniques, saying that they were nothing like the coercive and invasive practices popular during the nineteenth and early twentieth centuries. Instead, he maintained, they offer compassionate, life-saving care to those children and adults experiencing torment over

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<sup>1103</sup> Southern Poverty Law Center, "American College of Pediatricians," *SPLCenter.org* (n.d.), <https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians> (Accessed March 21, 2019).

<sup>1104</sup> American Academy of Pediatrics, "About the AAP," *AAP.org* (2019), <https://www.aap.org/en-us/about-the-aap/Pages/About-the-AAP.aspx> (Accessed March 21, 2019).

<sup>1105</sup> American College of Pediatricians, "Homosexual Parenting: Is It Time For Change?," *ACPEDS.org* (July 2017), <https://www.acped.org/the-college-speaks/position-statements/parenting-issues/homosexual-parenting-is-it-time-for-change> (Accessed March 21, 2019).

<sup>1106</sup> Jack Turban, "The American College of Pediatricians Is an Anti-LGBT Group," *Psychology Today* (May 8, 2017), <https://www.psychologytoday.com/us/blog/political-minds/201705/the-american-college-pediatricians-is-anti-lgbt-group> (Accessed March 21, 2019).

their identities and desires.<sup>1107</sup> Van Mol cautioned that without access to such therapies some patients would be “unable to heal [their] wounds, be legislated into a false identity, and be left suicidal and without hope as a result.”<sup>1108</sup> By inverting the trauma narrative propounded by conversion ban supporters, the ACP has taken the position that such bans not only violate the freedom of patients to choose their own care regiment, but they also put those struggling with their identities at risk of harm or death.

Another conservative professional medical, this one representing several thousand physicians and surgeons, has also joined various coalitions against conversion therapy bans in recent years. Originally founded in 1943 in opposition to an early congressional attempt at a national healthcare program, the Association of American Physicians and Surgeons (AAPS) in its contemporary form publishes a journal in which members have written pieces on the adverse health consequences of living a “gay male lifestyle” and in which the organization has denounced transgender bathroom access policies as “radical social experiments” based in a “Marxist cultural agenda.”<sup>1109</sup> In its official statement opposing AB 2943, the AAPS accused California lawmakers of undermining patients’ right of self-determination with regard to sexuality and gender identity.<sup>1110</sup> Like the ACP,

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<sup>1107</sup> Andre Van Mol, “Unlawful and Unnecessary—Oppose AB 1779 & AB 2943,” *American College of Pediatricians* (2018), <https://drive.google.com/file/d/0B9njBaZTrCfSZ09tRDFQaVVFN1hqVnpHb3I5RTlqcTI5bHIB/view> (Accessed March 21, 2019).

<sup>1108</sup> *Ibid.*

<sup>1109</sup> Nathaniel S. Lehrman, “Homosexuality: Some Neglected Considerations,” *Journal of American Physicians and Surgeons* 10, no.3 (2005): 80-2; Association of American Physicians and Surgeons, “AAPS News July 2016 – Discrimination,” *AAPS Online* 72, no.7 (July 2016), <https://aapsonline.org/aaps-news-july-2016-discrimination/> (Accessed March 21, 2019).

<sup>1110</sup> Association of American Physicians and Surgeons, “California Proposes Bills to Outlaw Self-Determination in Medical Therapy, Reports the Association of American Physicians and Surgeons (AAPS),” *AAPS Online* (April 16, 2018),

the AAPS also accused AB 2943 and similar bans of perpetuating trauma and harm and, in doing so, violating the Hippocratic Oath. Such bans, the association argued, “require physicians to violate their sacred Oath and withhold therapy they believe to be valuable, or cooperate with treatment they believe to be harmful and/or immoral.”<sup>1111</sup> For the AAPS, conversion therapy bans are not politically unacceptable only because they impede individuals in a free society from exercising their religious beliefs and their right to choose their own mental health treatments: such bans are also antithetical to the ethical practice of medical care.

Lastly, new scientific and mental health ventures pursued by researchers with NARTH and related ex-gay organizations have in recent years appealed to self-proclaimed advances in psychotherapeutic care as well as the latest theories and empirical findings in neuroscience in attempts to bring conversion therapy back into the networks of legitimate scientific research and mental health. Looking first to NARTH, the preeminent ex-gay scientific institutions run by psychologist Joseph Nicolosi until his death in 2017, found itself nearly alone in a country increasingly accepting of the notion that sexual orientation was to be embraced rather than reoriented. In an apparent recognition of its tainted brand, Nicolosi and others re-established themselves in 2014 as the Alliance for Therapeutic Choice and Scientific Integrity Training Institute (ATCSI). Similar to its predecessor, ATCSI’s stated mission is to reclaim the mantle of the truly objective psychological approach to conceptualizing and treating homosexuality for those

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<https://drive.google.com/file/d/0B9njBaZTrCfSaV15cXJ6SUNsdTdiQXRRdVFvMTRzSHF5bEJj/view>  
(Accessed March 21, 2019).

<sup>1111</sup> Ibid.

experts who perceive sexual orientation as amenable to change.<sup>1112</sup> To this point, the organization's answer to the first question in its Frequently Asked Questions is a refutation of the idea that sexuality is "essentially genetically or biologically determined."<sup>1113</sup> Within this answer, the ATCSI includes references to research opposing the bioessentialist thesis that it publishes regularly in its *Journal of Human Sexuality*, a publication originally founded by NARTH members in 2009.<sup>1114</sup>

What is novel then about the ATCSI's theory of change? Much of its approach is, after all, indebted to the kinds of language and logic typical of past SOCE research and practice. See, for example, the organization's statement on the nature and ends of psychotherapy, which it bases in an "a priori [acknowledgement of] the biologically based male-female human design as the foundation for optimal psychosexual functioning," i.e. a cis-gender heterosexual orientation and identity.<sup>1115</sup> The ATCSI does, however, cleverly invert notions of sexual fluidity to suggest that reorientation to a more heterosexual pattern of desire and behavior is possible. In its statement on SOCE, the ATCSI explains its conceptualization of sexuality with reference to the Kinsey-inspired theory of a continuum, wherein a person can fall in between exclusively-defined

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<sup>1112</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, "Our Mission: Because Values Matter," *TherapeuticChoice.com* (n.d.), <https://www.therapeuticchoice.com/our-mission> (Accessed March 25, 2019).

<sup>1113</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, "Frequently Asked Questions," *TherapeuticChoice.com* (n.d.), <https://www.therapeuticchoice.com/frequently-asked-questions> (Accessed March 25, 2019).

<sup>1114</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, "About the Journal of Human Sexuality," *Journal of Human Sexuality* (n.d.), <https://www.journalofhumansexuality.com/about> (Accessed March 25, 2019).

<sup>1115</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, "Statement on Psychotherapy," *TherapeuticChoice.com* (n.d.), [https://docs.wixstatic.com/ugd/ec16e9\\_9d6b956695604055b4c2c1aec459da18.pdf](https://docs.wixstatic.com/ugd/ec16e9_9d6b956695604055b4c2c1aec459da18.pdf) (Accessed March 25, 2019).

orientations and can even move between them.<sup>1116</sup> This statement counterposes an absolute categorical conception of sexuality (i.e. one that is “grounded in an essentialist view of homosexual sexual orientation that assumes same-sex attractions are the natural and immutable essence of a person”) with its own to assert that the latter is actually much closer in theory to other behavioral “challenges” that mental health practitioners generally treat. Unlike in psychiatric approaches to issues like alcoholism, depression and grief, the ATCSI argues, the mainstream scientific and medical consensus on sexuality has come to perceive any backsliding as evidence that the default orientation is impossible to alter.<sup>1117</sup>

In addition to establishing itself as a lone voice of reason amidst a political climate that incentivizes “nonpartisan scientific inquiry,” the ATCSI also made clear its affinity for those religious institutions promoting change narratives.<sup>1118</sup> In its mission statement, the ATCSI committed itself in particular to endeavors that permit religious persons to access reorientation treatments as a crucial part of exercising their faiths.<sup>1119</sup> This recognition of that segment of the faithful and their organizations as political allies in the fight to legitimate their therapeutic practices, the ATCSI created an Ethics, Family, & Faith Division to aid in thwarting off what it perceived to be mainstream psychology’s

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<sup>1116</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, “Alliance Statement on Sexual Orientation Change,” *TherapeuticChoice.com* (January 25, 2012), [https://docs.wixstatic.com/ugd/ec16e9\\_1d6108cfa05d4a73921e0d0292c0bc91.pdf](https://docs.wixstatic.com/ugd/ec16e9_1d6108cfa05d4a73921e0d0292c0bc91.pdf) (Accessed March 25, 2019).

<sup>1117</sup> *Ibid.*

<sup>1118</sup> *Ibid.*

<sup>1119</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, “Our Mission: Because Values Matter.”

attack on religious institutions and undermining of their members' rights.<sup>1120</sup> However, the ATCSI has also been unambiguous in its stance that psychological intervention by trained professionals is the gold standard for such therapies and that unlicensed religious practices are not to be considered an equivalent. To this point, the ATCSI's official statement on change therapies states that the supposedly strong evidence against SOCE can be attributed to the contestable claim that most research in this vein has focused on "religiously mediated" practices as opposed to its science-based ones.<sup>1121</sup> No matter the degree to which organizations like the ATCSI see conservative religious institutions as their political teammates, they ultimately aim to wield final authority over the nature of sexuality.

The latest venture in reorientation therapy is the Reintegrative Therapy Association (RTA), an organization that has mobilized cutting edge research agendas in neuroscience to make new scientific claims for an old purpose. Founded by Nicolosi's son and fellow clinical psychologist Joseph Nicolosi Jr., the RTA purports to promote "a specific combination of established, evidence-based treatment interventions" for those persons unhappy with their same-sex desires.<sup>1122</sup> In advancing its own trademarked assemblage of techniques and theories in contrast to outdated ones falling under the catch-all term "conversion therapy," the RTA has framed its efforts as emanating not from discredited attempts to force reorientation but rather as based in theories that one

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<sup>1120</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, "Ethics, Family, & Faith Division," *TherapeuticChoice.com* (n.d.), <https://www.therapeuticchoice.com/ethics-family-and-faith-division> (Accessed March 25, 2019).

<sup>1121</sup> Alliance for Therapeutic Choice and Scientific Integrity Training Institute, "Alliance Statement on Sexual Orientation Change."

<sup>1122</sup> Reintegrative Therapy Association, "About Us," *ReintegrativeTherapy.com* (2018), <https://www.reintegrativetherapy.com/reintegrative-therapy> (Accessed March 25, 2019).

would find in modern mainstream of psychology and neuroscience research. As new research on neuroplasticity—the notion that brain structures are to a certain degree malleable and that changes can occur as a response to environmental conditions—demonstrates, the very brain structures to which those like Simon LeVay and others have attributed the immutability of sexual orientation are in fact amenable to alteration.<sup>1123</sup> As Nicolosi Jr. explained in an interview:

“This topic [of immutability] was very polarized in the 90s. Back then, people framed it with the question, ‘Are people born gay, or is it a choice?’ Thankfully, the public is slowly rejecting both those ideas. A middle-ground approach emerged. It says that sexuality is fluid for many people. They don’t choose their orientation. On the other hand, no one has discovered a so-called ‘gay gene.’ Sexuality is far more complex than something that can be boiled down to a mere gene. Advances in neuroscience show us that our life experiences continually impact the brain. This is called ‘neuroplasticity.’ It’s led scientists to acknowledge that sexuality is not set in stone for everyone.”<sup>1124</sup>

Thus, Nicolosi Jr. concluded that there was indeed a role to be played by mental health practitioners to assist those in reshaping their brains according to their preferred orientations.

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<sup>1123</sup> Reintegrative Therapy Association, “The Science,” *ReintegrativeTherapy.com* (2018), <https://www.reintegrativetherapy.com/the-science> (Accessed March 25, 2019).

<sup>1124</sup> Rachel Alexander, “Reintegrative Therapy an Alternative to Conversion Therapy?” *The Stream* (September 12, 2018), <https://stream.org/reintegrative-therapy/> (Accessed March 25, 2019).

These assertions aside, Nicolosi Jr. and the RTA appear to have based their frameworks in what most in the field would conceive to be common premises and theories in new neuroscientific research into sexuality. It is one thing to suggest that certain regions in the brain such as the thalamus and the hypothalamus are potentially involved in one's sexual predilections in some nebulous way and quite another to posit that this necessarily entails that a therapist might engage in targeted practices to shape it according to a specific plan for how a patient wishes to experience their sexuality. In fact, this interpretation of neuroplasticity reads a sort of biodeterminism back into the equation as a handful of neuroanatomical structures are assumed to code for sexual orientation in an "on/off" fashion. Even if these structures are held to be malleable, they are ultimately biological sites hypothesized to be determinative of vast arrays of sexual expression, desire, and identity that one should hardly take as a premise to have such a primordial origins and lineage. Although Nicolosi Jr. acknowledges the complexity that is distorted in simple born this way versus choice formulations of sexual orientation, the RTA's theory and agenda rely upon the same kinds of crude dichotomies that govern the reigning bioessentialist thesis.

Not only is the reintegrative approach founded upon a fundamental misrepresentation of contemporary neuroscientific research, it is also steeped in a conceptualization of homosexuality that renders it more akin to a psychiatric disorder than a normal expression of human sexuality. As explicated on the RTA website, reintegrative therapy is allegedly not concerned as much with conversion as the end goal as older models are, but instead it is directed toward dealing with "trauma and addictions



using evidence-based approaches [wherein] changes in sexuality are the byproduct.”<sup>1125</sup> However, it is clear from the remainder of the description of what reintegrative therapy is and is not that trauma and addiction are defined in such a way that links them inextricably to same-sex desire. This is evident in an example that examines the parallels between “a female client with binge eating disorder and male client with sexually compulsive behaviors.”<sup>1126</sup> By homing in on what are taken to be more obvious pathologies, the RTA finds connections between compulsive and destructive behaviors with expressions of same-sex desire in ways that reorient a client away from the latter as the outcome of dealing more directly with the former. The end result is a novel conversion therapy practice that smuggles in a pathological conception of same-sex attraction and identity through the backdoor.

Thus far, neither the late Nicolosi Sr.’s nor Nicolosi Jr.’s attempts at reinvention have garnered them much clout in either established medical and scientific institutions or the state. This has not been, however, for lack of trying. Until his passing, Nicolosi Sr. was party to a number of lawsuits against conversion therapy bans passed at the state level. In addition to losing the most high-profile of these in New Jersey and California, judges in these cases have begun to refuse to recognize conversion therapy practitioners or those who are conversion therapy-adjacent as legitimate scientific experts under general evidentiary standards. For example, in a suit that paralleled the ones filed against the original California ban, the New Jersey Superior Court refused to acknowledge Nicolosi Sr. as a legitimate expert witness, noting that the organizations with which he

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<sup>1125</sup> Reintegrative Therapy Association, “About Us.”

<sup>1126</sup> Ibid.

was involved sit outside the bounds of mainstream mental health practice.<sup>1127</sup> Nicolosi Jr. has worked against the expansion of California’s ban in the fight over AB 2943, in which he worked alongside religious and other conservative professional associations in what he saw to be a battle to protect the rights of his clients to engage in reintegrative therapy.<sup>1128</sup> Though Nicolosi Jr. was a member of a coalition that won the first encounter of what promises to be a longer war in California over the expanded ban, his role was minor compared to the religious institutions’ influence in that fight. It remains is likely that even if religious organizations end up receiving certain guarantees to free exercise in a later iteration, those like Nicolosi Jr. and the RTA will continue to be cast as the just targets of state intervention.

Despite their efforts to drape themselves in references to the latest research in sexuality and the biological sciences, these proponents of conversion therapy are also left largely outside the realm of reputable scientific journals and conferences. The RTA, for instance, features a citation to a study in the Catholic Medical Association’s (an organization that defines homosexuality as “illicit sexual activity”) journal *The Linacre Quarterly* prominently at the top of its “The Science” explainer on its website, suggesting that it has difficulty finding an audience for its position in more mainstream peer-reviewed outlets.<sup>1129</sup> The ATCSI too has resorted mostly to citing its own journal’s work

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<sup>1127</sup> Southern Poverty Law Center, “New Jersey Excludes Key ‘Conversion’ Therapy Experts in SPLC Consumer Fraud Case,” *SPLCenter.org* (February 5, 2015), <https://www.splcenter.org/news/2015/02/05/new-jersey-judge-excludes-key-%E2%80%98conversion%E2%80%99-therapy-experts-splc-consumer-fraud-case> (Accessed March 25, 2019).

<sup>1128</sup> Alexander, “Reintegrative Therapy an Alternative to Conversion Therapy?”

<sup>1129</sup> Paul L. Santero, Neil E. Whitehead, and, Dolores Ballesteros, “Effects of Therapy on Religious Men Who Have Unwanted Same-Sex Attraction,” *The Linacre Quarterly* (July 23, 2018); Catholic Medical

in its efforts to appear grounded in rigorous and unbiased scientific research. For the time being, the mainstream consensus against these therapeutic practices and theories appears stable, much to the chagrin of those working from the scientific and political margins

*The Ends and Limits of Scientific Authority and Bioessentialism*

As the LGBTQ movement continues to make strides toward equality across a seemingly ever-expanding terrain of political and social issues, these scientifically-imbued conceptions of identity categories will likely continue to undergird commonsense notions of what it means to be queer. Scientific authority has after all played a massive role in this expansion of formal civil rights and cultural representation; in doing so, though, it has contributed to a logic of LGBTQ rights and personhood that is skewed in ways that allow for only a fraction of the population to achieve the fullest realization of these privileges and protections. By tying the very concept of equality so closely to the biopolitical underpinning of marriage, for example, the very nature of what it means to be gay is now envisioned as teleologically-oriented toward monogamous, child-rearing relationships that are just as much about the legal transfer of property as anything socio-cultural.

It would of course be absurd to consider the current situation of LGBTQ persons in the U.S. as entirely lamentable. This chapter began with an observation of the swiftness of change in this country's laws and social attitudes toward queer people and the role that scientific institutions have played in that change. Even marriage rights

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Association, "Homosexuality," *Cathmed.org* (2015), <https://www.cathmed.org/programs-resources/health-care-policy/resolutions/homosexuality/> (Accessed March 25, 2019).

admittedly offer key protections to those who exercise them, such as the right to visit one's partner in a hospital or a prison as well as the opportunity to extend employer-provided healthcare benefits to a loved one for those fortunate enough to have access to them. Scientific authority too has been levied quite effectively against the often coercive and generally dehumanizing practice of conversion therapy. But as the foregoing discussion has hopefully made clear, even this project contains within it severe limitations. Arguments made in the spirit of religious liberty are continually combined with pseudoscientific ontological attacks that pose existential threats to queer desires and expressions. Even if a queer sense of self does not owe itself to any primordial force or have an origin in a pre-socio-political context, both the historical record and contemporary testimonies demonstrate that such desires and feelings about oneself cannot be easily eradicated by such repressive forces, at least without much trauma and death. The problem, thus, is not that experts in the domain of mental health now provide a significant degree of legitimacy in political battles to protect the most defenseless—namely minors—from coercive and unfounded therapeutic practices. It is instead that advocacy groups and their allies have advanced their goals in difficult if not impossible to prove bioessentialist claims, and in doing so, have asked the state to govern in ways that it is not clear if it is always constitutionally permitted to do so.

Take religious liberty arguments against conversion therapy bans. Laws that ban any licensed mental health professional from engaging in attempts to reorient or to convert a minor's sexuality, for instance, are the easiest to defend against religious rights claims. As long as a professionally-licensed clergy member or other religious counselor

is acting as a mental health professional and not in their spiritual capacity, then the state is well within a legitimate use of its police powers to prevent these unduly coercive and demonstrably harmful practices to be performed under the guise of mental healthcare. This scenario is much more akin to the homophile and early lesbian challenge to the pathological model of homosexuality, which was resisted with a reliance on scientific experts who more often confirmed the harm associated with reparative practices than they did make grand assertions on the ontology of sexual identity.

However, what is a far more complex case is the one in which a clergy member or religious counselor acts in their religious capacity to compel a minor to act according to a set of religious views on the nature (and along with this, the malleability) of what they may believe to be sinful desires or expressions of sexuality. Wrapped up in this are also parental custodial rights that—while not an effective means of asserting one’s right to obtain conversion therapy for their child from a licensed professional—are difficult to dismiss out of hand in the context of religious liberty. While it is not clear that California bill AB 2943 would have actually led to, as its opponents cautioned, regulations extending beyond those acting as licensed professionals and into the realm of the spiritual, it is not difficult to imagine a law (or the interpretation of a vague one) that might do so. Though this would present a difficult conundrum requiring an analysis of the particular ways that this might unfold alongside nuanced reflections upon how a state or Congress might legislate accordingly, it too would not necessitate a bioessentialist defense. Whether a government eventually pursues such legislation with monitoring practices or an outright ban, it could justify its actions with reference to similar cases in

which states ensure that religious sects are not engaging in child neglect or abuse under the semblance of constitutionally-protected religious liberties. Where and how that line is drawn, however, would again be tied to musings on circumstantial considerations and the testimony of experts explaining what practices are proven to lead down dangerous roads for a minor's mental health.

The LGBTQ movement and its allies have at times shown an ability and willingness to take a less heavily bioessentialist route in its advocacy against religious institutions seeking to reorient their members' sexualities. This has sometimes taken the form of a softer approach toward those religious Americans skeptical of the call for equality in a way that speaks not on scientific terms but on spiritual ones. In their "Just As They Are" booklet, the NCLR and the HRC devoted multiple pages to the ways in which religious persons and institutions might reconcile their faiths and practices with a more tolerant—even accepting—attitudes toward LGBTQ persons.<sup>1130</sup> In one example from the text, a Christian mother with an LGBTQ child advised readers to "Let God be God" and to pray for guidance about how to navigate their faith and the reality of their child's identity.<sup>1131</sup> Due to their commitments to the bioessentialist frame, there are pitfalls in the current approach these organizations have taken. Some of the examples from "Just As They Are" can be still be reduced down to the premise that sexuality and gender identity are so deeply-rooted that a religious parent of a gay child would be better off leaving one's church than attempting any form of reorientation that might make their continued presence in their religious community a possibility. But ultimately even these

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<sup>1130</sup> Human Rights Campaign and the National Center for Lesbian Rights, "Just As They Are."

<sup>1131</sup> *Ibid.*, 36.

appeals do not *need* a bioessentialist grounding; rather, they only requires that one accept the evidence that such practices are cruel and dangerous.

The justification for outright bans like AB 2943 that prevent consenting adults from receiving these kinds of therapies as they are offered, however, are much more fraught. Anyone who takes seriously the ideal that individuals ought to be afforded broad autonomy over their sexualities and gender expressions should be alarmed by this encroachment of the state. In recognition of the conflict inherent in sweeping state bans, civil rights organizations such as the Rhode Island chapter of the ACLU have taken a route that entails a more subtle push from within the realm of professional association politics, rather than directly involving the institutions of the state. In a statement opposing proposed legislation in its own state, this ACLU chapter posited that the civil liberties of religious and LGBTQ persons might be best be protected through a simple refusal to license those practitioners who do not conform to widely-accepted professional ethics and standards of care.<sup>1132</sup> The ACLU of Rhode Island argued that this route would ensure that religious counselors could continue to spiritually counsel those such as persons in heterosexual marriages they longed to preserve, as well as those entering the seminary or into similar religious vocations.

The ACLU of Rhode Island's alternative thus transcends AB 2943's shortcomings that emanate from both its overreaching into the realm of individual autonomy as well as

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<sup>1132</sup> American Civil Liberties Union of Rhode Island, "Why the ACLU of Rhode Island Opposes Conversion Therapy, But Also Opposes Legislation to Ban It," *RIACLU.org* (March 22, 2017), <http://www.riaclu.org/blog/post/the-aclu-of-rhode-island-opposes-conversion-therapy> (Accessed March 28, 2019); This statement also opposed state bans for minors though, as explained in the preceding pages, I am more hesitant at this time to take a definitive stand on whether such bans are always impermissible.

the law's bioessentialist foundations. Such alternatives avoid legislating the kind of language and logic of sexual orientation that confuses attempts to assist a person in managing one's patterns of desire with those that promise reorientation entirely. In other words, resisting the allure of state intervention has the benefit of allowing professionals to decide within their own organizations how to best deal with the nebulous and gray areas of therapy that are not so amenable to the blunt force of a state ban. This best protects the freedom of individuals who seek assistance in confronting and working through feelings that may be for whatever reasons give them distress while also allowing—and potentially at times even encouraging—professional ethics boards and related associational bodies to regulate or to prohibit programs that promise to actually convert a person's desires (i.e. eliminate rather than manage) into cis-gender or heterosexual ones. Surely there is no shortage of people in this country who seek to control or even fundamentally change how they experience their sexualities or gender identities because of the economic or social ruin they stand to face if they began to explore or to publicly-embrace those sentiments. However, that is as much a failing of the reigning political economic order than it is an indictment of a homophobic or transphobic society. Accordingly, it is a problem that is better remedied through a politics of redistribution, robust social welfare policies, and a systemic shift of power away from capital.

Lastly, the bioessentialist logic has at times even contributed to persistent incommensurability of thought between LGBTQ advocates and ex-gay religious figures who preach heterosexuality as an option rather than a mandate. In a notable example



from early 2019, David Matheson, a well-known gay conversion therapist and member of The Church of Jesus Christ of Latter-day Saints, decided to live his life as an openly gay man without renouncing his past work in the ex-gay community.<sup>1133</sup> Stating that he still believed in what he termed “mixed orientation marriages” and whatever consensual therapeutic means might make that possible for a given person, Matheson expressed that he personally had decided to live according to desires that he had previously felt but had not expressed or acted upon. To most liberal-minded Americans, this position sounds contradictory: how could a person both characterize one’s years of suppression as “a rich blessing” while simultaneously celebrating a newly realized gay male identity?<sup>1134</sup> Recall that several years ago actor-turned-politician Cynthia Nixon was excoriated for suggesting that she had chosen her sexuality, or even further back to the radical lesbian sentiment that one’s sexual identity is constituted through a *political* choice about how to orient one’s relationships and pattern of desire.<sup>1135</sup> Clearly the sense that one’s sexuality is in some fashion an element of personal or political choice can be a liberating and fulfilling way that a person comes to understand themselves.<sup>1136</sup> How is it then that these positions have been ridiculed and mocked as dangerous, confused, and even “wrong?”

The answer to this question is a political one. It involves considering how the “reign of the gay gene” and the elevated status of scientific authority has shaped the

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<sup>1133</sup> Dominique Jackson, “Infamous Anti-Gay Therapist Now Says He Wants to Date Other Men,” *Raw Story* (January 21, 2019), <https://www.rawstory.com/2019/01/notable-gay-conversation-therapist-flips-and-now-desires-relationship-with-a-man/> (Accessed March 28, 2019).

<sup>1134</sup> Ibid.

<sup>1135</sup> Luchina Fisher, “Cynthia Nixon: Gay by Choice?,” *ABC News* (January 24, 2012), <https://abcnews.go.com/blogs/entertainment/2012/01/cynthia-nixon-gay-by-choice/> (Accessed March 28, 2019).

<sup>1136</sup> Vera Whisman, *Queer By Choice: Lesbian, Gay Men, and the Politics of Identity* (New York: Routledge, 1996).

political and cultural discourse with regards to LGBTQ identities in such a way that encourages an endless examination and position-taking about *who* is *what* and what rights and protections are attendant upon that ontological distinction. This is the question that is at the heart of biopolitical LGBTQ citizenship. It is what informs the logics and institutions upon which these political identities have been constructed and what guarantees their longevity, their potential for expansion, and their limitations. It is a politics in which the most authoritative voice is that of the taxonomist. Accordingly, there is an understandable anxiety over even minor threats to the authority of the particular taxonomizing institutions with which the LGBTQ movement in its current form has tied its fate. So, despite it being important to note all the ways in which this particular form of a liberal politics of sexuality (and more recently gender identity) has generated gains in terms of civil rights and many kinds of political cultural acceptance, it is equally requisite to understand what this politics of personhood—what these narratives and logics of identity—crowds out, distorts, misrepresents, and maligns in doing so, both in terms of how we speak about the nature of such things as well as in how we pursue a politics of social justice in their names.

## PART IV: ADAPTATIONS

## CHAPTER 8: The Scientific Gaze in Bisexuality and Transgender Politics

In the second decade of the twenty-first century, the mainstream liberal discourse on transgender identity came to take a distinctly bioessentialist character.<sup>1137</sup> This popular manner of speaking gender identity was exemplified in statements like former-Olympic athlete Caitlyn Jenner's about having a “female brain,” as well as by Katie Couric's 2017 National Geographic special that focused in large part on the scientific origins of gender identity in biological phenomena.<sup>1138</sup> In a boisterous declaration on the meaning of this shift in understanding transgender identity, former Human Rights Campaign Chief Legal Counsel Tony Verona declared that just as the gay and lesbian movement “achieved marriage equality and other legal protections...by insisting that our same-sex attraction was not something we could readily change, [the] same argument can benefit the cause of justice and fairness for transgender Americans.”<sup>1139</sup> These pronouncements by non-profit leaders, celebrities, and others designated for whatever reason as trans spokespersons have been buttressed by experts in endocrinology, psychology, neuroscience, and related fields who have come to understand transgender identity as emerging from genetic and neuroanatomical features that result in a

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<sup>1137</sup> I thank Cambridge University Press and *Politics & Gender* for allowing me to reproduce portions of a previously-published article in this chapter; Jo Wuest, “The Scientific Gaze in American Transgender Politics: Contesting the Meanings of Sex, Gender, and Gender Identity in the Bathroom Rights Cases,” *Politics & Gender* (forthcoming).

<sup>1138</sup> Diane Sawyer, “Bruce Jenner: The Interview,” *ABC News*, April 24, 2015, <http://abcnews.go.com/2020/fullpage/bruce-jenner-the-interview-30471558> (Accessed June 11, 2018); National Geographic Channel, “Gender Revolution: How Science Is Helping Us Understand Gender,” *National Geographic TV*, 2016 <http://channel.nationalgeographic.com/gender-revolution-a-journey-with-katie-couric/> (Accessed June 11, 2018).

<sup>1139</sup> Kristina Olson, “When Sex and Gender Collide,” *Scientific American* 317, no.3 (2017): 44–9.

“mismatch” of gender and sex.<sup>1140</sup> As trans identity has become an increasing target of social conservatives and a struggle on the frontier of civil rights for many progressives, it has become commonplace to hear such framings in the media, courtrooms, and the broader popular discourse.

Likewise, bisexuality has found itself subject to a similar scientific rethinking as evidenced in a several-years-long controversy involving the American Institute of Bisexuality (AIB), Michael Bailey of past gay gene fame, and a series of stories published by *The New York Times*. Musing excitedly about the research’s scientific and political possibilities, AIB President John Sylla speculated: “Can we see differences in the brains of bisexual people using fMRI technology? How many bisexual people are there—regardless of how they identify—and what range of relationships and life experiences do they have?”<sup>1141</sup> The answer to the first question given by long-time researchers of gay and lesbian sexual orientation, those affiliated with the AIB, and the science page of *The New York Times*, was a resounding “yes.” Other works endorsed by those like Dean Hamer and Simon LeVay purport to have discovered the origins of bisexuality in an evolutionary story about “hyper-heterosexuals” while others point to a possible innate disposition for bisexual fluidity lurking within the genomes of cis women.<sup>1142</sup> Though conversations about the science of bisexuality or bisexual identity

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<sup>1140</sup> Brynne Tannehill, “Is Research Into Gender Identity A Necessary Evil?” *INTO* (June 11, 2018), <https://www.intomore.com/impact/is-research-into-gender-identity-a-necessary-evil> (Accessed August 22, 2018).

<sup>1141</sup> Benoit Denizet-Lewis, “The Scientific Quest to Prove Bisexuality Exists,” *New York Times Magazine* (March 20, 2014), [http://www.nytimes.com/2014/03/23/magazine/the-scientific-quest-to-prove-bisexuality-exists.html?\\_r=0](http://www.nytimes.com/2014/03/23/magazine/the-scientific-quest-to-prove-bisexuality-exists.html?_r=0) (Accessed April 15, 2019).

<sup>1142</sup> Tamsin Osborne, “Bisexuality Passed on by ‘Hyper-Heterosexuals,’” *New Scientist*, August 15, 2008, <https://www.newscientist.com/article/dn14543-bisexuality-passed-on-by-hyper-heterosexuals/> (Accessed

more generally have not enjoyed nearly the same political, legal, or cultural attention as has trans identity, the influence of scientific conceptions of sexual selves has found its way to this corner of the movement as well.

It has been shocking to see not only the relatively rapid pace of expanded political cultural visibility for transgender and bisexual identities, but also how effectively bioessentialist renderings have been produced to legitimate them in the political realm and to make them intelligible to the public in cultural ones. It is for this dynamic that the present chapter falls under the subheading “adaptations,” in reference to the biological phenomena in which an organism becomes more suitably fitted to its environment. It is thus about how, despite past prognostications that foretold a world in which bioessentialist investments in political, legal, and social representations of gay and lesbian identities would lead to the continued marginalization of bisexual and transgender ones in part because they would then be logically foreclosed from a similar biodeterministic form, that in reality the opposite has transpired.<sup>1143</sup> The path that the gay and lesbian movement has taken with regards to bioessentialism and scientific authority has led to surprising ways in which these identity categories could come to be articulated through the “born this way” message. As activists and leaders from various bisexual and transgender organizations were integrated into the movement throughout the 1990s and 2000s, they came to be interpreted through readily available biodeterministic notions

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April 16, 2019); Lisa M. Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* (Cambridge, MA: Harvard University Press, 2009).

<sup>1143</sup> Kenji Yoshino, “The Epistemic Contract of Bisexual Erasure,” *Stanford Law Review* 52 (January 2000): 356-460 (p.405); Nancy J. Knauer, “Science, Identity, and the Construction of the Gay Political Narrative,” *Law & Sexuality* 12 (2003): 1-87.

oftentimes by the same political and legal organizations and scientific forces—sometimes even down to the same individual researcher—as had gay and lesbian ones. In this sense, bisexual and trans identities have become adapted to their environment, one in which scientific categorizations offer political legitimation to once-maligned groups.

In addition to showing how bioessentialist logic has come to fore in these domains, this chapter delves into the reasons why critics of bioessentialism and champions of more queer-inspired notions of identity did not anticipate these developments. These blind spots were due in large part to a history and logic of sexual and gender transgression that underestimated the ways in which supposedly distinct visions of L, G, B, and T categories could be rewedded together through a scientific logic that a century ago made far fewer distinctions among the four. This account undercuts the idea that just because an identity is articulated as transgressive, unsettling, or disruptive at one point in history or by one subset of identifiers, that it cannot ultimately be assimilated into a naturalistic framework. By its taxonomizing logic, its privileging of scientific authority for political legitimation, and its hubristic attitude toward what scientific inquiry has proven or even *can* prove with regards to sexual and gender identities, this form of biopolitical citizenship has incorporated bi and trans identities in ways that have ironically curtailed certain modes of expressing those identities, while highlighting others that are assumed to be the most accurate and politically potent representations of them. This has taken the form of adopting a new litigation strategy as has occurred in the trans case or in attempts to create a new face for bisexuality that erases the complexity and

multidimensionality of the term that has attracted so many identifiers throughout the past several decades.

In tracking these changes, this chapter begins with a more detailed consideration of how certain histories and experiences of bisexual and trans identity have made this story of adaptation an unpredictable one. It includes an examination of those alternative conceptions of identity as well as a look at the scientific logics both past and present that have allowed for an at least partial reunion of the gender transgressor and the bisexual with the figure of the “exclusive” homosexual. It then turns to the story of how Michael Bailey and the American Bisexuality Institute have attempted to bring bioessentialism to the realm of bisexual political advocacy. The second half of the chapter dissects recent litigation over transgender bathroom access policies to probe how scientific authority and theories of biodeterminism have been at the foundation of arguments in favor of granting suspect classification protections under the equal protection clause and expanding existing statutory law to protect trans rights. The following analysis in some ways provides only snapshots of the developmental trajectory that has moved these identity constructions from a previous life as co-constitutive of gay and lesbian ones, through their differentiation in the twentieth century, and into their newest forms in the twenty-first. Yet even in this present less-than-comprehensive investigation, it demonstrates how the acronym “LGBT” has come to its current meaning through this reintegration of once disparate parts into a conglomerate, albeit one which marks the ways in which its component parts exist in their own stable and discrete forms.



### *Winding Paths to Bioessentialism*

What about some of the usual understandings of the history of bisexual and trans politics make this new bio-trend so surprising? Part of the answer lies in the fact that such modes of sexuality and gender have been often cast as possessing some inherently transgressive or transformative potential that distinguished them from their gay and lesbian counterparts. In the gay liberation era, this took the form of radical interpretations of Freud that, in prophesizing the impending end to both heterosexuality and homosexuality, looked forward to a utopian sexual state defined by the free expression of bisexual desires and new, more emancipatory social arrangements made in its image.<sup>1144</sup> Though less starry-eyed than the early liberationists, more contemporary members of bisexual-based political and cultural communities as well as scholars have understood the adoption of a bisexual identity as working toward the eventual eradication of the homo-hetero binary.<sup>1145</sup> The logic here is that, in emphasizing sexuality as existing on a spectrum of attraction wherein a person may fall in various points between the two poles, bisexuality by its very nature throws into relief the fiction of stable hetero or homo sexual identities entirely.

Transgender identity too has its own radical heritage and theoretical renderings that have contributed to the assumption that it would remain impervious to bioessentialist representation. The broadly queer umbrella notion of the term itself emerged in the late

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<sup>1144</sup> Steven Angelides, *A History of Bisexuality* (Chicago, IL: University of Chicago, 2001), 191-2; This version of bisexuality contains within it features that are today more associated with the terms polyamory and pansexuality.

<sup>1145</sup> Marjorie Garber, *Bisexuality and the Eroticism of Everyday Life* (New York: Routledge, 2000), note 8 at 99; Shiri Eisner, *Bi: Notes for a Bisexual Revolution* (Berkeley, CA: Seal Press, 2013).

1980s and 1990s as an attempt to encompass all sorts of genderqueer, intersex, and transsexual persons in a collective challenge to the rigid policing of gender identity and sex.<sup>1146</sup> Those theorists and advocates of a new transgender politics came to rebuke the more standard medically-influenced “trapped/born in the wrong body” narrative and instead emphasized the human body’s malleability as they called for visions of gender as performative—a “genre” rather than a natural category—and as conditioned by the power dynamics associated with sexuality and gender in Western patriarchal capitalist society.<sup>1147</sup> In recent years, some writers, activists, and organizations have remained committed to a radical ideal of trans identity as means of deconstructing and subverting gender conventions.<sup>1148</sup> Though these theories of trans identity and related conceptions of gender have flourished mostly in the halls of academic humanities programs as well as small pockets of anarcho-queer radicals (this vision was always contested within actual advocacy spaces), they have been at least partially responsible for making the bioessentialist conception seem so unlikely.<sup>1149</sup>

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<sup>1146</sup> Susan Stryker, *Transgender History, Second Edition: The Roots of Today’s Revolution* (Berkeley, CA: Seal Press, 2017).

<sup>1147</sup> Sandy Stone, “The Empire Strikes Back: A Posttranssexual Manifesto,” 1987, <https://sandystone.com/empire-strikes-back.pdf> (Accessed June 11, 2018); Donna Haraway, “A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century,” in *Simians, Cyborgs and Women: The Reinvention of Nature* (New York: Routledge, 1991).

<sup>1148</sup> Riki Anne Wilchins, *Read My Lips: Sexual Subversion and the End of Gender* (Ithaca, NY: Firebrand Books, 1997); Mattilda Bernstein Sycamore ed., *That’s Revolting! Queer Strategies for Resisting Assimilation* (Berkeley, CA: Soft Skull Press, 2008); J. Rogue, “De-essentializing Anarchist Feminism: Lessons from the Transfeminist Movement,” in *Queering Anarchism: Addressing and Undressing Power and Desire*, eds. Deric Shannon, J. Rogue, and Abbey Volcano (AK Press, 2012): 25-32.

<sup>1149</sup> Megan Davidson, “Seeking Refuge under the Umbrella: Inclusion, Exclusion, and Organizing within the Category Transgender,” *Sexuality Research and Social Policy* 4, no.4 (2007): 60–80; No Justice No Pride, “About,” *No Justice No Pride*, (n.d.), [https://www.nojusticenopride.org/?fbclid=IwAR3bG4c2dUmvqkflXPkg9PLY4qn6vdP23y6Zl\\_M6yXSDCw3DHi9D\\_pNd\\_oE](https://www.nojusticenopride.org/?fbclid=IwAR3bG4c2dUmvqkflXPkg9PLY4qn6vdP23y6Zl_M6yXSDCw3DHi9D_pNd_oE) (Accessed April 16, 2019).

Another part of this answer stems from hypotheses about the nature of political and legal arguments about immutability as well as the scientific logic developed to explain gay and lesbian identities that many presumed to present insurmountable obstacles to advocating for bisexual and trans identities through the same style of reasoning. Kenji Yoshino, for instance, wrote that bisexuality would never be construed as immutable because it would then undermine both gay identity's ability to prove itself with the ambiguity of an immutable bisexual alternative as well as to threaten the retort against those right-wing opponents to expanded rights who levied the rhetoric of "choice."<sup>1150</sup> Nancy Knauer similarly argued that biological notions of gay and lesbian identity would thwart the ability to explain what she termed more "ambiguous" ones like bisexual or transgender identities in the same way.<sup>1151</sup> Not only were these views short-sighted, they were also ignorant of developments that had already been underway. For example, as far back as the 1995 federal case *Brown v. Zavaras*, the Tenth Circuit Court of Appeals drew connections between the scientific studies and expert witnesses in gay rights cases and the subsequent identity claims of transgender advocates, which allowed courts to reconsider transgender identity as immutable in contrast to the older judicial theory that transgender identity was malleable by its very nature and namesake.<sup>1152</sup> Citing assertions of immutability as they appeared in several prominent military exclusion and discrimination cases from the early 1990s, the court's opinion notes that the governing case law at the time that held transsexual identity to not merit suspect classification

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<sup>1150</sup> Yoshino, "The Epistemic Contract of Bisexual Erasure," 405-6.

<sup>1151</sup> Nancy J. Knauer, "Science, Identity, and the Construction of the Gay Political Narrative," 36-8.

<sup>1152</sup> *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995).

protections under the equal protection clause might require a reevaluation on the assumption that it may prove to be immutable after all.<sup>1153</sup>

As noted in a previous chapter, part of the scientific project of constructing a theory of biodeterministic gay and lesbian identities in the 1990s to distinguish them from patterns of sexuality and gender that were less stable and gender conforming than the heteronormative versions they were interested in constructing. Even from the beginnings of that project, however, researchers were hypothesizing the existence of additional biological processes that would explain these identities. As co-author of one of the most famous gay male twins studies Richard Pillard remarked on transsexual identity, “[y]ou’d think they’d be on the far end of the spectrum, the ‘gayest of the gay.’” And yet transsexuals are not in fact gay.”<sup>1154</sup> Rather than cede the point though that there might be something worth rethinking about the bioessentialist framework, he instead reasoned through a series of alternative biological explanations to explain transsexuality.<sup>1155</sup> Going back as far as the 1980s too, early proponents of biological research speculated that there may be individual biological processes that attend each degree of sexuality on the Kinsey scale that would result in *multiple* biological forms of bisexuality. Clearly, there has been room for such explanations and representations of these forms of identity for a long time.

There is reason to go back even further to the origins of sexology to comprehend why it is that gender nonconformity and varied and multiple patterns of sexual desire are never so far away from homosexuality. In the late-nineteenth and early-twentieth

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<sup>1153</sup> Ibid., 971.

<sup>1154</sup> Chandler Burr, “Homosexuality and Biology,” *The Atlantic Monthly* (March 1993), 54.

<sup>1155</sup> Ibid.

centuries, researchers and clinicians tended not to make such sharp demarcations among same-sex patterns of desire and gender nonconformity. German researcher Karl Heinrich Ulrichs, for instance, coined the term “urning” to describe those he deemed to be a third sex possessing the body of a man and the psyche of a woman.<sup>1156</sup> Psychiatrist Richard von Krafft-Ebing also took those expressing same-sex desires to be sexual “inverts” defined by a perverted nervous system as well as physiological characteristics including things such as cranial structures and physical mannerisms.<sup>1157</sup> Though Ulrichs’s urnings and Krafft-Ebing’s inverts were imposed on individuals who would be most akin to those who identify as gay men today, their taxonomies were based on a notion of a female soul enclosed within a male body that is nearly indistinguishable from contemporary popular understandings of transgender identity. British sexologist Havelock Ellis too concluded that those aberrant sexualities stemming from defects in embryonic development such as exclusive homosexuality and the non-exclusive variant (i.e. bisexuality) existed on a continuum as different degrees of the same kind.<sup>1158</sup>

In making a similar point about the linked histories and logics of different varieties of sexuality and gender sentiments, Roger Lancaster observed the perpetual inability of scientific frameworks to separate out baseline assumptions about gender from theories of sexuality.<sup>1159</sup> Since the nineteenth century, Lancaster noted, “the ‘science’ of homosexuality invariably rests on, refers to, and reinforces a broader set of cultural

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<sup>1156</sup> Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Science* (Chicago: University of Chicago Press, 1999), 43.

<sup>1157</sup> *Ibid.*, 46.

<sup>1158</sup> *Ibid.*, 50; This reflects in many ways a more pathological version of Alfred Kinsey’s notion of a continuum.

<sup>1159</sup> Roger Lancaster, *The Trouble with Nature: Sex in Science and Pop Culture* (Berkeley, CA: University of California Press, 2003).

conceptions; notions of what a real man is and what a natural woman ought to be, understandings of what a man does and how a woman feels, ideas about reproduction and its role in human life.”<sup>1160</sup> In his ethnography of transgender life in 1990s New York City, David Valentine also discerned the entangled nature of gender and sexuality, in this instance focusing specifically on the lived experiences of many transwomen.<sup>1161</sup>

Valentine spoke repeatedly with individuals who identified simultaneously as transgender *and* gay in ways that neither reigning scientific theories, academic gender studies ones, or cultural understandings of the supposed ontological distinction between gender and sexuality could make sense of. We are thus now living in a moment that, while it in some ways may feel aberrational to those who presumed that bisexual and trans identities would remain far removed from the interlocking realms of mainstream gay and lesbian politics and bioessentialist theories of sexuality and gender, is in many ways a return to a more natural state of affairs.

What is novel about the last several decades, however, are the processes of co-production through which we have arrived at this new version of an old dynamic. In what historical developmental ways have these processes of adaptation played out? As scholars of transgender politics have noted, mainstream gay and lesbian organizations during the 1990s and early 2000s were still hesitant to include transgender rights due to both the fear of conservative backlash as well as their own internal ambivalences, even at times

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<sup>1160</sup> Lancaster, *The Trouble with Nature*, 19.

<sup>1161</sup> David Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham, NC: Duke University Press, 2007).

prejudices.<sup>1162</sup> Organizations like the National Gay and Lesbian Task Force and the Human Rights Campaign (HRC) and their allies in the American Civil Liberties Union (ACLU) had moved the gay and lesbian rights movement to D.C. and the national political scene increasingly over the past two decades and were cautious about how quickly they could pursue their rights claims in this context. Evidence from internal memos, pamphlets, and published research reports, and the litigation strategies of several mainstream gay and lesbian organizations suggests that their leaders and activists spent considerable time discussing, conceptualizing, and deciding how to publicly communicate the nature and origins of transgender identity as they began to be challenged by trans groups seeking inclusion. As Zein Murib has shown, this was the moment in which the modern LGBTQ movement was being built through semiannual meetings of various gay, lesbian, bisexual, and transgender organizations to develop a coordinated front on sexual and gender identity issues and identities.<sup>1163</sup> Through the work of these established institutions in addition to newer ones such as the congressional lobbying trans group GenderPAC and other litigatory ones, Murib explained, “[w]hat began as a broad identity category to capture many different iterations of gender identity came to be represented in politics as a subset of sexual orientation in order to maximize political opportunities.”<sup>1164</sup>

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<sup>1162</sup> Zein Murib, “Transgender: Examining An Emerging Political Identity Using Three Political Processes,” *Politics, Groups, and Identities* 3, no.3 (2015): 381-97.

<sup>1163</sup> Ibid.; Zein Murib, “Rethinking GLBT as a Political Category in U.S. Politics,” in *LGBTQ Politics: A Critical Reader*, eds. Marla Brettschneider, Susan Burgess, and Christine Keating (New York: New York University Press, 2017), 14–33

<sup>1164</sup> Murib, “Transgender,” 393.

In an early example of this dynamic, PFLAG, one of the earliest supporters of trans rights as evidenced in the decision to include those rights in its 1998 mission statement, published a pamphlet that year centered on the causes of transsexuality, particularly in children.<sup>1165</sup> In this statement, PFLAG indicated that “[transsexuality] may be caused by the bathing of a fetus by opposite birth sex hormones while *in utero*, or perhaps by some spontaneous genetic mutation, which is also one of the theories of the origin of homosexuality.”<sup>1166</sup> In an earlier 1995 pamphlet PFLAG too wrote that transgender individuals may “have a genetic predisposition that would cause the person to want to be a member of the other sex”<sup>1167</sup> before preceding to entertain a number of possible origins stories for trans identity. This language and reasoning reflects the framing that the gay and lesbian movement had employed during the decades in which it promoted biodeterministic views regarding its own identities. In these instances, a position paper or statement would begin with a nod to the possibility of “multiple causes” to soften the deterministic element, only to end with a special emphasis on the biological component.<sup>1168</sup>

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<sup>1165</sup> PFLAG, “PFLAG Votes ‘Yes’ Overwhelmingly To Include Transgender in Mission” (1998), Collection 7616, Box 43, Folder 35: PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY; PFLAG, “Our Trans Children: A Publication of the Transgender Outreach Networks of Parents, Families and Friends of Lesbians and Gays (PFLAG), 2nd edition,” (1998), Collection 7616 Box 43, Folder 35, PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>1166</sup> *Ibid.*, 4.

<sup>1167</sup> Jessica Xavier, “PFLAG Transgender Resource Packet,” (October 17, 1995), Collection 7616, Box 42: Folder 35, PFLAG (Parents, Families and Friends of Lesbians and Gays Records, Cornell University, Ithaca, NY.

<sup>1168</sup> Judd Marmor (ed.), *Sexual Inversion: The Multiple Roots of Homosexuality* (New York: Basic Books, 1965).



A bit more tepid at first, the Human Rights Campaign was keen on resolving for itself the nature of trans identity before very publicly linking their struggles together. The HRC was not openly hostile to the idea of trans rights as much as it was wary about how such advocacy might affect its messaging that highlighted commonalities between straight and gay persons, in part by reading gender nonconformity out of its representations. As HRC leaders debated internally what form its support for transgender causes might take, they worried about the backlash they might receive if the transgender movement itself did not first resolve its own internal tensions regarding the medical and psychiatric issues surrounding gender identity as a concept and as part of the *DSM*'s "Gender Identity Disorder" diagnosis.<sup>1169</sup> In a 1997 internal email thread, HRC leaders fretted about working together with those who they saw as internally-divided and not possessing a legally coherent strategy for pursuing anti-discrimination protections.<sup>1170</sup> After all, how could the HRC, a premier liberal advocate gay and lesbian rights, support a population that it perceived as lacking a clear sense of identity that could be easily communicated to their supporters?

By 2001, however, the HRC added transgender persons into their mission statement, putting them in line with a trend of other mainstream organizations voicing support such as PFLAG and eventually the National Gay and Lesbian Task Force as well. A public opinion paper on transgender issues published by the HRC in the following year

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<sup>1169</sup> For more on these internal tensions, see: Davidson, "Seeking Refuge under the Umbrella,"; Amy L. Stone, "More Than Adding a T: American Lesbian and Gay Activists' Attitudes Towards Transgender Inclusion," *Sexualities* 12, no.3 (2009): 334-54.

<sup>1170</sup> Human Rights Campaign, "Re: External Document regarding Transgender Americans, Internal Confidential Memo from KP to EB, DRW, NB, and KM," (May 4, 1997), Collection 7712 , Box 54, Folder 26, Human Rights Campaign Records, Cornell University, Ithaca, NY.

provides some insight into the how and why the HRC came to support trans persons.<sup>1171</sup> In the 2002 research report, the HRC asked respondents whether they saw being transgender as a moral issue over which people retained some degree of choice or an identity or condition into which a person is born. Here, the HRC employed the “born this way” dichotomous language of choice versus orientation, which they had spent the last decade promoting as the fundamental question concerning gay and lesbian identities. The HRC and its allies had worked to instill the biodeterministic idea in their supporters and, therefore, it appears to have made logical sense for them to come to see transgender identity in the same way. Though previously the HRC had emphasized the differences among those struggling for rights based on gender identity and those fighting for protections based on sexual orientation, this well-publicized research report shows the HRC as integrating transgender political identity into their political program by emphasizing a shared logic of ontology. Though the HRC was not unequivocally committed to trans rights as evidenced in its strategic sanctioning of the removal of gender identity protections from the 2007 Employment Non-Discrimination Act, it was at this early moment attempting to graft transgender identity to this preexisting mode of interpretation.<sup>1172</sup>

What is perhaps most revealing of the gay and lesbian movement's biopolitical influence is the fact that the most recent cases featuring biodeterminist arguments

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<sup>1171</sup> Human Rights Campaign, “HRC Releases Ground-Breaking Public Opinion Research on Transgender Issues,” (September 30, 2002), Collection 7301, Box 268, Folder 40, The National Gay and Lesbian Task Force Records, 1973-2000, Cornell University, Ithaca, NY.

<sup>1172</sup> Parker Marie Molloy, “What Barney Frank Still Gets Wrong on ENDA,” *The Advocate* (October 1, 2014), <https://www.advocate.com/commentary/2014/10/01/op-ed-what-barney-frank-still-gets-wrong-enda> (Accessed April 23, 2019).

covered in the last sections of this chapter come on the heels of earlier federal circuit and state court cases in which free expression and “sex stereotyping” claims delivered wins for trans litigants. In *Doe v. Yunits*, the Massachusetts Superior Court ruled in 2000 in favor of a transgender student's right to dress in feminine attire based on her right to free expression under the U.S. Constitution's First Amendment.<sup>1173</sup> Federal appellate courts for the Sixth and Eleventh Circuits and the District of Columbia also ruled in favor of transgender plaintiffs who argued that they were guaranteed Title VII protections based on a 1989 U.S. Supreme Court decision that ruled sex stereotyping (e.g., discriminating against a woman for displaying masculine traits or a man for wearing feminine clothing) to be a form of sex discrimination.<sup>1174</sup> It is important to note as a caveat that legal scholar Kimberly Yuracko has contended that sex discrimination jurisprudence regarding gender and sex stereotyping has not been concerned primarily with free gender expression, but rather “[g]ender nonconformists have increasingly won protection under Title VII [and Title IX as well] by convincing courts that their nonconformity is not a matter of personal choice or taste but a product of necessity—a core aspect of their being, demanded not by their physical sex but by their psychological gender.”<sup>1175</sup> What is key, however, is that jurisprudentially, trans plaintiffs were winning cases with pronouncements that the equal protection clause and civil rights law protected not only transgender but also gender nonconforming persons in schools and the workplace. At least nominally, this provided

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<sup>1173</sup> *Doe v. Yunits et al.*, No. 00-10060A, 2000 WL 33162199 (Mass. Super., October 11, 2000).

<sup>1174</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See also *Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004); *Glenn v. Brumby et al.*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010), aff'd, 663 F.3d 1312 (11th Cir. 2011); and *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>1175</sup> Kimberly Yuracko, *Gender Nonconformity and the Law* (New Haven, CT: Yale University Press, 2016), 173.

discursive potential to expand protections to an array of gender expressions. While constitutional and statutory sex classifications inherently provide an incentive to argue that discrimination against transgender persons is always on the basis of sex, this shift to a biodeterministic frame did not occur until mainstream LGBT, transgender, and civil rights organizations began litigating recent cases.

As in other conflicts over gay and lesbian rights, proponents of transgender political rights have had to reckon with opponents on the right who have exercised influence over the discourses and venues in which trans persons have been forced to defend themselves.<sup>1176</sup> Just as the gay rights movement mobilized narratives from nature and biology to defend against the right's rhetoric of “choice,” transgender advocates, too, have been forced to guard against various hostile voices, including reparative therapists who advocate against gender-confirming treatment as well as state legislators and governors and their conservative Christian allies who equate the call for transgender rights with opening the doors of public restrooms to sexual predators.<sup>1177</sup> Trans litigator and scholar Shannon Price Minter noted that a core feature of the right's strategy has been to appeal to a mix of science and “common sense” that sex—defined generally by reference to a person's genitals—establishes important natural differences between men and women that necessitate sex-segregated bathrooms, locker rooms, and other facilities to protect women and children from predatory men.<sup>1178</sup> Thus, as transgender persons have

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<sup>1176</sup> Tina Fetner, *How the Religious Right Shaped Lesbian and Gay Activism* (Minneapolis: University of Minnesota Press, 2008).

<sup>1177</sup> Karl Bryant, “Making Gender Identity Disorder of Childhood: Historical Lessons for Contemporary Debates,” *Sexuality Research and Social Policy* 3, no.1 (2006): 23–39

<sup>1178</sup> Shannon Price Minter, “Déjà vu All Over Again’: The Recourse to Biology by Opponents of Transgender Equality,” *North Carolina Law Review* 95, no.4 (2017): 1161–204

become more visible in American political culture, opponents have advanced discriminatory laws and administrative policies barring access to public restrooms on the bases that transgender persons simply do not “exist,” that trans identity is the product of liberal myths and faulty science, and that civil rights law and constitutional protections regarding sex ought to be based on a narrow genitals-or chromosomal-based conception of sex.

As was the case with the gay and lesbian rights movement, however, it is not the case that the reach for biology has been a purely defensive move. Instead, these legal battles for trans rights have mimicked gay and lesbian ones in the ways how medical and scientific expertise has been cultivated, mobilized, and deployed by nearly all sides in gay and lesbian rights struggles. Transgender identity is just now beginning to be interpreted through a similar modality of recognition by state institutions and private forces (here meaning scientific and medical ones) in the same way that gay and lesbian political actors have used the courts to attain state protections from discrimination, inclusion into existing institutional and social arrangements, and most generally the rights of citizenship through “public and equal recognition” despite once being considered anathema to public morality and order.<sup>1179</sup> The end result of these processes has been the political construction of a bioessentialist form of transgender identity, which are explored further in later sections of this chapter on recent litigation regarding trans rights.

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<sup>1179</sup> Desmond S. King and Rogers M. Smith, “Racial Orders in American Political Development,” *American Political Science Review* 99, no.1 (2005): 75–92; Stephen Engel, *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives* (New York: New York University Press, 2016), 27.

Before shifting to those developments this section ends with a brief note on the processes of co-production that have led to conflicts within bisexual political communities over whether to interpret their sexual identities as having a biological heritage. Though this political community has historically been rather marginal even relative to gay and lesbian ones, some bisexual identity-based organizations did begin to form by the end of gay liberation's heyday in the early 1970s. These included groups such as the National Bisexual Liberation Group in New York which formed in 1972 and expanded to more than 5,500 members in ten U.S. chapters in its first three years.<sup>1180</sup> On the other side of the country, the San Francisco Bisexual Center, a key institution in early bisexual activism, health, and counseling, was founded in 1976 and later gave rise in 1983 to BiPOL, the nation's first primarily politically-focused bisexual organization.<sup>1181</sup> Throughout the 1980s, BiPOL and similar groups across the U.S. came to be both important sources for building political power to fight HIV/AIDS as well as influential sources of lobbying the gay and lesbian movement to open its doors to include bisexuals into the increasingly mainstreamed movement. On the heels of BiPOL's Autumn Courtney historic election to co-chair of the San Francisco's Lesbian Gay Freedom Day Pride Parade Committee, the 1993 March on Washington for Lesbian, Gay, and Bi Equal Rights and Liberation marked the first time a national gay and lesbian event included bisexual activists so prominently.<sup>1182</sup>

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<sup>1180</sup> BiNetUSA, "A Brief History of the Bisexual Movement," *BiNet USA*, (n.d.), <http://www.binetusa.org/bi-history> (Accessed February 22, 2016).

<sup>1181</sup> Ibid.

<sup>1182</sup> Amin Ghaziani, *The Dividends of Dissent: How Conflict and Culture Work in Lesbian and Gay Marches on Washington* (Chicago, IL: University of Chicago Press, 2008), 177-8.

This integration was not seamless, however. The HIV/AIDS crisis in particular presented a site of shared struggle, but it also created suspicion toward bisexuals who were often cast as dangerously promiscuous and, therefore, the main agents of infection.<sup>1183</sup> In the late 1980s, the Center for Disease Control identified bisexual men as a category of persons likely to introduce AIDS into general populations (i.e. essentially heterosexual society as the disease then was still understood to be a “gay” one).<sup>1184</sup> As sociologists Weinberg, Williams, and Pryor have documented, this fear led to discrimination against bisexual men in particular, as bisexual men increasingly moved into heterosexual relationships and females into homosexual ones in order to prevent catching or spreading the virus.<sup>1185</sup> This produced a stigma against bisexual men within their own communities in particular, as many respondents in the Weinberg et al. study reported feeling the same degree of prejudice from homosexual persons as they did from heterosexuals.<sup>1186</sup>

These stigmas persisted as bisexual activists further integrated into the gay and lesbian movement into the 1990s. Even as bisexual Americans were represented in the 1993 Washington march, the title was self-consciously crafted to include “Bi” and not “Bisexual” in an attempt to direct attention away from the connotation of sexuality itself, which had aroused fear among march organizers who worried that they would appear to

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<sup>1183</sup> For more on the anti-promiscuity discourse see the debates surrounding the content of Larry Kramer, *Faggots* (New York: Random House, 1978).

<sup>1184</sup> Ghaziani, 150.

<sup>1185</sup> Martin S. Weinberg, Colin J. Williams, Douglas W. Pryor, *Dual Attraction: Understanding Bisexuality* (New York: Oxford University Press, 1994).

<sup>1186</sup> *Ibid.*, 19, 117.

be promoting promiscuity or non-monogamy.<sup>1187</sup> Existing prejudices like this and the general orientation of the mainstream LGBT movement in the 1990s and 2000s has led to the critique among bisexual activists that “LGBT” was a misnomer and that the movement ought to be more accurately referred to as the “Gay, Gay, Gay, and Gay” (GGGG) movement. The criticism here stems not only from these kinds of tip-toeing around controversies so as to appease the perceived delicate sentiments of heterosexual society, but also from the bisexual movement’s historically queer orientation toward issues of sexuality and gender.<sup>1188</sup> This queer approach can be seen in bisexual activist leaders Loraine Hutchins and Lani Ka’ahumanu’s canonical 1991 work *Bi Any Other Name*, which emphasized bisexuality as fundamentally a worldview and a perspective, one that is simultaneously personal and political.<sup>1189</sup> Rather than being a strict identity issue based on sexual orientation (a key element to the GGGG critique), this text exemplified the tendency among many bisexual organizers to approach these issues through gay liberation-inspired and queer theoretical understandings of sexuality and gender.

Paradoxically, as the more queer-oriented bisexual organizations began to be more fully integrated into the movement, the mainstream liberal gay and lesbian movement’s bioessentialist articulations of its identities were quickly becoming the

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<sup>1187</sup> Ghaziani, *Dividends of Dissent*, 177-8.

<sup>1188</sup> Kathryn L. Nutter-Pridgen “The Old, the New, and the Redefined: Identifying the Discourses in Contemporary Bisexual Activism,” *Journal of Bisexuality* 15, no.3 (July 28, 2015): 383-415.

<sup>1189</sup> Loraine Hutchins and Lani Ka’ahumanu, *Bi Any Other Name* (New York: Alyson Books, 1991); It is worth noting that although the first section of this text is titled “Psychology,” this collection of essays appears to consciously avoid any fine pin-pointing as to exactly what bisexuality means for a person in a strict identity sense. Rather, the text is about multiple and varying experiences, which are never taken to encompass the range of what bisexuality signifies.



dominant frame for understanding sexual orientation. Again, it was not uncommon for members of these communities and organizations to use the language of choice and agency in expressing their sexual and romantic desires. There too were suspicions of bioessentialism as evidenced in Minneapolis-based Bisexual Organizing Project leader William Burleson's denunciation of the gay gene studies as recklessly narrow and essentially a distortion of the complexities of sexuality.<sup>1190</sup> Despite this long tradition of skepticism toward any approach that downplayed the "sex" element of "sexual orientation" or promoted the notion of fixity with regards to the object of desire, the forces that had produced the gay and lesbian versions of biological identity would come to bear on bisexual ones as well. The following section is a record of how the political and scientific actors, institutions, and discourses that developed and articulated these studies did not remain within the realm of gay and lesbian politics alone, but rather have made their way into bisexual activist organizations. In doing so, it tracks how these iterative features of co-production such as familiar bioessentialist researchers, media institutions such as science journalism in major newspapers, and active participant activists in the processes of scientific inquiry came to return the scientific gaze to the subject of bisexuality.

*Bi Erasure and the New Way "Out": The New Biopolitics of Bisexuality*

The story of bioessentialism's emergence in the contemporary politics of bisexuality begins in 2005 when Northwestern University psychologist and gay twins

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<sup>1190</sup> William E. Burleson, *Bi America: Myths, Truths, and Struggles of an Invisible Community* (New York: Harrington Park Press 2005), 21.

study co-author Michael Bailey’s research team received coverage in the *New York Times* for their study on bisexual men.<sup>1191</sup> In this research, Bailey and his colleagues conducted “genital arousal” tests using a phallometric device—specifically a “penile plethysmograph”—on self-identified homosexual, heterosexual, and bisexual men while they watched different pornographic stimuli, some involving only men and others involving only women.<sup>1192</sup> The results indicated that the bisexual men did not actually demonstrate a “bisexual pattern” of arousal. The majority of these men were only aroused by images of same-sex activity in the stimuli and a small minority were aroused only by heterosexual stimuli.<sup>1193</sup> Based on the premise that for men sexual arousal alone is equivalent to sexual orientation, Bailey and his co-authors determined that bisexuality is less a hardwired sexual predisposition than it is a means of interpreting desire.<sup>1194</sup> In interpreting the data, Bailey and his coauthors wrote that “when self-report is suspect, genital arousal may provide a more valid measure [for sexual identities].”<sup>1195</sup> The

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<sup>1191</sup> Benedict Carey, “Gay, Straight or Lying? Bisexuality Revisited,” *New York Times*, (July 5, 2005), <http://www.nytimes.com/2005/07/05/health/straight-gay-or-lying-bisexuality-revisited.html> (Accessed April 23, 2019).

<sup>1192</sup> Gerulf Reiger, Meredith L. Chivers, and Michael J Bailey, “Sexual Arousal Patterns of Bisexual Men,” *Psychological Science* 16, no.8 (August 2005): 579-84. For more on phallometric testing, see Tom Waidzunas, *The Straight Line*; Tom Waidzunas, “Intellectual Opportunity Structures and Science-Targeted Activism: Influence of the Ex-Gay Movement on the Science of Sexual Orientation,” *Mobilization: An International Journal* 18, no.1 (2013): 1–18; Tom Waidzunas and Steven Epstein, “‘For Men Arousal is Orientation’: Bodily Truthing, Technosexual Scripts, and the Materialization of Sexualities Through the Phallometric Test,” *Social Studies of Science* 45, no.2 (April 2015):187-213.

<sup>1193</sup> Ibid.

<sup>1194</sup> Ibid.; The interesting contradiction here is that a narrow scientific theory and approach led to what at least sounds like a queer theory of bisexuality: for these researchers, male bisexuality is not so much defined by arousal than it is by the interpretation of particular desires. Lest proponents of queer theory be too enthused, recall that the baseline assumption here is that orientation and identity for *men* in particular is directly related to how external stimuli directs blood flow to the penis (a decidedly *not* queer theoretical premise).

<sup>1195</sup>; Reiger et al., “Sexual Arousal,” 580.

assumption was thus that it is up to researchers to determine the validity of bisexual identity in men as the subject cannot be trusted to report it accurately himself.<sup>1196</sup>

The reaction from movement organizations registered immediately. The day after the *New York Times* published the story, the National Gay and Lesbian Task Force began coordinating allied organizations such as the Gay and Lesbian Alliance Against Defamation (GLAAD) as well as bisexual organizations such as BiNet USA, The National Bisexual Network, and the Bisexual Resource Center of Boston to denounce the study as well as the *Times*'s coverage, which had run under the title "Gay, Straight or Lying?"<sup>1197</sup> This coalition assembled by the Task Force produced a three-page fact sheet to critique the Bailey study on scientific and ethical grounds.<sup>1198</sup> On the scientific front, the Task Force criticized phallometric testing as methodologically controversial and that the assumption it was used to test—that arousal is equivalent to orientation in men—was suspect at best among other scientists who largely agreed that sexual orientation is the effect of both cognitive and physical factors.<sup>1199</sup> The Task Force also linked Bailey to his then just-published book on transgender identity, for which he was accused of relying on what is widely seen as a transphobic theory that presented transgender identity as

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<sup>1196</sup> Ibid.; This logic is on its clearest display in the line following the previous quote: "For example, genital arousal to stimuli depicting children is an effective method of assessing pedophilia, even among men who deny attraction to children."

<sup>1197</sup> Loraine Hutchins, "Sexual Prejudice: The Erasure of Bisexuals in Academia and the Media," *American Sexuality Magazine* 3, no.4 (2005).

<sup>1198</sup> National Gay and Lesbian Task Force, "The Problems with 'Gay, Straight or Lying,'" *thetaskforce.org*, (July, 2005), [http://www.thetaskforce.org/static\\_html/downloads/reports/NYTBisexualityFactSheet.pdf](http://www.thetaskforce.org/static_html/downloads/reports/NYTBisexualityFactSheet.pdf) (Accessed April 23, 2019).

<sup>1199</sup> Ibid.

emanating primarily from a sexual desire to have a female body.<sup>1200</sup> In addition to this coalition's response, several bisexual organizations responded with their own statements on the Bailey study. Speaking on behalf of the Bisexual Resource Center, Sheeri Kirtzer stated plainly that "[b]isexuality exists and identity doesn't need science to back it up."<sup>1201</sup> Kirtzer summarized the general sentiment in the community by citing prominent bisexual activist Loni Ka'ahumani's line that bisexuality is, "not about the plumbing, it's the electricity."<sup>1202</sup>

Although this rapid response to the Bailey study represented both wide and diverse elements of the bisexuality community as well as the larger LGBT movement, some activists were not satisfied with the demonization of Bailey's attempt to discern the etiology of bisexuality. The American Bisexuality Institute (AIB) in particular took a more sympathetic approach to Bailey's research, as its members and leadership read this moment as an opportunity to integrate scientific evidence into their political project of bisexual advocacy. This in part has to do with the origins of AIB and its founder, psychiatrist Fritz Klein. Klein gained notoriety in the early bisexual movement in 1978 by publishing a book that updated the Kinsey continuum model of sexuality to include seven new variables (ranging from sexual behavior to emotional preference). These purported to better identify bisexual characteristics in a person's sexuality as well as their

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<sup>1200</sup> Ibid.; Michael Bailey, *The Man Who Would be Queen: The Science of Gender-Bending and Transsexualism* (Washington, D.C.: Joseph Henry Press, 2003); This theory of *autogynephilia* was developed by Ray Blanchard in the 1980s.

<sup>1201</sup> Andy Humm, "Firestorm Over Bisexuality in Times: GLAAD, Task Force Assail Story Suggesting Most Bis Not Owning Up to Their Orientation," *Gay City News* 75, no.28 (July 2005), [http://gaycitynews.nyc/gcn\\_428/firestormover.html](http://gaycitynews.nyc/gcn_428/firestormover.html) (Accessed April 17, 2019).

<sup>1202</sup> Ibid.

preferred form of relationships.<sup>1203</sup> Founded in 1998, the AIB's mission reflected Klein's work, as it was established to assist and fund research into bisexual issues ranging from health disparities to the psychological dimensions of sexual identity.<sup>1204</sup> Importantly, the AIB is not singularly-focused on biology. Rather, it provides funds for diverse projects, and its *Journal of Bisexuality* is ecumenical in that it publishes literary and cultural studies work, psychological studies, and even essays by those such as bisexual activists like Loraine Hutchins who emphatically reject bioessentialist-driven inquiries.

While other organizations denounced Bailey, AIB's president John Sylla courted him with dinners and research funds in the hope that he could convince the scientist to probe further into the existence of male bisexuality (and, in doing so, offer a different interpretation). In a *New York Times* article on the relationship between AIB and Bailey, Sylla recounted explaining to Bailey that he simply had not "found" any bisexual men yet—of course discounting the fact that self-identified bisexual men made up a third of the participants in the original study.<sup>1205</sup> Sylla and AIB board members found fault not so much with the premises nor the logic of the Bailey study, but instead took issue with the particulars of his methodological approach. For example, one board member noted the quality of pornography that the study had used, claiming that the women looked "cracked out" and that no one who truly loved women would have felt aroused viewing such content.<sup>1206</sup> Ultimately, AIB decided to grant funds from its \$17 million endowment to

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<sup>1203</sup> Fritz Klein, *The Bisexual Option: A Concept of One Hundred Percent Intimacy* (New York: NY: Harrington Park Press, 1978).

<sup>1204</sup> American Bisexuality Institute, "About Fritz Klein," *AmericanInstituteofBisexuality.org* (n.d.), <http://www.americaninstituteofbisexuality.org/fritz-klein/> (Accessed April 17, 2019).

<sup>1205</sup> Denizet-Lewis, "The Scientific Quest to Prove Bisexuality Exists."

<sup>1206</sup> *Ibid.*

support a new Bailey study with the explicit aim of finding evidence to counter the 2005 research.

In 2011, Michael Bailey published this AIB-funded follow-up study led by his graduate student Allen Rosenthal titled “Sexual Arousal Patterns in Bisexual Men Revisited.”<sup>1207</sup> Addressing the methodological errors AIB had helped identify, the participants were more carefully selected from online bisexual forums instead of through advertisements in general LGBT publications in the hope that “truly” bisexual men would be recruited to participate.<sup>1208</sup> Additionally, each subject was required to have had sexual experiences with at least two members of each sex as well as romantic relationships with members of each sex lasting at least three months.<sup>1209</sup> Wanting to be politically well-positioned for the impending backlash from certain elements of the bisexual community as well as various anti-Bailey and skeptics of the science of sexuality, AIB set up an independent website, BiBrain.org, with a video of Bailey explaining the new research, accompanied by a twenty-page PDF defending the general academic and the scientific approach to exploring the existence of identity.<sup>1210</sup> In this document, AIB criticized the Task Force for their 2005 attack on phallometric testing on the basis that they did not recommend any better method with which to measure bisexuality. The AIB’s repeated

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<sup>1207</sup> Allen M. Rosenthal et al., “Sexual Arousal Patterns in Bisexual Men Revisited,” *Biological Psychology* 88, no.1 (September 2011): 112-5. It should be noted that Kinsey Institute researchers published a similar study in the same year, see: Jerome A. Cerny and Erick Janssen, “Patterns of Sexual Arousal in Homosexual, Bisexual, and Heterosexual Men,” *Archives of Sexual Behavior* 40, no.4 (August 2011): 687-97.

<sup>1208</sup> Ibid.

<sup>1209</sup> Ibid.

<sup>1210</sup> American Bisexuality Institute, “Controversy over Professor Bailey and the Existence of Bisexuality,” *BiBrain.org* (2010); While BiBrain.org is no longer accessible, the original website’s layout and content can be found by using the Way Back Machine. I contacted AIB President John Sylla to ask why the site was no longer available and was told that it was a simple matter of YouTube changing its parameter requirements for hosting videos and that in the near future the site would be up and running again.

insistence on the use of physiological indicators (they also referenced fMRI brain scans as a fruitful approach for future studies and have funded studies using pupil-dilators<sup>1211</sup>) demonstrates that this scientific discourse centers around an ideology of technicism where the first premises regarding the conception of identity are always fixed and the primary focus is on developing technology that can more accurately pinpoint something already assumed to be “there.” Due to this technicist perspective where self-reported experiences are treated as scientifically invalid, there is a degree of incommensurability endemic to these debates as the foundational logics and priors of each side often engender arguments that run past one another rather than meeting each other head on.

Although the popular press gave much credence to this new study, some leaders and activists in the bisexual community expressed skepticism and others outright hostility at this continued emphasis on scientific legitimation. Robyn Ochs, a bisexual activist and leader involved in groups such as the Boston Bisexual Women's Network, the Bisexual Resource Center of Boston, and BiNet USA, argued that the sexuality component of bisexuality is far too complex to capture so statically and within the confines of a laboratory. Additionally, she claimed that bisexuality should not be reduced merely to sexual arousal but rather should account for diverse approaches to sexual and romantic relationships.<sup>1212</sup> Chairman Jim Larsen of the Bisexual Organizing Project stated that although the new study could potentially help those struggling to accept their bisexuality,

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<sup>1211</sup> Gerulf Reiger and Ritch Savins-Williams, “The Eyes Have It: Sex and Sexual Orientation Differences in Pupil Dilation Patterns,” *PLOS One* (August 3, 2012) doi: 10.1371/journal.pone.0040256; Additionally, AIB has funded research by psychologists Ritch Savins-Williams and Gerulf Reiger who use pupil-dilators to measure bisexual arousal and sexual curiosity.

<sup>1212</sup> Denizet-Lewis, “The Scientific Quest to Prove Bisexuality Exists.”

he felt that any scientific approach that did not see self-reporting as a valid measure was insulting to bisexuals who do not need evidence that they do in fact exist.<sup>1213</sup> Ellyn Rushstrom, president of the Bisexual Resource Center of Boston, criticized the study for positing all bisexual attraction as a homogenous same “kind” and said that bisexuality is about diversity and fluidity and cannot be placed into one single box.<sup>1214</sup>

Some bisexual activists were less upset with the substance of the study but instead lamented the AIB’s use of precious resources to fund what seemed like an unnecessary academic exercise when others in the movement were declaring a crisis of health among bisexual Americans. When a journalist from the *New York Times* interviewed bisexual activists in the wake of the AIB-funded Bailey study, he found that “many bisexuals would prefer that money go to studies that will help solve health disparities that bisexual people face, rather than another study looking at arousal in a lab setting.”<sup>1215</sup> It is likely that these discontent activists were referring to the Bisexual Resource Center’s creation of a Bisexual Health Awareness Month in 2014 to bring attention to the fact that populations such as the bisexual youth in the U.S. had far worse health statistics than the generation of gay and lesbian Americans before them.<sup>1216</sup> Other recent figures show that depression, suicide, and risk of HIV infection is more prevalent among U.S. bisexual

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<sup>1213</sup> David, Tuller, “No Surprise for Bisexual Men: Report Indicates They Exist,” *New York Times* (August 22, 2011), <http://www.nytimes.com/2011/08/23/health/23bisexual.html> (Accessed April 22, 2019).

<sup>1214</sup> Ibid.

<sup>1215</sup> Rachel Nolan, “Beyond the Cover Story: Benoit Denizet-Lewis on Bisexuality and the Seven Dimensions of Sexual Orientation,” *The 6<sup>th</sup> Floor*, (March 24, 2014), [http://6thfloor.blogs.nytimes.com/2014/03/24/behind-the-cover-story-benoit-denizet-lewis-on-bisexuality-and-the-seven-dimensions-of-sexual-orientation/?\\_r=0](http://6thfloor.blogs.nytimes.com/2014/03/24/behind-the-cover-story-benoit-denizet-lewis-on-bisexuality-and-the-seven-dimensions-of-sexual-orientation/?_r=0) (Accessed April 22, 2019).

<sup>1216</sup> Nicole Kristal, “Bisexuals Lack Support – and It’s Literally Killing Us,” *The Advocate*, (April 1, 2016), <http://www.advocate.com/commentary/2016/4/01/bisexuals-lack-support-and-its-literally-killing-us> (Accessed April 22, 2019).



women and that bisexual men are 50% more likely to live in poverty than their gay counterparts.<sup>1217</sup> Those activists who disapproved of the AIB's use of funds did not so much discount their desire for a politics of recognition in which their identities were legitimated; rather, they were reacting to the priority placed on such recognition in the face of social conditions that begged for a politics of redistribution to accompany such recognition.

Not every bisexual organization or LGBTQ group was so critical of AIB's approach, however. BiNet USA's official blog congratulated AIB for achieving their goals in funding the study as well as the "brave folks" who opted to participate.<sup>1218</sup> Truth Wins Out (TWO), an organization that fights against ex-gay therapy institutions such as Exodus International and National Association for Research & Therapy of Homosexuality (NARTH), posted these studies to their LGBT Science website as well as conducted interviews with their authors. Employing the technician perspective, TWO claimed that the original 2005 Bailey study was methodologically-flawed and "the latest scientific research is explicitly clear that bisexuality is a very real sexual orientation that can be tested and measured."<sup>1219</sup> Among some of the most vocal supporters was Adrienne Williams, founder of the Bi Social Network, who hosted a podcast episode with an AIB spokesperson in which she announced that she had a relationship with higher powers in the U.S. Department of Health and Human Services who were interested in conducting

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<sup>1217</sup> Ibid.

<sup>1218</sup> Faith Cheltenham, "Real To Everyone: Bisexual Study Sponsored by AIB Makes The News," *BiNet USA Blog* (August 25, 2011), <http://binetusa.blogspot.com/2011/08/just-this-week-journal-of-biological.html> (Accessed April 22, 2019).

<sup>1219</sup> Truth Wins Out, "Bisexuality," *LGBTScience.org*, (n.d.) <http://www.lgbtscience.org/bisexuality/> (Accessed April 22, 2019).

more studies in order to provide additional validation for bisexual Americans.<sup>1220</sup>

Williams voiced some skepticism toward Bailey's approach throughout the interview but ultimately she expressed the belief that the general public and in-the-closet bisexual persons could use science to better understand bisexual identity and that future studies should include women so as to expand the role of science in legitimating identity.<sup>1221</sup>

In many ways it is unsurprising that some in the LGBTQ movement were drawn to the allure of this scientific rendering of identity, particularly because it was precipitated by an instance of sexology erasing a category rather than affirming one. The diversity in response to both of these studies reveals an internally-conflicted bisexual activist community that has been forced to wrestle with the legacy of politicized science within the larger American LGBTQ movement. Ideas, actors, and institutions from earlier moments in bisexual political history generated pushback to this series of taxonomizing events that many identifiers believed threw them into and out of discursive existence without much say on their part. The adaptation process here, however, can be witnessed in the array of scientific, political, and media forces that trumpeted these results and elevated the visibility of nonprofit leaders and activists who were much more amenable to this conception of bisexual identity than were those still holding onto more complex and self-styled radical ones.

The discord between competing perspectives like these was also heightened by fact that bisexual identity has not been the subject of many high political or legal fights.

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<sup>1220</sup> Adrienne Williams, "The American Institute of Bisexuality on Bi Men, Part 1," *Bi Talk* (August 30, 2011) <http://podbay.fm/show/304830098/e/1314741600> (Accessed April 22, 2019)

<sup>1221</sup> *Ibid.*

Therefore, the terrain upon which this battle was fought among activists could play out in smaller organizational settings than other gay and lesbian fights that have been duked out before a national audience in major governmental institutions. One of the most important takeaways from this case is the observation that the closer a conflict gets to the political and legal work of the major LGBTQ organizations and their engagement within the institutions of the state, the more scientific narratives are likely to show up. In smaller activist settings the barrier to entry into the discourse is much lower and, therefore, a diversity of perspectives can reign. Even so, the AIB-affiliated faction has enjoyed far more national press attention precisely because their position has been a staple of how these conversations have played out in political culture over the past several decades. Thus, the extent to which bisexuality will continue to adapt to this science-laden environment is likely to be most contingent upon how bisexual identity figures into the larger universe of these entrenched and iterative scientific and political forces as they play out in major institutional sites of governance and in the national political discourse.

*Transgender Bathroom Discrimination Cases and the Shifting Meaning of Gender and Sex*

By 2016, it had become nearly impossible to find a discussion in mainstream political discourse in which transgender identity and rights were not accompanied by mentions of “bathroom bills.” Though North Carolina's infamous bathroom bill, known as House Bill (HB) 2, appeared to usher in a new political fight, conservative opponents of trans rights had begun targeting the ability of trans persons to use the restroom of their choice at least as far back as 2008, when the group Citizens for Good Public Policy ran a

campaign against a Gainesville, Florida, ordinance by characterizing it as an open invitation for sex predators to assault young girls in public restrooms.<sup>1222</sup> Sociologists Kristin Schilt and Laurel Westbrook have argued that these new gender panics over trans rights are in large part “penis panics,” in which conservatives frame any accommodation to trans people as presenting a sexual and violent threat to average citizens.<sup>1223</sup> It is significant that young (often white and gender-normative) plaintiffs are the faces of these high-profile legal cases, as this illuminates how grounded the science and biopolitics of transgender identity (and related themes of sexuality) have been in the figure of the child.<sup>1224</sup> For opponents, the child provides a foil against which “deviants” pose a threat, while for proponents, the child allows a site on which to inscribe theories of immutability, which serve as a defensive posture and a basis on which rights claims can be made.

The bathroom issue's salience was boosted by the Barack Obama administration's expansion of federal civil rights law to include transgender and gender identity under Title VII and Title IX protections against sex discrimination. Over several years, the Equal Employment Opportunity Commission and the U.S. Departments of Justice and Education rulings and directives expanding the notion of sex to include, among other

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<sup>1222</sup> “An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations,” Session Law 2016-3, House Bill 2, March 23, 2016,

<http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf> (Accessed March 20, 2017); Kristen Schilt and Laurel Westbrook, “Bathroom Battlegrounds and Penis Panics,” *Contexts*, (August 20, 2015), <https://contexts.org/articles/bathroom-battlegrounds-and-penis-panics/> (Accessed June 11, 2018).

<sup>1223</sup> Kristen Schilt and Laurel Westbrook, “Doing Gender, Determining Gender: Transgender People, Gender Panics, and the Maintenance of the Sex/Gender/Sexuality System,” *Gender & Society* 28, no.1 (2014): 32–57

<sup>1224</sup> Eve Sedgwick, “How to Bring Your Kids Up Gay,” *Social Text* 29 (1991): 18–27

things, the right of trans persons to use the restroom at work and in public places of accommodation that best suits them.<sup>1225</sup> The most recent of these directives, the May 13, 2016, “Dear Colleague” letter issued by the Department of Education's Office for Civil Rights and rescinded by the Donald Trump administration in February 2017, explicitly demanded that Title IX be interpreted to provide transgender persons access to their preferred restrooms at educational facilities receiving federal dollars.<sup>1226</sup> This was a central factor in high-profile federal court cases concerned with such issues of access and antidiscrimination protection.

Along with being the most visible contestations in contemporary transgender politics, cases centered around bathroom access at the local, state, and national levels have come to constitute a new arena in which transgender political identity is being contested and constructed. For this reason, I have considered the ways in which proponents and opponents of transgender rights have advanced their claims regarding the nature of transgender identity in political, legal, and scientific terms throughout these cases. Accordingly, I have selected cases litigated by transgender, LGBTQ, and allied civil rights organizations to ensure that my claims about the ways in which identity is being contested here are not representing merely the tactics of one organization such as

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<sup>1225</sup> *Macy v. Holder*, EEOC Appeal No. 0120120821 (2012); *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (2015); Office of the U.S. Attorney General, “Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964,” (2014), <https://www.justice.gov/file/188671/download> (Accessed June 11, 2018); U.S. Department of Justice, Civil Rights Division, “Dear Colleague Letter on Transgender Students,” (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (Accessed June 11, 2018); U.S. Department of Education, Office for Civil Rights, “Dear Colleague Letter on Transgender Students,” (2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (Accessed June 26, 2018).

<sup>1226</sup> U.S. Department of Justice, Civil Rights Division, “Dear Colleague Letter,” (February 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf> (Accessed June 11, 2018).

the ACLU, but instead encompass a diversity of LGBTQ groups such as the Transgender Law Center, the Lambda Legal Defense and Education Fund, and the National Center for Lesbian Rights (NCLR).

As I show in the HB 2 case, biopolitical notions of transgender identity have become so pervasive that even the Obama Department of Justice (DOJ) relied on them in its briefs. In taking this broad view, I have found that these organizations have adopted similar approaches to science and the law and have in many cases shared scientific resources (e.g., research reports and expert testimonies) with one another. Ultimately, I find that at the heart of all these cases is a fundamental conflict over the meanings of gender (and gender identity) and sex in which conservatives have deployed scientists to argue that sex is biologically rooted whereas gender is a social construct, while liberal proponents have tended to subsume gender identity into the meaning of sex, arguing that “sex” under federal civil rights law and constitutional law ought to follow the dominant assumptions of scientists who believe that genitals, chromosomes, and gender identity are biologically constitutive elements of one's sex.

#### *North Carolina and HB 2: Marshaling Scientific Authority*

Looking first to the North Carolina bathroom bill, HB 2, Republican governor Pat McCrory signed the antitransgender legislation following a special legislative session on March 23, 2016, to counter a new ordinance in Charlotte that would have protected gay and transgender persons from various forms of discrimination. HB 2 quickly became a matter of national political controversy as Attorney General Loretta Lynch announced in

May 2016 that the federal government was suing North Carolina for violations of civil rights law.<sup>1227</sup> Lynch notably referred to the restrictions on bathroom rights as an instance of “state-sponsored discrimination” that imposed hardship on persons for “something they cannot control.”<sup>1228</sup> Conservative-dominated statehouses returned fire with both a countersuit coming out of North Carolina as well as two separate lawsuits joined by nearly two dozen states challenging the Obama administration for its expansive reading of Title IX that required schools (including the University of North Carolina) receiving federal funding to allow students to use the bathroom of their choosing.<sup>1229</sup> In both lawsuits, the states cast sex as a biological category, determined by one's anatomy and genes, and gender identity as a malleable psychological quality unprotected by legal and constitutional prohibitions against sex discrimination.

The DOJ's May 2016 lawsuit against North Carolina thrust the federal government into a conflict that would center around the science of gender identity and its bearing on the interpretation of sex under federal civil rights and constitutional law. In its claims that North Carolina had violated Title VII, Title IX, and the Violence Against Women Reauthorization Act, the DOJ argued in a section titled “Gender Identity and Its Relationship to Sex” that “[a]n individual's ‘sex’ consists of multiple factors, which may not always be in alignment. Among those factors are hormones, external genitalia,

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<sup>1227</sup> U.S. Department of Justice, “Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint against the State of North Carolina to Stop Discrimination Against Transgender Individuals,” May 9, 2016, <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> (Accessed June 11, 2018).

<sup>1228</sup> Ibid.

<sup>1229</sup> Defendants’ and Intervenor-Defendants’ Brief in Opposition to the United States’ Motion for Preliminary Injunction, *United States of America v. State of North Carolina et al.*, No.1:16-cv-00425-TDS-JEP (August 17, 2016); Moriah Balingit, “After Trump Administration Rescinds Transgender Student Directive, States Drop Lawsuit Challenging It,” *Washington Post*, (March 2, 2017).

internal reproductive organs, chromosomes, and gender identity, which is an individual's internal sense of being male or female.”<sup>1230</sup> The DOJ further stated that “[a]lthough there is not yet one definitive explanation for what determines gender identity, biological factors, most notably sexual differentiation in the brain, have a role in gender identity development.”<sup>1231</sup>

The first legal challenge to HB 2, however, did not come from the federal government but instead from a suit filed immediately upon its passage by an ACLU-led coalition of LGBTQ and civil rights organizations.<sup>1232</sup> In March 2016, the ACLU sued North Carolina on behalf of two transgender men (and one lesbian employee), one of whom was a student at the University of North Carolina and the other an employee. The ACLU advanced an even more biodeterministic argument than the DOJ in its statement that “[g]ender identity is the primary determinant of sex.”<sup>1233</sup> Using scientific evidence to combat the idea that gender identity is a condition or a choice that can be “cured,” the ACLU argued that “[t]here is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being.”<sup>1234</sup> In advocating for heightened protections for those discriminated against based on their gender identity, the ACLU noted that “[g]ender identity generally is fixed at an early age and highly resistant to change through intervention.”<sup>1235</sup> This language comes from a new current in gender identity clinics in which researchers and

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<sup>1230</sup> *United States of America v. State of North Carolina, et al.*, No. 1:16-cv-00425 (M.D.N.C. 2016), at 7.

<sup>1231</sup> *United States v. North Carolina*, at 7.

<sup>1232</sup> *Joaquín Carcaño et al. v. North Carolina Governor Patrick McCrory et al.*, No. 1:16-cv-236 (M.D.N.C. 2016).

<sup>1233</sup> *Carcaño*, at 8.

<sup>1234</sup> *Carcaño*, at 8.

<sup>1235</sup> *Carcaño*, at 8.



clinicians emphasize gender identity as something that is located in neuroanatomical structures and therefore highly resistant to change after infancy.<sup>1236</sup> Though Tey Meadow's ethnographic work on trans children and gender identity clinics illuminates how nuanced these discussions about gender identity often are in individual cases, such clinicians often bring their most biodeterministic arguments into their expert testimonies.<sup>1237</sup> The strategy appears to be geared toward asserting the innateness and inalterability of gender identity; the political legitimization, then, is less about free gender expression or the questioning or deconstruction of a gender binary but instead about assumptions of biological fixity.

In support of the ACLU-led litigation, the NCLR and GLBTQ Legal Advocates and Defenders filed an amicus brief that was joined by a coalition of trans groups including the National Center for Transgender Equality, the Transgender Law and Policy Institute, and the Trans People of Color Coalition.<sup>1238</sup> In this brief, the biological immutability argument is more developed and prominent than in either the DOJ or ACLU lawsuits. In accordance with case law for achieving suspect classification under the equal protection clause, the NCLR argued that transgender identity deserves the strongest protection of the courts because of transgender persons' long history of discrimination, their equal ability in contributing to society compared with nontransgender persons, their

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<sup>1236</sup> Stephanie Brill and Rachel Pepper, Rachel, *The Transgender Child: A Handbook for Families and Professionals* (San Francisco: Cleis Press, 2018).

<sup>1237</sup> Tey Meadow, *Trans Kids: Being Gendered in the Twenty-First Century* (Oakland, CA: University of California Press, 2018).

<sup>1238</sup> Brief for National Center for Lesbian Rights, GLBTQ Legal Advocates & Defenders, National Center for Transgender Equality, Forge, Transgender Law & Policy Institute, and Trans People of Color Coalition as Amici Curiae Supporting Reversal on Behalf of Plaintiffs-Appellants, *Joaquín Carcaño, et al. v. North Carolina Governor Patrick McCrory et al.*, No. 1:16-cv-236 (M.D.N.C. 2016) (October 25, 2016).

position as a small and politically vulnerable group, and their exhibiting of an immutable characteristic, which makes them a “discrete and insular minority.”<sup>1239</sup>

In making its immutability claim, the NCLR cited an article titled “Evidence Supporting the Biologic Nature of Gender Identity” published in 2015 in the journal *Endocrine Practice* by endocrinologists Aruna Saraswat and Joshua D. Safer and transgender health advocate and medical student Jamie D. Weinand.<sup>1240</sup> The article, a meta-study of various inquiries into possible hormonal, neuroanatomical, and genetic sources of gender identity, concludes that transsexual brain studies provide the most convincing evidence for a biological etiology of transgender identity. The NCLR brief goes on to cite several legal cases that linked the legal and constitutional claims for increased judicial protection of gay identities to transgender ones.<sup>1241</sup> As in 1990s gay rights cases such as *Romer v. Evans*, in which pro-gay rights geneticists and neuroscientists provided expert testimonies to establish that gay identity had a scientifically discoverable natural origin, these immutability claims have relied on scientific studies published in part by political advocates themselves to aid in their struggle to achieve heightened judicial protection.<sup>1242</sup>

North Carolina's response to the DOJ lawsuit and the subsequent actions of various LGBTQ organizations reveals the ways in which a scientific debate over the meanings of sex and gender came to characterize this conflict. In defending HB 2,

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<sup>1239</sup> Brief for Plaintiffs-Appellants, *Carcaño*, at 3–14.

<sup>1240</sup> Aruna Saraswat, Jamie D. Weinand, and Joshua D. Safer, “Evidence Supporting the Biological Basis of Gender Identity,” *Endocrine Practice* 21, no.2 (2015): 199–204.

<sup>1241</sup> Brief for Plaintiffs-Appellants, *Carcaño*, at 12–13.

<sup>1242</sup> *Romer v. Evans*, 517 U.S. 620 (1996); Lisa Melinda Keen and Goldberg and Suzanne B. Goldberg, *Strangers to the Law: Gay People on Trial* (Ann Arbor: University of Michigan Press, 2000), 68-73.

Governor McCrory employed biostatistician Lawrence Mayer to testify on behalf of the law based on research that Mayer had written with his coauthor and Johns Hopkins University colleague, psychiatrist Paul McHugh.<sup>1243</sup> In their article “Sexuality and Gender Findings from the Biological, Psychological, and Social Sciences,” Mayer and McHugh reviewed several decades of research and came to the conclusions that biological sex is innate, whereas gender identity is more of a culturally determined social construct and that current treatments for gender dysphoria in children are inappropriate because they assume that transgender identity is innate and therefore mistreat many “confused” children who would otherwise grow out of their nonconformity.<sup>1244</sup>

Mayer and McHugh also took aim at the 1990s gay brain and genetics studies, claiming that many respected geneticists and biologists had not been able to replicate the original studies. This was a strategic move in that some of the most famous studies of this era were indeed debunked; by highlighting this fact, these scientists could take aim at what they referred to as the “born this way” hypothesis for transgender identity as well.<sup>1245</sup> It is important to note that the article appeared in the journal *New Atlantis*, which, rather than being a respected peer-reviewed scientific journal, is an appendage of the Ethics and Public Policy Center, a conservative Christian think tank that has in the past defended anti-LGBTQ issues such as the Defense of Marriage Act and the military's exclusionary don't ask, don't tell policy. Still, Mayer and McHugh's positions as sexual

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<sup>1243</sup> Dawn Ennis, “Human Rights Campaign Sets Sights on Johns Hopkins after Controversial Trans Report,” *NBC News*, September 1, 2016), <http://www.nbcnews.com/feature/nbc-out/hrc-sets-sights-johns-hopkins-after-controversial-sexuality-gender-report-n641501/> (Accessed June 11, 2018).

<sup>1244</sup> Lawrence S. Mayer and Paul R. McHugh, “Sexuality and Gender Findings from the Biological, Psychological, and Social Sciences,” *New Atlantis*, no. 50 (2016): 1–143.

<sup>1245</sup> *Ibid.*, 13-58.

behavior researchers and clinicians at Johns Hopkins University School of Medicine gave them at the least the veneer of scientific legitimacy. Overall, these appeals to a variety of scientific and medical authorities throughout the litigation over HB 2 demonstrate how both opponents and proponents of transgender rights have challenged the credibility of either side's science based on the belief that winning in this domain will lead to victories in court battles and with the public.

### *Gavin Grimm and Transgender Identity Before the Supreme Court*

In addition to the ongoing controversy over North Carolina's bathroom bill, a variety of other salient transgender bathroom rights cases have been making their way through federal and state courts. The most well-known of these is *Gloucester County School Board v. G. G.*, a case brought by the ACLU on behalf of Gavin Grimm, a transgender student who was denied the use of the men's room at his Virginia high school.<sup>1246</sup> Grimm's case garnered national attention in 2016 when the U.S. Supreme Court agreed to hear the school board's appeal after the Fourth Circuit Court of Appeals ruled in favor of Grimm's rights on Title IX grounds. In the Fourth Circuit's ruling, the question of gender identity and its relation to sex was slightly eclipsed by an administrative law dispute over how controlling the Obama Department of Education's "Dear Colleague" letter was in regard to the interpretation of "sex" under Title IX. The Fourth Circuit ultimately sided with Grimm, citing a precedent from the administrative

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<sup>1246</sup> *G. G. v. Gloucester County School Board*, No. 15-2056 (4th Cir. 2016).

law case *Auer v. Robbins*, which granted broad deference to a bureaucratic entity in interpreting the law it has been charged with enforcing.<sup>1247</sup>

However, an examination of sources such as Grimm's statements to his school board, the ACLU's litigation in the case, and amicus briefs filed in support of either party before the Supreme Court demonstrates that debates over the scientific meaning of sex and gender identity have been central to this case. In an address to the school board publicized by the ACLU and LGBTQ media outlets, Grimm demanded that his rights be respected because the innateness of transgender identity is a “scientific fact” and “[people do] not choose to have cancer like I didn't choose to be born transgender.”<sup>1248</sup> The ACLU's petition for Grimm backed up this assertion by citing the Saraswat, Weinand, and Safer study to make its equal protection clause argument for Grimm.<sup>1249</sup> Arguing against the school board's suggestion that gender identity is in any way “subjective,” the ACLU stated that “[g]ender identity’ is an established medical concept, referring to one's sense of oneself as belonging to a particular gender. It is an innate and immutable aspect of personality, with biological roots.”<sup>1250</sup>

In a later brief solicited by the court asking each party to argue whether and how the case should continue after the Trump administration rescinded the Obama administration's “Dear Colleague” letter, the ACLU invoked medical expertise and diagnostic criteria to alleviate fears that Grimm's case would open doors to sexual

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<sup>1247</sup> *Auer v. Robbins*, 519 U.S. 452 (1997).

<sup>1248</sup> Gavin Grimm, “I'm Transgender and Can't Use the Student Bathroom. The Supreme Court Could Change That,” *Washington Post*, October 27, 2016).

<sup>1249</sup> Brief in Opposition, *Gloucester County School Board v. G. G., By His Next Friend and Mother, Deirdre Grimm*, No. 16-273 (September 2016), at 4.

<sup>1250</sup> Brief in Opposition, *Gloucester County School Board v. G. G.*, at 4.

predators being given access to women's restrooms.<sup>1251</sup> The language here was as follows:

“Gavin has never argued that the Board should accept his “mere assertion” that he is transgender. He has provided ample corroboration from his doctors, his parents, and his state identification documents. He is following a treatment protocol from his healthcare providers in accordance with widely accepted standards of care for treating gender dysphoria.”<sup>1252</sup>

This language, combined with this brief's restatement that “research indicates that gender identity has a biological component,” illustrates how central this biodeterministic argument was to the most high-profile Title IX transgender rights case in the country.<sup>1253</sup> Such discourse was used not only to argue for Grimm's rights under Title IX and the equal protection clause but also to draw a boundary of exclusion between the figure of the sexual predator and transgender persons. Yet, in doing so, the claim to protection was in a very Foucauldian biopolitical sense legitimated by the clinician's authority over the meaning of Grimm's body and conception of his gender identity.

According to this argument, it is not enough to ask Grimm whether he is transgender; rather, his identity is always subject to reevaluation, as evidenced in the brief's guarantee that “[i]f school administrators have legitimate concerns that a person is

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<sup>1251</sup> Brief of Respondent, *Gloucester County School Board v. G. G., By His Next Friend and Mother, Deirdre Grimm*, No. 16-273 (February 2017).

<sup>1252</sup> Brief of Respondent, *Gloucester County School Board v. G. G.*, at 24.

<sup>1253</sup> Brief of Respondent, *Gloucester County School Board v. G. G.*, at 3.

pretending to be transgender, a letter from the student's doctor or parent can easily provide corroboration.”<sup>1254</sup> If Grimm had won his case based on this logic, he and other transgender students would still be constantly at risk of being asked to “show one's papers” in quite a literal sense. The essence of biopolitical citizenship lies in the fact that “mere assertions” of transgender identity are privileged far less by the state than clinical pronouncements and medical papers. As Paisley Currah and Lisa Jean Moore have argued, this stems in part from the state's shift in the past few decades from a concern with trans people committing gender “fraud” to a concern with transgender identity's “permanence,” which can be certified by medical professionals.<sup>1255</sup> Accordingly, the ACLU and its scientific allies have attempted to guarantee that permanence by reassuring the state and the public that Grimm's identity is so fixed that it is written into his biological being.

The amicus briefs filed with the Supreme Court in the Gloucester County case illustrate this strange new terrain in which liberal proponents have turned to hardline arguments from nature, while some conservative opponents have gone as far to couch their attacks on trans rights in postmodern references to gender as a distinct phenomenon from sex. In their brief in support of the school board, McHugh, Mayer, and pediatric endocrinologist Paul Hruz argued that the Fourth Circuit had erred in subsuming gender identity into both legal and scientific categories of sex because sex is innate, fixed, and

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<sup>1254</sup> Brief of Respondent, *Gloucester County School Board v. G. G.*, at 3.

<sup>1255</sup> Paisley Currah and Lisa Jean Moore, “We Won't Know Who You Are”: Contesting Sex Designations in New York City Birth Certificates,” *Hypatia* 24, no.3 (2009): 113–35.

binary, whereas gender is a socially constructed entity.<sup>1256</sup> Citing gender theorist Judith Butler's *Gender Trouble*, these conservative scientists stated that “gender is a fluid concept with no truly objective meaning,” and is, therefore, something entirely distinct from sex.<sup>1257</sup> While this comically misrepresents Butler's theory of performativity and sex/gender, the distinction is part of a conservative strategy that refers to gender identity as “fuzzy and mercurial” and without stable meaning.<sup>1258</sup> For these scientists (and the school administrators and parent-and-student groups opposed to transgender rights for whom they speak), sex is a much more stable referent—an “innate and immutable” quality “determined fundamentally by one's chromosomal constitution, and ultimately by clearly defined reproductive capacities”—and it is more amenable to legal classification than gender identity.<sup>1259</sup>

*Expert Testimonies and Transgender Identity in the Federal District Courts: Scientific Authority and the Remaking of Sex Discrimination Jurisprudence*

Grimm's case is one of several challenges made against discriminatory school boards across the country by transgender students, who argue that their Title IX and equal protection clause rights have been abrogated. Examples from the following cases highlight the similarities in how various organizations have litigated these cases. They also demonstrate how scientific experts have been used at the federal district court level

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<sup>1256</sup> Brief for Dr. Paul R. McHugh, M.D., Dr. Paul Hruz, M.D., Ph.D., and Dr. Lawrence S. Mayer, Ph.D. as Amici Curiae Supporting Petitioner, *G. G. v. Gloucester County School Board*, No. 16-273, (January 10, 2017), at 3–4.

<sup>1257</sup> Brief of McHugh et al.; Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 2016).

<sup>1258</sup> Brief of McHugh et al., at 9.

<sup>1259</sup> Brief of McHugh et al., at 7, 6.



in ways that have begun to transform the meaning of sex in Title IX and equal protection clause cases, making the category capacious enough to include this biomedically legitimated version of transgender identity. These cases brought by Lambda Legal, the NCLR, and the Transgender Law Center signal that there is a consensus among mainstream liberal LGBTQ and transgender organizations regarding the biological approach. In the face of conservative arguments from groups such as the Alliance Defending Freedom and coalitions of perennially “concerned” parents and school administrators, transgender proponents have mobilized scientific allies and discourses here, too.

The organizations in these cases have engaged in a long tradition in pro-gay rights and LGBTQ politics of inviting scientific experts to give testimony at the trial level. Diane Ehrensaft, a Gender Spectrum board member and the director of mental health at the Child and Adolescent Gender Center in San Francisco, has been a frequent expert in these district-level cases. In *Evancho v. Pine-Richland School District*, Lambda Legal brought in Ehrensaft to testify on the nature of transgender identity and against Pine-Richland School District's reversal of a policy that had originally allowed its trans students access to their preferred bathroom<sup>1260</sup>. Ehrensaft explained in her declaration to the court:

“There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health

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<sup>1260</sup> *Juliet Evancho et al. v. Pine-Richland School District et al.*, No. 2:16-cv-01537 (W.D. Pa. 2017).

and well-being. Biological factors, most notably sexual differentiation in the brain, have a role in gender identity development. Gender identity is the most important and determinative factor in establishing a person's sex.”<sup>1261</sup>

Ehrensaft did not merely state that previous notions of sex that focused more narrowly on chromosomal or hormonal factors were misguided. Instead, gender identity was presented here as the most constitutive element of a person's sex; Ehrensaft described it as a biological phenomenon with roots somewhere in the anatomy of the brain. Though Ehrensaft strategically argued that physical characteristics are less determinative of sex than gender identity in a move against the opponents of transgender rights who focus more on genitals, chromosomes, and secondary sex characteristics as the defining markers of the sex binary, she fundamentally rested her conception on a narrow form of transgender identity that both privileges gender identity over all other biological components of sex, while also reading gender identity back into biological sex.<sup>1262</sup>

The NCLR also brought in Ehrensaft to testify against a discriminatory Ohio school board in the case *Board of Education of the Highland Local School District v. U.S. Department of Education et al.*<sup>1263</sup> In both this case and the Lambda Legal one, Ehrensaft testified that gender identity ought to be legally protected because of its origins in early childhood and the futility of reparative therapeutic attempts to alter it. Ehrensaft argued

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<sup>1261</sup> Memorandum of Law Supporting Plaintiffs’ Motion For Preliminary Injunction, *Juliet Evancho et al. v. Pine-Richland School District et al.*, No. 2:16-cv-01537-MRH (W.D. Pa. 2017) (October 20, 2016), at 2–3.

<sup>1262</sup> Memorandum, *Evancho*, at 23.

<sup>1263</sup> *Board of Education of the Highland Local School District v. U.S. Department of Education et al.*, No. 2:16-cv-00524 (S.D. Oh. 2016).

that “[g]ender identity—a person's internal sense of their own gender—is the primary factor in determining a person's sex. It is a deeply felt and core component of human identity.”<sup>1264</sup> The U.S. District Court for the Southern District of Ohio cited Ehrensaft's testimony—especially on the immutable nature of gender identity—in its decision granting a preliminary injunction against the local school board. In this decision, the court indicated that a future ruling on the transgender student's Title IX and equal protection clause would likely succeed on these grounds.<sup>1265</sup> Importantly, Ehrensaft's argument was not simply that gender identity is something that is so deeply felt that it is cruel to expect one to reorient it; rather, she argued that such a disposition toward one's gender identity is a product of biology.

Whereas Ehrensaft served as the voice of science for the NCLR and Lambda cases, the Transgender Law Center relied on Dr. R. Nicholas Gorton, a physician who has served on the research committee of the World Professional Association for Transgender Health, the medical advisory board of the University of California, San Francisco Center of Excellence for Transgender Health, and the American Medical Association's LGBT Advisory Committee. In his declaration in the case *Whitaker v. Kenosha Unified School District No. 1 Board of Education*, Gorton made many similar arguments regarding biological immutability as well as arguments against using sex chromosomes entirely to define a person's sex.<sup>1266</sup> Toward the end of his testimony, Gorton made a telling

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<sup>1264</sup> Memorandum, *Evancho*, at 2–3.

<sup>1265</sup> *Board of Education v. U.S. Department of Education*, at 3–4.

<sup>1266</sup> *Whitaker v. Kenosha Unified School District No.1 Board of Education*, No. 16-CV-943-PP (E.D. Wi. 2016); The Seventh Circuit in this case has also been receptive to the biopolitical conception of transgender identity as evidenced in its language that “[t]his is not a case where a student has merely announced that he

reference to the role of scientific and medical expertise in defining and legitimating transgender identity when he stated that “[a] physician's role is to assist the person in transitioning to living in accordance with their true sex.”<sup>1267</sup> Although one might interpret Gorton's statement to mean that the physician's role is to assist a transgender person into living a life according to the dictates of one's own autonomous will, the entirety of his testimony suggests that Gorton was instead referencing both the biological nature of gender identity (what he termed “true sex”) and the medical expert's unique role in helping find and treat that identity. Gender identity is once again subsumed into the biological category of sex, and thus transgender identity becomes an essentialized biodeterministic category.

Turning to an example of a recent federal district court decision, is clear that these scientific arguments are providing wins for trans litigants, and therefore they will likely come to define the legal and constitutional approach to transgender identity for the foreseeable future. Writing for the U.S. District Court for the Western District of Pennsylvania, Judge Mark Hornak relied heavily on Lambda's scientific evidence and arguments to justify his issuing of a preliminary injunction against Pine-Richland School District. In light of Grimm's then-pending Supreme Court case, which had come to focus on a Title IX claim, Hornak directed his attention to the Pine-Richland students’ equal protection clause claim, and particularly how to adjudicate this claim based on the scientific evidence introduced by both parties. Ultimately, Hornak was persuaded by

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is a different gender. Rather, Ash [the plaintiff] has a medically diagnosed and documented condition”; *Whitaker v. Kenosha Unified School District No.1 Board of Education*, No 16-3522 (2017), at 24.

<sup>1267</sup> Declaration of Dr. R. Nicholas Gorton, M.D. (Exhibit 3), *Whitaker v. Kenosha* (2016).

Ehrensaft's testimony, as evidenced by a positive citation to the psychologist's quote that “being transgender is not a ‘preference,’ that being transgender has a medically-recognized biological basis, and that it is an innate and non-alterable status.”<sup>1268</sup>

In siding with the scientific conception of gender identity as a constitutive component of sex, Hornak moved beyond evaluating transgender identity claims using the rational basis approach to the equal protection clause and instead employed the more protective intermediate scrutiny test, giving the students here additional judicial protections than most previous case law had.<sup>1269</sup> Whereas courts in some earlier cases had considered transgender identity to be akin to sex for matters of antidiscrimination, Hornak was moving his own district court beyond its previously low protections for this identity to a higher one based on sex classification.<sup>1270</sup> In conceptualizing this discrimination as based on sex rather than transgender or transsexual identity more narrowly, the Pine-Richland students were granted more constitutional protection than a similar case heard by the same court two years prior.<sup>1271</sup> Hornak wrote that the decision in that case “acutely recognized that cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts.”<sup>1272</sup> Hornak indicated in his equal protection clause analysis that the “factual context” here included scientific evidence regarding the immutable nature of the transgender students’ identities.<sup>1273</sup> Considering this alongside Hornak's acknowledgment

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<sup>1268</sup> *Evancho*, at 8-9.

<sup>1269</sup> *Evancho*, at 20-35.

<sup>1270</sup> *Evancho*, at 22.

<sup>1271</sup> *Johnston v. University of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).

<sup>1272</sup> *Evancho*, at 24.

<sup>1273</sup> *Evancho*, at 26.

of the idea that “gender identity is entirely akin to ‘sex’ as that term has been customarily used in equal protection analysis,” Lambda’s twin arguments regarding the immutability of transgender identity and the premise that gender identity is constitutive of sex were determinative in the final ruling of the court affording heightened scrutiny for transgender persons here.<sup>1274</sup>

### *The Adaptive Landscape of LGBTQ Political Identity Formation*

Despite the proliferation of queer subcultures in activist communities as well as the widespread integration of the “Q” into the LGBTQ moniker, the present and near future of queer politics is one that is heavily influenced by the bioessentialist theories of identity that those donning the queer label so often refuse. The incentive for the movement’s most powerful national organizations to deploy its rich collection of scientific and medical authorities has been determinative and will likely continue to be so, especially in the face of near constant attacks by the Trump administration, Republican-dominated state legislatures, and, perhaps sooner than later, an emboldened socially conservative majority on the Supreme Court.<sup>1275</sup> As a result of this longstanding institutional buildup of such resources and expectations that scientific authority can and

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<sup>1274</sup> *Evancho*, at 27.

<sup>1275</sup> Erica L. Green, Katie Benner and Robert Pear, “Transgender’ Could Be Defined Out of Existence Under Trump Administration,” *New York Times* (October 21, 2018), [https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?ref=collection%2Fbyline%2Feric-a-l-green&action=click&contentCollection=undefined%2C%20%20&ion=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection](https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html?ref=collection%2Fbyline%2Feric-a-l-green&action=click&contentCollection=undefined%2C%20%20&ion=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection) (Accessed February 7, 2019); Amy Howe, “Court to take up LGBT rights in the workplace,” *SCOTUSblog*, April 22, 2019, [https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/?fbclid=IwAR0S\\_ZKPWd95HMLV5HcU9pHrBr5uxY0RyctJSAAdCA3LBEjtU7i0ehe5WGIc#more-285229](https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/?fbclid=IwAR0S_ZKPWd95HMLV5HcU9pHrBr5uxY0RyctJSAAdCA3LBEjtU7i0ehe5WGIc#more-285229) (Accessed April 23, 2019).

should exert such influence within political and cultural debates, one should not expect to encounter less bioessentialism any time soon. The normal state of discourse is one in which those such as director of the Transgender Legal Defense & Education Fund Jillian Weiss will continue to wield fistfuls of studies published in medical journals about the determinative impact of certain arrangements of chemicals and neurons in the development of the “trans brain.”<sup>1276</sup> It too is one where measurements of blood flow and other laboratory stimuli might pervade even the queerest segments of the movement. None of this is predetermined of course; just as our political culture could stand to recognize how exploring the contingencies and multidimensionality of desire and identity might place us on a path to expanded freedoms in ways that bioessentialist thinking cannot, it is also important to note how there are always choices to be made within the thick institutional pressures, incentives, and networks that have come to comprise the modern LGBTQ movement. What can be said for now though is that the environment in which these political actors find themselves is conducive for a particular form of identity construction to flourish. It remains to be seen how these processes of adaptation develop in the near future.

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<sup>1276</sup> Tucker Carlson Interview Jillian Weiss, “Transgender Bathroom Debate: State or Civil Rights Issue?” *Tucker Carlson Tonight*, February 24, 2017, <https://video.foxnews.com/v/5336728640001/#sp=show-clips> (Accessed April 23, 2019).

## **CONCLUSION: Resistance is Futile**

### The Resilience of Bioessentialism as Institution and Idea

The foregoing account of the persistent and adaptable quality of bioessentialist ideas in the U.S. LGBTQ movement speaks to Rogers Brubaker's observation about the curious tenacity of such ideas in our supposedly slippery, foundationless postmodern world. In assessing the rhetoric around the 2015 controversy concerning Rachel Dolezal and the parallels between transracialism and transgender identities, Brubaker remarked that "[i]nstead of a shift from given to chosen identities, as posited by theories of reflexive modernity, we see a sharpened tension – in everyday identity talk, public discourse, and even academic analysis – between idioms of choice, autonomy, subjectivity, and self-fashioning on the one hand and idioms of givenness, essence, objectivity, and nature on the other."<sup>1277</sup> So in the place of considerations of the fluid, unstable, even sometimes contradictory nature of the categories most Americans have become accustomed to using to comprehend sexuality and gender, we have witnessed instead a steady propagation of new essentialist conceptions that anchor down all kinds of identities ranging from the heterosexual-homosexual binary to bisexual and trans ones. The whole notion of the LGBTQ+ framework itself has evolved to be additive in how it posits a neat separation of discrete identities, each letter marking a distinct tribe with its own innate qualities, characteristics, and origins stories.

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<sup>1277</sup> Rogers Brubaker, "The Dolezal Affair: Race, Gender, and the Micropolitics of Identity," *Ethnic and Racial Studies* 39, no.3 (2016): 414-48 (p.415); For a more class statement on this curious condition of postmodernity, see: David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Hoboken, NJ: Wiley-Blackwell, 1991).



Despite the proliferation of queer approaches to identity and desire in certain subcultural realms in recent years, the relationships between political and scientific forces charted throughout this dissertation are by far the most politically and culturally influential and are likely to remain the dominant ones for the foreseeable future. In fact, we appear to be experiencing a resurgence of sociogenomic ideas about identity categories and notions of heritage and ancestry. The political economy and attendant cultural resonance of consumer DNA testing ventures such as 23AndMe and Ancestry.com indicate a popular willingness to subscribe to such bioreductive theories. As sociologist Catharine Bliss has noted, new collaborations between social scientists and those in the natural scientists who wield cutting-edge genomic methodologies have similarly begun to offer explanations for a variety of traits extending beyond race, sexuality, and gender ones including “educational attainment, gang membership, life satisfaction, and debt” in ways that echo the hubristic theorizing and prophecies that were common during the height of the Human Genome Project era.<sup>1278</sup>

In addition to being sustained by doctoral training programs, fellowships and workshops offered by prestigious foundations, and encouragement from media outlets that lust after such stories, the propensity to conduct and promote these studies comes from a class of scientists that are self-consciously styling themselves as social justice advocates of the “truth” of queer identities.<sup>1279</sup> See for example, a recent article published

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<sup>1278</sup> Bliss, *Social by Nature*, 2.

<sup>1279</sup> Ibid., 13; Sarah A. Wilcox, “Cultural Context and the Conventions of Science Journalism: Drama and Contradiction in Media Coverage of Biological Ideas about Sexuality,” *Critical Studies in Media Communication* 20, no. 3 (September 2003): 225–247; Russell Sage Foundation, “Summer Institute in Social-Science Genomics 2017,” *Russell Sage Foundation*, (2017), <https://www.russellsage.org/summer-institute-social-science-genomics-june-11-23-2017> (Accessed April 26, 2019).

by a team led by Michael Bailey which ultimately concluded that biological theories of sexual identity are well-founded and that more research ought to be conducted in this mode, especially given that such science is frequently used in political advocacy.<sup>1280</sup> In addition to being tautological considering the authorship, this shows the political character of bioessentialism, as its proponents see only benefits to their research programs and only their political enemies in any opposition to their reductive pronouncements.<sup>1281</sup> The belief in the validity of the “by nature” origins story is inseparable from their view that a biological conception of ontology is *the* route toward expanded state protections and social equality.

The pull of this logic is so strong that even when scientific researchers turn their gaze toward the ambiguities and fluidity of sexuality, they often continue to naturalize those behaviors and identities in surprising ways. Take for example psychologist Lisa Diamond’s work on the fluidity of female sexuality. Though she explicitly avoids endorsing a side in the nature versus nurture debate in her own book on the subject, she was a contributor to the aforementioned Bailey-led study in which the authors entertained the idea that the difference between female sexual fluidity and more binaristic measurements of male sexuality was possibly due to some innate, genetic factor.<sup>1282</sup> By

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<sup>1280</sup> J. Michael Bailey, Paul L. Vasey, Lisa M. Diamond, S. Marc Breedlove, Eric Vilain, and Marc Epprecht, “Sexual Orientation, Controversy, and Science,” *Psychological Science in the Public Interest* 17, no.2 (2016): 45-101; Though Bailey et al. equivocate on this point in stating that “[i]n our view, the single best justification for studying the causes of sexual orientation is scientific, not sociopolitical,” it is clear from this article and other Bailey-led projects that there is a political motive underlying this research agenda.

<sup>1281</sup> See for example: Alice Dreger, *Galileo's Middle Finger: Heretics, Activists, and One Scholar's Search for Justice* (New York: Penguin Press, 2015).

<sup>1282</sup> Lisa Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* (Cambridge, MA: Harvard University Press, 2007); Bailey et al., “Sexual Orientation, Controversy, and Science,” 55-7; Tom

2018, however, Diamond appeared to be turning against bioessentialist ideas as evidenced in her TEDx Talk titled “Why The ‘Born This Way’ Argument Doesn’t Advance LGBT Equality.”<sup>1283</sup> In that talk, Diamond recounted studies in which individuals reported shifting patterns of sexual preference throughout their lifetimes in service of the argument that the bioessentialist thesis is neither scientifically accurate nor legally necessary; accordingly, Diamond argued, it is “unjust and time to retire” the idea entirely.<sup>1284</sup>

Despite this self-professed skepticism, Diamond proceeded to wed ideas of fluidity to biodeterministic theories. Upon delving into the research on fluidity, Diamond cautioned that these data were irrelevant to the idea of innateness, explaining that “there is to be sure strong evidence for genetic contributions to sexual orientation, but those contributions do not cement your entire sexual lifespan from birth. What they do is push its development in a certain direction.”<sup>1285</sup> Diamond continued on with citations to various twins studies to show that there is still a strong likelihood that genetics play some significant form in the shaping of sexual orientation. While highlighting an understated element of fluidity in human sexuality, Diamond’s formulation here was still heavily overdetermined by the idea that somewhere deep within the human genome lies an “on/off” switch that compels a human being’s sexual preferences in one direction over

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Waidzunas, *The Straight Line: How the Fringe Science of Ex-Gay Therapy Reoriented Sexuality* (Minneapolis, N: University of Minnesota Press, 2015): 140-1; See Waidzunas for how reparative therapy proponents have used Diamond’s work against gay and lesbian advocates in tying her research on fluidity to their assumptions regarding the malleability of sexuality.

<sup>1283</sup> Lisa Diamond, “Why The ‘Born This Way’ Argument Doesn’t Advance LGBT Equality,” *TEDxSaltLakeCity*, December 18, 2018, <https://www.youtube.com/watch?v=RjX-KBPm4&feature=youtu.be> (Accessed April 26, 2019).

<sup>1284</sup> Ibid.

<sup>1285</sup> Ibid.

another.<sup>1286</sup> Again, this is an instance in which a supposed logical stumbling block has proven to be astonishingly assimilable to bioessentialist thinking.

Given this persistent dominance of bioessentialism and its creeping influence into even those places one might not expect to find it, what can be said about the present state of LGBTQ politics and its relationship to such forms of scientific authority? And what implications might this have for interpretations of past, present, and future attempts to transcend the strictures imposed by this current state of affairs? In answering the first question, I return to the concept of biopolitical LGBTQ citizenship, which I have attempted to give some meaning throughout this project. It bears repeating first that this concept is not meant to draw a crude distinction between those versions of sexuality and gender politics that rely on scientific authority and those that do not. Instead, it is a concept meant to illuminate just how central such authority has been to the development of the modern LGBTQ movement and to provide some insight into the benefits and pitfalls this has presented for those committed to expansive and egalitarian visions for how gender and sexual autonomy might be realized.

Not all invocations of scientific authority in political rhetoric, litigation, or other means of addressing state institutions are equivalent to one another. The homophile and lesbian movement's reliance on scientific expertise to fight off the pathological model, for instance, involved relatively modest claims emanating from psychiatric and psychological research that distinguished severe forms of mental illness from those

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<sup>1286</sup> Jane Ward, *Not Gay: Sex Between Straight White Men* (New York: New York University Press, 2015), 206-7; See Ward's work for both a critical take on fluidity discourse as well as an example of how Diamond's work is often wielded against those who oppose the notion of a fixed biological or genetic orientation.

sexual desires and expressions that had become classified as medical diagnoses in response to anxieties about the impending collapse of the heterosexual social order (itself taken to be a natural ordering of gender and sexuality). Since these initial contestations, such authority has been used time and again as a defensive measure to combat the idea that queer and trans people are not the victims of some mental or social pathology or contagion, nor are they in need of coercive reparative conversion therapies. In this sense, to say that LGBTQ citizenship has taken on a biopolitical character is a recognition of the fact that scientific and medical expertise has been and continues to be a crucial resource wielded both by those who seek to constrict the bounds of sexual and gender freedom and autonomy as well as by those who wish to expand it.

However, it is simultaneously true that the mainstream liberal LGBTQ movement has pursued a political and legal agenda as well as a cultural message about identity that has been buttressed by an overreliance on scientific authority and in particular upon the bioessentialist renderings of identity that it has helped to co-produce. So, whereas the former examples are those in which scientific authority has come to play a significant role in the pursuit of rights, they are qualitatively different from (though not divorced from the development of) those tracked throughout this dissertation, wherein scientific authority has not only offered a degree of support, but it has also been asserted as presenting *the* truth about the fundamental nature of sexuality and gender identity, which in turn has denied the legitimacy of any and all other alternatives. This has had the effect of needlessly narrowing the contours of protected gender identity expression under the law, as well as justifying the pursuit of same-sex marriage rights by crafting

homonormative representations of what it means to *be* gay. It too has crowded out notions that there is something liberating about a view of human society that acknowledges how expanding freedoms to those whose desires and expressions were previously repressed to live according to their own wills may have the effect of making those modes of living increasingly attractive, or at least not out of the realm of possibility of exploration, for many others.

To reject an overreliance on scientific authority and its bioessentialist narratives is not to wholesale condemn all that has been done in its name. Scientific expertise has its place in these battles over rights, but it is not nearly as necessary for achieving them as many have come to suppose. It is not at all self-evident, for instance, that such strong assertions of etiology are required to pass antidiscrimination laws or to make other similar changes to the treatment of marginalized persons in both government and many realms of civil society. Biopolitical LGBTQ citizenship is an analytic that can serve a role in describing and interpreting the history and present of sexuality and gender identity politics in a way that recognizes both scientific authority's promises and problems. In doing so, it sheds light on what has been lost as well as what has been gained.

Lastly here, to speak of biopolitical LGBTQ citizenship is also a recognition of the dangers that attend formulations of identity that cede too much interpretative authority to scientific and medical institutional power that may be turned against them. For a cautionary tale on this front, see the attention surrounding Stanford University psychologist Michal Kosinski's use of facial recognition technology and artificial intelligence to allegedly distinguish between straight and self-identifying gays and

lesbians. Based on prenatal hormone theories of sexual orientation which take gay men and women to exhibit “gender-atypical facial morphology, expression, and grooming styles,” Kosinski and his co-author Yilun Wang developed an algorithm that could accurately categorize male subjects 81% of the time and female ones 74%.<sup>1287</sup> Not only can one hear the echoes of nineteenth century race scientific premises about facial structures and gender and racial types in this study, Kosinski has shown a profound lack of responsibility for how this research might ultimately be used. As reported by *The Guardian*, Kosinski took meetings in the summer of 2017 with top members of Vladimir Putin’s government including prime minister Dmitry Medvedev to share his research with a regime that has been notoriously hostile toward queer people.<sup>1288</sup>

While several major LGBTQ organizations condemned the study and the authors both for the model’s limited methodological scope and flaws as well as its perverse political implications, it is hard to escape noticing these organizations’ own culpability in co-developing and promoting the very theories of hormones and etiology upon which Wang and Kosinski’s paper was based. Human Rights Campaign Director Public Education and Research Ashland Johnson responded to the research by accusing it of being “dangerously bad” and a likely threat to “the safety and privacy of LGBTQ and

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<sup>1287</sup> Yulin Wang and Michal Kosinski, “Deep Neural Networks are More Accurate than Humans at Detecting Sexual Orientation from Facial Images,” *Journal of Personality and Social Psychology* 114, no.2 (2018): 246-57.

<sup>1288</sup> Paul Lewis, “I Was shocked It Was So Easy’: Meet the Professor Who Says Facial Recognition Can Tell if You’re Gay,” *The Guardian*, July 7, 2018, <https://www.theguardian.com/technology/2018/jul/07/artificial-intelligence-can-tell-your-sexuality-politics-surveillance-paul-lewis> (Accessed April 28, 2019).

non-LGBTQ people alike.”<sup>1289</sup> Those like GLAAD’s Jim Halloran also criticized it on methodological grounds, stating that research subjects represented only “a small subset of out white gay and lesbian people on dating sites” and, therefore, did not encompass the broad array of “people of color, transgender people, older individuals, and other LGBTQ people who don’t want to post photos on dating sites.”<sup>1290</sup> Again, it is not clear that future research would prove incapable of incorporating these thus far unaccounted-for traits and identities. In light of bioessentialism’s impressive adaptability as seen in the cases of bisexual and transgender identities, one should not underestimate the ability of models like these to integrate persons beyond what we might currently imagine is even possible. Despite the research being flawed down to its theoretical premises, such science has proven willing and capable of gobbling up identity after identity and, in doing so, risks opening the doors to political persecution rather than to liberation.

Even in those instances in which biological origin stories do not appear to present a threat to LGBTQ persons, they are tied to an ideological perspective and a network of institutions that propagate regressive biodeterministic visions of how the world is and how it ought to be. Hying bioessentialism in one realm then can have consequences for how seriously similarly reductive and potentially politically dangerous interpretations are received among researchers, funding agencies, and the public more generally. Take for example work published by renowned geneticist Robert Plomin that, under the pretense of employing scientific insights to create a more efficient and productive liberal society,

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<sup>1289</sup> Curtis M. Wong, “Queer Groups Condemn Study Claiming Computers Can Tell If You’re Gay From Photos,” *Huffpost*, September 8, 2017, [https://www.huffpost.com/entry/stanford-study-sexuality\\_n\\_59b2b8e1e4b0dfaafcf7b4a5](https://www.huffpost.com/entry/stanford-study-sexuality_n_59b2b8e1e4b0dfaafcf7b4a5) (Accessed April 28, 2019).

<sup>1290</sup> *Ibid.*



smuggles in authoritarian and eugenics-inspired sentiments and proposals. In his 2018 book *Blueprint: How DNA Makes Us Who We Are*, Plomin claims that while people in a liberal society ought to be allowed to pursue the kind of employment opportunities they most aspire to, it is likely that advancements in genetic knowledge and testing will reveal to us what kinds of work people are genetically suited for and, accordingly, they will be sorted according to this data.<sup>1291</sup>

Though Plomin states that liberty entails allowing persons to take genetic tests repeatedly in attempts to prove themselves capable for particular forms of work, he believes ultimately that employers ought to make use of genetic factors in choosing who to hire. Whether or not genetic knowledge will actually ever be able to deliver on this promise of such specific and targeted genomic conclusions about particular individuals, this vision of the future ought to frighten anyone with even the slightest familiarity with the history of eugenics, which is full of characters like Plomin who—despite being well-intentioned and starry-eyed about the technological developments that might order our future lives—lend legitimacy to illiberal forms of social control. To be clear, Plomin is no Nicholas Wade, Charles Murray, or any other neo-eugenic hereditarian scholar. Much like his counterparts in the study of sexuality and gender identity, however, he does exhibit a blind faith in a narrative of infinite progress, one which has proven historically to be all too compatible with a darker, more insidious research and policy program based in biological assumptions about the way that people *are* intrinsically.

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<sup>1291</sup> Robert Plomin, *Blueprint: How DNA Makes Us Who We Are* (London: Penguin Random House U.K., 2018); Nathaniel Comfort, “Genetic Determinism Rides Again,” *Nature*, September 25, 2018, <https://www.nature.com/articles/d41586-018-06784-5> (Accessed April 29, 2019).

Unfortunately, those who have historically been the most committed to challenging bioessentialism's role in the politics of gender identity and sexuality have been among the least powerful of those engaged in the fight. Throughout this dissertation, I have tracked liberationist and radical queer refusals of scientific authority to both highlight that there have always been vocal critics of this project but also to emphasize the limited efficacy of these various political groupings since their modern origins in the New Left era. Queer scholarship and activist circles have tended to focus heavily on themes of "resistance," "disruption," "revolution," and the tactics of direct action, despite the reality that this orientation has failed repeatedly to oppose the mainstream LGBTQ movement's development of a liberal pluralist approach to queer politics and the bioessentialist rhetoric and logic that has buttressed its ideological program. This is not meant to be a criticism of those doing rich historical work on queer life, politics, and culture; instead it is a call to stop overstating the political significance of particular moments of "revolutionary potential" that characterize many of these recovered genealogies of resistance.<sup>1292</sup> To avoid this temptation is to recognize that those political formations like gay liberation and its offspring have not represented roads not taken for a left queer politics. To interpret them as ever having presented a viable alternative to the politics that the mainstream movement has wrought is to avoid the hard questions of what failures of institutional thinking and practice about how to build a formidable challenge

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<sup>1292</sup> See for example: Lisa Duggan, *The Twilight of Equality?: Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston, MA: Beacon Press, 2003); Abram J. Lewis, "We Are Certain of Our Own Insanity": Antipsychiatry and the Gay Liberation Movement, 1968-1980," *Journal of the History of Sexuality*, 25, no.1 (January 2016): 83-113; Joshua Chambers-Letson, *After the Party: A Manifesto for Queer Color of Life* (New York: New York University Press, 2018); For a cogent critique of this dead end liberationist politics of autonomy and separation, see: Sherry Wolf, *Sexuality and Socialism: History, Politics, and Theory of LGBT Liberation* (Chicago, IL: Haymarket Books, 2009), 173-8.

to the oppressively gendered ordering of society—and its material bases—have been fundamental to these left-wing challenges.

This is then less an admission of defeat for a political program that I acknowledge I find myself normatively attracted to but instead a recognition that there has never been much of contest between these notions and the dominant form of this style of gender and sexuality politics. So while I am an advocate for an imaginative approach to the multidimensionality of sexuality and gender that draws in part from the social theory developed in more radical iterations of queer politics and academic thought, I believe that the account I have assembled here should make one wary of how much is to be gained from “being in the streets” or creating coalitions of radically-inclined community groups when this political orientation has proven itself to be so ineffective in the face of a much more organized, monied, networked, and persuasive LGBTQ movement.<sup>1293</sup> In this sense, I join other critical legal scholars like Libby Adler who, while being inspired in part by many of the principles and aspirations of those queer sentiments that flow downstream from gay liberation, have no default aversion to relying at least in part on the law and state institutions to construct a different form of queer politics.<sup>1294</sup> Now is the time to take political institutional power seriously and to think creatively about how to contest structural modes of discrimination and inequality without succumbing to the pathologies that have attended the heavily biopolitical liberal approach.

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<sup>1293</sup> Jeffrey Escoffier, *American Homo: Community and Perversity* (London: Verso Books, 2018).

<sup>1294</sup> Libby Adler, *Gay Priori: A Queer Critical Legal Studies Approach to Law Reform* (Durham, NC: Duke University Press, 2018), 9.

What political programs and transformations within the sciences and medicine might lead toward a more expansive terrain of sexual and gender expression and freedom in the twenty-first century U.S.? First, de-emphasizing the role of gender/sex markers on state documents and various forms of identification has proven one fruitful route toward protecting against the violence that can stem from constant administrative state interpellation in a way that elides legal reification of gender identity. In his work *Beyond Trans*, Heath Fogg Davis has shown that removing sex classifications from administrative records would reduce the role that medical authority currently plays in defining—and often policing—a person's sex or gender.<sup>1295</sup> Davis's claim is that nearly all sex classifications lack a rational governing purpose, and therefore ought to be legally and constitutionally impermissible under civil rights law and the equal protection clause. This approach would drastically improve the lives of not only many trans people but also any cis person who is perceived to be transgressing gender norms or a trans person targeted by immigration authorities for having incongruent sex/gender markers on their state and federal identification documents.<sup>1296</sup> The administrative reform also holds promise for the fuller integration of intersex persons into a queer politics, which could then strengthen the call against “corrective surgery” that tends to harm and erase so-called aberrant bodies and instead to promote the idea that it is perfectly natural to sit outside misleading textbook versions of “properly sexed” bodies.<sup>1297</sup>

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<sup>1295</sup> Heath Fogg Davis, *Beyond Trans: Does Gender Matter?* (New York: New York University Press, 2017).

<sup>1296</sup> Ibid., 142; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics and the Limits of Law (Rev. Ed.)* (Durham, NC: Duke University Press, 2015), 90.

<sup>1297</sup> Georgiann Davis, *Contesting Intersexuality: The Dubious Diagnosis* (New York: New York University Press, 2015).

There too are legal and constitutional remedies to discrimination that trade strong assertions of scientific authority for an expanded sense of gender equality and freedom of expression. As discussed briefly in Chapter 8, anti-sex stereotyping jurisprudence offers a means of interpreting sex in statutory and constitutional law that shifts the focus away from what it means to inhabit a particular identity category to one that reads the core of sex discrimination as a prohibition on policing outdated assumptions of what men and women ought to be like. Under this formulation, it is legally and constitutionally impermissible to discriminate against LGBTQ persons because one always does so under the pretense that men are masculine, women are feminine, and both are heterosexual. Accordingly, discrimination might be conceptualized as any attempt to suppress or punish deviations from those norms either in how one embodies or expresses gender or sexuality. There is a long history of this approach to litigating trans rights as well as gay and lesbian ones, though in both cases the modern LGBTQ movement has often reached for alternatives that have invited more attention to the question of etiology.<sup>1298</sup> In April 2019, the Supreme Court agreed to hear three cases, two involving gay litigants and the other a transwoman, all centered around the theme of sex discrimination.<sup>1299</sup> Though it remains to be seen if the emboldened conservative Republican majority with its two Trump administration-appointed justices will inaugurate a backsliding trend on LGBTQ

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<sup>1298</sup> Andrew Koppelman, *Gay Rights Question in Contemporary American Law* (Chicago, IL: University of Chicago Press, 2002).

<sup>1299</sup> *Altitude Express Inc. v. Zarda*, No.17-1623 (appealed from 2<sup>nd</sup> Cir., 2019); *Bostock v. Clayton County, Georgia*, No. 17-1618 (appealed from 11<sup>th</sup> Cir., 2019); *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No.18-107 (appealed from 6<sup>th</sup> Cir., 2019).

rights, there is a possibility that these cases might breathe new life into the sex stereotyping conception.

There is also a role for those within the academy and related research institutions to push back against the bioreductivists within their ranks. Those in fields such as biology, genetics, neuroscience, and bioanthropology are well-situated to internally regulate and stomp out the production of research based on unscientific premises regarding the nature of ascriptive categories of difference in the name of studying phenomena like human diversity.<sup>1300</sup> Historians of science such as Sarah Richardson and feminist neuroscientists like Cordelia Fine have also demonstrated how to position one's work to speak to multiple audiences across the humanities, natural sciences, and the general public.<sup>1301</sup> Relatedly, public-facing intellectuals and journalists have a role to play in dispelling bio-infused mythologies, especially to combat the gushing enthusiasm scientific journalism often has for such research. We would be well served by a revival of such skepticism within the ranks of journalism that once characterized the profession's attitudes toward such grandiose claims as they appeared in the sociobiological research of the 1970s and 1980s but seem to have been lost in the genomania of the 1990s and absent since then.<sup>1302</sup> As Jonathan Marks's work on the history of debates over biology and human diversity has revealed, this is a continuous battle that has been waged since the

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<sup>1300</sup> Jonathan Marks, *Human Biodiversity: Genes, Race, and History* (Piscataway, NJ: Aldine Transaction, 1995); Jonathan Marks, *Is Science Racist? Debating Race* (Cambridge, UK: Polity Press, 2017).

<sup>1301</sup> Lise Eliot and Sarah S. Richardson, "Sex in Context: Limitations of Animal Studies for Addressing Human Sex/Gender Neurobehavioral Health Disparities," *Journal of Neuroscience* 36, no. 47 (2016): 11823-1830; Cordelia Fine, *Delusions of Gender: How Our Minds, Society, and Neurosexism Create Difference* (New York: W. W. Norton & Company, 2010).

<sup>1302</sup> Roger N. Lancaster, "Sex, Science, and Pseudoscience in the Public Sphere," *Identities: Global Studies in Culture and Power* 13, no. 1 (2006): 101-38.

days of Herbert Spencer and Francis Galton. If there is any truth to Stephen Jay Gould's observation that "Resurgences of biological determinism correlate with periods of political retrenchment and destruction of social generosity," then it is likely that such fights will persist for some time.<sup>1303</sup>

Finally, a class-based movement politics as well as democratic socialist reforms to the structural features of the U.S. political economy hold potential for those seeking to move beyond contemporary liberal LGBTQ politics and its bioessentialist-imbued ideology. Transforming basic features of the political order would afford some modicum of security to those escaping family environments and even employment ones where discrimination may lead individuals into the open arms of conversion therapists or at the very least contexts where they feel the need to suppress their desires and identities. In this sense, such a politics would avoid some of the constitutional pitfalls that arguments for religious liberty have presented legislative attempts to curtail conversion treatments. It would do so by providing all people with the economic means to live according to whatever patterns of sexual desire or gender expression give some meaning and fulfillment to their lives.

More broadly, a class-based egalitarian politics would strike at the material relations that buttress sexist social and economic structures of which LGBTQ persons often find themselves the victims.<sup>1304</sup> This orientation has the benefit of addressing the

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<sup>1303</sup> Jonathan Marks, "An Evolving, Evolutionary Science of Human Differences," in *The Palgrave Handbook of Biology and Society*, eds. Maurizio Meloni, John Cromby, Des Fitzgerald, and Stephanie Lloyd (London: Palgrave Macmillan, 2018): 123-41; Stephen Jay Gould, *The Mismeasure of Man, Revised and Expanded* (New York: W.W. Norton & Company, 1999), 28.

<sup>1304</sup> Stephanie Coontz, "Capitalism and the Family," *Catalyst* 1, no.4 (Winter 2018), <https://catalyst-journal.com/vol1/no4/capitalism-and-the-family-an-interview-with-stephanie-coontz>

root causes of inequality and exploitation rather than falling into gay liberation's trap of being nominally anti-capitalist but actually targeting the social institutions of the Fordist order, themselves as likely to change due to flux inherent both to political institutional development and to the dynamics of capitalism.<sup>1305</sup> It too would undercut the notion that LGBTQ persons should assimilate into certain institutions of the existing order such as marriage because many of the material benefits of such arrangements (i.e. economic security and healthcare benefits) would lose their luster. To pose a serious challenge to the prevailing political order in this way would be destabilize notions that LGBTQ persons possess "immutable natures" directed toward class-skewed policy ends or that professional managerial class spokespersons and the leaders of massive nonprofits reflect some ontologically-united and undifferentiated whole, the construction of which has increasingly come to give support to the corroded left-wing of neoliberalism.<sup>1306</sup>

There are many routes toward undermining and replacing bioessentialist visions of sexuality and gender and the style of politics that they currently rationalize. These include reforms within the sciences as well as political programs that recognize the social and economic needs and rights of all individuals regardless of ascriptive category. Class-based organizations such as those that constitute the labor movement have a role to play too, as they have historically proven amenable to incorporating the needs of particular

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<sup>1305</sup> Lancaster, *The Trouble with Nature*, 319; Marshall Berman, *All That Is Solid Melts Into Air: The Experience of Modernity, New Edition* (London: Verso Books, 2010).

<sup>1306</sup> Kenneth Warren et al., "On the End(s) of Black Politics," *nonsite*, September 16, 2016, <https://nonsite.org/editorial/on-the-ends-of-black-politics> (Accessed April 30, 2019); For just one example how indebted the contemporary neoliberal wing of the Democratic Party, see Speaker of the House Nancy Pelosi's and others' 2018 campaign trail promise to hold hearings on the long-awaited Equality Act; Tim Fitzsimons, "Democrats Double Down on Equality Act Ahead of Midterm Elections," *NBC News*, October 24, 2018, <https://www.nbcnews.com/feature/nbc-out/democrats-double-down-equality-act-ahead-midterm-elections-n923846> (Accessed April 30, 2019).



members within their ranks and attaching them to a broader egalitarian project that emphasizes solidarity as a powerful means of overcoming the political ills of difference.<sup>1307</sup> This should not be construed as a call to abandon a proactive program against discrimination, one that will likely take the usual form of legislation and litigation. It is, however, an appeal to the multiplicity of means by which we might pursue the construction of a more egalitarian society without relying on flawed, dangerous, and politically limiting theories of essentialism.

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<sup>1307</sup> Miriam Frank, *Out in the Union: A Labor History of Queer America* (Philadelphia, PA: Temple University Press, 2015); Allan Bérubé, “No Red-Baiting! No Race-Baiting! No Queen-Baiting!” Produced by Estelle Freedman and John D’Emilio, *Out History*, (2016), <http://outhistory.org/exhibits/show/no-baiting/red-race-queen> (Accessed April 30, 2019).

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97<sup>th</sup> H.R. 3955, The Family Protection Act, (June 17, 1981)  
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