

CHOOSE OR LOSE: EMBRACING THEORIES OF CHOICE IN GAY RIGHTS LITIGATION STRATEGIES

JONATHAN PICKHARDT*

[A]lthough the exact origins of sexual desire are unknown, there is consensus that a person's sexual orientation, homosexual or heterosexual, cannot be changed by a simple decision-making process Thus, sexual orientation per se is not a characteristic over which an individual has had any responsibility in acquiring.

—Brief of the Human Rights Campaign Fund
et al., as amici curiae in *Romer v. Evans*¹

INTRODUCTION

In the decade since *Bowers v. Hardwick*,² gay³ rights advocates have increasingly employed constitutional litigation strategies that explicitly or implicitly characterize being gay as something that gay men and lesbians do not choose. Arguments that sexual orientation should constitute a suspect classification under the Equal Protection Clause and claims that there is a significant distinction between homosexual status and homosexual conduct are two examples of such “choice-denying” arguments.

The decision of gay rights litigators to adopt choice-denying constitutional arguments reflects both the exigencies of litigating after *Bowers* and the broader social acceptance of the belief that gay people do not choose to be gay. However, choice-denying arguments have proven ineffective in the legal realm. In addition, they threaten to undermine the broader gay rights movement by implicitly suggesting that being gay is undesirable, by leading gay rights advocates to make claims that are untenable and short sighted, and by misrepresenting segments of the gay community.

* I wish to thank Marc Wolinsky and Professors David A. J. Richards and John Pagan for their invaluable suggestions. I also wish to thank Marianna Vaidman Stone, Terry Maroney, Elizabeth Kramer, and the staff of the *New York University Law Review* for their superb editing assistance.

¹ Amicus Curiae Brief on Behalf of the Respondents by the Human Rights Campaign Fund at 23, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039).

² 478 U.S. 186 (1986).

³ Throughout this Note, “gay” is used, for lack of a more accepted and inclusive term, to denote both men and women who consider themselves to be gay or lesbian.

Commentators who have recognized the futility of, and damage caused by, choice-denying legal arguments have recommended that gay rights litigators remove issues of choice from legal arguments altogether.⁴ This Note agrees that gay rights litigators should abandon choice-denying arguments but argues further that “choice-affirming” arguments, arguments that emphasize the myriad ways that gay men and lesbians do choose their sexual identities, should be adopted in their stead. This shift would encourage acceptance of gay men and lesbians rather than mere tolerance, focus the gay rights debate on the legitimacy of gay identities rather than the inevitability of gay people, and empower gay men and lesbians by forcing them to assert responsibility for their own identities. Furthermore, choice-affirming gay rights strategies have become more tactically viable in the wake of *Romer v. Evans*,⁵ which called into question the continuing vitality of *Bowers*.

At the outset, it must be noted that this Note employs a simple taxonomy to describe whether gay rights arguments suggest that gay people do or do not make a choice to be gay. The term “choice-denying” is used to denote any argument or theory that claims, either explicitly or implicitly, that gay people do not choose to be gay. Choice-denying arguments generally rely upon theories that gay men and lesbians are gay due to factors beyond their control, such as genetics or early socialization.⁶

The term “choice-affirming” is used to denote any argument or theory that emphasizes how gay men and lesbians, regardless of biological or social inclination, make conscious choices to form gay identities.⁷ Choice-affirming arguments can encompass a wide range of

⁴ See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *Stan. L. Rev.* 503, 516-28 (1994) [hereinafter Halley, *Politics of Biology*] (developing argument that gay rights litigators should abandon choice-denying arguments based on biological causation in favor of arguments that take no stance on causation at all); Janet E. Halley, *The Status/Conduct Distinction in the 1993 Revisions to Military Anti-Gay Policy*, 3 *GLQ: J. Lesbian & Gay Stud.* 159, 220-21 (1996) (arguing that gay rights litigators should abandon arguments based on status/conduct distinction).

⁵ 517 U.S. 620 (1996).

⁶ For a discussion of the evidence that choice-denying theories are true, see *infra* Part I.C.1.

⁷ This distinction between choice-denying and choice-affirming theories is closely related to the more commonly referred-to distinction between essentialism or determinism and constructivism or voluntarism. For an illuminating discussion of the meaning of, and distinctions between, those terms, see Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 *Va. L. Rev.* 1833, 1836-43 (1994). The more pedestrian terminology has been adopted here both to promote accessibility and to help limit the discussion to the visceral rhetorical impact of the distinction rather than its more refined theoretical underpinnings.

theories, however. They can rely on the theory that gay people make the choice to cultivate their desires for other people of the same sex and thus have conscious control over all aspects of their sexual preference and identity.⁸ They can also rely on the less extreme position that while gay people may be programmed, biologically or socially, to have a sexual preference for people of the same sex, it is only through consciously choosing to recognize and express that preference in a social or cultural setting that they form a gay identity.

It is conceded that this bipolar taxonomy is exceedingly crude and elides what must be a complex system of individual choice, sociology, and biology through which sexual identities are formed. After all, biology does not force anyone to march in a gay rights parade, but neither does conscious choice explain the innermost recesses of anyone's sexual desires. This Note, however, is not concerned with presenting a complete theory of how gay identities are formed. Instead, it recognizes that, in the battles for gay rights, such complexity will invariably be subjugated by all sides to the forces of rhetoric. It is thus only with the impact of that rhetoric that this Note is concerned. For that purpose, a crude taxonomy is sufficient.

In emphasizing the importance of rhetoric in legal arguments, this Note also concentrates more on long term advances for the gay rights movement than short term victories in specific cases. Although the two cannot be completely divorced, neither does one guarantee the other. In his last article, Tom Stoddard reflected on the common disjunction between changes in law that are merely "rule-shifting" and those that are "culture-shifting," noting that while "rule-shifting" laws can affect conduct, it is the "culture-shifting" laws that "alter basic principles, and alter them in ways that are inescapable—indeed transformational. They remake culture."⁹ It is on such "culture-shifting" changes that Professor Stoddard suggested the gay rights movement must set its sights.¹⁰ Thus, while not ignoring the "rule-shifting" importance of gay rights constitutional arguments, this Note is more con-

⁸ One creative analogy has been used to describe how this position is plausible: [A woman on a panel said she chose to be a lesbian] and the audience was just going crazy! "What does this mean?" And "Well, do you still have an attraction to men?" And she said, "No, I don't." And they said, "But that can't be, if you had it before." And she said, "Yeah, I used to like cheese but I don't eat cheese any more and I actually don't like it; it was an acquired taste. Men were the acquired taste. I no longer have the taste for them."

Vera Whisman, *Queer By Choice* 31-32 (1996).

⁹ Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law to Make Social Change*, 72 N.Y.U. L. Rev. 967, 978 (1997).

¹⁰ See *id.* at 982 ("'Rule-shifting' has its merits and advantages, but it is simply less potent than 'culture-shifting' in accomplishing the things I want to accomplish.")

cerned with their ultimate "culture-shifting" role in establishing both legal and social equality for gay men and lesbians.

Part I of this Note explores how choice-denying arguments have evolved over the last decade. It first shows how the failure of choice-affirming arguments in *Bowers* led to the adoption of choice-denying arguments in subsequent litigation. It then discusses two forms of choice-denying arguments: that sexual orientation constitutes a suspect classification and that homosexual status is distinct from homosexual conduct. Next, it illustrates how choice-denying theories have been propagated outside the legal realm through popular gay rights arguments, gay narratives, and scientific studies.

Part II critiques the choice-denying arguments described in Part I. It shows how they have met with almost complete failure in the courtroom. It then discusses the many flaws that choice-denying arguments have as a foundation for a gay rights movement in general. Part III describes the advantages that choice-affirming arguments offer over their choice-denying alternatives and offers ideas for choice-affirming constitutional strategies.

I

THE EVOLUTION OF CHOICE-DENYING THEORIES

This Part explores how gay rights arguments over the last decade have addressed the question of whether gay men and lesbians choose to be gay. It finds that while the impulse behind the gay rights legal strategies in the landmark case *Bowers v. Hardwick*¹¹ was to treat being gay as a choice, the failure of those strategies set in motion a shift to arguments that instead characterize being gay as not chosen. This Part further describes how this shift reflects the gay community's loose consensus, formed on the basis of gay narratives, a simple syllogism, and scientific studies, that being gay truly is not a choice. Finally, this Part explores some of the reasons that gay men and lesbians rely on choice-denying arguments outside the legal realm.

A. *Choice-Affirming Arguments in Bowers*

Bowers v. Hardwick, the Supreme Court's first case squarely addressing the constitutional rights of gay men and lesbians, grew out of the arrest of Michael Hardwick, a gay man, for breaking a Georgia sodomy statute by engaging in a proscribed sexual activity with another man in the privacy of his own bedroom.¹² Although the District Attorney eventually dropped the charges, Hardwick brought suit in

¹¹ 478 U.S. 186 (1986).

¹² See *id.* at 187-88.

federal court challenging the constitutionality of the statute, claiming that it violated his right to "sexual intimacy"¹³ protected by the Due Process Clause of the Fourteenth Amendment.¹⁴ In a 5-4 decision, the Court cursorily rejected Hardwick's claim, holding that the Due Process Clause does not "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."¹⁵

Bowers, as a gay rights case, represents the culmination of a failed attempt by gay rights litigators to append the right of "sexual intimacy" to the laundry list of substantive due process privacy protections that the Court has elaborated since *Griswold v. Connecticut*.¹⁶ Given that the list already included rights relating to contraception,¹⁷ abortion,¹⁸ marriage,¹⁹ and family²⁰—all ostensibly similar to the sought right to sexual intimacy—this strategy had a reasonable likelihood of success. It had, in fact, succeeded in the circuit court below,²¹ although it had fared less well in other circuits.²²

The arguments utilized by the litigators in *Bowers* were, in essence, choice-affirming arguments. These arguments relied upon the foundation of privacy cases that recognized the rights of individuals to make certain fundamental personal *choices* free from unjustified government coercion. Hardwick's main brief emphasized this point in discussing the relationship between the right of sexual intimacy and the Court's contraception and abortion decisions: "[T]he constitu-

¹³ This was the term Hardwick used in his brief. See Brief for Respondent at 10, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) [hereinafter *Hardwick Brief*].

¹⁴ See *Bowers*, 478 U.S. at 188.

¹⁵ *Id.* at 192.

¹⁶ 381 U.S. 479 (1965).

¹⁷ See, e.g., *id.* at 485-86 (invalidating Connecticut law prohibiting use of contraceptives because it interfered with intimate relationship between husband and wife and thus violated right of privacy).

¹⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (invalidating Texas law banning abortions).

¹⁹ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (invalidating Wisconsin statute prohibiting residents with unpaid child support from marrying without court approval).

²⁰ See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 499-500 (1977) (invalidating zoning ordinance that limited occupation of dwelling to one family and defined family sufficiently narrowly to preclude grandmother from living with her two grandsons who were cousins).

²¹ See *Hardwick v. Bowers*, 760 F.2d 1202, 1211 (11th Cir. 1985) (subjecting Georgia sodomy law to strict scrutiny based upon its infringing right to privacy), *rev'd*, 478 U.S. 186 (1986).

²² See, e.g., *Wade v. Baker*, 769 F.2d 289, 292 (5th Cir. 1985) (finding that state sodomy law was supported by state interest in "implementing morality, a permissible state goal"), *rev'g* 553 F. Supp. 1121 (N.D. Tex. 1982); *Dronenburg v. Zech*, 741 F.2d 1388, 1397-98 (D.C. Cir. 1984) (holding that military policy of discharging service members for homosexual conduct did not violate right to privacy). But see *Baker v. Wade*, 553 F. Supp. 1121, 1140 (N.D. Tex. 1982) (holding that right to privacy protects private sexual conduct between consenting adults), *rev'd*, 769 F.2d 289 (5th Cir. 1985).

tional principle of 'individual autonomy' affirmed in *Griswold*, *Eisenstadt*, and *Roe* protected not procreation, but the individual's 'right of decision' about procreation."²³ An amicus brief filed by Lambda Legal Defense and Education Fund made the point even more explicitly, arguing that "[b]ecause the choice of an intimate sexual activity or of a sexual partner is so keenly personal and important to the individual, the Constitution protects the individual's *right to choose* even if a majority disapproves of the decision he or she makes."²⁴

Justice White's decision for the Court in *Bowers* was a stinging defeat for gay rights advocates. It first reframed the right in question from the right to "sexual intimacy" as articulated in *Hardwick's* brief²⁵ to the much narrower "right of homosexuals to engage in acts of sodomy."²⁶ Finding, unsurprisingly, that the right as reframed was neither "deeply rooted in this Nation's history and tradition"²⁷ nor "implicit in the concept of ordered liberty,"²⁸ the decision dismissed

²³ *Hardwick Brief*, supra note 13, at 12 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687-89 (1977)).

²⁴ *Amicus Curiae Brief on Behalf of the Respondents by Lambda Legal Defense and Education Fund, Inc.* at 11, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140) [hereinafter *Lambda Brief*] (emphasis added). To be clear, the briefs in *Bowers* did not adopt the most extreme choice-affirming position, that being gay is a completely chosen attribute. Rather, they took the narrower choice-affirming position that people choose types of sexual activity and sexual partners. See *Hardwick Brief*, supra note 13, at 12 (arguing that Supreme Court's privacy cases protect decisions surrounding "sexual activities and relationships"); *Lambda Brief*, supra, at 12 (describing "adult's interest in deciding to engage in a particular sexual activity or choosing a partner"). While *Hardwick's* main brief is silent as to what influences people to make these choices, *Lambda's* amicus brief clearly takes a choice-denying position on that question: "[T]he consensus of expert authority is that sexual orientation has already developed by a very early age, independent of isolated sexual experiences." *Id.* at 14. *Lambda's* constitutional arguments are nonetheless choice-affirming because they do not rely on the truth of this choice-denying assertion and, in fact, through suggesting that gay people choose both sexual partners and activities, suggest that gay people have a large degree of control over the types of activities that signify that a person is gay.

The constitutional claims in *Bowers* would not have been choice-affirming had they integrated into their privacy arguments a claim that the choice of sexual partner should be a protected or fundamental privacy right because it is beyond the individual's control to make a different choice. In this form of choice-denying privacy argument, laws prohibiting same-sex sexual intimacy are said to be unconstitutional because they compel gay people to be celibate. See, e.g., *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1138 (9th Cir. 1997) (Reinhardt, J., dissenting) ("[T]he idea that [homosexual] persons should be compelled to surrender entirely the right to engage in sexual conduct if they wish to serve in the armed forces would seem to me clearly to conflict with the Constitution and in particular with substantive due process."). But see *Jed Rubinfeld, The Right of Privacy*, 102 *Harv. L. Rev.* 737, 799-801 (1989) (making same argument from choice-affirming position suggesting that sodomy laws compel heterosexuality, not celibacy).

²⁵ *Hardwick Brief*, supra note 13, at 10.

²⁶ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

²⁷ *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

²⁸ *Id.* at 191 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

the claim that the Court's privacy cases protected "a right to engage in such conduct" as "at best, facetious."²⁹

B. *Post-Bowers Constitutional Choice-Denying Arguments*

Despite the fact that the reasoning employed by the Court has been roundly rebuked in academic circles as a misapplication of the Court's privacy jurisprudence,³⁰ the defeat sent gay rights litigators back to the drawing boards to reformulate their strategies. It also forced them to move from challenging sodomy laws to challenging other types of anti-gay government legislation—most commonly, the federal laws excluding gays from the military, state ballot initiatives prohibiting local gay civil rights ordinances, and state laws prohibiting same-sex marriage.³¹ The arguments that gay rights litigators have utilized in these areas are clearly distinct from those that failed to carry the day in *Bowers*. First, they have largely depended on equal protection rather than privacy protections. Second, they have generally rested on choice-denying positions rather than choice-affirming positions. This section will discuss the choice-denying aspects of two arguments: that sexual orientation as immutable is deserving of suspect status under the Equal Protection Clause; and that discrimination against gay people is constitutionally distinct from discriminating against people who engage in homosexual acts.

1. *Choice-Denying Arguments for Suspect Class Status: Immutability*

The Supreme Court has not considered whether sexual orientation constitutes a suspect or quasi-suspect classification under the Equal Protection Clause of the Fourteenth Amendment or the equal protection component of the Due Process Clause of the Fifth Amendment. Since the Court's ruling in *Bowers*, however, gay rights litigators have increasingly made suspect classification claims in state and

²⁹ *Id.* at 194.

³⁰ See, e.g., Charles Fried, *Order and Law: Arguing the Reagan Revolution—A First-hand Account* 81-84 (1991) (describing Justice White's decision in *Bowers* as unreasoned and cruel); David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. Rev. 800, 801 (1986) (arguing that Court's "failure to extend [the right of privacy] to consensual homosexuality is both interpretively wrong and unprincipled"); Thomas B. Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. Chi. L. Rev. 648, 651-56 (1987) (criticizing Court's reasoning in *Bowers* as "weak").

³¹ See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (considering challenge to state ballot-enacted constitutional amendment prohibiting local gay rights ordinances); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (considering challenge to Department of Defense Directives prohibiting gay men and lesbians in the military); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (considering challenge to state marriage law limited to opposite sex couples).

lower federal courts.³² Because the Supreme Court has not elaborated a specific test for determining when a classification will be deserving of suspect or quasi-suspect status, lower federal courts evaluating these arguments have based their decisions upon the examination of a number of factors that the Supreme Court has repeatedly considered,³³ including whether the classification represents an immutable characteristic.

Numerous courts have given significant attention to the immutability factor, and some have considered it an absolute requirement.³⁴ Lower courts have justified this reliance on the immutability factor by reference to the Supreme Court's rationale for granting heightened scrutiny to sex-based classifications in *Frontiero v. Richardson*:³⁵

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."³⁶

This justification for immutability thus relies on a nexus between immutability and responsibility: Members of a group defined by a characteristic that they neither chose nor can change are not responsible

³² See, e.g., *Padula v. Webster*, 822 F.2d 97, 99 & n.1 (D.C. Cir. 1987) (considering suspect class equal protection challenge to FBI's refusal to hire lesbian applicant); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 434-40 (S.D. Ohio 1994) (considering suspect class equal protection challenge to voter enacted city charter amendment prohibiting city from enacting gay rights ordinances), rev'd, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh'g, 128 F.3d 289 (6th Cir. 1997); *Dean v. District of Columbia*, 653 A.2d 307, 333-58 (D.C. 1995) (considering suspect class equal protection challenge to District of Columbia ordinance prohibiting same-sex couples from marrying).

³³ These include whether the classification has been used historically in purposefully discriminating against a target group, see *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (holding that classifications based upon age are not suspect), whether the classification is based on a characteristic unrelated to ability, see *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (holding that mental retardation is not quasi-suspect classification); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (holding that gender is suspect classification), whether the target group is politically powerless, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that classification based upon income is not suspect), and whether the classification represents an immutable characteristic, see *Plyler v. Doe*, 457 U.S. 202, 220 (1982) (basing denial of suspect status to illegal aliens on ground that undocumented status is not immutable characteristic); *Frontiero*, 411 U.S. at 686 (granting gender suspect status partially on ground that gender is immutable characteristic).

³⁴ See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (finding gay men and lesbians are not a suspect or quasi-suspect class because "[h]omosexuality is not an immutable characteristic").

³⁵ 411 U.S. 677 (1973).

³⁶ *Id.* at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

for their situation and thus should be eligible for heightened judicial protection. This explanation of the immutability requirement comports with the Court's subsequent holding in *Plyler v. Doe*³⁷ that illegal aliens do not constitute a suspect class because "undocumented status [is not] an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."³⁸

In seeking to satisfy the immutability factor, gay rights litigators have often made the choice-denying claims that being gay is something that gay men and lesbians do not choose, cannot change, and have no responsibility in acquiring. To support these characterizations, they have relied heavily upon a growing body of scientific and sociological studies that suggests that sexual orientation is determined either by biological factors prior to birth or by social factors at a very early age.³⁹

Examples of such choice-denying claims as part of suspect classification arguments are common. For example, in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*,⁴⁰ gay rights litigators seeking to establish sexual orientation as a suspect classification in a challenge to an anti-gay initiative relied on a psychologist's testimony

³⁷ 457 U.S. 202 (1982).

³⁸ *Id.* at 220. A second justification for the immutability factor, one propounded by John Hart Ely, is that minority groups defined by immutable characteristics are more likely to face empathy failure in the legislative process. In other words, the legislative process is less likely to protect groups that are defined by immutable characteristics because the legislators are less likely to feel empathy for a group to which they never, by definition, could belong themselves. See John Hart Ely, *Democracy and Distrust* 154-70 (1980). The immutability factor would thus militate against providing heightened protection to any minority defined by age, for example, because legislators, who were all young once and will all be old some day, will naturally feel some empathy for any group defined by age. The Supreme Court provided some credence for Ely's justification for the immutability factor in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), where it quoted Ely as support for denying mentally retarded members of a group home quasi-suspect class status despite the fact that mental retardation is clearly an immutable characteristic: "Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling." *Id.* at 442 n.10 (quoting Ely, *supra*, at 150). The Court found that the immutability factor was thus not relevant, in part because it was a case where Ely's justification was inapplicable—the immutability of mental retardation was not a proxy for empathy failure. Because Ely's justification was used in *Cleburne* to de-emphasize the importance of the immutability factor, it is not clear whether the Court would ever use the empathy failure justification to support the extension of suspect status, or whether the inapplicability of Ely's justification in *Cleburne* marks a general decline in the relevance of the immutability factor. For an opinion supporting the latter interpretation, see Halley, *Politics of Biology*, *supra* note 4, at 510 (arguing that while immutability remains factor after *Cleburne*, it is unlikely to regain importance it held in *Frontiero*).

³⁹ See *infra* notes 83-96 and accompanying text.

⁴⁰ 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996), *vacated holding reinstated on reh'g*, 128 F.3d 289 (6th Cir. 1997).

that “sexual orientation is an involuntary status, that it sets in at an early age, [and] that it is unamenable to techniques designed to change it.”⁴¹ Likewise, in the state court proceedings in *Romer v. Evans*,⁴² gay rights litigators presented the testimony of scientist Dean Hamer that he was “99.5% sure there is some genetic influence in forming sexual orientation” to advance a biological theory in support of arguments for suspect classification status.⁴³ Similar scientific support prompted gay rights litigators in *Dahl v. Secretary of United States Navy*⁴⁴ to assert as part of their suspect classification argument that “it has now been conclusively and authoritatively established that sexual orientation is biological, genetic and innate.”⁴⁵

2. *Choice-Denying Arguments for Claiming a Status/Conduct Distinction*

Gay rights litigators have also used choice-denying arguments to make another point—that sexual orientation is a status that is separate from homosexual conduct. These arguments are made in two contexts: as a response to the claim that *Bowers* limits the equal protection remedies available to gay men and lesbians, and as a challenge to the military’s “Don’t Ask, Don’t Tell” policy as violating Fifth Amendment and First Amendment protections.

The majority of courts that have rejected suspect and quasi-suspect classification status for sexual orientation, perhaps surprisingly, have not relied on the notion that sexual orientation lacks any of the specific “suspect class” factors⁴⁶ enunciated by the Supreme Court. Instead, they have based their rejections on the Supreme Court’s holding in *Bowers* that Georgia’s sodomy law did not violate due process because homosexuals do not have a fundamental right to engage in sodomy.⁴⁷ Many courts have used that ruling as dispositive of suspect class claims by relying on the following reasoning utilized by the Ninth Circuit in *High Tech Gays v. Defense Industrial Security Clearance Office*⁴⁸: “[B]y the *Hardwick* majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class enti-

⁴¹ *Id.* at 424.

⁴² *Evans v. Romer*, No. 92 CV 7223, 1993 WL 518586 (Colo. Dist. Ct. Dec. 14, 1993).

⁴³ *Id.* at *11.

⁴⁴ 830 F. Supp. 1319 (E.D. Cal. 1993).

⁴⁵ *Id.* at 1323.

⁴⁶ See *supra* note 33.

⁴⁷ See *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986).

⁴⁸ 895 F.2d 563 (9th Cir. 1990).

bled to greater than rational basis review for equal protection purposes."⁴⁹

Gay rights litigators have refuted such reasoning on two grounds. First, they have argued that this approach conflates due process analysis with equal protection analysis because the holding in *Bowers* was explicitly limited to due process and thus holds no precedential value for an equal protection claim.⁵⁰ Second, and more relevant to this discussion, they have argued that it conflates sodomy, the conduct that *Bowers* held unprotected, with sexual orientation, the status that defines the class of gay men and lesbians.⁵¹ For example, gay rights litigators in *Equality Foundation* made this point through the testimony of psychologist Dr. Gonsiorek that "sexual orientation is distinct from, and exists wholly independently of, sexual behavior or conduct."⁵²

Gay rights litigators have made similar status/conduct distinctions when arguing against the military's policy of discharging gay men and lesbians from military service. The Supreme Court has recognized in the criminal setting that the Constitution does not permit people to be punished for having a particular status, even if related to proscribed conduct. In *Robinson v. California*,⁵³ for example, the Court held unconstitutional a law criminalizing addiction to narcotics, even though taking narcotics was illegal.⁵⁴ Neither *Robinson* nor its progeny⁵⁵ are controlling in the military's exclusion setting (because a discharge is not a criminal proceeding) but they have nevertheless provided grounds to believe that status based discharges would be unconstitutional. Although the Supreme Court has not considered the constitutionality of status based discharges, much of the legal argument concerning the military's exclusion policies has assumed that a policy that permitted discharge based solely on the status of being gay would be unconstitutional. For example, the Ninth Circuit in *Meinhold v.*

⁴⁹ Id. at 571.

⁵⁰ See, e.g., *Watkins v. United States Army*, 837 F.2d 1428, 1438-40 (9th Cir. 1988) (finding that Hardwick's due process holding has "little relevance to equal protection doctrine"), modified, 875 F.2d 699 (9th Cir. 1989) (en banc).

⁵¹ See, e.g., id. at 1439 ("[W]hile Hardwick does indeed hold that the due process clause provides no substantive privacy protection for acts of private homosexual sodomy, nothing in Hardwick suggests that the state may penalize gays for their sexual orientation.").

⁵² *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 424 (S.D. Ohio 1994), rev'd, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh'g, 128 F.3d 289 (6th Cir. 1997).

⁵³ 370 U.S. 660 (1962).

⁵⁴ See id. at 667.

⁵⁵ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (finding ethnicity insufficient basis for assuming persons are illegal aliens); *Powell v. Texas*, 392 U.S. 514, 532-34 (1968) (observing that criminal penalties can be inflicted only if accused has committed act, rather than held status).

*United States Department of Defense*⁵⁶ held that a Naval seaman's discharge that was based "solely on his classification as a homosexual" was likely unconstitutional.⁵⁷ Furthermore, counsel for the Department of Defense has testified that its decision generally to avoid status based discharges was premised on the recognition that "if [the military] did have a status-based as opposed to a conduct-based rule, . . . it would be vulnerable to the courts."⁵⁸

This presumption that status based discharges would be unconstitutional has provided gay rights litigators with a basis to challenge the "Don't Ask, Don't Tell" policy implemented in 1993. Under that policy, service members can be discharged based upon their own statements that they are gay.⁵⁹ Those statements, according to the policy, create a rebuttable presumption that the service member "engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."⁶⁰ Since it would likely be impermissible for a service member to be discharged based merely upon the status implications of his or her admission of being gay, the policy relies on those statements as evidence of conduct, as well as descriptions of status. The policy thus invites arguments that a service member's statement that he or she is gay is only evidence of a status based orientation and is not an indication of conduct in any way.

Therefore, in cases challenging discharges, gay rights litigators have argued that there is a significant distinction and lack of correlation between the status of being gay and the conduct of engaging in homosexual acts. As an example, in *Thomasson v. Perry*⁶¹ the discharged plaintiff argued that "it is not rational or permissible to presume that declared homosexuals possess a unique propensity to engage in homosexual acts."⁶² Similarly, in *Steffan v. Perry*,⁶³ Steffan argued that it was unreasonable "to presume that a servicemember

⁵⁶ 34 F.3d 1469 (9th Cir. 1994).

⁵⁷ See *id.* at 1479; see also *Able v. United States*, 88 F.3d 1280, 1297 n.10 (2d Cir. 1996) (assuming for purposes of analysis "that the separation of a service member only because he has a homosexual orientation would violate the Constitution because the separation would be based on status alone"). But see *Steffan v. Perry*, 41 F.3d 677, 687 (D.C. Cir. 1994) (holding that discharge was employment decision rather than criminal punishment and thus did not fall within constitutional restrictions on status based punishment).

⁵⁸ Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103d Cong. 777 (1993) (statement of Jamie Gorelick).

⁵⁹ See 10 U.S.C. § 654(b)(2) (1994) (stating that service member can be discharged based upon finding that "the member has stated that he or she is a homosexual or bisexual, or words to that effect").

⁶⁰ *Id.*

⁶¹ 80 F.3d 915 (4th Cir. 1996).

⁶² *Id.* at 930.

⁶³ 41 F.3d 677 (D.C. Cir. 1994).

who did nothing more than identify him or herself as a gay man or woman would engage in prohibited 'homosexual acts,'"⁶⁴ and in *Holmes v. California Army National Guard*,⁶⁵ the service members contended that "it is not rational for the government to presume from statements regarding homosexual orientation that they will likely engage in homosexual conduct."⁶⁶ In perhaps the most extreme claim, the discharged plaintiff in *Cammermeyer v. Aspin*⁶⁷ relied on a psychology professor's testimony that "[t]here is almost no relationship between an individual's orientation and his or her sexual conduct" to establish the status/conduct distinction.⁶⁸

The distinction between the status of being gay and the conduct of engaging in homosexual acts is most apparent if people do not choose to be gay but are born that way. A person in that situation would have been gay before ever being sexual and likely would have been aware of being gay long before engaging in any homosexual acts. There are also numerous explanations for why a person who was born gay might choose not to engage in homosexual acts, at least for periods of time, but that still would not change his or her status of being gay.⁶⁹ And even in the common situation where the innate status of being gay and the conduct of engaging in homosexual acts are joined, it is still easier to conceive of them as separate if one is chosen and the other is not.

Thus, claims that draw a distinction between gay status and gay conduct are implicitly choice-denying. Making a status/conduct distinction, to be clear, does not absolutely require that a choice-denying theory be employed. For example, it is possible to think of being gay as choosing the status or identity of being gay, and then completely separately choosing to engage in, or not to engage in, homosexual acts. That conception, however, does not make intuitive sense. If *choosing* the status of being gay would not involve *choosing* to engage in "homosexual acts," then what would it involve?⁷⁰ There certainly

⁶⁴ Reply Brief of Plaintiff-Appellant Joseph C. Steffan on Rehearing En Banc at 12, *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (No. 91-5409).

⁶⁵ 124 F.3d 1126 (9th Cir. 1997).

⁶⁶ *Id.* at 1134.

⁶⁷ 850 F. Supp. 910 (W.D. Wash. 1994).

⁶⁸ *Id.* at 919. This decision, while reached under the exclusion policy preceding the "Don't Ask, Don't Tell" policy, considered the same issue of whether statements represented status or conduct. See *id.* at 918-20.

⁶⁹ See, e.g., *Richenberg v. Perry*, 97 F.3d 256, 264 (8th Cir. 1996) (Arnold, C.J., dissenting) ("Captain Richenberg admitted that he is a homosexual but also stated under oath that that he did not intend to violate military law by acting upon those feelings.").

⁷⁰ Since *Bowers* dealt with sodomy, and not "homosexual acts," there is a different argument available for the *Bowers*-related challenges: that gay people are not defined by sodomy, because not all gay people engage in sodomy and a lot of non-gay people do.

may be examples where the two could be conceptually separate, but describing a general distinction is difficult.

C. *Broader Adoption of the Choice-Denying Model*

Gay rights litigators' increased use of choice-denying constitutional arguments can be explained in two ways. As presented above, such use represents a strategic response to the realities of litigating after *Bowers*. In this respect, gay rights litigators rely on choice-denying arguments because they believe in their tactical advantages. At the same time, however, the use of choice-denying arguments reflects a loose consensus that has developed within the gay community that being gay is, in fact, not a choice. In this respect, gay rights litigators rely on choice-denying arguments because they believe in their veracity. Furthermore, choice-denying theories have been utilized by gay rights advocates outside of the legal realm to formulate compelling arguments for greater tolerance for gay people.

1. *Sources of Evidence for Choice-Denying Theories*

For many, the most compelling body of evidence that being gay is not a choice lies in the individual experiences of gay men and lesbians.⁷¹ Since the general question whether people choose to be gay relies on the ability or inability of gay individuals to alter their sexual identities, every gay person must, through his or her own experience, hold at least one answer to that question. The relatively recent elaboration and distribution of numerous gay autobiographical narratives has created a body of accounts that provides a range of evidence that being gay is not a choice.

The last thirty years have witnessed an immense increase in the visibility of gay people and the publication of gay narratives.⁷² The riots at the Stonewall bar in Greenwich Village on June 27, 1969 marked the beginning of a gay rights community committed to visibil-

However, that challenge is not a status/conduct challenge, but a definitional challenge that is separate from issues relating to choice-denying and choice-affirming arguments.

⁷¹ See Richard D. Mohr, *A More Perfect Union: Why Straight America Must Stand Up for Gay Rights* 13 (1994) ("All that is needed to answer the question is to look at the actual experience of lesbians and gay men in current society, and it becomes fairly clear that sexual orientation is not likely a matter of choice."); Andrew Sullivan, *Virtually Normal* 15-16 (1995) ("I was once asked at a conservative think tank what evidence I had that homosexuality was far more of an orientation than a choice, and I was forced to reply quite simply: my life."). But see Timothy F. Murphy, *Gay Science: The Ethics of Sexual Orientation Research* 61 (1997) ("[I]t seems fair to say that gay people probably incorporate just as many unsubstantiated views in their folk accounts of why they are gay as do even the most heterosexist straight people . . .").

⁷² See Martin Baum Duberman, *About Time: Exploring the Gay Past* xiii (1986) (noting growth of scholarship about gay people and homosexuality during 1970s).

ity.⁷³ Described as the “moment in time when gays and lesbians recognized all at once their mistreatment and their solidarity,”⁷⁴ Stonewall ushered in an era of gay rights politics focused on the metaphor of the closet.⁷⁵ In the decades following Stonewall, the defining personal/political moment for every gay man and lesbian became “coming out,” which very often involved the telling of autobiographical narratives.⁷⁶ These narratives almost invariably described being gay as something that was never chosen nor amenable to change.⁷⁷ The broad influence that these stories have had in establishing a popular belief that being gay is not chosen is perhaps nowhere more apparent than in the widely accepted shift from labeling gay people as having a gay “sexual preference” to having a gay “sexual orientation,” with all the connotations of “orientation” as innate and immutable.⁷⁸

A second source of “evidence” that being gay is not a choice follows from a relatively crude, although widely accepted, rational choice syllogism. At its simplest, the syllogism is as follows: Since a rational person given a choice between being gay or straight would choose to be straight, and there are many rational people who are gay, being gay must not be a choice.

This syllogism can appear in many forms. At times it is merely a means of drawing conclusions from an individual narrative. For example, one of the people interviewed for Vera Whisman’s book *Queer by Choice* used it to understand that she had not made a choice: “I don’t feel like I had a choice, because sometimes if I had had a choice, I would probably have chosen to be straight. It would be a lot simpler being straight. You know, so making a choice to be a lesbian sometimes doesn’t seem right.”⁷⁹ Some, like Andrew Sullivan, offer a form

⁷³ See Barry D. Adam, *The Rise of a Gay and Lesbian Movement* 81-104 (rev. ed. 1995) (describing emergence of gay and lesbian movements following Stonewall).

⁷⁴ Martin Duberman, *Stonewall* xv (1993).

⁷⁵ See Arthur D. Kahn, *The Many Faces of Gay: Activists Who Are Changing the Nation* 149 (1997) (“The outburst of militancy unleashed by Stonewall provided the impetus to the mass coming out of lesbians and gays who had previously feared to expose themselves to the world.”).

⁷⁶ See Gilbert Herdt, “Coming Out” as a Rite of Passage: A Chicago Study, in *Gay Culture in America: Essays from the Field* 29, 31 (Gilbert Herdt ed., 1992) (describing coming out as having become “key ritual of gay culture”).

⁷⁷ There are few, if any, popularized accounts by gay authors who describe experiencing being gay as a choice. Examples of those who have described it as not a choice are legion. See, e.g., Scott Peck, *All-American Boy* 38-40 (1995) (describing pain caused by knowing he was gay as very young child); John Reid, *The Best Little Boy in the World* 36 (1973) (“I was all of eleven when I first ‘knew’ what I was . . .”); Sullivan, *supra* note 71, at 4-7 (explaining his fear of realizing his sexual orientation).

⁷⁸ See Whisman, *supra* note 8, at 3 (“Anti-gay rhetoric uses the term ‘sexual preference’ to imply choice, while pro-gay rhetoric uses ‘sexual orientation’ to deny it.”).

⁷⁹ *Id.* at 47.

of the syllogism as a means of explaining the persistence of homosexuality despite its being unwelcome:

Men married happily for years eventually crack and reveal the truth about themselves; people dedicated to extirpating homosexuality from the face of the earth have succumbed to the realization that they too are homosexual; individuals intent on ridding it from their systems have ended in defeat and sometimes despair; countless thousands have killed themselves in order not to face up to it, or often because they *have* finally faced up to it. They were not fleeing a chimera or chasing a deception; they were experiencing something real, whatever it was.⁸⁰

Finally, and most relevant here, some offer it as the rhetorical proof that being gay is universally not a choice. In *Is It a Choice?*,⁸¹ a book dedicated to answering the most frequently asked questions about being gay, Eric Marcus offers the syllogism in answer to the question he received most frequently:

I like what one of my friends says whenever he's asked [if it's a choice] or hears someone voice the opinion that gay people make a conscious choice to be gay: "Why would I choose to be something that horrifies my parents, that could ruin my career, that my religion condemns, and that could cost me my life if I dared to walk down the street holding hands with my boyfriend?"⁸²

Science provides the third source of "evidence" that choice-denying theories are true. During the early 1990s, three studies finally appeared to provide empirical scientific proof that being gay is not a choice. These studies, one in neuroanatomy and two in behavioral genetics, not only confirmed that being gay was not a choice but further claimed to find the first significant links between sexual orientation and biology.

The most celebrated of these studies was conducted by Simon LeVay, a neuroscientist at the Salk Institute in California.⁸³ LeVay studied the brains of forty-one cadavers, finding that a portion of the hypothalamus believed to control sexual activity was smaller in homosexual men than it was in heterosexual men.⁸⁴ While LeVay admitted that "[w]e can't say on the basis of [the study] what makes people gay or straight,"⁸⁵ his report did make the limited claim "that sexual orien-

⁸⁰ Sullivan, *supra* note 71, at 17-18.

⁸¹ Eric Marcus, *Is It a Choice?* (1993).

⁸² *Id.* at 9.

⁸³ See Simon LeVay, A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, 253 *Science* 1034 (1991).

⁸⁴ See *id.* at 1035.

⁸⁵ David Gelman et al., *Born or Bred?*, *Newsweek*, Feb. 24, 1994, at 46, 50 (quoting LeVay).

tation in humans is amenable to study at the biological level."⁸⁶ LeVay was much less guarded in his public descriptions of the report's implications: "This work may show that sexual orientation is genetically determined like skin color, and may therefore have implications for the civil rights of gays and lesbians."⁸⁷

Two subsequent genetics studies claimed to expand on LeVay's findings by demonstrating causal links between homosexuality and genetics. The first, a study of twins by J. Michael Bailey and Richard C. Pillard published a few months after LeVay's study, compared the degree to which the sexual orientations of congenital male twins, fraternal twins, and adopted brothers correlated.⁸⁸ This study demonstrated that identical twins are three times more likely to both be gay than fraternal twins or adopted brothers.⁸⁹ While they narrowly concluded in their report that their results "suggest that genetic factors are important in determining individual differences in sexual orientation,"⁹⁰ they more broadly claimed in a *New York Times* editorial that "[s]cience is rapidly converging on the conclusion that sexual orientation is innate."⁹¹

The second genetics study, conducted by Dean H. Hamer at the National Institutes of Health, also relied on gay brothers, studying genetic sequences on their X chromosomes, the chromosomes males inherit only from their mothers.⁹² Hamer's study "indicate[d] a statistically significant correlation between the inheritance of [certain] genetic markers . . . and sexual orientation in a selected group of homosexual males."⁹³ In the press, Hamer made the more extreme claim to have found "the first concrete evidence that 'gay genes' really do exist."⁹⁴

⁸⁶ LeVay, *supra* note 83, at 1036.

⁸⁷ Jamie Talan, Study Shows Homosexuality is Innate: Gay Scientist is a Hero and a Villain, *N.Y. Newsday*, Dec. 9, 1991, at 43 (quoting LeVay).

⁸⁸ See J. Michael Bailey & Richard C. Pillard, A Genetic Study of Male Sexual Orientation, 48 *Archives Gen. Psychiatry* 1089, 1089 (1991).

⁸⁹ See *id.* at 1092-93.

⁹⁰ *Id.* at 1093.

⁹¹ Michael Bailey & Richard Pillard, Are Some People Born Gay?, *N.Y. Times*, Dec. 17, 1991, at A21.

⁹² See Dean H. Hamer et al., A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, 261 *Science* 321, 321 (1993).

⁹³ *Id.*

⁹⁴ John Crewdson, Study on 'Gay Gene' Challenged, *Chicago Trib.*, June 25, 1995, at 1. Hamer has more recently stepped back from this statement, claiming that "there is no 'gay gene' and I've never thought there was." Philip L. Bereano, *Mystique of the Phantom 'Gay Gene'*, *Seattle Times*, Feb. 25, 1996, at B5.

The three studies not only confirmed what many gay people already felt,⁹⁵ that being gay was not a choice, but expanded their knowledge by providing them with a specific cause: biology. For activist author Randy Shilts, it thus permitted a compelling metaphor: “[A biological link] would reduce being gay to something like being left-handed, which is in fact all that it is.”⁹⁶

2. *Choice-Denying Theories in Non-Legal Gay Rights Arguments*

Individual narratives, rational choice reasoning, and science have all offered different forms of evidence that the gay community has largely accepted as proof that being gay truly is not a choice. The power of the proof lies in more than the community’s appreciation of the potential implications of choice-denying theories in constitutional litigation strategies, however. It also offers gay men and lesbians much more immediate and personal benefits.

Perhaps the greatest personal benefit of choice-denying theories is that they allow gay men and lesbians to abdicate fault for being gay or lesbian. This abdication affords an often much needed degree of comfort and protection to both the individual gay man or lesbian and to other people in their lives. In fact, as Janet Halley has suggested, “it often is the *only* effective resource available to gay men, lesbians, and bisexuals seeking to persuade their parents, coworkers, and neighbors that they can love someone of the same sex and remain fully human.”⁹⁷

For almost all gay men and lesbians, childhood and adolescence were attended by some feelings of guilt and isolation stemming from nascent homosexual feelings that could not be expressed for fear of condemnation.⁹⁸ While many gay men and lesbians migrate into more

⁹⁵ The fact that the studies were for many gay people merely a confirmation of what they knew all along is demonstrated most poignantly in this description of Simon LeVay’s discovery:

LeVay was alone in his fifth-floor laboratory when his moment of discovery came. “I was measuring the total volume in the brain samples, blind to where they came from, and it was right there.”

The scientist looked down at the tissue samples, now blurred by tears. “I was very emotional about it. I had a lot invested in my work.” A walk along the Pacific bluffs helped. “I have always felt that I was born gay,” [LeVay] said.

Talan, *supra* note 87, at 46.

⁹⁶ Gelman et al., *supra* note 85, at 48 (quoting Shilts).

⁹⁷ Halley, *Politics of Biology*, *supra* note 4, at 567.

⁹⁸ See, e.g., Emery S. Hetrick & A. Damien Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 *J. Homosexuality* 25, 30-35 (1987) (describing deleterious effects of stigmatization on gay youth); Susan K. Telljohann & James H. Price, *A Qualitative Examination of Adolescent Homosexuals’ Life Experiences: Ramifications for Secondary School Personnel*, 26 *J. Homosexuality* 41, 42-44 (1993)

accepting communities as they near adulthood, the freedom to express their sexuality does not necessarily remove ingrained beliefs that being gay is wrong. For the many gay men and lesbians whose sexual orientation in adulthood continues to cause them some degree of guilt, shame, or embarrassment, discovering and accepting that their homosexuality is biologically determined can be wonderfully liberating. Richard Pillard saw this liberation as one of the primary contributions of his research: "A genetic component in sexual orientation says, 'This is not a fault, and it's not your fault.'"⁹⁹

In the same way that choice-denying theories may bring personal liberation to gay men and lesbians, they can bring comfort to others in their lives. For example, parents of gay men and lesbians can experience feelings of guilt because their child is gay.¹⁰⁰ The stereotypical Freudian description of homosexuality as the result of domineering mothers and aloof fathers characterized parents as responsible for their children's homosexuality.¹⁰¹ While this theory is in disfavor, its implication still haunts many parents who wonder if they should have done something differently.¹⁰² For those parents, biological choice-denying theories remove the question of their responsibility and can relieve them of attendant feelings of guilt.¹⁰³

Choice-denying theories also serve gay people by counteracting damaging stereotypes about gay people. One of the most ingrained stereotypes of gay people, that they recruit children, was a central im-

("[I]solation and alienation will cause many young gays to develop a sense of inferiority and worthlessness because of the ubiquitous nature of the negative societal attitudes toward homosexuals.").

⁹⁹ Gelman et al., *supra* note 85, at 48 (quoting Pillard).

¹⁰⁰ See Hetrick & Martin, *supra* note 98, at 41 ("[F]amilies react with shame and guilt to homosexuality in a child partly because of the widespread belief that homosexuality is the result of bad parenting."); see also David W. Holtzen & Albert A. Agresti, Parental Responses to Gay and Lesbian Children: Differences in Homophobia, Self-Esteem, and Sex-Role Stereotyping, 9 *J. Soc. & Clinical Psychol.* 390, 392 (1990) ("[H]omophobic parents evidenced . . . a lower sense of social self-esteem . . .").

¹⁰¹ See Sigmund Freud, *Three Essays on the Theory of Sexuality* 95-96 (James Strachey ed. & trans., Basic Books 1962) (1905) (suggesting that type of bonds formed between child and parents may alter child's sexual orientation).

¹⁰² See Telljohann & Price, *supra* note 98, at 43 ("Parental discovery of an adolescent's homosexuality can cause guilt and fear in the parents. The parents [sic] self-esteem may initially be affronted, causing them to wonder what they did wrong and how good a parent they [sic] are.").

¹⁰³ While alleviating one kind of parental guilt, choice-denying theories do present the danger of creating another kind. If being gay is found to be the result of genetic factors, parents will be responsible for their child's homosexuality in a much more direct fashion than even Freud's discredited sociological theories envisioned. Given the presumed inability of parents to be aware of their own genetic makeup, however, creating a gay child by passing along a "gay gene" would likely lead to less guilty feelings than allowing a child to become gay through improper parenting.

age utilized by Anita Bryant in seeking to overturn gay rights ordinances:

[R]ecruitment of our children is absolutely necessary for the survival and growth of homosexuality—for since homosexuals cannot reproduce, they *must* recruit, *must* freshen their ranks. And who qualifies as a likely recruit: a 35-year-old father or mother of two . . . or a teenage boy or girl who is surging with sexual awareness?¹⁰⁴

At its most virulent, this stereotype creates the image of a predatory recruiter actively indoctrinating youth,¹⁰⁵ while at its slightest, it creates the image of a passive recruiter inadvertently converting youth by acting as a role model.¹⁰⁶ Choice-denying theories counteract these images of gay men by making recruitment a technical impossibility and thus invalidate concerns about recruitment as irrational.

Choice-denying theories can also benefit gay men and lesbians by engendering more sympathetic portrayals of their lives. While counteracting harmful images, choice-denying stories can construct more compelling ones to take their place: that of the individual coming to accept the reality of his or her nature despite, and in the face of, great societal antagonism. This new sympathetic image, often portrayed and publicized through the “coming out” narratives described earlier,¹⁰⁷ casts the gay man or lesbian as the protagonist who must overcome internal demons of guilt and self-hatred and external demons of prejudice and hate.¹⁰⁸ In this portrayal, the openly gay man or lesbian is not a miscreant flouting societal norms but instead a sympathetic underdog, trying to live true to his or her nature in the face of intolerance.

Finally, beliefs that being gay is not a choice further benefit gay people by condemning misguided efforts to reform them. Numerous

¹⁰⁴ Anita Bryant, *The Anita Bryant Story: The Survival of Our Nation's Families and the Threat of Militant Homosexuality* 146 (1977).

¹⁰⁵ This image is not far removed from the image of gay men as predatory pederasts. While the choice-denying theory does not counteract that image, there is a body of sociological data which refutes it by demonstrating its statistical falsity. See, e.g., Jack Nichols, *The Gay Agenda: Talking Back to the Fundamentalists* 87 (1996) (responding to claim that homosexuals molest minors by citing studies that show heterosexual males pose primary threat of sexual abuse of minors).

¹⁰⁶ The extent of this fear is demonstrated in the results of a *New York Times* poll that showed that while 78% of people interviewed thought homosexuals should have equal rights in terms of job opportunities, 55% objected to having a homosexual as a child's elementary school teacher. See Jeffrey Schmalz, *Poll Finds an Even Split on Homosexuality's Cause*, *N.Y. Times*, Mar. 5, 1993, at A14.

¹⁰⁷ See *supra* notes 71-78 and accompanying text.

¹⁰⁸ This description almost fully characterizes many popularized portrayals of the lives of gay men and lesbians. See generally Tony Kushner, *Angels in America* (1993); Maurice (October Films 1987); *Torch Song Trilogy* (New Line Cinema 1988).

commentators have attempted to show that gay men or lesbians can change their sexual orientation.¹⁰⁹ At least one New York City analyst claims a flourishing practice in “turning troubled homosexuals into ‘happy, fulfilled, heterosexuals.’”¹¹⁰ The reforming process can vary from religious conversion¹¹¹ to aversion shock therapy¹¹² to psychological treatment.¹¹³ By embedding sexual orientation in the natural composition of the individual, choice-denying theories discredit attempts at reform as inevitably futile and furthermore cruel.

Choice-denying theories have thus widely been adopted in both legal and non-legal realms by those advocating gay rights. Although choice-denying arguments are therefore well established as central to the gay rights movement, it is less clear whether they should remain so.

II

THE CRITIQUE OF CHOICE-DENYING THEORIES

While choice-denying arguments have become predominant in the constitutional litigation strategies adopted by gay rights litigators, nothing *requires* that they advance choice-denying arguments. This Part provides a critique of choice-denying arguments and their implications and concludes that, despite their allure, choice-denying arguments should be abandoned.

A. *Lack of Success In the Courts*

When scientific studies supporting biological choice-denying theories came out in the early 1990s,¹¹⁴ many commentators forecast that their most significant impact for gay people would be seen in the legal battles for gay rights. A *New York Times* article proclaimed that “[i]f homosexuality were viewed legally as a biological phenomenon, rather than a fuzziier matter of ‘choice’ or ‘preference,’ then gay peo-

¹⁰⁹ See, e.g., Robert Kronmeyer, *Overcoming Homosexuality* 80-90 (1980) (describing approaches used historically to cure homosexuality).

¹¹⁰ Gelman et al., *supra* note 85, at 53.

¹¹¹ See generally William Aaron, Straight (1972) (describing transition from homosexual to heterosexual lifestyle and marriage through commitment to Christianity).

¹¹² See, e.g., B. H. Fookes, Some Experiences in the Use of Aversion Therapy in Male Homosexuality, Exhibitionism, and Fetishism-Transvestism, 115 *Brit. J. Psychiatry* 339, 339-41 (1969) (describing success of shock aversion therapy in decreasing homosexual arousal).

¹¹³ See Joseph Nicolosi, *Healing Homosexuality* 211-13 (1993) (claiming that bolstering gay men’s sense of male identity can diminish homosexual feelings); Charles W. Socarides, *Homosexuality* 6 (1978) (describing homosexuality as treatable disorder resulting from failure to undergo separation-individuation phase in early childhood).

¹¹⁴ See *supra* text accompanying notes 83-96.

ple could no more rightfully be kept out of the military, a housing complex or a teaching job than could, say, blacks."¹¹⁵ This hope was also felt in the gay rights legal community which, as the last Part described, quickly incorporated the new studies into litigation strategies. Despite the high hopes, however, courts have almost universally rejected arguments relying upon choice-denying theories.

1. *The Failure of Immutability Arguments*

Arguments for suspect classification status for sexual orientation based on immutability have been almost completely rejected. The four federal decisions that have granted suspect class status have been subsequently reversed or vacated.¹¹⁶ Most courts that have explicitly considered the immutability factor for sexual orientation have reached conclusions similar to that of the Federal Circuit in *Woodward v. United States*,¹¹⁷ which held that "[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."¹¹⁸

*Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*¹¹⁹ provides a good example of how this conception of being gay as "primarily behavioral in nature" has thwarted the few courts that have accepted gay rights choice-denying arguments for suspect classification. The findings of the district court in *Equality Foundation* were as unequivocal as they could be, accepting as "findings of fact" that "[s]exual orientation is set in at a very early age—3 to 5 years—and is not only involuntary, but is unamenable to change" and that "[s]exual orientation is a characteristic which exists separately and independently from sexual conduct or behavior."¹²⁰ The district court

¹¹⁵ Natalie Angier, *The Biology of What It Means to be Gay*, N.Y. Times, Sept. 1, 1991, § 4, at 1.

¹¹⁶ See *Watkins v. United States Army*, 837 F.2d 1428, 1448 (9th Cir. 1988) (holding that sexual orientation constitutes suspect classification), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 440 (S.D. Ohio 1994) (holding that sexual orientation constitutes quasi-suspect classification), rev'd, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh'g, 128 F.3d 289 (6th Cir. 1997); *Jantz v. Muci*, 759 F. Supp. 1543, 1550-51 (D. Kan. 1991) (holding that sexual orientation constitutes suspect classification), rev'd, 976 F.2d 623 (10th Cir. 1992); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987) (holding that sexual orientation constitutes quasi-suspect classification), rev'd, 895 F.2d 563 (9th Cir. 1990).

¹¹⁷ 871 F.2d 1068 (Fed. Cir. 1989).

¹¹⁸ *Id.* at 1076; see also *High Tech Gays*, 895 F.2d at 573 ("Homosexuality is not an immutable characteristic; it is behavioral . . .").

¹¹⁹ 860 F. Supp. 417 (S.D. Ohio 1994), rev'd, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh'g, 128 F.3d 289 (6th Cir. 1997).

¹²⁰ *Id.* at 426.

based those findings on the testimony of "a highly credentialed psychologist," whose testimony "was not seriously refuted by the defense."¹²¹ The court used the findings both to support the immutability component of its decision granting suspect classification status and to distinguish *Bowers* on the basis of a status/conduct distinction.¹²²

Despite the clarity of the district court's factual findings, the Sixth Circuit was not convinced of their import and reversed the district court's ruling.¹²³ This reversal is particularly interesting because the circuit court was able to reject the district court's findings of law without expressly rejecting its choice-denying findings of fact. Instead, the circuit court argued that:

Assuming *arguendo* the truth of the scientific theory that sexual orientation is a "characteristic beyond the control of the individual" as found by the trial court, . . . the reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts. . . . Because homosexuals generally are not identifiable "on sight" unless they elect to be so identifiable by conduct . . . they cannot constitute a suspect class or a quasi-suspect class because "they do not [necessarily] exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group[.]"¹²⁴

The circuit court's reasoning highlights the inevitable difficulty that choice-denying arguments face in convincing any unsympathetic court that being gay is immutable. Even if it were scientifically proven that sexual orientation is fixed and unchangeable, such orientation could arguably only be manifested through conscious action, and conscious action as a product of volition can never be immutable. Thus, the description of sexual orientation as "primarily behavioral in nature" becomes impossible to disprove since the only means of identifying someone as gay is through his or her behavior.

2. *The Failure of Status/Conduct Arguments*

Arguments relying on choice-denying theories to establish a status/conduct distinction for limiting the reach of *Bowers*¹²⁵ and chal-

¹²¹ Id. at 424.

¹²² See id. at 437, 440.

¹²³ See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 271 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh'g, 128 F.3d 289 (6th Cir. 1997).

¹²⁴ Id. at 267 (quoting *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987)).

¹²⁵ See *supra* text accompanying notes 46-52.

lenging the “Don’t Ask, Don’t Tell” military exclusion policy¹²⁶ have not been any more successful. The first court to consider the status/conduct argument after *Bowers* was the D.C. Circuit in *Padula v. Webster*,¹²⁷ in which an applicant who had been rejected by the FBI because she was gay argued that the court should apply a heightened standard of review because homosexuals constitute a suspect class.¹²⁸ While she argued that *Bowers*, as a due process case, was inapposite, the court soundly rejected the distinction:

It would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.¹²⁹

The court in *Padula* thus sidestepped the status/conduct distinction through a simple definitional maneuver—since the status of being gay is defined in terms of conduct, specifically sexual conduct that can be made illegal, then discriminating against gay people for the status of being gay can be no more invidious than discriminating against them for illegal conduct.

The Ninth Circuit has been the only circuit court to show any reservations about the reasoning employed in *Padula*. In *Watkins v. United States Army*,¹³⁰ a panel of the Ninth Circuit explicitly refused to follow the *Padula* court’s reasoning, finding instead that “while *Hardwick* does indeed hold that the due process clause provides no substantive privacy protection for acts of private homosexual sodomy, nothing in *Hardwick* suggests that the state may penalize gays for their sexual orientation.”¹³¹ That panel’s decision was later vacated, however, for a rehearing en banc.¹³² While the Ninth Circuit affirmed the panel’s decision en banc, they did so on other grounds and did not reach the panel’s status/conduct findings.¹³³ Thus, *Bowers* has stood, along with the difficulties inherent in meeting the Court’s suspect class

¹²⁶ See supra text accompanying notes 53-68.

¹²⁷ 822 F.2d 97 (D.C. Cir. 1987).

¹²⁸ See id. at 101-02.

¹²⁹ Id. at 103.

¹³⁰ 837 F.2d 1428 (9th Cir. 1988), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc).

¹³¹ Id. at 1439.

¹³² See *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989).

¹³³ See id. at 711 (affirming panel’s decision based on doctrine of estoppel rather than panel’s constitutional findings).

factors test, as a steadfast impediment to the achievement of suspect class status for gay men and lesbians.¹³⁴

Further, the courts have not been receptive to the status/conduct argument made in the context of challenging the "Don't Ask, Don't Tell" military exclusion policy, namely that it is impermissible to infer homosexual conduct from a claimed homosexual status. In fact, all four circuit courts that have considered this status/conduct argument have rejected it without any apparent hesitation.¹³⁵ The Fourth Circuit found that "[t]he presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis."¹³⁶ The Ninth Circuit, untroubled by its earlier holding in *Meinhold* requiring that discharges under the previous policy be based on more than a mere statement of homosexual orientation,¹³⁷ found that "[a]lthough the legislature's assumption that declared homosexuals will engage in homosexual conduct is imperfect, it is sufficiently rational to survive scrutiny."¹³⁸ The Eighth Circuit even cited with approval Judge Reinhardt's dissent in the first *Watkins*

¹³⁴ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) ("[B]y the *Hardwick* majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class"); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), rev'd, 54 F.3d 261 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh'g, 128 F.3d 289 (6th Cir. 1997) ("Those persons who fall within the orbit of legislation concerning sexual orientation are so affected not because of their orientation but rather by their conduct which identifies them as homosexual, bisexual, or heterosexual."). But see *Equality Foundation*, 860 F. Supp. at 440 ("[W]e conclude that sexual orientation, whether homosexual or heterosexual, exists independently of any conduct. Consequently, neither *Bowers*, nor the reasoning of *High Tech Gays*, *Woodward*, *Padula*, *Ben-Shalom*, nor any of the other cases similarly ruling, is controlling.").

¹³⁵ See *Holmes v. California Army Nat'l Guard*, 124 F.3d 1126, 1135 (9th Cir. 1997) (holding that it is rational to infer homosexual conduct from homosexual status); *Richenberg v. Perry*, 97 F.3d 256, 262 (8th Cir. 1996) (same); *Able v. United States*, 88 F.3d 1280, 1296-97 (2d Cir. 1996) (same); *Thomasson v. Perry*, 80 F.3d 915, 930 (4th Cir. 1996) (same); see also *Steffan v. Perry*, 41 F.3d 677, 686-87 (D.C. Cir. 1994) (en banc) (same in context of exclusion policy that preceded "Don't Ask, Don't Tell").

¹³⁶ *Thomasson*, 80 F.3d at 930.

¹³⁷ See *Meinhold v. United States Dep't of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994) (suggesting that discharge based on statements that do not "show a concrete, fixed, or expressed desire to commit homosexual acts" would likely be unconstitutional).

¹³⁸ *Holmes*, 124 F.3d at 1135.

panel where he argued that “[t]o pretend that homosexuality . . . is unrelated to sexual conduct borders on the absurd.”¹³⁹

Clearly, the choice-denying arguments that gay rights litigators have utilized to seek suspect status for gay people, to limit the reach of *Bowers*, and to challenge the military exclusion policy have found little support among the courts. Although there have been occasional glimmers of hope from receptive trial courts and two circuit panels, these have been uniformly extinguished on appeal or rehearing.¹⁴⁰ As shown, circuit courts have either simply sidestepped scientific evidence as not determinative of the legal arguments,¹⁴¹ or have rejected it altogether, some going so far as to call the testimony used to support choice-denying arguments “‘absurd’”¹⁴² or “preposterous.”¹⁴³

B. Scientific “Proof” Mandate

It could be suggested that, regardless of the efficacy of choice-denying legal arguments, they are mandated because they simply incorporate what science has proven to be true: that gay people are not gay because of choice but because of biological factors. This argument would point to the evidence offered in the last Part, specifically the scientific studies that are coming closer to confirming the biological roots of sexual orientation.¹⁴⁴ This evidence, however, falls far short of proving that being gay is not a choice.

First, the scientific studies, on their own terms, are not proof that being gay is not a choice. In fact, the studies themselves made much narrower claims: LeVay’s study found merely that “sexual orientation in humans is amenable to study at the biological level,”¹⁴⁵ Bailey and Pillard concluded only that “genetic factors are important in determining individual differences in sexual orientation,” but could not estimate the “*magnitude* of that influence,”¹⁴⁶ and Hamer noted only

¹³⁹ *Richenberg*, 97 F.3d at 262 (quoting *Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc)).

¹⁴⁰ See *supra* note 116.

¹⁴¹ See, e.g., *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995), vacated, 116 S. Ct. 2519 (1996), vacated holding reinstated on reh’g, 128 F.3d 289 (6th Cir. 1997) (“[a]ssuming *arguendo*” truth of choice-denying testimony accepted at trial but finding its application to sexual orientation irrelevant to laws that, by definition, can only reach conduct).

¹⁴² *Richenberg*, 97 F.3d at 262 (quoting *Watkins v. United States Army*, 847 F.2d 1329, 1361 n.19 (9th Cir. 1988) (Reinhardt, J., dissenting), vacated, 875 F.2d 699 (9th Cir. 1989) (en banc)).

¹⁴³ *Steffan v. Perry*, 41 F.3d 677, 690 (D.C. Cir. 1994).

¹⁴⁴ See *supra* notes 83-97 and accompanying text.

¹⁴⁵ LeVay, *supra* note 83, at 1036.

¹⁴⁶ Bailey & Pillard, *supra* note 88, at 1093.

the "statistically significant correlation between inheritance of certain genetic markers . . . and sexual orientation."¹⁴⁷ None of the studies actually claimed to have found a cause of homosexuality; it was only through the spin that was placed on them in the media that this claim was imputed. Second, all three studies looked only to the causes of homosexuality in men, completely ignoring the fact that there may be different causes of homosexuality in women. Especially given the fact that lesbians appear more likely than gay men to experience being gay as something chosen,¹⁴⁸ any universal claims as to the causes of homosexuality arising from such studies is suspect. Finally, the scientific community itself has criticized the studies, which indicates that it is too early to assume that even their limited findings will withstand the scrutiny of time.¹⁴⁹

There are, furthermore, reasons to believe that science may never be able to establish the specific type of causal connection between biology and sexual orientation that would be required to prove that being gay is not a choice. First, any study into the causes of sexual orientation will suffer from a problem of reductionism, creating what can only be crude categorizations of what are in reality variegated expressions of sexual desire.¹⁵⁰ Professor Halley found the most problematic aspect of this reductionism to be that the studies must start from an assumption about the bimodal or continuous nature of sexual orientation.¹⁵¹ In other words, the three studies discussed in Part II presumed that people are either heterosexual or homosexual and looked for the causal link that would place someone in one camp or the other. The studies could just as easily have started from the observation that people exist along a continuous spectrum of homosexual and heterosexual tendency¹⁵² and sought to prove the causal link to

¹⁴⁷ Hamer et al, *supra* note 92, at 321.

¹⁴⁸ See *infra* note 167 and accompanying text.

¹⁴⁹ See Timothy F. Murphy, *Gay Science: The Ethics of Sexual Orientation Research* 47 (1997) (arguing that studies by LeVay, Bailey, and Hamer are "incremental additions to a fallible scientific literature, and researchers will have to toil long and hard to determine what ultimate explanatory utility is to be found in them, if any"); see also John P. DeCecco & David Allen Parker, *The Biology of Homosexuality: Sexual Orientation or Sexual Preference?*, 28 *J. Homosexuality* 1, 9-16 (1995) (describing presuppositions of scientific reports that undermine their validity).

¹⁵⁰ See Murphy, *supra* note 149, at 46 (recognizing limitations of scientific studies due to complexity of sexual eroticism).

¹⁵¹ See Halley, *Politics of Biology*, *supra* note 4, at 530-31.

¹⁵² Such a continuum model was relied upon in the famous empirical studies conducted by Alfred Kinsey. He posited that sexuality could be categorized along a linear scale from 0 to 6 which measured relative amounts of homosexual and heterosexual tendency. See Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* 639-41 (1948). Kinsey's scale, while being more nuanced than the bipolar models utilized in the scientific studies, still suffers from the problem of reductionism, however. By placing sexuality along a linear

where on the spectrum a person lies. The problem is that once the scientist has established the model, he or she has already answered the choice question. If the study presumes that sexual orientation is bimodal—either homosexual or heterosexual—then establishing biological links to orientation will show that people are dumped into the gay camp or the straight camp without having made a choice in the matter. If, however, it is presumed that sexual orientation exists along a continuum, then establishing biological links to sexual orientation shows only that people are programmed with certain sexual preferences that will influence their *choices* among being gay, straight, or bisexual.

C. *Choice-Denying Arguments Threaten to Undermine the Gay Rights Movement*

Beyond being unsuccessful in the courtroom, choice-denying theories are problematic as foundations for any gay rights arguments, whether legal or not. First, they risk appearing to suggest that being gay is undesirable. Second, when used in the context of making a status/conduct distinction, they invite claims that are untenable and short sighted. Third, they misrepresent members of the gay community who experience being gay as something chosen.

1. *Suggesting That Being Gay is Undesirable*

The most problematic effect of using choice-denying theories as a base in gay rights arguments is that the arguments can ultimately suggest that being gay is undesirable. This suggestion is made either by implicitly admitting the validity of a common presumption in anti-gay rhetoric that being gay is undesirable, or by explicitly making assertions that themselves presume the undesirability of being gay.

For example, when choice-denying arguments are used to counteract stereotypes of gay men as sexual recruiters, often an implicit suggestion is made that being gay is undesirable. In "The Gay Agenda," a video created and distributed by a right wing religious organization, Dr. Stanley Monteith described how "boys [are] being actively recruited out of our homes, out of our schools" by gay men.¹⁵³

scale, Kinsey presupposed that sexual orientation can be described along a single dimension. If, however, sexual orientation is formed by the confluence of more than one factor, then such single dimensional models will also be inaccurate, even if they do describe a continuum. See Frederick Suppe, *Explaining Homosexuality: Philosophical Issues, and Who Cares Anyway?*, in *Gay Ethics: Controversies in Outing, Civil Rights, and Sexual Science* 223, 234-36 (Timothy F. Murphy ed., 1994) (describing sexual identities as comprised of multiple components and suggesting that any non-multivariate analysis of sexual identity is not credible).

¹⁵³ Whisman, *supra* note 8, at 1-2.

For almost any person seeking to refute this claim from a gay rights perspective, the first impulse is a choice-denying response—that his statement is false because boys cannot be recruited since recruitment is not how people become gay.¹⁵⁴ This response, however effective it may be, does not address Monteith's more invidious assertion: that the creation of more gay youth would be undesirable and should be prevented. By failing to address this aspect of Monteith's claim, the choice-denying response risks appearing to admit its validity.

Similarly, in response to the Freudian contention that domineering mothers and aloof fathers create homosexual sons, gay rights advocates can employ choice-denying arguments to refute the validity of the sociological theory underlying the claim. Again, while this response does refute the claim that children can be made gay through improper parenting, it leaves intact the contention's more central assertion that gay sons are somehow undesirable.

While such implicit admissions may, at times, be both inadvertent and unintended, there are also times when gay rights advocates clearly presume in their own arguments that being gay is undesirable. The most obvious example of such a presumption is the reliance upon the rational choice syllogism described in Part I as a form of "proof" that being gay is not a choice.¹⁵⁵ For instance, Eric Marcus's rhetorical question, "Why would I choose to be something that horrifies my parents, that could ruin my career, that my religion condemns, and that could cost me my life . . . ?"¹⁵⁶ could quite accurately be paraphrased as "Why would I choose to be something so clearly and utterly undesirable?"

It should not be surprising that the first impulse of gay rights advocates is not to challenge the undesirability of being gay. If it is true, as was suggested in the last Part, that many gay men and lesbians have personally utilized choice-denying theories as a way of abdicating fault for being gay,¹⁵⁷ then inherent in the identities of many gay people is the notion that being gay is something undesirable for which they do not want to assert responsibility for having chosen. However, although such beliefs may be necessary in some instances for gay men and lesbians to protect themselves while forming a gay identity in a hostile environment, suggesting that being gay is undesirable is

¹⁵⁴ See Murphy, *supra* note 149, at 57 (arguing that scientific study showing children of gay parents are not more likely to be gay themselves should be used in court as "hard evidence against claims that gay people should as a class be considered unfit as parents because they necessarily visit their own sexual orientation upon their children").

¹⁵⁵ See *supra* text accompanying notes 79-82.

¹⁵⁶ See Marcus, *supra* note 81, at 9.

¹⁵⁷ See *supra* Part I.C.2.

neither proper nor effective as part of a long term gay rights movement.

2. *Leading to Unsound Arguments*

The second problem created by choice-denying arguments, especially in the context of claiming a status/conduct distinction, is that they lead gay rights litigators to make claims that are indefensible, and ultimately short sighted. As was described in the last Part,¹⁵⁸ believing that gay people do not choose to be gay provides the basis for claiming a distinction between the unchosen status of being gay and the chosen conduct of acting in accordance with that status. While this distinction may make sense in theory, it is untenable when presented as a distinction rigid enough to gain constitutional importance. For example, Dr. Gonsiorek's testimony in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*¹⁵⁹ that "sexual orientation . . . exists wholly independently of . . . sexual behavior or conduct"¹⁶⁰ and the plaintiff service member's claim in *Thomasson v. Perry*¹⁶¹ that "it is not rational . . . to presume that declared homosexuals possess a unique propensity to engage in homosexual acts"¹⁶² both require such a disconnect from intuition about, or experience of, what it means to be gay that it is understandable for courts to deride such claims.¹⁶³ There is also the question whether, beyond challenging intuition, such testimony represents good science. Even Simon LeVay, an obvious supporter of choice-denying theories, has noted that scientists testifying in these cases are interested in their outcome and may "shade" or go beyond the data.¹⁶⁴ Gay rights litigators only jeopardize their credibility with courts by relying on such choice-denying testimony to support their claims.

Beyond risking credibility, however, relying on choice-denying arguments to support a status/conduct distinction may ultimately be a short sighted strategy. The legal value of establishing a gay status separate from gay conduct is that the government is more constrained in

¹⁵⁸ See *supra* text accompanying notes 152-56 (detailing how choice-denying theories are problematic as foundations for gay rights arguments).

¹⁵⁹ 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd*, 54 F.3d 261 (6th Cir. 1995), *vacated*, 116 S. Ct. 2519 (1996), *vacated holding reinstated on reh'g*, 128 F.3d 289 (6th Cir. 1997).

¹⁶⁰ *Id.* at 424.

¹⁶¹ 80 F.3d 915 (4th Cir. 1996).

¹⁶² *Id.* at 930.

¹⁶³ See *supra* notes 142-43 (indicating courts' pejorative treatment of choice-affirming arguments).

¹⁶⁴ See Simon LeVay, *Queer Science: The Use and Abuse of Research into Homosexuality* 241-45 (describing how trial pressures in *Steffan* and *Romer* "drove the expert witnesses to take somewhat more extreme or simplified positions than they might otherwise have done").

its ability to punish people for their status than for their conduct.¹⁶⁵ What this means in practice is that winning cases based on the status/conduct distinction ultimately would earn gay men and lesbians the right to be gay but not the right to do anything, either publicly or privately, that could be considered gay. Although this right may hold some appeal for the few service members who would be willing to remain celibate for the duration of their duty in the armed forces, it accomplishes little for the vast majority of gay men and lesbians. They would find no value in an abstract right to be gay that was divorced from the concrete right to act in accordance with all that being gay usually means.

3. *Misrepresenting Segments of the Gay Community*

Choice-denying theories are further problematic because they risk misrepresenting and thus dividing the communities that they should be protecting. Despite the "loose consensus" that was described in the last Part,¹⁶⁶ not all gay people experience being gay as something that they did not choose. This is especially true of many lesbians, who are much more likely to consider themselves as having chosen to be gay.¹⁶⁷ This subjects choice-denying arguments to the further criticism that they are "androcentric, treating a common male experience as generically human."¹⁶⁸ Even though the majority of gay men may conceive of being gay as something innate,¹⁶⁹ the adoption of choice-denying arguments undermines the unity of the broader gay rights movement by ignoring the experiences of a whole other segment of the gay community, a segment that may already experience systematic underrepresentation in the movement for both structural and discriminatory reasons.

III

A THEORY OF CHOICE

The last Part concluded that choice-denying theories have been ineffective as part of a gay rights legal strategy and are a theoretically unsound basis for gay rights arguments. This Part suggests the use of

¹⁶⁵ See *supra* text accompanying notes 53-58 (outlining unconstitutionality of punishment for particular status, even if related to proscribed conduct).

¹⁶⁶ See *supra* Part I.C.1 (describing evolution of choice-denying arguments).

¹⁶⁷ See Claudia Card, *Lesbian Choices* 53-57 (1995) (arguing that "[i]t is important to insist on lesbianism as a choice"); Whisman, *supra* note 8, at 107-17 (describing gender differences in accounts of being gay).

¹⁶⁸ Whisman, *supra* note 8, at 6.

¹⁶⁹ See *id.* (reporting that vast majority of gay men consider their homosexuality "an orientation they did not choose or create").

choice-affirming arguments as an alternative. As noted in Part I, choice-affirming arguments emphasize the ways in which gay men and lesbians do choose to be gay. This Part first explores three benefits that would be offered by incorporating choice-affirming theories into gay rights arguments. It then discusses how choice-affirming theories can be incorporated into privacy, expressive, equal protection, and rational basis legal arguments. It notes that while using these arguments would require abandoning some current constitutional arguments, it would avoid the difficulties that courts have found in accepting immutability arguments and the status/conduct distinction and would more directly address the legal bases for anti-gay discrimination.

A. *The Benefits of Choice-Affirming Arguments*

Although they have rarely been utilized, choice-affirming gay rights arguments offer numerous advantages over the more frequently presented arguments that conceptualize being gay as innate. First, choice-affirming arguments, unlike choice-denying arguments, hold more potential to encourage acceptance of gay people rather than mere tolerance. Second, choice-affirming arguments are more empowering for gay people than choice-denying arguments. Third, choice-affirming arguments focus debate not on determining the cause of homosexuality, but on the more relevant issue of accepting diverse sexual identities.

1. *Encouraging Acceptance Rather than Tolerance*

The first benefit of choice-affirming theories in gay rights arguments is that they encourage non-gay people to develop a deeper respect and acceptance for the autonomy of gay people and the choices they make. By requiring non-gay people to confront the idea that people choose to be gay, choice-affirming arguments do not permit non-gay people simply to tolerate gay men and lesbians based on a presumption that gay men and lesbians cannot help but be gay.

Most gay rights arguments that employ choice-denying theories can, in the end, only hope to engender a limited degree of tolerance even in those who accept the arguments as true. Many of these arguments, simply stated, contend that it is unfair to discriminate against gay people for being gay *because* being gay is something that they did not choose.¹⁷⁰ The foundation of this argument, as was discussed in

¹⁷⁰ See, e.g., *Steffan v. Perry*, 41 F.3d 677, 687-88 (D.C. Cir. 1994) (noting that service member had “asserted that one does not choose to be homosexual and that therefore it is unfair for the military to make distinctions on that basis”).

the last Part,¹⁷¹ suggests that discrimination against gay people is unfair *only* because gay people cannot be anything but gay. It thus leaves intact an invidious presumption that being gay is undesirable. When these arguments are successful, gay people achieve a degree of toleration. Yet, given the presumption that underlies the entire argument that being gay is somehow undesirable, any toleration gay men and lesbians achieve is likely to feel hollow.

Any tolerance those arguments achieve may be mixed with unwelcome degrees of sympathy or pity for the "misfortune" of the person who is gay. Such arguments also insure that the tolerance is likely to be devoid of any respect for the value in diversity of sexual expression that gay people bring to society. John D'Emilio's rhetorical question sums up these problems succinctly: "Do we really expect to bid for real power from a position of 'I can't help it'?"¹⁷²

Gay rights arguments that make choice-affirming claims, on the other hand, do not permit the type of toleration based upon sympathy that the choice-denying arguments engender. In asserting that gay people choose to be gay, choice-affirming arguments force non-gay people to confront the idea that gay people have actually chosen a sexual identity that is different from their own. This approach accomplishes two goals. First, it challenges the presumption that being gay is undesirable since, after all, many rational people will have chosen it.¹⁷³ Second, it forces non-gay people who are willing to accept the choice-affirming arguments to move beyond tolerating gay people as though they were afflicted with a disability to accepting them as having adopted a different, but not by definition less desirable, sexual identity. From this position, unlike one based upon choice-denying claims, gay people could ultimately hope to achieve full equality.

Suggesting that choice-affirming arguments should be adopted is not to claim that they will convince everyone who is now merely tolerant to become accepting immediately. In fact, it is inevitable that some people who are currently tolerant of gay people because they think that being gay is not a choice would become intolerant if they were convinced that being gay *is* a choice. Despite creating the risk of losing some of the tolerance for gay people that has been achieved over the past decades, however, choice-affirming arguments should be adopted, because they are the only arguments that hold the ultimate key to full equality for gay people.

¹⁷¹ See *supra* Part II.C.1 (describing problematic effect of choice-denying arguments).

¹⁷² John D'Emilio, *Making Trouble: Essays on Gay History, Politics, and the University* 187 (1992).

¹⁷³ This is, in many ways, merely working the syllogism discussed in Part I.C.1. in reverse.

2. *Empowering Gay People and Communities*

Adopting choice-affirming arguments instead of choice-denying arguments would not only affect the attitudes of non-gay people toward people who are gay, it would also affect how gay people themselves view being gay. As was discussed in the last Part, many gay people learn to rely heavily on arguments that they did not choose to be gay.¹⁷⁴ While these arguments may provide gay men and lesbians with a feeling of protection, this protection comes at the expense of deprecating their sexual identities. Masha Gessen, a lesbian activist, has stated the point forcefully:

In addition to perpetuating bigoted attitudes outside our community, the claims of having no choice in our sexual orientation exact a great cost on our own community's self-esteem. What backs up those claims are descriptions of gay life as fraught with suffering, as riddled with lies aimed at hiding one's sexuality, as devoid of love and joy.¹⁷⁵

By adopting choice-affirming arguments, gay men and lesbians would be choosing a more difficult path, one where they must take full responsibility for their gay identities and insist on the legitimacy of those identities. Whether that would be done by insisting on the right of individuals to develop their sexual identities uncoerced, or by arguing for the value inherent in having a gay identity, gay men and lesbians would be exerting ownership over their identities in a fashion not permitted by choice-denying arguments. Learning to exert such ownership would benefit both the gay people who, by doing so, would become more comfortable with their identities, and the gay rights movement by empowering more members of the gay community to believe in and thus argue for the legitimacy of having a gay identity.

3. *Focusing Debate on Legitimacy of Diverse Sexual Identities Rather than Causes of Homosexuality*

Relying upon choice-affirming arguments also would benefit the gay rights movement by shifting the debate surrounding gay rights from the causes of being gay to more relevant issues dealing with the moral legitimacy of being gay. As the last Part described, making choice-denying arguments in the wake of *Bowers* has led gay rights advocates to make the extreme and ultimately untenable claim that there is no relationship between being gay and engaging in gay con-

¹⁷⁴ See *supra* text accompanying notes 98-103 (describing personal benefit of choice-denying theory as allowing gay men and lesbians to abdicate fault).

¹⁷⁵ Whisman, *supra* note 8, at 30 (quoting Gessen).

duct.¹⁷⁶ Among the problems caused by these claims is that they focus discussion of gay rights on the issue of what causes people to be gay, an issue that, as Edward Stein has noted, does not necessarily move gay men and lesbians any closer to achieving protection in the political or legal system:

[J]ust because a category has a biological basis does not thereby entail that members of it deserve protected status; there are many categories with a biological basis that are not thought to be morally relevant categories, much less, to be categories that warrant protected status. . . . Being a biologically-based category is thus not a *sufficient* condition for being a category that deserves protected status. It is worth noting that being biologically based is not a *necessary* condition either. For example, being of a certain religious affiliation or nationality are not biologically based but they constitute protected categories.¹⁷⁷

Relying instead on choice-affirming gay rights arguments would shift attention to more cogent issues for two reasons. First, gay rights advocates will not often be challenged on claims that being gay is a choice since, traditionally, those opposing gay rights have themselves claimed that gay people have chosen to be gay.¹⁷⁸ Second, by asserting that gay people have made a choice to be gay, gay rights advocates would highlight the more central question of whether it is appropriate for society to try to coerce a single type of sexual identity and expression, even if it could be successful in doing so. By shifting the argument to the moral legitimacy of diverse sexual identities,¹⁷⁹ these arguments would thus lead to a discourse through which gay people would, if successful, achieve true equality and acceptance, regardless of whether they chose to be gay or not.

B. Choice-Affirming Legal Arguments

Much gay rights litigation, and most choice-denying legal strategies, have been directed toward obtaining heightened judicial scrutiny for gay rights claims. This Part, therefore, first considers choice-affirming

¹⁷⁶ See *supra* text accompanying notes 61-68 (discussing litigation strategy in series of gay rights cases).

¹⁷⁷ Edward Stein, *The Relevance of Scientific Research About Sexual Orientation to Lesbian and Gay Rights*, in *Gay Ethics*, *supra* note 152, at 269, 278.

¹⁷⁸ See Schmalz, *supra* note 106, at A14 (showing correlation between believing that being gay is not a choice and not supporting gay rights); see also Karen De Witt, *Quayle Contends Homosexuality is a Matter of Choice, Not Biology*, *N.Y. Times*, Sept. 14, 1992, at A17 (quoting then Vice President Dan Quayle as saying "My viewpoint is that it's more of a choice than a biological situation. . . . [I]t is a wrong choice.").

¹⁷⁹ For choice-affirming arguments in favor of the moral legitimacy of gay rights, see Vincent J. Samar, *A Moral Justification for Gay and Lesbian Civil Rights Legislation*, in *Gay Ethics*, *supra* note 152, at 147, 149-62.

firming strategies that could also be used to seek heightened scrutiny in gay rights cases. These are divided among the three traditional types of claims that have been used by gay rights litigators: privacy claims, expressive claims, and equality claims. After demonstrating the availability of such claims, this Part next questions their necessity. In response to the Supreme Court's decision in *Romer v. Evans*,¹⁸⁰ striking down a Colorado anti-gay ballot initiative relying only on rational basis review, some commentators have suggested that heightened scrutiny need not be the grail upon which all gay rights litigators set their sights.¹⁸¹ Choice-affirming rational basis arguments are thus evaluated with some analysis of their likelihood of succeeding in the courts.

1. *Choice-Affirming Privacy Arguments*

The right to privacy, as an element in the substantive sphere of the Due Process Clause, provides perhaps the most natural basis on which to make choice-affirming gay rights claims. While this natural fit commonly led gay rights litigators to rely on privacy claims during the years following Stonewall,¹⁸² the Court's decision in *Bowers v. Hardwick*¹⁸³ sent them scurrying to find other constitutional provisions on which to rely. *Bowers* remains, no doubt, the single largest barrier to gay rights litigators. Yet the Court's decision in *Romer*, while not explicitly overruling *Bowers*, may have undermined it sufficiently to allow gay rights litigators to return choice-affirming privacy arguments to their legal arsenals.

There are two aspects of the Court's privacy cases that make them particularly useful in constructing choice-affirming gay rights arguments. The first aspect is that almost all of the Court's privacy cases have concerned rights that are in many ways analogous to the types of rights that gay rights litigators would be seeking to assert. The Court has listed the rights protected under privacy as those relating to "marriage, procreation, contraception, family relationships, child rearing, and education."¹⁸⁴ When this laundry list of rights is abstracted only slightly, a theme emerges that suggests that the right to privacy protects individuals in those interactions with the state that deal with sex,

¹⁸⁰ 517 U.S. 620 (1996).

¹⁸¹ See, e.g., Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 *Stan. L. Rev.* 45, 91-109 (1996) (advocating arguments relying on rational basis review rather than heightened scrutiny).

¹⁸² See, e.g., *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199 (E.D. Va. 1975) (challenging Virginia sodomy statute as violation of the right of privacy), *aff'd*, 425 U.S. 901 (1976).

¹⁸³ 478 U.S. 186 (1986).

¹⁸⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

family, and intimate identity. Since all laws discriminating against gay people fall within one, if not all, of those areas, the Court's privacy cases offer an obvious and attractive option to gay rights litigators.

The second aspect, one which makes the Court's privacy cases a seemingly ideal basis for choice-affirming gay rights claims, is the fact that all of the Court's privacy cases, as opposed to its equality cases, have concerned rights of "doing" as opposed to rights of "being." In other words, the Court's privacy cases have made certain activities—abortion, use of contraception, marriage, defining family—protected without regard to the specific people who are engaging in the activity.¹⁸⁵ Because the right to privacy has been concerned with protecting activities, the whole notion of choice, and choosing whether or not to partake in the activity, lies at its very foundation. It is, after all, no coincidence that supporting the right to have an abortion, the most contested of the privacy rights, oft has been termed a "pro-choice" position.

Gay rights litigators making privacy arguments would thus be guided into making choice-affirming claims, because they would be forced to seek protection for gay activities, as opposed to gay identities. The privacy claims made in *Bowers*, described in Part I, are one illustration of where this occurred, yet many others can be considered. Privacy arguments for same-sex marriages, for example, could contest the right of the state to intrude upon the ability of individuals to choose a consenting spouse of any gender.¹⁸⁶ They could rely on cases like *Loving v. Virginia*,¹⁸⁷ which held that Virginia's anti-miscegenation statute violated due process (as well as equal protection),¹⁸⁸ and *Turner v. Safley*,¹⁸⁹ which struck down, on due process grounds, a law prohibiting inmates from marrying.¹⁹⁰ Privacy arguments against restrictions on gay parenting could contest the right of the state to intrude upon the way that gay individuals choose to construct their families. They could rely on cases like *Moore v. City of East Cleveland*,¹⁹¹ which struck down a zoning statute that used a restrictive definition of family.¹⁹² Privacy arguments against the military exclusion

¹⁸⁵ See *supra* notes 17-20.

¹⁸⁶ See, e.g., *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995) (describing plaintiffs' claim that "limitation of the right to marry unconstitutionally burdens gays' and lesbians' 'fundamental right' to marry as they choose—a right protected by the due process clause").

¹⁸⁷ 388 U.S. 1 (1967).

¹⁸⁸ See *id.* at 12.

¹⁸⁹ 482 U.S. 78 (1987).

¹⁹⁰ See *id.* at 94-99.

¹⁹¹ 431 U.S. 494 (1977).

¹⁹² See *id.* at 499-500.

and anti-gay initiatives could contest the right of the state to intrude upon the way gay individuals choose the fundamental aspects of personhood such as their sexual identities and could rely on some of the expansive language used by the Court in *Planned Parenthood v. Casey*¹⁹³ which, in reaffirming the right to privacy, noted that it concerns

matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁹⁴

Despite the apparent availability of compelling choice-affirming gay rights privacy arguments, there is an obvious, and heretofore insurmountable, impediment to their success: *Bowers v. Hardwick*.¹⁹⁵ The Court's holding that privacy does not protect a right to homosexual sodomy has severely demoted privacy arguments in the gay rights litigation arsenal, and with good cause—*Bowers* has thwarted gay rights arguments far afield from privacy, thus rendering apparently futile any attempt to argue in its teeth.

Yet, there are important reasons why gay rights litigators might push choice-affirming gay rights privacy arguments despite *Bowers*. The most central is that gay rights litigators must set their sights on the ultimate reversal of *Bowers*. As long as *Bowers* remains good law it will be a pernicious force working to defeat gay rights efforts at every turn. Reversing Supreme Court precedent is, obviously, a gargantuan task but, given the broad chorus of commentators who have criticized the *Bowers* decision,¹⁹⁶ it is perhaps not an impossible one.

In addition, the Court's recent decision in *Romer v. Evans*¹⁹⁷ that struck down the Colorado anti-gay ballot initiative as violating equal protection¹⁹⁸ suggests that *Bowers*'s influence may be waning. Surprisingly absent from the Court's decision is any mention of *Bowers*, despite its having appeared in the parties' briefs and in oral argument.¹⁹⁹ The Court's failure to address the impact of its decision on

¹⁹³ 505 U.S. 833 (1992).

¹⁹⁴ *Id.* at 851.

¹⁹⁵ 478 U.S. 186 (1986).

¹⁹⁶ See *supra* note 30.

¹⁹⁷ 517 U.S. 620 (1996).

¹⁹⁸ See *id.* at 1629.

¹⁹⁹ See Brief for Petitioners at 28-29, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (citing *Bowers* for proposition that "[f]undamental rights are those 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were

the continued vitality of *Bowers* provides at least some question as to how much favor the *Bowers* decision still holds with the Court. Justice Scalia clearly noted this failure in his dissent, in which he contended that, while *Bowers* had not been challenged, the Court's decision in *Romer* contradicted the holding of *Bowers*.²⁰⁰

There are also at least two ways in which gay rights litigators can make privacy arguments that would not fly directly into the teeth of the Court's holding in *Bowers*. The first is by seeking to have the right to privacy protect activities other than sex. As was discussed in Part I, the Court in *Bowers* very narrowly construed the right being sought by the gay rights advocates as the "constitutional right of homosexuals to engage in acts of sodomy."²⁰¹ While narrow construction of the right doomed the gay rights arguments in *Bowers* itself, it may provide a means of distinguishing *Bowers* and ultimately limiting its reach. If *Bowers* is viewed as a privacy case about gay sex, there is no reason a priori why it must be determinative of privacy cases dealing with the other aspects of gay life, including marriage, family, and identity.

The second way to avoid *Bowers* is to make privacy arguments in state courts based on state constitutions. Following Justice Brennan's notion that state courts may ultimately provide greater protection for individual rights than the federal courts,²⁰² many gay rights litigators have moved into state courts. Before *Bowers*, the state courts of New York in *People v. Onofre*²⁰³ and Pennsylvania in *Commonwealth v. Bonadio*²⁰⁴ found that their sodomy statutes violated the privacy protections in their state constitutions regardless of the statutes' validity under the federal constitution. Even after *Bowers*, state courts in

sacrificed,"" (second alteration in original) (quoting *Bowers*, 478 U.S. at 191-92 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937))) and arguing that right to political participation is not fundamental right); Brief for Respondents at 46 n.32, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (arguing that "even if an interest in preserving traditional sexual morality can justify state laws that actually regulate sexual conduct [like the law upheld in *Bowers*], such an interest cannot justify Amendment 2's blanket authorization of all discrimination against a class of people . . ."); Transcript of Oral Argument, 1995 WL 605822, at *53, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (questioning respondents' attorney about impact of *Bowers* on this case).

²⁰⁰ See *Romer*, 517 U.S. at 626 (Scalia, J., dissenting) ("In holding that homosexuality cannot be singled out for unfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers v. Hardwick* . . .").

²⁰¹ *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

²⁰² See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977) (noting that numerous state courts extend greater protections to their citizens than Supreme Court).

²⁰³ 415 N.E.2d 936, 943 (N.Y. 1980).

²⁰⁴ 415 A.2d 47, 49-50 (Pa. 1980).

Kentucky,²⁰⁵ Michigan,²⁰⁶ Texas,²⁰⁷ and Tennessee²⁰⁸ found that sodomy laws violated their state constitutions, despite the Court's holding in *Bowers*. While federal precedent will undoubtedly remain influential in defining the boundaries of state constitutional analogs, the examples of these states demonstrate at least the potential for privacy arguments to be accepted in state courts when they might not be accepted in federal courts. Beyond the obvious value of obtaining such victories in state courts also lies the potential for state court privacy formulations to act as bellwethers for future federal rulings.

2. *Choice-Affirming Expressive Claims*

The expressive freedoms guaranteed by the First Amendment also provide a base on which to build choice-affirming gay rights claims. Although expressive claims may, in some ways, provide narrower protections for gay men and lesbians, their stronger foundation in the courts may ultimately make them a more viable choice-affirming option than privacy claims.

Traditionally, there have been two justifications for protecting expression. The first concerns the instrumental role that free expression plays in a democratic political system.²⁰⁹ The second justification, more relevant here, is that free expression is important, as an end in itself, to permit individuals to develop their identities within society.²¹⁰ This justification was articulated by the Supreme Court in *Cohen v. California*²¹¹ when it held that wearing a jacket with the words "Fuck the Draft" emblazoned upon it was protected expression,²¹² noting that such protections are based in part on the "individual dignity and choice upon which our political system rests."²¹³ While privacy claims generally concern "doing" and equality claims generally concern "being," expressive claims often exist somewhere in between. They have elements of "doing" since they literally involve protecting an individual's choice to engage in certain types of activity, even if that activity is purely speech. They also have a great deal to do

²⁰⁵ See *Commonwealth v. Wasson*, 842 S.W.2d 487, 493 (Ky. 1992).

²⁰⁶ See *Michigan Org. for Human Rights v. Kelly*, No. 88-815820(CZ) (Wayne County Cir. Ct., July 9, 1990) (not appealed by state).

²⁰⁷ See *Texas v. Morales*, 826 S.W.2d 201, 204-05 (Tex. App. 1992, writ granted), rev'd on jurisdictional grounds, 869 S.W.2d 941 (Tex. 1994).

²⁰⁸ See *Campbell v. Sundquist*, 926 S.W.2d 250, 259 (Tenn. Ct. App. 1996).

²⁰⁹ See Ely, *supra* note 38, at 105-16; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 26-27 (1960).

²¹⁰ See C. Edwin Baker, *Human Liberty and Freedom of Speech* (1989).

²¹¹ 403 U.S. 15 (1971).

²¹² See *id.* at 16.

²¹³ *Id.* at 24.

with "being" since it is often through speech that individuals develop and let it be known who they are.

The nature of expressive claims encourages gay rights litigators to utilize choice-affirming arguments because the freedom of expression concentrates on the ability to *choose* what to express. To the extent that expression is considered so tightly coupled with identity that the act of choosing to express a gay identity directly reflects the choosing of that gay identity itself, expressive claims will always be choice-affirming. Nan Hunter, suggesting that expressive claims may be the "most reliable path to success of any of the doctrinal claims utilized by lesbian and gay rights lawyers,"²¹⁴ argued:

Self-identifying speech does not merely reflect or communicate one's identity; it is a major factor in constructing identity. Identity cannot exist without it. That is even more true when the distinguishing group characteristics are not visible, as is typically true of sexual orientation. Therefore, in the field of lesbian and gay civil rights, much more so than for most other equality claims, expression is a component of the very identity itself.²¹⁵

In Hunter's formulation, expressing that you are gay is a significant part of what makes you gay. Thus, making the choice to express one's sexual orientation is tantamount to choosing one's sexual orientation.

This formulation may overstate the case to some degree. After all, one may only be choosing whether to express one's sexual orientation at all, not which sexual orientation to express. However, centering arguments around the role of protected expressive activity in forming gay identities would still serve the underlying purposes of choice-affirming claims, namely, focusing debate on the legitimacy of gay identities, and empowering gay people by forcing them to take some responsibility for their own identities.

3. *Choice-Affirming Equal Protection Claims*

Equal protection claims seeking heightened scrutiny are the least likely to provide a means for gay rights litigators to make choice-affirming arguments. This assertion was illustrated in Part I, which explored the immutability arguments that gay rights litigators have used as part of the campaign to obtain suspect class status for gay men and lesbians. Certainly any gay rights argument that incorporates an immutability claim cannot be choice-affirming. However, there is academic support for the position that suspect class arguments do not

²¹⁴ Nan D. Hunter, *Identity, Speech, and Equality*, 79 Va. L. Rev. 1695, 1695 (1993).

²¹⁵ *Id.* at 1718.

require claims of immutability and might thus be able to incorporate choice-affirming theories.

In the most extensive critique of immutability claims in suspect class arguments, Professor Janet Halley has argued that "legal arguments from biological causation should be abandoned"²¹⁶ and concluded that "immutability is not a requirement for suspect class status and is unlikely to become one, so that pro-gay litigators who invoke the argument from immutability do so at their option."²¹⁷ Her argument that proving the immutability of being gay is not required to succeed in establishing sexual orientation as a suspect class is based upon her understanding of the Supreme Court's suspect class cases through *Cleburne* as having shown the Court's increasing reticence to rely on immutability as a central factor in determining which classes are deserving of heightened protection.²¹⁸ Professor David Richards has similarly called for the abandonment of immutability claims in gay suspect class arguments, suggesting that "the issue of immutability of sexual preference should be irrelevant to its constitutional examination as a suspect classification, [while] the issue of irrational political prejudice . . . should be central to the analysis."²¹⁹

4. Choice-Affirming Rational Basis Claims

Although gay rights litigators have traditionally sought heightened scrutiny for their claims, the Supreme Court's recent decision in *Romer v. Evans*²²⁰ may have given an indication that gay men and lesbians can expect some meaningful level of protection even under rational basis review.

Rational basis review requires that government action be rationally related to a legitimate state interest.²²¹ The traditionally deferential approach that the Court has taken when applying this standard, however, has earned rational basis review the reputation of being "minimal scrutiny in theory and virtually none in fact."²²² Yet, on isolated occasions, the Supreme Court has struck down legislation while

²¹⁶ Halley, *Politics of Biology*, supra note 4, at 506.

²¹⁷ *Id.*

²¹⁸ *Id.* at 510.

²¹⁹ David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 *Ohio St. L.J.* 491, 505-06 (1994).

²²⁰ 517 U.S. 620 (1996).

²²¹ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("[L]egislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

²²² Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *Harv. L. Rev.* 1, 8 (1972).

relying upon the rational basis standard,²²³ suggesting that there may be cases where the Court is willing to apply what lower courts and commentators have termed "active rational basis review"²²⁴ or "'rational basis with teeth.'"²²⁵

*Romer v. Evans*²²⁶ is one such rare example where the Court chose to flex the rational basis muscle. In *Romer*, the Court struck down a voter-enacted amendment to the Colorado constitution that prohibited any state or local government body from enacting rules or legislation that sought to provide specific protections to gay men or lesbians.²²⁷ Specifically, the Court found the amendment "so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests."²²⁸

The Court's holding in *Romer* that mere "animus" toward gay men and lesbians does not constitute a legitimate state interest provides a blueprint for formulating potentially successful choice-affirming rational basis claims. First, since rational basis review is concerned more with the legitimacy of the state interests asserted than with the attributes of classes against which the state is discriminating, gay rights litigators should be free to make choice-affirming claims against the state without affecting the type of review that will be employed. Thus, "animus" toward gay men and lesbians should be illegitimate regardless of whether those gay men and lesbians chose to be gay or not.

Second, since almost all legislation or government action that discriminates against gay men and lesbians can be described as reflecting nothing more than "animus," gay rights litigators should be able to rely on the reasoning of *Romer* in a variety of situations. This is not to suggest that gay rights litigators are going to win significantly more cases under the mere force of *Romer*'s "animus" proscription.²²⁹ It

²²³ See, e.g., *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 532-33 (1973) (using rational basis review to strike down provision of Food Stamp Act which excludes any household with member who is unrelated to other members of household); *Cleburne*, 473 U.S. at 446 (using rational basis review to strike down zoning ordinance requiring special use permit for group home for mentally retarded).

²²⁴ See *Pruitt v. Cheney*, 963 F.2d 1160, 1165-66 (9th Cir. 1991).

²²⁵ See David O. Stewart, *A Growing Equal Protection Clause?*, A.B.A. J., Oct. 1985, at 108, 112 (quoting Professor Victor Rosenblum).

²²⁶ 517 U.S. 620 (1996).

²²⁷ See *id.* at 1623.

²²⁸ *Id.* at 1627.

²²⁹ The fact that *Romer* is not going to provide gay rights litigators with a silver bullet is evident in the Sixth Circuit's decision in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997). Despite the fact that *Equality Foundation* involved an anti-gay voter initiative almost identical to that struck down in *Romer* and that

does, however, provide gay rights litigators a means of forcing courts into a serious examination of what legitimate basis a state has to discriminate against people who choose diverse sexual identities. Although these examinations are not likely to yield immediate courtroom victories, the fact that they would require the proffering of explanations other than a mere dislike for people choosing to be gay means that they would be fruitful for the gay rights movement.

CONCLUSION

Gay rights litigators responded to *Bowers v. Hardwick* by adopting legal arguments that support theories that being gay is something that gay men and lesbians do not choose. While adopting such arguments may have made sense in the aftermath of *Bowers*, this Note argues that it is time for gay rights litigators to examine whether such arguments will ultimately be successful in providing a foundation for a strong gay rights movement. It concludes that the gay rights movement would be better served by adopting arguments that reconceptualize being gay as something that gay men and lesbians have chosen. While this change would require formulating new constitutional arguments, those arguments would ultimately provide a foundation upon which gay men and lesbians can more viably seek both legal and cultural equality and acceptance.

the Supreme Court vacated the Sixth Circuit's first decision in *Equality Foundation* for reconsideration in light of its decision in *Romer*, the Sixth Circuit nonetheless found the initiative constitutional. See *id.* at 301 ("Unlike Colorado Amendment 2, the Cincinnati Charter Amendment cannot be characterized as an irrational measure fashioned only to harm an unpopular segment of the population in a sweeping and unjustifiable manner.").