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**MAKE ME GAY: WHAT NEURO-INTERVENTIONS TELL US ABOUT  
SEXUAL ORIENTATION AND WHY IT MATTERS FOR GAY RIGHTS**

by

ANDREW VIERRA

Under the Direction of Nicole Vincent, PhD

ABSTRACT: This thesis challenges the restrictive definition of ‘gay’ used in legal discourse, argues for the adoption of a broader definition that is inclusive of more gay individuals, and demonstrates that the adoption of a broader definition would help frame gay rights debates in a way that is more acceptable to both progressives and conservatives. Current legal arguments for gay rights use ‘gay’ to refer almost solely to individuals that have exclusively—largely immutable—same-sex erotic desires. However, ‘gay’ should be understood to include a more diverse group of individuals. Thus, the current restrictive use of the term ‘gay’ either captures too many people or too few. Too many people, for conservatives, because gay rights are extended to many gay individuals that are not included in the restrictive definition. Too few people, for progressives, because the restrictive use of the term ‘gay’ doesn’t capture the entire gay community.

INDEX WORDS: Gay Rights, Neuro-interventions, Law

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by

ANDREW VIERRA

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of  
Masters of Arts  
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2016

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## **DEDICATION**

I want to dedicate this thesis to Emily Hill for inspiring me to pursue higher education.

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## 1 INTRODUCTION

This thesis challenges the restrictive definition of ‘gay’ used in legal discourse, argues for the adoption of a broader definition that is inclusive of more gay individuals, and demonstrates that the adoption of a broader definition would help frame gay rights debates in a way that is more acceptable to both progressives and conservatives. Current legal arguments for gay rights, as I argue in section two, use ‘gay’ to refer almost solely to individuals that have exclusively—largely immutable—same-sex erotic desires. However, as I argue in section three, the term ‘gay’ should be understood in a broader sense to include a more diverse group of individuals, including some gay individuals that do not have exclusively same-sex erotic desires and some gay individuals that do not take their erotic desires to be immutable or an important part of their identity. I argue that, for this reason, depending on one’s attitude towards gay rights, the current restrictive use of the term ‘gay’ either captures too many people or too few. Too many people, for social conservatives, because although arguments for gay rights almost exclusively refer to individuals with exclusively, largely immutable, same-sex erotic desires, the rights are extended to many gay individuals that are not included in that restrictive definition. Too few people, for progressives, because the restrictive use of the term ‘gay’ doesn’t capture the entire gay community that they want to extend rights to. Thus, the way the debate is currently being framed should not be satisfactory to either conservatives or progressives. In order to rectify this problem with the way that the debate is being framed, I suggest that we expand the use of the term ‘gay’ in legal discourse to encompass all gay individuals. I argue that doing so would help frame the debate in a way that satisfies both progressives and conservatives and is inclusive of the entire gay community.

I begin in section two by outlining some views about what it is to be gay. In particular, I draw attention to what I call the “common intuition”—the view that being gay is a matter of having exclusively same-sex erotic desires—and argue that this is the definition of ‘gay’ that is presupposed

in legal discourse. In section three, I argue against this definition by proposing a counter-example to holders of the common intuition based on the idea of a neuro-intervention that gives individuals same-sex erotic desires for a period of one day or longer. I begin this section by overviewing the science about what causes sexual preference in order to show that, in theory, we could develop a neuro-intervention that changes sexual preferences for one day or longer. I then argue that even holders of the common intuition—including those in the legal arena—would not believe that the users of such interventions would necessarily become gay. I will take this to show that being gay is not simply a matter of having same-sex erotic desires. Finally, in section four, I argue that, in light of my argument in section three, the gay rights debate is being framed incorrectly. I propose that a broader definition of the term ‘gay’ should be adopted in legal discourse and explain some of the advantages of doing so.

## 2 What is Gay?

Philosophers, scientists, and sociologists’ views on what it is to be gay can be roughly divided into four camps: the self-identification view (Kushner 1992, 45-46), dispositionalism (Kinsey et al. 1948, Kinsey et al. 1953, Dembroff 2016), social constructionism (Ward 2015), and what I have called the common intuition (Stein 2001). There is variation within each of these camps as to whether sexual orientation is binary (gay or straight), bipolar (a continuum between gay and straight), or composed of multiple discrete categories (Wesleyan University uses LGBTTTQQFAGPBDSM<sup>1</sup>). For the sake of this discussion, I will assume that the binary model is the correct view, largely because that is a tacit assumption in the current legal debate over gay rights with which I shall engage.

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<sup>1</sup> Lesbian, gay, bisexual, transgender, transsexual, queer, questioning, flexible, asexual, genderfuck, polyamorous, bondage/discipline, dominance/submission, and sadism/masochism.

Self-identification views hold that the way one identifies determines one's sexual orientation, regardless of one's behavior, sexual desires, or the opinion of others. As Stein puts, "a view that gives weight to a person's own assessment of his or her sexual orientation is the view that I call the *self-identification view*" (2001, 43). On this view, one could (e.g.) be exclusively erotically attracted to members of the same-sex and married to a same-sex partner but still be straight if that is how one identifies. Self-identification views are thus radical departures from the common intuition. They deny the importance of erotic desires altogether and focus solely on the way one identifies.

Dispositional views hold that "a person's sexual orientation is based on his or her sexual desires and fantasies and the sexual behaviors that he or she is disposed to engage in under ideal conditions" (Stein 45). The focus on erotic desires resembles the common intuition, but the dispositional view differs in its focus on counterfactuals and the addition of behavior as a determinant of sexual orientation. According to some dispositional views, one is gay if one would engage in sexual behaviors with members of the same sex in a variety of different ideal situations, where the word 'ideal' is intended to capture such clauses as that one is not forced to have sex, one has different sexual partners to choose from, and there are no social pressures to choose one sex over the other. Put another way, if one would have sex with members of the same sex in the majority of a sufficiently large number of ideal circumstances and would decline sex with opposite-sex partners in similar circumstances, then one is gay. Dispositionalism allows that under some counterfactual circumstances, straight individuals will have sex with and maybe even feel erotically attracted to members of the same sex — for instance, when prisoners who previously had exclusively opposite-sex partners enter sexual and romantic relations with other prisoners of the same sex. But it holds that one's sexual orientation cannot be defined by circumstances that account for only a small percentage of one's dispositions.

Social constructionists—to give a very broad generalization—argue that what it is to be gay is the result of contingent social and historical process. The concept 'gay', or so the argument goes, need not have existed at all and need not be at all as it is. Lesbian feminists, for example, argue that lesbianism in the United States is defined as a matter of same-sex erotic desires because “male society defines lesbianism as a sexual act...(and) this reflects men’s limited view of women as sexual objects” (Faderman 1984: 87). In addition to noting that gay is a social construct, some social constructionists take the further step of rejecting the way society defines ‘gay’ on the grounds that the definition is both contingent and harmful. Lesbian feminists take the contingency of male society’s definition of the term ‘lesbian’ and the negative normative consequences that arise from viewing women as sexual objects as grounds to reject the notion that lesbianism is a sexual identity. Instead, lesbian feminists offer alternative, women-oriented, definitions of lesbianism such as “a lesbian is the rage of all women condensed to the point of explosion” and lesbianism is “a political choice” (Faderman 2015: 234).

Throughout this thesis, though, I focus on the common intuition—the position that being gay is a matter of having exclusively, largely immutable, same-sex erotic desires—because that is the definition that I will argue is presupposed in legal discourse. I begin by overviewing the prevalence of the common intuition in arguments for gay rights and in Supreme Court rulings to demonstrate that the common intuition is the definition of ‘gay’ used in legal discourse. I then outline the argument proponents of the common intuition put forward to defend their definition.

## **2.1 The Common Intuition**

The common intuition has been the basis of some of the most effective arguments for gay rights — for instance, that being gay should not be a ground for being discharged from the military, that gay people should be allowed to marry one another, or adopt children, or be recognized as one another's legal guardians in situations where (for instance) medical treatment decisions need to be

made by a substitute decision-maker. One example is “the immutability argument.” Proponents of this argument (APA 2003, Lady Gaga 2011, Schwarz 2015) begin from the premise that gay individuals cannot choose or change their sexual orientation (i.e. their erotic desires are immutable). They then argue that one should not be discriminated against on the basis of what one cannot choose or change, so gay individuals should not be discriminated against on the basis of being gay — for instance, they oughtn't be discharged from the military purely on grounds of being gay, or denied the right to marry a partner of the same sex, or to adopt a child, etc.

In making this argument, gay rights activists presuppose that being gay is a matter of having immutable same-sex erotic desires—i.e. the common intuition. This definition of 'gay' fits well with their argument. In contrast, self-identification views and some social constructionist views (e.g. those put forward by lesbian feminists) do not fit well with their argument because on those views individuals can *choose* to be gay, thereby failing to meet the immutability condition of the immutability argument for equal rights. Erotic desires, on the other hand, may indeed be largely unchangeable, at least by willpower alone. Gay conversion therapies like “pray the gay away,” for example, are not successful at reorienting or extinguishing same-sex erotic desires even when the individual in therapy genuinely wants to be attracted to members of the opposite sex (Anton 2010). Definitions of ‘gay’ that center on same-sex erotic desires, like the common intuition, are thus a good fit for proponents of the immutability argument.

Recent American Supreme Court cases provide several examples of the common intuition and the immutability argument playing a major role in legal discourse. In their amicus brief for *Lawrence v. Texas*<sup>2</sup>, the APA (2003) repeatedly stressed that for most gay men<sup>3</sup> and women, being gay

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<sup>2</sup> The Supreme Court case that ruled that a Texas statute (§ 21.06) that made sodomy a crime was unconstitutional.

<sup>3</sup> The APA says “most” and not “all” because “in the Kinsey studies of the 1940s and 1950s” some gay individuals reported having “incidental attractions to or behaviors with the other sex” (8). I assume that they took this finding to suggest that some gay individuals have a limited degree of choice.

(i.e. having same-sex erotic desires) is not a choice (4, 8, 9), and sexual orientation is “highly resistant to change” (4). The APA used these claims to argue that people should not be discriminated against for being gay, because being gay is a matter of being same-sex attracted, and this is a feature that people do not get to choose and cannot change. Further, in the opinion of the Court for *Obergefell v. Hodges*, the landmark Supreme Court ruling that the Constitution requires States to issue marriage licenses to same-sex couples, Justice Kennedy twice claimed that sexual orientation is immutable (4, 8), writing that for gay individuals, sexual orientations’ “immutable nature dictates that same-sex marriage is the only real path” to the “profound commitment” of marriage (4).

The common intuition also played a role in the Department Of Justice’s decision to consider Edie Windsor’s case against the Defense of Marriage Act using heightened scrutiny,<sup>4</sup> which was critical in getting the case heard by the Supreme Court. One of the criteria for giving a case heightened scrutiny is that being a member of the group that is being discriminated against (in this case people who are gay) “is not a choice (and is) immutable” (Kaplan 2015: 142). Unlike other definitions of what it is to be gay, which often include individuals that choose to be gay, the common intuition holds that sexual orientation is immutable and thereby supports arguments for heightened scrutiny in a way other definitions of what it is to be gay do not.

The prevalence of the common intuition in these high profile cases and arguments for gay rights suggests that the common intuition is the definition of ‘gay’ that is presupposed in legal discourse. Further, the prominence of the common intuition in successful arguments for gay rights suggests that the definition of ‘gay’ that is used in these cases matters.

Arguments for the position that being gay is a matter of having same-sex erotic desires tend to center on the definition’s intuitiveness. Edward Stein (2001, 44-45), for example, argues against

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<sup>4</sup> Under heightened scrutiny, “the assumption is no longer that the law is constitutional; the burden is now on the government to show that the law furthers an ‘important’ government interest and that the law is ‘substantially related’ to that important issue” (Kaplan 2015: 141).

the self-identification view of what it is to be gay by claiming that the self-identification view leads to unintuitive consequences. He argues that some individuals that self-identify as straight may have same-sex erotic desires that they are not aware of or are repressing, and in his view the most intuitive thing to say about these people is that they are gay. He then claims that because the “self-identification view does not seem to capture our notion of sexual orientation,” the view is not sound (2001: 45). A sound definition of ‘gay,’ according to the common intuition, is thus one that the folk find intuitive (this is indeed precisely why I refer this position as ‘the common intuition’). And, in line with the common intuition, the most pervasive definition of what it is to be gay in the United States is that being gay is a matter of having same-sex erotic desires. The first seven entries on Urban Dictionary (that do not define gay as happy) define being gay as being homosexual, which in turn is defined exclusively in sexual and romantic terms such as “sexual preferences” for members of the same sex, “sexual attraction” to members of the same sex, and “guys who are into other guys.” (2016). The Merriam-Webster dictionary likewise defines being gay as being “sexually attracted to someone who is the same sex.” (2016). Even the American Psychological Association (APA) defines being gay as having same-sex “erotic attractions and sexual arousal” (APA 2008, 2-3). The American Psychiatric Association and The National Association of Social Workers purport the same definition (APA 2003, 4-5, esp. footnote 6).

Proponents of the common intuition, thus, hold that ‘gay’ is by definition a matter of having same-sex erotic desires, not unlike the proposition that ‘table’ is by definition a piece of furniture, typically with four legs and a flat top, and typically used to place things on top like cups, glasses, plates, vases, ornaments, computers, and the like, but not typically used for such things as sleeping or sitting on. That is, when people use the word ‘gay’ to refer to a person, what they mean is that that person has same-sex erotic desires. If this is right, then individuals, like some lesbian feminists,

who self-identify as gay despite not having same-sex erotic desires, are just misunderstanding the meaning of the word ‘gay,’ like an individual who calls a chair a ‘table.’

In the next section, I will explain why even if this is the definition of ‘gay’ that most people actually have in mind, or perhaps what they would say if they were asked what ‘gay’ means, there is nevertheless good reason to suppose that after reflecting on the considerations that I will discuss below they would subsequently retract their view as not accurately capturing their view on what ‘gay’ means. That is, I will show that even holders of the common intuition would find it intuitive that under some circumstances an individual can have same-sex erotic desires without being gay. In doing so, I will demonstrate, contra the common intuition, that being gay is not simply a matter of having same-sex erotic desires.

### **3 Gay for a Day? Being Straight with Same-Sex Erotic Desires**

In this section, I develop a counterexample to the proponents of the common intuition’s claim that being gay is a matter of having same-sex erotic desires. I intend for this to be a counterexample that engages with views and commitments that proponents of the common intuition will recognize as their own — i.e. I intend to engage with them on their own terms— rather than merely offering yet another different definition of ‘gay.’ In this way I hope to convince them that on reflection they do not after all endorse the claim that being gay is a matter of having same-sex desires. I argue that thinking critically about the possibility of a “gay-for-a-day pill”—an intervention that would give a straight individual exclusively same-sex erotic desires for one day— and how common intuition holders, including the person taking the pill, would perceive such a person post-intervention reveals that even people who thought that they would endorse the common intuition would, on reflection, recognize that being gay is not after all simply a matter of having same-sex erotic desires. I begin by explaining how this neuro-intervention might work. I then look at the social scripts straight people use to engage in homoerotic behavior without taking themselves or



others taking them to be gay, and I use these observations to motivate my counter-example before generalizing my argument to long-term interventions to show that my claim (that being gay is not just, and perhaps not even, a matter of same-sex attraction) applies not only to the contrived scenario of a short-duration change in sexual attraction induced through the use of a medical intervention, but that it applies to ordinary situations as well.

### **3.1 Making the Brain Gay**

In this section, after describing recent developments in neuroscience and genetics and how they inform our understanding of the neurophysiological factors that underpin sexuality, I argue that it is plausible that a neuro-intervention may at some stage be created that will give people exclusively same-sex erotic desires. The vast majority of neuroscientific and genetic research focuses on the prenatal conditions correlated with same-sex erotic desires in males, so that will be the example discussed in this section. I will begin with the neurohormonal studies that link the development of same-sex erotic desires with the exposure of the fetus to certain hormones, and conclude with twin studies and research on the “gay gene.”

Neuroscientific research on sexual orientation focuses on the hypothalamus, the brain’s hormone center. The hypothalamus plays a key role in determining the strength of individuals’ sex drives and the frequency that individuals have sex, so many scientists hypothesize that it plays some role in orienting erotic desires. Simon Levay (1991), for example, examined the cadavers of 41 males of varying sexual orientations to see if there were any morphological differences between the hypothalamuses of gay and straight men. He found that the third interstitial notch of the anterior hypothalamus (INAH-3) is the same size in gay men and straight women (half the size of straight men). Because most women appear to be attracted to men, and women have smaller INAH-3s than straight men, Levay reasoned that the size of the INAH-3 may indicate the sex/gender that one is erotically attracted to, and hormone levels might play a role in determining sexual orientation.

In order to discover the role that hormones play in directing erotic desires towards a specific sex/gender, researchers began investigating whether gay men and straight women share sexually dimorphic characteristics.<sup>5</sup> The idea was that if these similarities exist, then this may be interpreted as evidence that gay men are prenatally exposed to similar levels of the same hormones as straight women. If this is the case, then perhaps hormone levels predict the sex that one is erotically attracted to, and future studies could determine if hormone levels also to some extent determine the sex that one is erotically attracted to.

The 2D:4D ratio (the ratio of the length of the second and fourth finger) is one such sexually dimorphic trait; males have lower ratios than females, i.e. longer ring fingers (Manning 2002; Gobrogge et al. 2008 and Loehlin 2009). Higher exposure to androgens like testosterone is thought to cause male's decreased ratio, so if men with same-sex erotic desires, on average, have higher 2D:4D ratios than men with opposite-sex erotic desires, then they may have had less prenatal exposure to androgens. Researchers have performed twin studies across different ethnic groups to determine if men with same-sex erotic desires have different 2D:4D ratios than men with opposite-sex erotic desires. This research has resulted in two findings. (1) The similarity in digit ratios between monozygotic twins is higher than in dizygotic twins, suggesting that genetic influences outweigh non-shared environmental factors. (2) As predicted, men with opposite-sex erotic desires have lower 2D:4D ratios than men with same-sex erotic desires. This result has been confirmed in Japanese (Hiraishi et al. 2012) and Caucasian populations but does not seem to hold in Black and Chinese populations (Manning 2007).

The differences in hypothalamus size and the variation in hormone levels are thought to result from genetic variations between straight and gay individuals. One study found that fifty-two percent of male identical twins and twenty-two percent of male non-identical twins share

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<sup>5</sup> Traits that the two sexes of the same species do not generally share.

concordant non-straight sexual orientations (Bailey and Pillard 1991), so, assuming that these numbers are representative, non-environmental influences must play some role in determining same-sex erotic desires and their corresponding brain structures, or so the argument goes. With this thought in mind, a number of studies have been performed looking for what has come to be popularly referred to as “the gay gene.” Dean Hammer, for example, found that maternal uncles and cousins of gay men were more likely to be gay than fraternal uncles and cousins of gay men (1993), suggesting that the “gay gene” is on the X chromosome, which males inherit from their mothers. Hamer ‘et al.’ later found that gay brothers share chromosomal region Xq28 at a higher rate than straight brothers (82 percent compared to 50 percent) (Hu 1995). Hamer concluded that “at least one subtype of male sexual orientation is genetically influenced” (1993, 321). More recently, a Ph.D. candidate at UCLA created the first predictive model for sexual orientation using genetic markers. The algorithm uses epigenetic information from nine regions of the human genome to predict male sexual orientation with seventy percent accuracy (Ngun et al. unpublished).

The upshot of this research is that same-sex erotic desires might be influenced by genes that determine brain structures. There is, thus, no in principle reason to think that neuro-interventions that alter what sex one is erotically attracted to will not become available in the not-so-distant future. They could work by (say) prenatally altering hormone levels or by activating transcription factors. Indeed, there are already medications that diminish libido – anti-androgen medications administered (sometimes forcibly) to convicted sex offenders are one example. This is also a common side effect of many anti-depressant medications (Rosen et al. 1999), and all psychological traits are at least in some sense neurologically based. So if a safe and effective way of changing one’s same-sex erotic desires were ever discovered, it would likely stem from advances in genetics and neuroscience.

In the next two sections, I argue that if a straight individual took a neuro-intervention that gave them exclusively same-sex erotic desires, then even common intuition supporters would have

reason to agree that they would not necessarily have become gay. If I am right that common intuition supporters would come to this conclusion, then I will take myself to have shown that being gay is not simply a matter of having same-sex erotic desires. I begin by looking at the various ways that proponents of the common intuition with social capital—that is, individuals who can break various social norms without negative social consequences—engage in homoerotic activities without considering themselves or being considered by others to be gay. I then extend this analysis from homoerotic behaviors to same-sex erotic desires by considering what I call a gay-for-a-day pill—a neuro-intervention that would give an otherwise exclusively opposite-sex-attracted person who uses it same-sex erotic desires for one day—before extending the analysis to long-term interventions. I argue that an individual that took such an intervention would not become gay, so being gay is not simply a matter of having same-sex erotic desires.

### 3.2 Social Capital Allows Sexual Norms to be Broken

The term ‘gay’ is often used in two different ways, especially in high school settings. One way is to jokingly emasculate someone who is popular and widely known to be straight. Call this *friendly emasculation*. Another way is to emasculate and express disdain towards someone who is gay or does not have social capital. Call this *hostile emasculation*.

Paradoxically, being the target of friendly emasculation can reinforce one’s straightness if one has what CJ Pascoe calls “jock insurance” (2003). Consider hazing rituals at fraternities. Pledges are sometimes forced to engage in what is called “the elephant walk” or the “limp biscuit.”<sup>6</sup> The men who have the social capital to do these activities without becoming the target of hostile emasculation end up reinforcing their straightness by bonding with their fraternity brothers and

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<sup>6</sup> Urban Dictionary defines the ‘elephant walk’ as a group of guys that “form a straight line and grab the erect cock of the guy in back of them with one hand and put their thumb in the sphincter of the guy in front of them then they walk in a circle” and defines the ‘limp biscuit’ as a fraternity hazing ritual in which “Several guys stand in a circle around a biscuit (and) they all begin to jerk off, ejaculating onto the biscuit. The last person to cum, consequently, has to eat the soggy biscuit.”

demonstrating their commitment to their hyper-masculine and straight fraternity. These men do not consider themselves to be gay. In fact, they sometimes take themselves to be showing off how straight they are. They are so comfortable with their straight identities that they can break sexual norms without worrying about others thinking that they are gay.

Laura Hamilton (2007) gives another example of jock insurance in her recent study of straight college women who kiss other women at parties. In her study, Hamilton found that college women's homoerotic acts were consistent with being straight. Unlike "real lesbians," these self-identified straight women used same-sex kissing to attract the male gaze. In doing so, they took same-sex kissing—often a lesbian act meant to express affection towards a member of the same sex—and redefined it as a flirtation device to attract members of the opposite sex. As one subject in the study explained the purpose of same-sex kissing, "You get guys that you just like to see their expressions. It's just so funny to see them be like, 'Oh my god, I can't believe you just did that, that was awesome'" (164). Like the men in the fraternity example, these women did not take themselves to be lesbians, nor did the men that were watching them. They only kissed women that they were certain were straight while they were under the influence of alcohol—a drug commonly used by these women to make their same-sex kissing evidence of their "spontaneity" and a result of their transient state of mind instead of a genuine erotic attraction to the same sex. By kissing other women while using these social scripts, they separated themselves from what they called "real lesbians."

C.J. Pascoe and Tristan Bridges give one final example of jock insurance in their analysis of the Warwick men's rowing team's annual nude photo calendar—a calendar designed to raise money for the team and (more recently) raise awareness about bullying and homophobia (2014). Pascoe and Bridges note that at first it seems strange that these rowers would be willing to pose naked with other men. Men that engage in homoerotic activities are often seen as being gay—an identity that

often results in hostile emasculation and a loss of social capital—so making an all-male nude calendar seems like a huge social risk. However, ironically, these men’s actions may reinforce their straightness. Indeed, Pascoe and Bridges write that “the Warwick rowing team's gender and sexual practices and proclamations reinscribe their heterosexuality as so powerful and inevitable that even an anti-homophobia stance can't call them into question” (2014).

All of the above examples share the following theme: proponents of the common intuition with social capital or jock insurance can “act gay”—i.e. engage in same-sex erotic behaviors—without considering themselves to be gay or being considered to be gay by their peers. In fact, they often reinforce their straight identities through their homoerotic activities. My aim in emphasizing this shared theme among these examples is to underscore the following point. Considering the amount of flexibility some straight individuals have within their straight identities and the tendency for individuals with jock insurance to reinforce their heterosexuality *even more* when they act in more extremely homoerotic ways—just consider the limp biscuit!—it is difficult to imagine what these individuals could possibly do to undermine or cast doubt upon their unimpeachable straightness.

Admittedly, I concede that another feature that all of the above examples share in common is that, regardless of what happen to be *doing*, none of the protagonists actually have same-sex erotic attraction. In light of this, wouldn't the right conclusion to draw from the above examples be precisely that the common intuition is correct – i.e. that being gay is a matter of having same-sex erotic attraction – and hence that a gay-for-a-day pill would cross this boundary and that a user of this pill would become gay?

I see no reason to think that the gay-for-a-day pill would impinge on these individuals’ straight identities when all of these other activities do not. But notice that rather than simply following the above trend of homoerotic *behaviors* being compatible with being straight, the gay-for-a-day pill would indeed go a step further. In the Warwick example, the athletes have the masculine

capital and jock insurance necessary to act in homoerotic ways *without having same-sex erotic desires* attributed to them, but this is not what the gay-for-a-day pill would provide. Rather, high-tech short-lasting conversion therapy of this sort would by definition (my definition of what the gay-for-a-day pill would do) give a male athlete same-sex erotic desires. The athlete would not just be *acting* like they are attracted to members of the same-sex to support a cause or undergird their straightness; they would *actually have* the desires. However, rather than undermining my analogy, I argue that, paradoxically, this even greater contrast between what they would take themselves to still be—not gay—and their having same-sex erotic desires as well as any behaviors, makes my point even more salient — their straightness would only be underscored further if they still would not self-identify or be identified by their peers as now being gay.

Individuals with jock insurance already have sufficient social capital to get away with bending sexual norms. There is little reason to think that bending the norms further by taking the gay-for-a-day pill would diminish these men's perceived straightness, especially in certain hyper-masculine contexts like fraternities. Gay-for-a-day pills could be forced on individuals before they engage in activities like the elephant walk. But precisely because these individuals would only take the pill to access the hyper-heterosexual fraternity in the hopes of having sex with women, I suspect that few individuals (including, most importantly, they themselves) would consider these men gay. Rather, I propose that the gay-for-a-day pill would become just another vehicle through which straight men and women can re-assert their straightness — by acting gay without being gay.

Here is another example to demonstrate the same point. Imagine a college aged white girl who is repulsed by people who are gay. She believes that being gay is morally wrong and has visceral disgust reactions when she observes homoerotic activities. However, on her boyfriend's birthday, she decides to take a gay-for-a-day pill so that she can act out one of her boyfriend's sexual fantasies and find it slightly less repulsive (she still considers what she is doing to be morally wrong, is

disgusted by her actions, and strongly identifies as straight, but is wholeheartedly committed to give her boyfriend the best birthday present ever). It seems unlikely to me that the folk would believe that this girl temporarily becomes gay. It also seems plausible to me that while under the influence of the gay-for-a-day pill she might exclaim something like "Wow, Johnny, how ghastly — I really feel sexually attracted to that girl! I'm so turned on by her, how repulsive!", explicitly distancing herself from her actual same-sex erotic attraction. After all, like the straight girls who kiss other girls at parties, she is only taking on these desires as a tool for the pleasure of her boyfriend, not to be gay.

If my conjectures are correct about how people who take the gay for a day pill and others around them would view themselves or others<sup>7</sup> under the influence of the gay-for-a-day pill, then people who, I take it, are just like holders of the common intuition – ordinary folks, not some fringe group with idiosyncratic opinions and views – would indeed believe that at least some individuals under some circumstances could take the gay-for-a-day pill and yet not become gay. That is, some individuals *could have same-sex erotic desires without being gay*, which entails that being gay cannot after all simply be a matter of having same-sex erotic desires, contra the presuppositions that permeate the current legal debate about gay rights, equality, and discrimination.

### 3.3 Long-Term Interventions

To address the foreseeable objection that perhaps my argument would not work beyond contrived scenarios where same-sex erotic attraction lasts for only a short period of time (i.e. for just a day), I will now consider the possibility of a gay-for-a-year pill. Extending my argument to this longer case is essential because, after all, one can acknowledge that one cannot be gay for a day and that it is not the case that same-sex erotic desire is sufficient for being gay and still consistently hold that being gay consists in having a *pattern of same-sex erotic desires* (POD). Put another way, one can

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<sup>7</sup> Experimental philosophical work on whether the folk share my intuitions is beyond the scope of this paper but would be a helpful supplement to the arguments I make in this section.



claim that having exclusively same-sex erotic desires over an extended period of time is sufficient for being gay even if having same-sex erotic desires for just one day is not sufficient for being gay,<sup>8</sup> and, therefore, a long-term neuro-intervention that gave a person same-sex erotic desires for a sufficiently long period of time could make a straight person gay. Richard Pillard and J. Michael Bailey, for example, describe sexual orientation as “the sustained erotic attraction to members of one’s own gender, the opposite gender, or both—homosexual, heterosexual, or bisexual respectively” (1995). Call this the *POD thesis*.

### ***3.3.1 Gay For a Year***

One version of the POD thesis holds that if one has same-sex erotic desires for one year, then during that one year period, one is gay. I will argue against this position by providing a counterexample in which one has same-sex erotic desires for one year but does not consider oneself to be gay and is not considered by others to be gay. In doing so, I will demonstrate that having same-sex erotic desires for one year is not sufficient for being gay.

In section 3.2, I overviewed three ways straight individuals engage in same-sex erotic activities without being gay. One shared characteristic of each of these activities was that they were infrequent; these heterosexual women did not kiss other women at every party, nor did the Warwick team pose naked every day (let alone for a year). There are, however, other circumstances under which straight-identified individuals can engage in same-sex erotic activities regularly for a year without considering themselves to be gay or being considered gay by others. One such example is prison.

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<sup>8</sup> I will not tie the POD thesis down to any exact length of time. POD thesis holders could coherently hold that the same-sex erotic desires have to last at least one week or that they have to last forever to be sufficient for making one gay. I will attempt to show that, whatever the length of time, having same-sex erotic desires is not sufficient to make one gay.

Prison comes with a variety of heterosexual scripts that enable straight men to have sex with other men without being identified as gay (Kunzel 2002 and 2008). For example, some incarcerated men argue that they are straight by appealing to their insatiable sex drive or the “agonizing call of biology” (Kunzel 2002, 260). They claim that although they prefer to have sex with women, they have to make due with less than ideal circumstances. One prisoner explained “These are men in their physical prime. They have the same drives that young men on the outside do, but they don’t have the same opportunities for satisfaction. They crave sex, but there are no girls. So, of necessity, prisoners turn to each other.” (ibid. 261). Author Louis Berg similarly appeals to the male sex drive in his description of male prisons: “in the end, all normal men (i.e. straight men) will find themselves torn by this natural hunger where satisfaction is denied for any length of time.” (1934, 143).

Other prisoners appeal to the need to protect themselves. They are not gay because they only have sex with other men out of necessity. These prisoners agree to (say) have an exclusive same-sex sexual relationship with another inmate not because they are gay, but because they worry that if they don’t, they will be raped by other prisoners or harmed in another way. They are straight men in non-ideal circumstances.

I suspect that straight men that use the gay-for-a-year pill before or during a prison sentence could appeal to similar social scripts. For example, men using the neuro-intervention could explain that they only took the pill because they knew that they would not have access to women—the gender they would prefer to have sex with if given the choice—and because they have an insatiable sex drive they knew that they would end up having sex with other men during their sentence. And if they are going to do that, why not enjoy it? Other users could argue that they are only taking the pill to protect themselves. They assume that they are going to have to have a same-sex relationship for their own personal safety and taking the pill would make it easier to endure the relationship.

Under either justification, it seems to me very unintuitive to insist that the person concerned becomes gay after taking the pill despite the fact that they whole-heartedly disavow this claim, and that they whole-heartedly insist on their straightness. In the former case, the intervention user continues appealing to masculine social scripts, like their sex drive, to buttress their identification as straight. As we saw in the fraternity and Warwick examples, appeals to masculinity are intimately tied with straight identities, and more masculine individuals can bend sexual norms without being identified as gay (especially in hyper-masculine settings like fraternities, male athletics, or, indeed, prisons). In the latter case, the intervention users do not take the same-sex erotic desires to have anything to do with their sexual identity (indeed, they could be happily married to women outside of prison); rather, the desires are simply a means to an end—their protection.

If the conclusions I have derived from considering the possibility of a gay-for-a-year pill are correct, then having same-sex erotic desires for one year is not sufficient to make one gay, and being gay, contra its use in current legal discourse, is not simply a matter of having same-sex erotic desires. Though this argument alone does not prove that the POD thesis is not sound—recall that I did not tie the POD thesis to any specific length of time—I believe that the above argument (in addition to my arguments in section 3.2) can be extended to cover any length of time that the POD thesis might deem sufficient to make one gay. The social scripts that allow straight men to use the gay-for-a-year pill while in prison without considering themselves to be gay or being considered by others to be gay may even become more credible as the prison sentence increases. Controlling one's sex drive for one year (i.e. not having sex with other men for one year) is far easier than remaining abstinent for (say) ten years.<sup>9</sup> How people identify and what social scripts are at their disposal to describe what they do

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<sup>9</sup> None of the above discussion rules out the possibility that individuals who take reversible long-term interventions could become gay. For instance, an individual who identified as gay, had a long-term relationship with a same-sex partner, and was invested in gay politics would likely become gay after taking the intervention (if they were not gay already). My point is only that a pattern of same-sex erotic desires or even that plus same-sex erotic behavior is not sufficient to make one gay.

and how they feel play a critically important role in imbuing same-sex attraction with either gay or straight salience. Particular behaviors (e.g. intercourse with a person of the same sex) and feelings (e.g. same-sex erotic attraction) might even, by default, normally be associated with particular scripts and self-identifications. However, what is doing the conceptual work here – what turns homo-erotic behavior and same-sex attraction into manifestations or evidence for a person *being* gay – are these social scripts and self-identification. By itself, the behaviors and feelings are neither gay, nor straight, nor anything in particular.

### 3.4 Legal Considerations

As I explained in section 2.1, the common intuition plays a critical role in many arguments by advocates for gay rights and even by American Supreme Court Justices. One prominent example is the immutability argument that was discussed in that section. For convenience of my upcoming analysis, this argument can roughly be standardized as follows:

1. Being gay is a matter of having exclusively, largely immutable, same-sex erotic desires (i.e. the common intuition).
2. The orientation of one's erotic desires is predetermined, or at least strongly constrained by biological and social factors.
3. The biological and social factors to which one is exposed are largely out of one's control—i.e. nobody gets to choose the biological and environmental factors that determine their own sexual orientation.
4. Thus, one cannot choose whether or not one is gay.
5. Nobody should be discriminated against on the basis of what they can neither choose nor change.
6. Therefore, nobody should be discriminated against on the basis of being gay.

In sections 3.2 and 3.3, I argued against premise one. If I am correct that premise one is false, however, then the immutability argument no longer demonstrates that one cannot choose whether or not to be gay. At best, the argument shows that (with our present technology, which has not yet produced a gay-for-a-day or similar effective and presumably medically safe gay conversion

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therapy) one cannot choose whether or not one has same-sex erotic desires. And, from there, the argument can only derive the conclusion that nobody should be discriminated against on the basis of *having same-sex erotic desires*. That is, without premise one, the premises no longer entail the conclusion that nobody should be discriminated against on the basis of *being gay*.

The distinction between being gay and having same-sex erotic desires has serious consequences for arguments for gay rights. For example, as I mentioned in section two, one of the criteria for giving a case heightened scrutiny is that being a member of the group that is discriminated against (in this case people who are gay) “is not a choice (and is) immutable” (Kaplan 2015: 142). This criterion was met largely on the basis of the common intuition—other theories discussed did not hold that sexual orientation was immutable. So if, as I have argued, the common intuition is not correct and being gay is not simply a matter of having same-sex erotic desires, then it is not clear that cases involving discrimination against the gay community (as opposed to *some* of the gay community, namely, people who are innately same-sex attracted<sup>10</sup>) warrant heightened scrutiny. To demonstrate one practical implication of my argument, lesbian feminists – that is, women who are in sexual relations with other women but not because they are same-sex attracted, see section 2.1. above or a page and a half further below – would not be entitled to protection from discrimination given the way that arguments for gay rights are currently being framed. Furthermore, for *Windsor v. United States*, being denied heightened scrutiny may even have prevented the case from reaching the Supreme Court.

Equally importantly, distinguishing between being gay and having same-sex erotic desires reveals that the gay rights debate is being framed incorrectly. The definition of gay currently used—what I have called the common intuition—does not encompass all gay individuals and only refers to

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<sup>10</sup> Even then, the argument will only work as long as we lack the technology to alter the orientation of one’s same-sex erotic desires (see Vierra and Earp 2015 and forthcoming).

one aspect of some gay individuals' identities. This is important not just because the way the term 'gay' is currently being used in legal discourse is misleading, but also because of the sorts of ramifications vis-à-vis practical implications that I mentioned in the previous paragraph. That is, this has practical implications for who ends up being entitled to protection under any anti-discrimination legislation that results from this debate, and who will not be entitled to its protection. The term is presented as if it includes all gay individuals when, in fact, it does not. Some gay individuals like lesbian feminists and many queer individuals are excluded in the definition of 'gay' that is presupposed within the current legal debates.

A further implication of my argument is that the current framing of the legal debates about gay rights, discrimination, and equality should be troubling to both progressives and conservatives alike. It should trouble conservatives for two reasons. Firstly, because even though the definition of 'gay' used in debates only refers to one portion of the gay population, most likely in practice the rights will end up being extended to the entire gay population (e.g., even those who could choose otherwise, like lesbian feminists and individuals that identity as bisexual) because who will think to confirm whether the person concerned is innately same-sex attracted or whether this was just a choice that they made. Secondly, this also gives an unfair advantage to gay rights advocates in the current debate because gay rights advocates only have to argue for the rights of this smaller group of individuals – and indeed, only a portion of this group qualifies for the special legal treatment that was afforded to the whole group, namely heightened scrutiny, and if they win the debate then they will secure benefits for the larger and more diverse group as well. For these reasons, conservatives should want to expand the definition of 'gay' used in legal discourse from the common intuition to one that includes all gay individuals. Doing so would help them make a stronger case against gay rights, and it would center the conversation more accurately on the actual group of individuals whose rights are in question, instead of the group for which it is easiest to make a strong case.

On the other hand, progressives should be troubled by the current framing of the legal debates about gay rights, discrimination, and equality for different kinds of reasons (regardless of any unfair advantages they might otherwise get in the debate with their opponents). Most importantly, as it stands, the definition of ‘gay’ used by progressives simply does not include all of the individuals that they want to, or at least should want to, protect. The definition excludes members of the gay community that likewise face severe discrimination but do not take erotic desires to be a major part of their identity.

Take lesbian feminists, whom I briefly mentioned four paragraphs earlier, as one example. As I recounted in the last two paragraphs just prior to section 2.1. above, lesbian feminists are lesbians, but they “deny that their choice to be lesbians arises from sexual interest or sexual proclivity.” Instead, they identify as lesbians for normative and political reasons. “They believe that it is male society that defines lesbianism as a sexual act and that this reflects men’s limited view of women as sexual objects” (Faderman 1984: 87). Thus, for lesbian feminists, being a lesbian is a political choice. As they note: “Lesbians are not born...Lesbians are women who have *chosen* to refuse to put themselves at the service of men.” (Faderman 2015: 234).

Because lesbian feminists deny that same-sex erotic desires are an important part of their identity—if they have such desires at all—and claim that they choose their sexual orientation—i.e. their sexual orientation is not immutable—they do not fall under the purview of the common intuition. But progressives should not want to exclude lesbian feminists from the conversation, and subsequently from protection under any resulting anti-discrimination legislation, simply because they are not included in an inaccurate definition of what it is to be gay. Lesbian feminists are met with many of the same injustices that gay individuals are because they choose to be with other women and want to fight against patriarchal norms that harm women generally. Excluding lesbian feminists not only unfairly treats lesbian feminists as if they are not a part of the gay community—a

community they are strong advocates for—but also sends a message to the gay community that gay individuals only deserve protection from discrimination if they cannot choose whether or not to be with a member of the same sex. Put another way, only including some gay individuals in arguments concerning gay rights and excluding other gay individuals sends the message “gay is only okay for some gay individuals.” This message starkly contrasts with “gay is good”—the simple slogan popularized at the beginning of the gay liberation movement in the 1960s—which was designed to lift up a united community comprised of all gay individuals. It is the latter slogan that progressives should endorse, and one way to begin doing that would be to expand the definition of ‘gay’ used in legal discourse from the common intuition to one that includes all gay individuals.

#### **4 CONCLUSION**

In this thesis, I used the possibility of neuro-interventions on sexual orientation to challenge the common intuition that being gay is simply a matter of having same-sex erotic desires. In doing so, I demonstrated that there is a discrepancy between the individuals referred to by ‘gay’ in legal discourse and the larger and more diverse gay community. I then argued that this discrepancy should be disconcerting to both conservatives and progressives. Conservatives should worry because special provisions, protections, and rights may be extended to gay individuals who under the current arguments would not qualify for those provisions, protections, and rights, and progressives should worry because the definition of ‘gay’ presupposed in legal discourse excludes members of the gay community that they want, or at least should want, to also protect. I concluded by suggesting that debates over gay rights should adopt a broader, non-exclusive, definition of ‘gay,’ and I argued that such a definition would be more agreeable to both parties.



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