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## Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How It Is Met

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EQUAL PROTECTION FOR HOMOSEXUALS: WHY THE  
IMMUTABILITY ARGUMENT IS NECESSARY  
AND HOW IT IS MET

I.	INTRODUCTION .....	545
II.	HISTORY AND APPLICATION OF EQUAL PROTECTION .....	549
	A. <i>Equal Protection in General</i> .....	549
	B. <i>Equal Protection for Homosexuals</i> .....	551
III.	WHAT IT MEANS FOR A TRAIT TO BE IMMUTABLE AND WHY IMMUTABLE TRAITS ARE PROTECTED .....	554
	A. <i>What it Means for a Trait to be Immutable</i> .....	554
	B. <i>Protection of Immutable Traits</i> .....	555
	C. <i>Currently Recognized Immutable Traits</i> .....	556
IV.	ANALYSIS: WHY THE IMMUTABILITY ARGUMENT IS IMPORTANT AND HOW IT IS MET .....	557
	A. <i>Importance of the Immutability Argument</i> .....	558
	B. <i>Medical and Scientific Research Supporting</i> <i>a Conclusion of Immutability</i> .....	560
	1. Psychological Studies .....	561
	2. Biological Studies.....	562
	a. <i>Brain Studies</i> .....	563
	b. <i>Hormonal Studies</i> .....	565
	3. Genetic Studies .....	566
	a. <i>Twin Studies</i> .....	567
	b. <i>Genetic Mapping</i> .....	568
V.	CONCLUSION: WHAT THE SCIENTIFIC AND MEDICAL STUDIES ON SEXUAL ORIENTATION MEAN FOR HOMOSEXUALS AND EQUAL PROTECTION .....	571

I. INTRODUCTION

Throughout middle school and high school, classmates of one Wisconsin student tormented him daily. They “regularly referred to him as ‘faggot,’ and subjected him to various forms of physical abuse, including striking and spitting on him.”<sup>1</sup> Every day he went to school knowing he would face some sort of hell from his fellow classmates. On good days the other students would only punch him, spit on him, and call him nasty names. The bad days were really bad. On one of those bad days,

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<sup>1</sup>Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996).

several male students kicked the boy into a urinal and then urinated on him. On another bad day they pushed him to the ground while several other boys performed a mock rape on him to the amusement of about twenty other students who stood around laughing and cheering. The physical abuse he faced was so severe that after one incident he suffered internal bleeding when several students pushed him to the ground and continually kicked him in the stomach. Perhaps the biggest atrocity of all is that not only did the public school he attend not provide him any protection or punish any of the students who harmed him, but several school officials shrugged their shoulders to the happenings and told this boy he should expect this kind of behavior since he was openly gay.<sup>2</sup>

Race, religion, and sexual orientation are the top three categories for the commission of hate crimes in the United States.<sup>3</sup> Hate crime reports from 1995 to 2002 show that while racially motivated hate crimes have substantially declined,<sup>4</sup> crimes motivated by prejudice against homosexuals have increased.<sup>5</sup> Not only has the number of hate crimes committed against homosexuals increased, but the crimes have intensified as the national average of assaults resulting in serious injury rose 21% in just one year.<sup>6</sup> The growing number and the severity of hate crimes committed on account of a person's sexual orientation demonstrate the growing need for extra protection against discrimination on the basis of sexual orientation. "Until our government treats [homosexuals] as equal citizens, [there will not be a] significant decline in the number of hate crimes. . . [because the lack of equal

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<sup>2</sup>Unfortunately, the facts of the student's ordeal have not been imagined and came directly from the student's equal protection suit. *Nabozny*, 92 F.3d at 446.

<sup>3</sup>James L. Dickinson, *Bullying Ban Would Help Protect Students*, THE LEXINGTON HERALD LEADER, Mar. 1, 2004, at A6, available at 2004 WL 71177692.

<sup>4</sup>Racially motivated hate crimes have declined from 61 % of all hate crimes in 1995 only 49 % of all hate crimes in 2002. Hate crimes motivated by prejudice against homosexuals rose from 13 % of all hate crimes in 1995 to 19 % of all hate crimes in 2002. Hate crimes committed because of sexual orientation exceeded the total number of hate crimes committed on account of religion by 2 % in 2002. Federal Bureau of Investigation Uniform Crime Reports for 1995, available at <http://www.fbi.gov/ucr/hatecm.htm>, last visited Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 2002, available at <http://www.fbi.gov/ucr/hatecrime2002.pdf>, last visited Feb. 5, 2005.

<sup>5</sup>Federal Bureau of Investigation Uniform Crime Reports for 1995, available at <http://www.fbi.gov/ucr/hatecm.htm>, last visited Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 1996, available at <http://www.fbi.gov/ucr/hate96.pdf>, last visited Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 1997, available at <http://www.fbi.gov/ucr/hc97all.pdf>, last visited Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 1998, available at <http://www.fbi.gov/ucr/98hate.pdf>, last accessed Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 1999, available at <http://www.fbi.gov/ucr/99hate.pdf>, last accessed Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 2000, available at [http://www.fbi.gov/ucr/cius\\_00/hate00.pdf](http://www.fbi.gov/ucr/cius_00/hate00.pdf), last accessed Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 2001, available at [http://www.fbi.gov/ucr/01\\_hate.pdf](http://www.fbi.gov/ucr/01_hate.pdf), last accessed Feb. 5, 2005; Federal Bureau of Investigation Uniform Crime Reports for 2002, available at <http://www.fbi.gov/ucr/hatecrime2002.pdf>, last accessed Feb. 5, 2005.

<sup>6</sup>Brian E. Albrecht, *Gun Club Aims to Arm Gays for Defense Against Bashers*, THE PLAIN DEALER, Oct., 2003, at A1.

protection] gives people the justification to treat [homosexuals] like second-class citizens.”<sup>7</sup>

Currently, racial discrimination provokes the highest order of protection under the Fourteenth Amendment.<sup>8</sup> Religious discrimination finds similar protection under the First Amendment,<sup>9</sup> but discrimination on the basis of sexual orientation triggers only the limited protection afforded by rational basis review under the Fourteenth Amendment. This limited protection offers relief only in those situations where the discrimination against homosexuals is completely irrational. In other instances, where there is at least some justification for the unequal treatment, rational basis review will not provide relief for homosexuals.

While homosexuals have made major legal breakthroughs in the last ten years,<sup>10</sup> they continue to suffer from discrimination. Discrimination against homosexuals ranges from schools refusing to punish gay bashing,<sup>11</sup> and states refusing homosexual couples the right to marry<sup>12</sup> or adopt children.<sup>13</sup> The Supreme Court has been faced with several cases in which the Court could have determined that homosexuality deserved the same heightened protections that race and gender receive.<sup>14</sup> However, the Court has managed to avoid the problem of determining whether or not homosexuals are a suspect class.<sup>15</sup> With the growing public interest in

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<sup>7</sup>Matt Krupnick, *State Sees Hate Crime Rates Drop*, CONTRA COSTA TIMES, July 16, 2003, available at 2003 WL 59997036.

<sup>8</sup> U.S. CONST. amend. XIV, § 1.

<sup>9</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I, § 1.

<sup>10</sup>*Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (finding that Massachusetts may not deny same-sex couples the right to marry); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding that Vermont was constitutionally required to extend to same-sex couples the common benefits and protections that flowed from marriage under Vermont law).

<sup>11</sup>*Nabozny*, 92 F.3d at 446.

<sup>12</sup>Defense of Marriage Act, 28 U.S.C.S. § 1738(C) (LexisNexis 2005) (prohibiting states from recognize same-sex marriages from other states); CAL. FAM. CODE § 308.5 (West 2004) (refusing to recognize marriages between same-sex couples); FLA. STAT. ANN. § 741.212 (West 2004) (refusing to recognize marriages between same-sex couples); MINN. STAT. ANN. § 517.01 (West 2004) (recognizing only marriages between a man and a woman); WASH. REV. CODE ANN. § 26.04.010 (West 2004) (recognizing only marriages between a man and a woman). *But see Goodridge*, 798 N.E.2d at 941 (granting same-sex couples the right to marry in Massachusetts).

<sup>13</sup>FLA. STAT. ANN. § 63.042 (West 2004) (denying adoption rights to homosexuals).

<sup>14</sup>*See Lawrence v. Texas*, 539 U.S. 558 (2003) (arguing that sodomy laws which were enforced against homosexuals, but not heterosexuals, violated both the Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620 (1996) (arguing that a state constitutional amendment which stripped homosexuals of rights provided to heterosexuals violated both the Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment).

<sup>15</sup>*See Lawrence*, 539 U.S. at 558 (determining whether sodomy laws violate Fourteenth Amendment, but deciding case under substantive due process grounds rather than equal protection); *Romer*, 517 U.S. at 620 (determining whether a Colorado state constitutional

legal rights of homosexuals,<sup>16</sup> the Court will probably not be able to side-step the issue much longer. The Court will have to determine whether or not homosexuals meet the four criteria for a suspect classification<sup>17</sup> and how much extra protection they should be awarded under the Fourteenth Amendment.

The immutability factor is possibly the most disputed of the four factors of the *Frontiero* test,<sup>18</sup> a test laid out by the Supreme Court to identify suspect classifications. Doctors and scientists have spent years studying sexual orientation, attempting to find the cause of homosexuality in order to determine whether or not sexual orientation may be changed.<sup>19</sup> Unfortunately, the many studies have not provided a definitive answer to the question of immutability. This Note considers many of the psychological, hormonal, and more recent genetic studies and determines what the medical and scientific evidence means for homosexuals in their pursuit for equal protection. More specifically, this Note considers whether the medical and scientific studies published to date prove that sexual orientation is an immutable trait.

Part II of this Note provides a brief explanation of the law of equal protection in the United States under the Fourteenth Amendment. It describes the different standards of review courts use when reviewing equal protection claims. It also specifically provides a historical overview of homosexuals' claims for equal protection under the Fourteenth Amendment as well as an explanation of the current state of equal protection review for homosexuals.

Part III looks specifically at the immutability factor in the test for suspect class status. This section explains what immutable means, why immutable traits receive protection, and what traits the Court currently recognizes as being immutable for equal protection purposes.

Part IV addresses concerns about arguing the immutability of sexual orientation and the claim that equal protection for homosexuals is obtainable apart from immutability considerations. This section explains why homosexuals must use the

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amendment violated the Fourteenth Amendment, but instead of determining the level of review required the court finds the amendment to be so irrational to not pass even the most lenient review).

<sup>16</sup> See Sandra G. Boodman, *Vowing to Set the World Straight; Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual. Experts Call That a Prescription for Harm*, WASH. POST, Aug. 16, 2005 (discussing the growing interest and debate in gay rights).

<sup>17</sup> In order for a group to be classified as a suspect classification they must meet four factors laid out by the Supreme Court. The group must have suffered a history of purposeful discrimination, they must be the object of deep-seated prejudice that is based on inaccurate stereotypes, they must be classified by an immutable trait, and the group must be a politically powerless minority. See *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>18</sup> *Id.*

<sup>19</sup> See TIMOTHY F. MURPHY, *GAY SCIENCE* 19 (1997) (describing Sigmund Freud's interest in finding the cause of homosexuality as early as 1905); Alan R. Sanders, *Molecular Genetic Study of Sexual Orientation*, available at [http://crisp.cit.nih.gov/crisp/CRISP\\_LIB.getdoc?textkey=6806560&p\\_grant\\_num=5R01HD04156302&p\\_query=&ticket=13181289&p\\_audit\\_session\\_id=61027714&p\\_keywords=](http://crisp.cit.nih.gov/crisp/CRISP_LIB.getdoc?textkey=6806560&p_grant_num=5R01HD04156302&p_query=&ticket=13181289&p_audit_session_id=61027714&p_keywords=), last visited Feb. 5, 2005 (ongoing study still searching for a cause of homosexuality).

immutability argument in order to receive a heightened standard of review. Lastly, Part IV considers many of the influential psychological, biological, and genetic studies, which shed light on the immutability of sexual orientation. From these studies, the immutability of sexual orientation is shown.

In conclusion, this Note argues that homosexuals must continue to argue the immutability of their sexual orientation. The medical and scientific evidence to date shows the immutability of sexual orientation. Therefore, assuming homosexuals are able to meet the remaining three *Frontiero* factors, homosexuality should be classified as a suspect classification and receive heightened review.

## II. HISTORY AND APPLICATION OF EQUAL PROTECTION

The Fourteenth Amendment to the United States Constitution provides that “No State shall . . . deny to any person . . . the equal protection of the laws.”<sup>20</sup> This amendment was first enacted to protect newly freed slaves,<sup>21</sup> but it has also been used to protect against various other types of discrimination.<sup>22</sup> The Equal Protection Clause of the Fourteenth Amendment protects disadvantaged groups from discriminatory practices.<sup>23</sup> It looks forward and invalidates widespread practices that were expected to endure.<sup>24</sup>

### A. Equal Protection in General

In applying the Equal Protection Clause, courts use three different levels of review, depending on the classification in question. When courts review laws that discriminate on the basis of race<sup>25</sup> they use the highest level of review, strict scrutiny.<sup>26</sup> The middle level review, heightened scrutiny, applies to discrimination

<sup>20</sup>U.S. CONST. amend. XIV, § 1.

<sup>21</sup>*Strauder v. West Virginia*, 100 U.S. 303, 306 (1880) (stating the purpose of the Fourteenth Amendment was “securing to a race recently emancipated . . . all the civil rights that the superior race enjoy.”).

<sup>22</sup>*See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (protecting against discrimination on the basis of mental retardation by applying the Equal Protection Clause of the Fourteenth Amendment); *Craig v. Boren*, 429 U.S. 190 (1976) (protecting against gender discrimination by applying the Equal Protection Clause of the Fourteenth Amendment); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (using the Fourteenth Amendment to protect against discrimination based upon alienage); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954) (overturning the Separate but Equal Doctrine and calling for desegregation of the United States public school systems by applying the Equal Protection Clause of the Fourteenth Amendment).

<sup>23</sup>Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

<sup>24</sup>*Id.*

<sup>25</sup>The highest level of review, strict scrutiny, is predominately used in classifications that discriminate on the basis of race, but is also used in review of Equal Protection claims involving state, but not federal, discrimination on the basis of alienage. *Sugarman*, 413 U.S. at 634; *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>26</sup>*Korematsu v. United States*, 323 U.S. 214 (1944) (holding that classifications based upon race are immediately suspect and will only be upheld if they pass the most rigid scrutiny, i.e., strict scrutiny).

based upon gender.<sup>27</sup> All other classifications that neither create a suspect classification<sup>28</sup> nor burden a fundamental right are upheld as long as they are rationally related to a legitimate government purpose.<sup>29</sup> For example, classifications based upon wealth<sup>30</sup> are not considered suspect and, therefore, receive only rational basis review.<sup>31</sup>

The different levels of review guard against “prejudice against discrete and insular minorities” who cannot protect themselves.<sup>32</sup> Strict scrutiny review is difficult to surmount,<sup>33</sup> and, therefore, ensures that the government generally cannot discriminate on the basis of race.<sup>34</sup> On the other hand, rational basis review is so lenient<sup>35</sup> that nearly every statute reviewed under this standard will survive.<sup>36</sup> Clearly, groups who have endured a history of social and political mistreatment would prefer to receive strict scrutiny review, or at least mid-level review. Strict scrutiny review would provide these groups extra protection to ensure that no discriminatory law could be passed with an improper purpose, such as perpetuating invidious stereotypes.<sup>37</sup>

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<sup>27</sup>*Craig*, 429 U.S. 190 (upholding classifications based upon gender only if they are substantially related to the achievement of an important government objective, i.e., mid-level review). *See also* *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (recognizing that the mid-level review, under which gender classifications are reviewed, also applies to classifications based upon illegitimacy).

<sup>28</sup>Suspect classifications include classifications based upon race, gender and alienage. *Frontiero*, 411 U.S. at 682. These classifications trigger a heightened level of review. *Id.* Classifications based upon characteristics other than those recognized as suspect will only be reviewed with the default rational basis review. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)

<sup>29</sup>*Cleburne*, 473 U.S. at 446 (holding that the mentally retarded are not a suspect classification and are therefore merely entitled to a rational basis review).

<sup>30</sup>*Papasan v. Allain*, 478 U.S. 265, 286 (1986) (finding disparate treatment on the basis of wealth need only be rationally related to a legitimate government interest).

<sup>31</sup>The Court has determined that classifications on the basis of age are not suspect and are to be reviewed with the lenient rational basis review. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

<sup>32</sup>*United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938).

<sup>33</sup> Under strict scrutiny review, classifications will only be upheld if they are necessary to achieve a compelling government interest. Classifications are not necessary when there are other less burdensome means available. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004).

<sup>34</sup>Christine C. Goodman, *Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws*, 66 ALB. L. REV. 633, 639 (2003) (recognizing that under strict scrutiny review, race-based classifications nearly always fail).

<sup>35</sup>Under rational basis review, classifications are presumptively valid and are sustained as long as the classification bears some rational relation to a legitimate government interest. *Lawrence*, 539 U.S. at 579 (citing *Cleburne*, 473 U.S. at 473).

<sup>36</sup>16B AM. JUR. 2D *Constitutional Law* § 813.

<sup>37</sup>Even under rational basis review, laws which are clearly passed with only the “bare . . . desire to harm a politically unpopular group” will be struck as irrational under the Equal Protection Clause of the Fourteenth Amendment. *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973).

The Supreme Court created a four-part test for recognizing suspect classifications that will enjoy strict scrutiny review:<sup>38</sup>

(1) Has the group suffered a history of purposeful discrimination? (2) Is the class the object of such deep-seated prejudice that it is often subjected to disabilities based on inaccurate stereotypes that do not truly reflect the members' abilities? (3) Is the class defined by the presence of an immutable trait that is beyond a class member's control and yet bears no relation to the individual's ability to contribute to society? (4) Is the group a politically powerless minority?<sup>39</sup>

When all four questions receive affirmative answers, the classification is considered suspect and strict scrutiny review is triggered.

#### *B. Equal Protection for Homosexuals*

In the summer of 2003, the Supreme Court was faced with a case that could have had tremendous impact on equal protection for homosexuals. *Lawrence v. Texas*<sup>40</sup> asked the Court to determine the constitutionality of sodomy laws that the Court had upheld less than twenty years earlier in *Bowers v. Hardwick*.<sup>41</sup> In *Bowers*, the Court was asked to determine the constitutionality of Georgia's sodomy law.<sup>42</sup> While the statute at issue in *Bowers*, by its plain meaning, applied to both heterosexuals and homosexuals, the state enforced the statute in a manner that discriminated against homosexuals.<sup>43</sup> The *Bowers* Court did not address the disparate treatment of the statute, but rather upheld the sodomy law on the grounds that there was no fundamental right for homosexuals to engage in acts of consensual sodomy.<sup>44</sup>

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<sup>38</sup>See *Frontiero*, 411 U.S. at 677.

<sup>39</sup>Dean v. Dist. of Columbia, 653 A.2d 307, 339-40 (D.C. 1995); see also *Frontiero*, 411 U.S. at 677.

<sup>40</sup>*Lawrence*, 539 U.S. at 558.

<sup>41</sup>*Bowers v. Hardwick*, 478 U.S. 186, 187 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling the case on substantive due process grounds rather than on equal protection grounds).

<sup>42</sup>*Bowers*, 478 U.S. at 187.

<sup>43</sup>“A person who commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . shall be punished by imprisonment for not less than one nor more than 20 years.” While the statute does not discriminate against homosexuals on its face, the law was enforced in a discriminating manner by primarily charging homosexuals with violations. *Id.* at 188.

<sup>44</sup>*Id.* The Court decided *Bowers* under substantive due process grounds rather than equal protections grounds and determined that because the right to engage in consensual homosexual sodomy was not a fundamental right, the government needed only a rational basis for their law. *Id.* The rational basis review applied by the court, while applied in a similar manner as rational basis review under equal protection, was not applied in an attempt to view the statute under the Equal Protection Clause. The Fourteenth Amendment to the United States Constitution includes both Equal Protection and Due Process Clauses, which employ similar standards of review. See 16B AM. JUR. 2D *Constitutional Law* § 869 (2005); 16B AM. JUR. 2D *Constitutional Law* § 890 (2005). While equal protection issues arise when there are two groups treated in different manners, substantive due process issues arise when a basic right is



Seventeen years after *Bowers*, the Court overturned its decision and found a similar sodomy law unconstitutional.<sup>45</sup> While *Lawrence* was a great victory for homosexuals, it did not provide an equal protection victory.<sup>46</sup> Instead of determining whether or not homosexuals are a suspect class or the level of review homosexuals would be provided in equal protection lawsuits, the Court side-stepped the equal protection issue. By deciding *Lawrence* on substantive due process grounds<sup>47</sup> and finding that the sodomy laws unconstitutionally imposed on sexual privacy,<sup>48</sup> the Court avoided determining the level of review.

The *Lawrence* decision was not the first instance that the Court has avoided determining the level of review for homosexuals. Prior to *Lawrence*, in *Romer v. Evans*, the Court heard an equal protection suit involving discrimination on the basis of sexual orientation.<sup>49</sup> In *Romer*, Colorado voters approved a state constitutional amendment that provided:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or

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being impaired. See 16B AM. JUR. 2D *Constitutional Law* § 892 (2005). Although homosexuals and heterosexuals were being treated differently through the application of the statute in *Bowers*, the Court decided the issue based upon the statutes affect on the right to homosexual sodomy. *Id.* at 192.

<sup>45</sup>*Lawrence*, 539 U.S. at 558.

<sup>46</sup>But see Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004) (arguing that the Court “authorized a new regime of heightened regulation of homosexuality”). Hunter argues that by striking the discriminatory law in question, the Court was actually using a higher standard of review than the general rational basis review. *Id.* at 1528-29. However, in *Lawrence* the Court did not decide the issue under equal protection grounds. The Court overturned the law at issue under the Substantive Due Process Clause of the Fourteenth Amendment. *Lawrence*, 539 U.S. at 558. Unlike equal protection claims, substantive due process claims have a two-tiered level of review depending on whether the law at issue burdens a fundamental right. See 16B AM. JUR. 2D *Constitutional Law* § 892 (2005). The right in question in *Lawrence* was the right to privacy. Because the sodomy law at issue in *Lawrence* interfered with the fundamental right to privacy, the Court used a more stringent level of review. *Lawrence*, 539 U.S. at 558. By deciding the case on substantive due process grounds, the Court avoided determining the standard of review for homosexuals in equal protection claims. In fact, homosexuality was not an issue in *Lawrence* because the case was decided on substantive due process grounds, i.e., suppression of a privacy right, rather than grounds relating to the unequal treatment of similarly situated groups. The Court held that privacy was fundamental and could not be burdened. *Id.* The majority opinion did not in anyway implicate sexual orientation and it did not authorize any level of review for equal protection suits involving discrimination on the basis of sexual orientation. See 16A AM. JUR. 2D *Constitutional Law* § 403 (2005).

<sup>47</sup>Although the statute at issue in *Lawrence* had been applied in a discriminatory manner by treating the acts of homosexual couples differently than the same acts of heterosexual couples, the Court invalidated the law under the Substantive Due Process Clause of the Fourteenth Amendment. *Lawrence*, 539 U.S. at 578-79.

<sup>48</sup>The majority opinion in *Lawrence* suggests that *Bowers* was decided incorrectly because the Court asked whether there was a fundamental right to homosexual sodomy instead of asking whether there was a general right to sexual privacy. *Id.* at 566-67.

<sup>49</sup>*Romer v. Evans*, 517 U.S. 620 (1996).

departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.<sup>50</sup>

Colorado voters passed the amendment in direct response to city ordinances prohibiting discrimination on the basis of sexual orientation.<sup>51</sup> The amendment did not merely repeal or rescind the city ordinances, but it prohibited any legislative, executive or judicial action at the state or local level designed to protect homosexuals.<sup>52</sup> In *Romer*, the Court, as in *Lawrence*, avoided determining the requisite level of review. Unlike *Lawrence*, *Romer* did decide the case on equal protection grounds, but determined the amendment at issue was so irrational, because it stripped homosexuals of all protections, that it could not even pass the most lenient rational basis review.<sup>53</sup>

*Romer* and *Lawrence* do not provide much insight into how a future lawsuit involving equal protection of homosexuals would be decided by the Supreme Court. *Lawrence* avoided the equal protection issue by deciding the case under a different clause of the Fourteenth Amendment,<sup>54</sup> and *Romer* avoided determining the level of review by finding the amendment at issue would not even pass the most lenient review.<sup>55</sup> These decisions were safe for the Court, but growing interest in legal rights of homosexuals<sup>56</sup> will undoubtedly soon force the Court to come to a real conclusion. The Court will have to determine whether homosexuality meets the qualifications of a suspect classification. Until the Court hears another equal protection lawsuit involving discrimination on the basis of sexual orientation, the standard of review to be applied is rational basis review.<sup>57</sup> The Court, as of yet, has failed to recognize homosexuals as a suspect classification. But, the time has come when the Court may be unable to continue to avoid deciding the issue.

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<sup>50</sup>*Id.* at 624.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 631-32.

<sup>54</sup>*Lawrence*, 539 U.S. 558 (striking sodomy law as a violation of the Substantive Due Process Clause of the Fourteenth Amendment).

<sup>55</sup>*Romer*, 517 U.S. 620 (striking state constitutional amendment because the amendment itself was so irrational that it would not even stand under the lenient rational basis review).

<sup>56</sup>Boodman, *supra* note 16.

<sup>57</sup>Until the Court finds sexual orientation to be a suspect classification, laws that discriminate against homosexuals will only receive rational basis review. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (applying rational basis review for classifications based on mental retardation because mental retardation is not a suspect classification).

### III. WHAT IT MEANS FOR A TRAIT TO BE IMMUTABLE AND WHY IMMUTABLE TRAITS ARE PROTECTED

A finding that sexual orientation is predetermined and not susceptible to change would mean that sexual orientation is as immutable as race and gender. Such a finding would bring homosexuality closer to meeting the criteria of a suspect class. Once labeled by the courts as a suspect classification, homosexuality would receive a higher standard of review in equal protection cases, guaranteeing that the Court will strike discrimination against homosexuals that results from public prejudice and stereotypes. Because of the legal implications the immutability of sexual orientation carries for homosexuals, the public, the courts, and our government all have great interest in the subject. These implications fuel the research and studies searching for a biological cause.<sup>58</sup> However, the Court's definition of immutability shows that homosexuals do not necessarily have to prove that sexual orientation is in fact biological or genetic. The definition requires homosexuals to prove that their sexual orientation was determined by birth and is not susceptible to change.

#### A. What it Means for a Trait to be Immutable

An immutable characteristic is a trait that is "determined solely by the accident of birth"<sup>59</sup> and is "not capable of or susceptible to change."<sup>60</sup> This definition of immutability<sup>61</sup> does not include "ethnic or sociocultural"<sup>62</sup> characteristics "such as citizenship or alienage"<sup>63</sup> or "poverty."<sup>64</sup> While this definition seems to exclude psychological conditions and only include biological traits, a predisposition to a certain psychological trait can be determined solely by the accident of birth, therefore being beyond the control of the inheriting child.<sup>65</sup> While the Court, thus

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<sup>58</sup> See Mark Meachem, *Science and Homosexuality*, HERALD, Sept. 24, 2005.

<sup>59</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>60</sup> WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 602 (9th ed. 1987).

<sup>61</sup> *Frontiero*, 411 U.S. at 686-87; *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980); *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973).

<sup>62</sup> *Garcia*, 618 F.2d at 269.

<sup>63</sup> *Id.* (citing *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973)).

<sup>64</sup> *Id.* Unlike race and gender, poverty and citizenship are susceptible to change. In addition, while certain events can occur after birth and cause a person an irreparable injury, such as an accident causing loss of a limb or blindness, these type of accidents do not fall within the Court's definition of immutability. *Id.* (citing *Ybarra v. City of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974)).

<sup>65</sup> Psychological conditions such as bipolar disorder and schizophrenia affect relatives of another person suffering from bipolar disorder or schizophrenia at a ten times higher rate than that of the general population. While researchers have yet to find a specific gene causing the disorders, the high percentage of those affected with affected family members implies that the illnesses have a hereditary component. See CATHERINE BAKER, BEHAVIORAL GENETICS: AN INTRODUCTION TO HOW GENES AND ENVIRONMENTS INTERACT THROUGH DEVELOPMENT TO SHARE DIFFERENCES IN MOOD, PERSONALITY, AND INTELLIGENCE 64-67 (2004), available at <http://www.aaas.org/spp/bgenes/publications.shtml>.

far, has recognized only fixed and visible characteristics, such as race and gender,<sup>66</sup> as immutable, nothing in the Court's definition explicitly rejects recognition of a psychological condition or requires visibility of the trait.<sup>67</sup> For a trait to be recognized as immutable under the Supreme Court's definition, the trait must merely be unchangeable and determined at birth.<sup>68</sup> Therefore, in order to prove immutability and gain recognition as a suspect classification, homosexuals need only show that sexual orientation is not chosen, is determined by birth, and is unlikely to be changed.

### B. Protection of Immutable Traits

The Court disfavors discrimination on the basis of an immutable trait because immutable characteristics are determined solely by the accident of birth and "the imposition of special disabilities upon the members of a particular [group] because of [the immutable characteristic] would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'"<sup>69</sup> Because immutable traits are not chosen by an individual and are unchangeable, no one should be penalized for bearing such a trait. The policy underlying the protection of immutable characteristics shows that what matters is whether the affected person chose or can control the particular trait. Thus, medical and scientific findings concluding that a homosexual did not choose his or her sexual orientation and cannot change it, would make sexual orientation an immutable trait under the Supreme Court's definition.<sup>70</sup>

The United States criminal justice requirement of *mens rea*<sup>71</sup> is an example of the policy of only punishing a person for his own conscious choices. By insisting on *mens rea*,<sup>72</sup> the criminal justice system requires that the offender have a requisite culpability before convicting him of a crime for his acts.<sup>73</sup> A person has no control over an immutable trait such as race, and arguably sexual orientation. While a person cannot be criminally responsible for an act he did not intend and had no control over,<sup>74</sup> he should also not suffer disparate treatment as a result of an

<sup>66</sup>*Frontiero*, 411 U.S. at 686.

<sup>67</sup>"[A]n immutable characteristic [is one] which its possessors are powerless to escape or set aside." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978).

<sup>68</sup>*See id.*

<sup>69</sup>*Frontiero*, 411 U.S. at 686 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

<sup>70</sup>*See id.*

<sup>71</sup>*See* MODEL PENAL CODE § 5.01.

<sup>72</sup>The *mens rea* requirement "describe[s] the mental element in blameworthy or culpable conduct that leads to criminal liability, as distinguished from conduct that causes harm but is unaccompanied by the mental state necessary for the imposition of criminal liability." 1 WITKIN CAL. CRIM. LAW ELEMENTS § 2 (3d ed. 2000).

<sup>73</sup> *Id.*

<sup>74</sup>"Except as statutorily provided, a person is not guilty of an offense unless he acted intentionally, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." 1 P.L.E. CRIMINAL LAW pt. 1, § 22.

immutable trait he bears. Punishing a person or treating him differently because of an immutable trait would be completely fruitless because a person can no more change an immutable trait than he can choose it at birth. The fact that our legal system seeks to avoid punishing people for acts that are not within their control indicates the need to protect immutable characteristics. Our legal system strives to avoid unwarranted discrimination.

### C. Currently Recognized Immutable Traits

Race and gender are the two main immutable traits recognized in the American Legal System.<sup>75</sup> As with other immutable characteristics, the Court recognizes and protects these traits because they were “determined solely by the accident of birth.”<sup>76</sup> Unlike sexual orientation, generally speaking, a person’s race or gender is visibly discernable. While the visibility of the trait could support the application of the extra protection for race and gender and not for sexual orientation, the idea of immutability of these characteristics is not so clear. While the definition of immutability includes the notion of an inability to change the trait, both race and gender can be visibly hidden, both are somewhat susceptible to change, and both are sometimes culturally determined.<sup>77</sup> By continually recognizing race and gender as immutable, while these traits are not entirely fixed, the Court is recognizing immutable traits as those that are very difficult to change.

The policy behind protection of immutable characteristics prevents punishing a person for a characteristic beyond his control.<sup>78</sup> This policy does not turn on the visibility of the characteristic, but rather focuses on whether the person had a choice in bearing the trait and whether it is within his control.<sup>79</sup> Therefore, to be recognized as equally immutable as race and gender, to fit the Court’s definition of immutable, and to meet the immutability requirement of the suspect classification test, homosexuals must show that they did not choose their sexual orientation and that it cannot be changed.

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<sup>75</sup>*Frontiero*, 411 U.S. at 686 (recognizing both race and gender as immutable characteristics).

<sup>76</sup>*Id.*

<sup>77</sup> Race is not always visibly clear. While miscegenation statutes claimed “one drop” made a person African American, the one drop was not always ascertainable. African Americans have “passed” as white, although their blood would classify them as otherwise. See Frank H. Wu, *From Black to White and Back Again*, 3 *ASIAN L.J.* 185, 201-04 (1996) (arguing that the idea of passing shows the fluidity of race). Gender can also be hidden. See *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Civ. App. 1999) (finding that although a man had completed a sex-change operation to visibly appear as a woman, he was unable to marry his male partner).

<sup>78</sup> *Frontiero*, 411 U.S. at 686.

<sup>79</sup> Laws that discriminate should “ideally be based on individual merit or achievement, or at the least on factors within the *control* of an individual.” *Regents of Univ. of Cal.*, 438 U.S. at 361 (emphasis added).

IV. ANALYSIS: WHY THE IMMUTABILITY ARGUMENT  
IS IMPORTANT AND HOW IT IS MET

Today “[t]he biological assumption [of homosexuality] is so widespread that the religious right has become obsessed with countering it, not only rhetorically but through counseling ministries designed to prove that gays can go straight.”<sup>80</sup> This vigorous attack against the biological causes of homosexuality shows the incredible need for extra protection for homosexuals. Americans, when confronted with medical evidence, will not accept homosexuality as natural, even though medical and scientific evidence shows that homosexuality is as biologically natural as heterosexuality.<sup>81</sup> “[T]he evidence indicates that sexual orientation is immensely resistant to change [and] that it is established early in life. . . . [H]omosexuals persevere in their homosexuality throughout their lives.”<sup>82</sup> While there is no definitive proof that sexual orientation is completely genetically inherited, there is also no definitive proof that sexual orientation is solely the result of social learning.<sup>83</sup> The medical evidence shows that homosexuals, whether their orientation results from genetics or environmental factors, are just as unable to change their sexual orientation as heterosexuals; therefore, homosexuals are characterized by an immutable trait. Because sexual orientation is deeply rooted and most likely predominately predetermined, it is as immutable as race and gender.

The immutability of sexual orientation for homosexuals is important because it is one highly disputed factor of the *Frontiero* test.<sup>84</sup> Scholars argue that the Court should drop the immutability factor from the test,<sup>85</sup> or that homosexuals unnecessarily invoke the argument of immutability in their pursuit of a heightened review of their equal protection claims.<sup>86</sup> However, homosexuals are asking the courts to grant them a heightened level of review, and their demands are less likely to be accepted when they are also demanding a different test to determine suspect classifications. The safest way for homosexuals to receive heightened review is to meet all four factors of the *Frontiero* test<sup>87</sup> as the Court has historically applied it. The plethora of scientific and medical research available on sexual orientation answers the question of immutability in the affirmative. Homosexuals do not take a

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<sup>80</sup>John D’ Emilio, *Born Gay, in THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE* 154, 154 (2002).

<sup>81</sup>Richard C. Pullard, *Homosexuality, Nature, and Biology: Is Homosexuality Natural? Does it Matter?*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 30 (John C. Gonsiorek & James D. Weinrich eds., 1991).

<sup>82</sup>Joseph Harry, *Sexual Orientation as Destiny*, 10(3/4) J. HOMOSEXUALITY 111, 122 (1984).

<sup>83</sup>James D. Haynes, *A Critique of the Possibility of Genetic Inheritance of Homosexual Orientation*, 28(1/2) J. HOMOSEXUALITY 91, 108 (1995).

<sup>84</sup>See *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973).

<sup>85</sup>Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 9 (1994).

<sup>86</sup>Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

<sup>87</sup>See *Frontiero*, 411 U.S. at 684-87.

risk in invoking the immutability argument in equal protection claims because the medical and scientific research positively shows sexual orientation to be as immutable as race and gender. Thus, invoking the immutability argument in pursuit of heightened scrutiny for equal protection is the safest way for homosexuals to argue. By arguing the immutability of sexual orientation, homosexuals do not risk losing their pursuit for heightened scrutiny through a failure to prove all factors of the *Frontiero* test.<sup>88</sup> The safest way for homosexuals to receive a heightened level of review in equal protection suits is to stick with the original *Frontiero* test.<sup>89</sup>

#### A. Importance of the Immutability Argument

While immutability is the main disputed issue in the suspect classification argument, one influential constitutional law author believes that the Court should get rid of the immutability requirement altogether. Cass R. Sunstein argues that the issue of immutability is not the decisive factor because the government can legitimately discriminate on the basis of some immutable characteristics.<sup>90</sup> For example, he explains that the government can deny driving privileges because of an individual's blindness, another immutable characteristic. He believes that the cause of sexual orientation should not matter because the use of new technology may make other suspect classifications, such as race and gender, mutable.<sup>91</sup> "After all, discrimination on the basis of race would not become acceptable if scientists developed a serum through which blacks could become white."<sup>92</sup> While Sunstein's point is well taken, it is completely impracticable.

In asking the Court to define homosexuals as a suspect classification worthy of a heightened level of review, homosexuals are asking the Court to rethink past positions.<sup>93</sup> It would be unreasonable to ask the Court not only to change its standard of review, but to change its standard of review for determining a suspect class in all equal protection claims. Such a change could create countless more suspect classifications, thus making the added protection more symbolic than practical. Asking for multiple changes within the court is completely unreasonable, especially for homosexuals, where they meet the immutability factor.

Other opponents of the immutability argument do not contend that the Court should stop considering the immutability of the trait by which the group is being classified; instead, they argue that the issue of immutability is not necessary.<sup>94</sup>

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<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>Sunstein, *supra* note 85, at 9.

<sup>91</sup>*Id.*

<sup>92</sup>*Id.* Sunstein is implying that it is just as wrong to discriminate based on a changeable trait as to discriminate against a fixed trait. If race were easily changeable, he argues, racial discrimination would still be unacceptable. *Id.*

<sup>93</sup>For example, Justice O'Connor's concurrence in *Lawrence v. Texas* which suggests she would have applied rational basis review to review the equal protection violation against homosexuals in the application of a sodomy law. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

<sup>94</sup>See, e.g., Halley, *supra* note 86, at 503.

Critics of immutability arguments claim that homosexuals can achieve equal protection without claiming the immutability of sexual orientation. *Id.* They argue that the test for suspect classifications laid out in *Frontiero*<sup>95</sup> is only a factors test; therefore, immutability is only one item to consider, but it is not necessary for the Court to find homosexuals as a suspect classification.<sup>96</sup>

Since the test laid out in *Frontiero*<sup>97</sup> is a factors test, it is probable that the Court could find a group to be suspect without meeting all of the four factors. However, the Court has failed to find any new suspect classifications in recent years. When the Court in *City of Cleburne v. Cleburne Living Center* was faced with the question of whether or not the mentally retarded should be considered a suspect class, it stated its intent was “not to create . . . new quasi-suspect classification[s].”<sup>98</sup> The plaintiffs in *Cleburne* provided evidence of the immutability of mental retardation<sup>99</sup> and that the mentally retarded suffer purposeful discrimination.<sup>100</sup> However, running through the *Frontiero*<sup>101</sup> factors like a checklist, the Court observed that the mentally retarded are not politically powerless,<sup>102</sup> and that there are some legitimate reasons for discriminating on the basis of mental retardation.<sup>103</sup> The Court concluded, reiterating its desire not to create more suspect classifications, that the mentally retarded, as a group, were not a suspect class.<sup>104</sup> Recognizing the mentally retarded as a suspect classification, because they did not meet all of the factors, would make it too easy for other groups, such as the blind, the disabled, and the aging, to also claim suspect status.<sup>105</sup> Therefore, while it is true that the *Frontiero* test<sup>106</sup> is a factors test, the Court has clearly stated an intent to restrict the groups it will allow to claim suspect status under it.

While critics argue that “pro-gay litigators who invoke the argument from immutability do so at their option,”<sup>107</sup> these pro-gay litigators actually invoke the

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<sup>95</sup>See *Frontiero*, 411 U.S. at 684-87.

<sup>96</sup>Halley, *supra* note 86, at 506.

<sup>97</sup>See *Frontiero*, 411 U.S. at 684-87.

<sup>98</sup>*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

<sup>99</sup>*Id.* at 442. The Court accepts that mental retardation is immutable while also accepting that mental retardation is caused by a variety of factors, some genetic, some environmental, and some unknown. While the Court is not addressing the issue of sexual orientation, its recognition that mental retardation, while not caused entirely by biological forces, is in fact immutable is a strong argument that, from the scientific findings published to date, sexual orientation is immutable. *See Id.*

<sup>100</sup>*Id.* at 444-45.

<sup>101</sup>See *Frontiero*, 411 U.S. 677.

<sup>102</sup>*City of Cleburne*, 473 U.S. at 445.

<sup>103</sup>*Id.* at 444-45.

<sup>104</sup>See *id.* at 446.

<sup>105</sup>See *id.* at 445-46.

<sup>106</sup>See *Frontiero*, 411 U.S. at 684-87.

<sup>107</sup>Halley, *supra* note 86, at 506.



immutability argument for their own benefit. In order to convince the Court to grant homosexuals the status of a suspect class, and thus heightened review for equal protection, the immutability argument must be invoked and all four factors must be met. An unwilling Court is unlikely to compromise, and for that reason arguments for heightened review for homosexuals cannot cut any corners. Homosexuals must show themselves as a perfect fit to the *Frontiero* test and only then will the Court be willing to create a new suspect classification to add to the ranks of race and gender.

*B. Medical and Scientific Research Supporting a Conclusion of Immutability*

Early studies of homosexual behavior concluded that same-sex desires resulted from severe personality disorders that were caused by environmental forces and childhood fears.<sup>108</sup> The American Psychiatric Association (APA) initially listed homosexuality as a mental disorder,<sup>109</sup> but it no longer does so.<sup>110</sup> Conversely, APA experts find that homosexuality is a normal variant in the population.<sup>111</sup> Homosexuals, if treated at all, are treated for various disturbances that result from their individual responses to homophobia and social prejudice.<sup>112</sup> By recognizing that sexual orientation is not subject to change and was most likely determined at birth, doctors and scientists are recognizing that sexual orientation is one trait which fits the Court's definition of immutability. If homosexuality is a normal variant that cannot be changed, then "[w]hat could be more unfair than to penalize [homosexuals] for being true to nature's ways?"<sup>113</sup>

While the medical and scientific research, thus far, has not revealed one definitive cause for homosexuality, researchers generally conclude that homosexuality is beyond an individual's control and that it is unlikely to change.<sup>114</sup> In a recent opinion, the district court for the Southern District of Ohio concluded that sexual orientation is immutable and "beyond the control of the individual."<sup>115</sup> From this finding, the court "conclude[d] that gays, lesbians and bisexuals meet the requisite criteria for quasi-suspect status."<sup>116</sup> The agreement in the medical and scientific field says that sexual orientation is as immutable as race or gender.

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<sup>108</sup>ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 76 (2002).

<sup>109</sup>*Id.*

<sup>110</sup>AM. PSYCHIATRIC ASS'N, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II (6th prtg. 1973), at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/197308.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/197308.pdf) (last visited Sept. 20, 2005).

<sup>111</sup>*Id.*

<sup>112</sup>Panelists Recount Events Leading to Deleting Homosexuality As a Psychiatric Disorder From DSM, <http://www.psych.org/pnews/98-07-17/dsm.html> (last visited Feb. 5, 2005) [hereinafter Panelists Recount Events].

<sup>113</sup>D'Emilio, *supra* note 80, at 159.

<sup>114</sup>Panelists Recount Events, *supra* note 112.

<sup>115</sup>Equality Found. of Greater Cincinnati v. City of Cincinnati, 860 F.Supp. 417, 437 (S.D. Ohio 1994), *cert. denied*, 525 U.S. 943 (1998).

<sup>116</sup>*Id.* at 440.

Hopefully, the Supreme Court will follow the Southern District of Ohio by recognizing that the medical and scientific evidence proves the immutability of sexual orientation. From this conclusion, the Court needs to recognize that homosexuals deserve a heightened level of review.

### 1. Psychological Studies

Early attitudes towards homosexuality regarded homosexuality as a deviation caused by external environmental factors that could be changed.<sup>117</sup> The belief that environmental factors caused homosexuality raised a fear that homosexuality could be spread by teaching the practice to others.<sup>118</sup> Because homosexuality was initially considered a psychological disorder, psychiatrists felt they could treat this condition.<sup>119</sup> Various forms of treatment ranged from hysterectomies and estrogen injections for women and transorbital lobotomies, shock therapy, castration, and various kinds of aversion therapy for men.<sup>120</sup> None of these treatments were actually shown to change the sexual orientation of the patients.<sup>121</sup> In fact, doctors who researched these patients after their treatments discovered that any signs of change were merely suppression of homosexual behavior.<sup>122</sup> The “claim that psychotherapy [has been] totally ineffective in changing homosexuals into heterosexuals . . . is consistent with the research.”<sup>123</sup>

In the mid-1950’s, Chicago psychologist Evelyn Hooker began a study of sixty men, thirty of whom were homosexual and thirty heterosexual.<sup>124</sup> Although the study was meant to show the pathology of homosexuals, it actually revealed that heterosexual and homosexual males were indistinguishable. The subjects demonstrated an equal distribution of pathology and mental health.<sup>125</sup> A similar study of homosexual and heterosexual women found that “with the exception of erotic preference, homosexual women possess the same psychological characteristics as . . . heterosexual women.”<sup>126</sup> Thus, homosexuals are as mentally sound as

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<sup>117</sup>See Decca Aitkenhead, *Weekend: GOING STRAIGHT: Revered by the religious right and bolstered by a supposedly scientific theory, a new wave of therapist-gurus claim they can 'cure' homosexuality. Their success rate is hotly contested. Decca Aitkenhead joins a rally of would-be converts in Nashville*, GUARDIAN (U.K.), Apr. 3, 2004, at 32, available at 2004 WLNR 4581547.

<sup>118</sup>DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY: THE MEDICALIZATION OF HOMOSEXUALITY* 400 (1988).

<sup>119</sup>Chandler Burr, *Homosexuality and Biology*, ATLANTIC MONTHLY, Mar. 1993, at 47, 48.

<sup>120</sup>*Id.*

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at 48-49.

<sup>123</sup>Harry, *supra* note 82, at 116-17.

<sup>124</sup>Burr, *supra* note 119, at 49.

<sup>125</sup>*Id.*

<sup>126</sup>Ronald A. La Torre & Kristina Wendenburg, *Psychological Characteristics of Bisexual, Heterosexual and Homosexual Women*, 9(1) J. HOMOSEXUALITY 86, 95 (1983).

heterosexuals, and the only psychological difference between homosexuals and heterosexuals is their sexual orientation.<sup>127</sup>

Following studies such as Hooker's, the American Psychological Association finally became convinced that homosexuality is not an illness.<sup>128</sup> But, while psychiatrists agree that homosexuality is not an illness, some psychiatrists still do not believe that homosexuality is *entirely* biological; they believe that sexual orientation develops across a person's lifetime.<sup>129</sup> However, psychologists do agree that "evidence indicates that the basis for sexual orientation, if not the orientation itself, is established by early childhood."<sup>130</sup> Thus, while sexual orientation may not be entirely determined by biology, it is so deep that it might as well have been.<sup>131</sup>

By being so deeply rooted and determined so early in life, sexual orientation, like race and gender, fits the Court's definition of immutability. While members of the American Psychiatric Association are unable to agree on one cause for sexual orientation, they do agree that "human beings can not chose to be either gay or straight . . . Sexual orientation [is not] a conscious choice that can be voluntarily changed."<sup>132</sup> The antiquated belief that homosexuality is an illness which can be spread has generally diminished and doctors and scientists widely agree that homosexual orientation can not be spread.<sup>133</sup> This drastic change in thought shows a general acceptance of homosexuality as a trait which is at least mostly predetermined and completely beyond the control of the affected person. The early determination of sexual orientation and its inability to change, shows that sexual orientation is as immutable as race or gender. Thus, homosexuals should be classified as a suspect classification for equal protection purposes.

## 2. Biological Studies

Medical science found evidence of a predisposition to homosexuality. Various medical studies have identified possible biological causes for homosexuality. These

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<sup>127</sup> *See id.*

<sup>128</sup> *See* Panelists Recount Events, *supra* note 108.

<sup>129</sup> *See* GLBT Fact Sheets: Gay, Lesbian and Bisexual Issues, <http://www.aglp.org/pages/cfactsheets.html> (last visited Sept. 20, 2005).

<sup>130</sup> Harry, *supra* note 82, at 118.

<sup>131</sup> John D'Emilio, *Born Gay*, in *THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE* 156 (2002). D'Emilio, *supra* note 80, at 156.

<sup>132</sup> Am. Psychological Ass'n, *Answers to Your Questions About Sexual Orientation and Homosexuality: Is Sexual Orientation a Choice?*, <http://www.apa.org/pubinfo/answers.html> (last visited Sept. 20, 2005) [hereinafter *Is Sexual Orientation a Choice?*]; *see also* WebMD, *Sexual Health: Sexual Orientation: Homosexuality and Bisexuality*, [http://my.webmd.com/content/article/46/2953\\_531.htm](http://my.webmd.com/content/article/46/2953_531.htm) (last visited Sept. 20, 2005) (stating that experts agree that sexual orientation is not a choice and cannot be changed) [hereinafter *Homosexuality and Bisexuality*].

<sup>133</sup> "Despite many attempts, there has been no clear demonstration that parental behavior, even a parent's homosexuality, affects children's sexual orientation. Cultures tolerant of homosexuals do not appear to raise more of them than do less permissive societies." *Are Some People Born Gay?*, at <http://www2.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/nature-nurture/bailey-pillard.html>, (last visited Sept. 20, 2005).

emerging medical discoveries strongly suggest that homosexual behavior is not learned and cannot be changed. As a result, the medical evidence shows that homosexuality is at least as immutable as race and gender because homosexuality is at least partially determined prior to birth.

*a. Brain Studies*

Many studies have searched for the cause of homosexuality in the human brain and have found interesting physical differences between homosexual and heterosexual brains. Several of these studies have found significant variations in brain size of homosexuals. A study between 1983 and 1991 found that the size of the anterior commissure,<sup>134</sup> a fiber tract in the brain, correlates with sexual orientation and gender.<sup>135</sup> This particular study, after accounting for various size and weight differences of the overall brain, discovered that the anterior commissure is 36% larger in the homosexual man than the heterosexual man, but only 5.9% larger than heterosexual females.<sup>136</sup> Heterosexual females' <sup>137</sup> anterior commissures were 28.4% larger than heterosexual males.<sup>138</sup>

Another study, focusing on a different portion of the brain, found more size differences between heterosexuals and homosexuals. In 1982, biologist Christine de Lacoste-Utamsing and anthropologist Ralph Holloway began a study of the size of the splenium between the sexes.<sup>139</sup> The study showed that one could determine the sex of the brain just by the size of the splenium, as it is larger in women's brains than in men's.<sup>140</sup> In attempting to recreate the De Lacoste-Utamsing and Holloway findings, Dick Swaab found "evidence of sexual dimorphism in human brains."<sup>141</sup> This sexual dimorphism, unlike Lacoste-Utamsing and Holloway's findings, was related to sexual orientation and not gender. Swaab found that the suprachiasmatic nucleus in the human brain was nearly twice as large in homosexual men as heterosexual men.<sup>142</sup>

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<sup>134</sup>The anterior commissure is a "bundle of axons that interconnect left and right olfactory areas." Medical Science 532, Nervous System Course: Anterior Commissure, <http://www.sci.uidaho.edu/med532/anterior.htm> (last visited September 20, 2005).

<sup>135</sup>Laura S. Allen & Roger A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, 89 PROC. NAT'L. ACAD. SCI. USA 7199, 7202 (1992).

<sup>136</sup>*Id.* at 7200.

<sup>137</sup>The brains in Drs. Allen and Gorski's study were obtained from California Hospitals. *Id.* at 7199. The study did not note any homosexual female patients because none of the female medical records indicated sexual orientation. *Id.*

<sup>138</sup>*Id.* at 7200.

<sup>139</sup>Burr, *supra* note 119, at 52. The splenium is described as the "shape of a portion of the corpus callosum." *Id.* The corpus callosum is the largest and most clearly identifiable portion of the brain and is made up of nerve fibers that connect and transmit information between the brain's left and right hemispheres. *Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*Id.*

<sup>142</sup>Burr, *supra* note 119, at 52

Neuroscientist Simon LeVay,<sup>143</sup> endocrinologist Gunter Dörner,<sup>144</sup> and neurobiologist Dick Swaab<sup>145</sup> have all found differences in the size of the hypothalamus<sup>146</sup> in brains of heterosexual and homosexual males. Swaab studied the sexually dimorphic nucleus (SDN) and the suprachiasmatic nucleus (SCN) of the hypothalamus.<sup>147</sup> Swaab's study found that the number of cells in the SDN of male homosexual and heterosexual subjects did not differ, but the SCN volume in homosexual men was 1.7 times larger than the SCN volume in heterosexuals and the homosexual brains contained 2.1 times as many cells.<sup>148</sup> LeVay's studies found results similar to Swaab's.<sup>149</sup>

Critics condemn these studies because many of the brains researched were obtained from men who had died from Acquired Immune Deficiency Syndrome (AIDS).<sup>150</sup> These critics claim the disease may have accounted for the differences in the brain sizes.<sup>151</sup> However, a 2002 study of homosexual sheep<sup>152</sup> recreated LeVay's study. The research, conducted by Kay Larkin at the Oregon Health and Science University, found the hypothalamus of homosexual rams was the same in size to heterosexual females, while heterosexual male rams typically had a hypothalamus twice in size to that of females.<sup>153</sup> This study suggests that LeVay's findings were a result of the sexual orientation of his subjects and not as a result of AIDS.

Clearly, the size of an internal organ, such as the brain, cannot be humanly controlled. The brain studies, completed to date, suggest either that a person's sexual orientation affects the size of the brain, or that the size of the brain affects a person's

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<sup>143</sup>CHANDLER BURR, A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION 21 (1996).

<sup>144</sup>John P. De Cecco & David Allen Parker, *The Biology of Homosexuality: Sexual Orientation or Sexual Preference?*, 28(1/2) J. HOMOSEXUALITY 1, 2 (1995).

<sup>145</sup>D.F. Swaab et. al, *Brain Research, Gender and Sexual Orientation*, 28(3/4) J. HOMOSEXUALITY 283, 283 (1995).

<sup>146</sup>“The hypothalamus is known to control sex hormone release and many types of sexual behaviour [sic].” NewScientist.com, *Breaking News: Homosexuality is Biological, Suggests Gay Sheep Study* (Nov. 5, 2002), <http://www.newscientist.com/article.ns?id=dn3008> [hereinafter *Gay Sheep Study*]

<sup>147</sup>Swaab et al, *supra* note 145, at 285-88.

<sup>148</sup>*Id.* at 290.

<sup>149</sup>A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men, <http://www-2.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/nature-nurture/levay.html> (last visited Sept. 20, 2005).

<sup>150</sup>William Byne, *Science and Belief: Psychobiological Research on Sexual Orientation*, 28(3/4) J. HOMOSEXUALITY 303, 329 (1995). *See also* *Gay Sheep Study*, *supra* note 146.

<sup>151</sup>*Id.*

<sup>152</sup>*Gay Sheep Study*, *supra* note 146. Researchers determined the sexual orientation of the sheep through observation. Sheep are the only animals, other than humans, that naturally express exclusive homosexual preference. *Id.* Researchers state that as many as 10 % of sheep are gay. *Id.*

<sup>153</sup>*Id.*

sexual orientation. Either way, both conclusions show that the brain's function in determining homosexuality is beyond the control of the affected person. Thus, if the size of the brain is a decisive factor in human sexual orientation, the trait of homosexuality is immutable.

*b. Hormonal Studies*

In 2000, psychologist Marc Breedlove published a study concluding that “the level of male hormones a fetus is exposed to in the womb can influence future sexual orientation.”<sup>154</sup> Breedlove found that the level of androgen<sup>155</sup> in the womb influences finger length.<sup>156</sup> Therefore, in order to determine the correlation between the hormone and sexual orientation, Breedlove did finger length comparisons. While many of the medical and scientific studies focus only on male sexual orientation, Breedlove studied both male and female subjects and determined the levels of androgen they were exposed to by the length of their fingers. His results showed that “higher levels of androgens can create a greater than normal tendency for both males and females to develop a homosexual orientation.”<sup>157</sup>

Neuroscientist Simon Levay praised Breedlove's findings and stated they confirmed his own studies: that sexual orientation is just one other trait that is determined prior to birth.<sup>158</sup> A study similar to Breedlove's, published in 1998, also indicated that a higher level of androgen in the womb may be a factor in determining sexual orientation.<sup>159</sup> In criticism of finger ratio studies, psychologist Gregory Herick called the use of finger ratios to determine sexual orientation an over simplification.<sup>160</sup> Whether over simplified or not, the study offers more evidence that sexual orientation is determined prior to birth, and consequently, beyond the control of the affected party.

A 1994 study by psychologists J.A.Y. Hall and Doreen Kimura found a difference in dermatoglyphics<sup>161</sup> between homosexual and heterosexual males.<sup>162</sup>

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<sup>154</sup> CNN.com, Male Hormone Levels in Womb May Affect Sexual Orientation, Study Says (Mar. 29, 2000), [http:// archives.cnn.com/2000/HEALTH/03/29/gay.fingers](http://archives.cnn.com/2000/HEALTH/03/29/gay.fingers) [hereinafter Hormone Levels in Womb]; *see also* WebMD, Pointing the Finger at Androgen as a Cause of Homosexuality (Mar. 29, 2000) [http://my.webmd.com/content/article/22/1728\\_56075.htm](http://my.webmd.com/content/article/22/1728_56075.htm), [hereinafter Pointing the Finger].

<sup>155</sup>“Androgen is the generic term for any natural or synthetic compound, usually a steroid hormone, that stimulates or controls the development and maintenance of masculine characteristics in vertebrates. Wikipedia, the Free Encyclopedia, Androgen, <http://en.wikipedia.org/wiki/Androgen> (last visited Sept. 20, 2005). This includes the activity of the accessory male sex organs and development of male secondary sex characteristics.” *Id.*

<sup>156</sup> Hormone Levels in Womb, *supra* note 154.

<sup>157</sup> *Id.*

<sup>158</sup> *See id.*

<sup>159</sup> Pointing the Finger, *supra* note 154.

<sup>160</sup> *See* Hormone Levels in Womb, *supra* note 154.

<sup>161</sup>Dermatoglyphics are “friction ridge formations which appear on the palms of the hands and soles of the feet. . . . The ridging formations serve well to enhance contact, an area of multiple nerve endings . . . and aids in the prevention of slippage.” Andres J. Washington,

The study compared the dermal ridges of sixty-six homosexual men and one-hundred and eighty-two heterosexual men. According to the researchers:

dermal ridges are complete in humans at about the sixteenth week of fetal development; genetics are the primary determination of their form, but they can also be influenced at certain developmental points by a pregnant woman's consumption of alcohol or certain anticonvulsant drugs. Maternal stress has also affected dermal traits in non-human primates, and hormonal variations may have similar effects in humans.<sup>163</sup>

Compared to females, males have a higher total average of dermal ridge counts on the fingers.<sup>164</sup> But, both males and females generally have a higher average number of ridges on their right hands.<sup>165</sup> A minority of males and females have leftwards symmetry, which means they display a higher number of ridges on their left hands than on their right.<sup>166</sup> While Hall and Kimura's study found that homosexual and heterosexual men did not differ in the amount of ridges present on their fingers, they also found that a significantly larger portion of homosexual men displayed the minority leftwards symmetry.<sup>167</sup> Their study also found that homosexual men displayed this minority trait in equal proportions to heterosexual women.<sup>168</sup> The brain studies all provide further evidence towards an early biological contribution to homosexuality.

### 3. Genetic Studies

Doctors, scientists, and the general public are very interested in searching for causes of diseases and ways to cure them. Genetic studies, such as the Human Genome Project, search to find causes and cures for many different diseases.<sup>169</sup> Sexual orientation, while no longer recognized as a disease, is part of the genetic search. Doctors and scientists have studied twins hoping to discover whether sexual orientation is determined by genetics or the environment.<sup>170</sup> Other researchers have focused on the search for a gay gene.<sup>171</sup> These studies offer more support for the argument of the immutability of sexual orientation.

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Fingerprint Geometric Analysis, <http://www.dermatoglyphics.com/derma>, (last visited Sept. 20, 2005).

<sup>162</sup> MURPHY, *supra* note 19, at 35.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 36.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *New Findings in the Area of Hypertension Described*, GENETICS AND ENVTL. L. WKLY., July 16, 2005.

<sup>170</sup> Burr, *supra* note 119.

<sup>171</sup> See Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993).

*a. Twin Studies*

A psychiatrist at the Boston University School of Medicine became interested in genetic studies of sexual orientation because he, his brother, and his sister are all gay.<sup>172</sup> He also believed his father was gay, and one of his three daughters from a marriage early in life is bisexual.<sup>173</sup> Because of the unusually large number of homosexuals in his family, Chandler Burr studied twins to determine the role heredity played in determining a person's sexual orientation.<sup>174</sup> A team of researchers from Burr's university began studying a random sampling of both heterosexuals and homosexuals and their siblings.<sup>175</sup> Their study found that while 4% of the heterosexuals had homosexual siblings, a striking 20% of the homosexuals studied had homosexual siblings.<sup>176</sup> Thus, their study strongly supported the psychiatrist's belief that homosexuality is in some way genetic.

A similar study conducted by Michael Bailey, psychology professor at Northwestern University, and Richard Pillard, psychiatry professor at Boston University School of Medicine also supported a genetic cause of homosexuality. They found that in their study of male brothers, 52% of identical twin brothers were both gay, 22% of non-identical twin brothers were both gay, and only 11% of non-twin brothers were both gay.<sup>177</sup> Such evidence of heredity as a role in sexuality argues strongly in favor of sexual orientation as an immutable characteristic.

Michael Bailey also did a study of women, attempting to prove homosexuality to be heritable in females as well as males. Bailey's study of eighty-five homosexual women and seventy-nine heterosexual women found that 12 to 35% of homosexual women had homosexual sisters while only 2 to 14% of the heterosexual women had homosexual sisters.<sup>178</sup> Their study showed a familiar relationship to the causes of female homosexuality.<sup>179</sup> It provides further evidence of the predetermination of sexual orientation.

Critics of the twin studies argue that examining twins who were raised in the same household blends any potential genetic factors with uncontrolled environmental factors.<sup>180</sup> These critics also contend that if homosexuality is in fact genetic, "the

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<sup>172</sup> Burr, *supra* note 119.

<sup>173</sup> *Id.* at 160.

<sup>174</sup> *Id.*

<sup>175</sup> Richard Pillard, *The Genetic Theory of Sexual Orientation*, HARV. GAY & LESBIAN REV., Winter 1997, at 64.

<sup>176</sup> *Id.*

<sup>177</sup> Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, <http://www-2.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/nature-nurture/bailey-pillard.html> (last visited February 5, 2005).

<sup>178</sup> Bailey Study on Lesbian Attraction, Jan. 18 1993, <http://www2.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/nature-nurture/lesbian.html>.

<sup>179</sup> *Id.*

<sup>180</sup> JEFFREY SATINOVER, *HOMOSEXUALITY AND THE POLITICS OF TRUTH* 82-83 (1996).



concordance rate between identical twins . . . [would] be 100 percent. There would never be a *discordant* pair.”<sup>181</sup>

A 1952 study of forty-five pairs of dizygotic<sup>182</sup> twins and forty monozygotic<sup>183</sup> twins attempted to overcome these critiques by finding a perfect, 100%, concordance for homosexuality among the monozygotic twins and a 42.3% concordance for homosexuality amongst dizygotic twins.<sup>184</sup> While this study demonstrated more evidence of a genetic influence, it could also not differentiate between genetic and environmental influences because the research did not indicate whether the twins were reared separately.<sup>185</sup> Other twin studies that found high concordance rates for homosexuality have faced similar criticism for failing to differentiate between genetic and environmental factors, because the subjects were raised together.<sup>186</sup> However, studies of identical twins separated shortly after birth, and raised in separate environments, while not showing perfect concordance, “strongly suggest a genetic influence on sexuality.”<sup>187</sup> This supports the argument that genetics are most likely a strong influence on sexual orientation.

#### *b. Genetic Mapping*

Genetic studies have become a part of daily conversation in recent years with projects such as the Human Genome Project. In 1993, this conversation started to include the idea of a gay gene as a result of scientist Dean Hamer’s study of genetic influences in sexual orientation.<sup>188</sup> Hamer’s study indicated “a statistical confidence level of more than 99 percent that . . . male sexual orientation is genetically influenced.”<sup>189</sup> Hamer and his fellow researchers observed homosexuals and at least one of their relatives. The participants gave blood samples and answered a series of

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<sup>181</sup>*Id.* at 83. A discordant pair of twins, as used in this context, means a pair where one twin is homosexual, but the other twin is heterosexual. *Id.* Critics of the twin studies claim that for homosexuality to be biological, identical twins would both have to exert either homosexual or heterosexual tendencies. *Id.* See MERRIAM-WEBSTER ONLINE, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=discordant&x=2&y=16> (last visited Sept. 20, 2005) (defining discordant as disagreeing).

<sup>182</sup>“Dizygotic twins (DZ) result from the fertilization of two separate eggs by two separate sperm.” Haynes, *supra* note 83, at 101.

<sup>183</sup>“Monozygotic twins (MZ) are those who develop from the splitting of a single zygote (fertilized egg) within the first two weeks of development.” *Id.*

<sup>184</sup>*Id.* at 103-04.

<sup>185</sup>*Id.* The study has also been criticized for selecting the sample largely from “mentally ill and institutionalized men.” William Byne & Bruce Parsons, *Human Sexual Orientation: The Biologic Theories Reappraised*, 50 ARCHIVES GEN. PSYCHIATRY 228, 229 (1993).

<sup>186</sup>*Id.*

<sup>187</sup>Richard Pillard, *Origins: The Science of Homosexuality*, in THE BEST OF THE HARVARD GAY & LESBIAN REVIEW 64 (Richard Schneider, Jr., ed. 1997).

<sup>188</sup> Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321, 321 (1993).

<sup>189</sup> *Id.*

questions regarding their sexual development.<sup>190</sup> The results of this study were compared to a separate study that had found a 2% populational prevalence of male homosexuality.<sup>191</sup>

By comparing the two studies, researchers discovered a 13.5 % chance of being gay amongst brothers and a 7.5 % chance of being gay amongst maternal uncles and the sons of maternal aunts.<sup>192</sup> The transmission of a male-limited trait with X chromosome linkage causes the maternal link.<sup>193</sup> Women are the sole carriers of X chromosomes to their male off-spring, thus any X-linked gene will pass through the mother's side of the family.<sup>194</sup> Hamer's observation that "uncles and cousins share inherited information with the index subjects, but are raised in different households by different parents," supports the argument for a genetic cause to sexual orientation.<sup>195</sup> His study, finding a genetic correlation without the problem of environmental influences, provides evidence that the connection between homosexuality and familiar traits found in the various twin studies was most likely not caused by environmental factors, but rather by genetic influences.

After discovering a possible X chromosome link to sexual orientation, Hamer and his researchers compared twenty-two markers along the X chromosome.<sup>196</sup> The main outcome of Hamer's study was the detection of a link between homosexual orientation and markers in the distal portion of gene Xq28.<sup>197</sup> The Hamer study "incate[s] a statistically significant correlation between the inheritance of genetic markers on chromosomal region Xq28 and sexual orientation."<sup>198</sup> The correlation is so strong that the study claims to be 99.5% certain that there is a gene (or genes) in the X chromosome that predisposes a male to become homosexual.<sup>199</sup> This study provides more support that homosexuality is at least more than just a learned behavior.

Hamer's study has yet to be replicated, and the Office of Research Integrity investigated the study for possible improprieties,<sup>200</sup> which raises questions about its validity. However, the study has also not been completely disproved, leaving open the possibility of truth. Hamer himself says that his study shows that being gay is not simply a choice or purely a decision.<sup>201</sup> "People have no control over the genes

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 322.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 324.

<sup>195</sup> *Id.* at 323.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 321.

<sup>199</sup> Robert Pool, *Evidence for Homosexuality Gene*, 261 SCIENCE 291(1993).

<sup>200</sup> Eliot Marshall, *NIH'S "Gay Gene" Study Questioned*, 268 SCIENCE 1841 (1995).

<sup>201</sup> *Id.*

they inherit and there is no way to change them.”<sup>202</sup> If his study can be replicated, it would be definitive proof that sexual orientation is an immutable characteristic.

While a particular gene associated with homosexuality has not been discovered in another study, scientists in Italy recently published a study supporting the female heritability of a genetic predisposition to male homosexuality.<sup>203</sup> Their study found that “women tend to have more children when they inherit the same—as yet unidentified—genetic factors linked to homosexuality in men.”<sup>204</sup> This theory, while also supporting arguments for a genetic factor to homosexuality, explains why homosexuality, a so-called genetic dead-end<sup>205</sup> can pass from generation to generation. In response to the findings, neuroscientist Simon LeVay of Stanford University suggested that what researchers consider a gene for male homosexuality may really be a gene for sexual attraction to men.<sup>206</sup> He argues that the gene may predispose men towards homosexuality while causing women to have a hyper-heterosexuality.<sup>207</sup> This hyper-heterosexuality may cause women to have more sex with men; therefore, having more off-spring.<sup>208</sup> The Italian study found homosexuality and fertility to pass through the mother’s side of the family, as did Hamer’s gay gene.<sup>209</sup> However, the Italian study, while supporting evidence of a genetic link along the X chromosome, did not pinpoint a particular gene as Hamer’s study did. Nonetheless, the Italian study still offers concrete support for Hamer’s work by providing more evidence of a female link to homosexuality through a gene passed along the female carried X chromosome.

The search for a gay gene has become so important that the federal government is currently funding a five-year grant under the National Institute of Child Health and Human Development.<sup>210</sup> In the fall of 2003, researchers in Chicago began the five-year study with the intentions of increasing the understanding of genetic contributions to homosexuality.<sup>211</sup> The first three years of the study, from 2003 to

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<sup>202</sup>NIH Study Links Sexuality to Genetic Factor, <http://www2.cs.cmu.edu/afs/cs.cmu.edu/user/scotts/bulgarians/nih-upi.html> (last visited Sept. 20, 2005).

<sup>203</sup>NewScientist.com, Breaking News: Survival of Genetic Homosexual Traits Explained (Oct. 13, 2004), <http://www.newscientist.com/article.ns?id=dn6519>. [hereinafter Survival of Genetic Homosexual Traits].

<sup>204</sup>*Id.*

<sup>205</sup>Because homosexual couples are unable to reproduce, the amount of children born to homosexuals are far less than the amount of children born to heterosexuals. The increase in fertility amongst females with homosexual relatives creates a higher probability that a child in that family will be born as a homosexual. *Id.*

<sup>206</sup>*Id.*

<sup>207</sup>*Id.*

<sup>208</sup>*Id.*

<sup>209</sup>Survival of Genetic Homosexual Traits, *supra* note 203; Pool, *supra* note 199, at 291.

<sup>210</sup>National Institute of Child Health and Human Development, Currently Supported Research, available at CRISP, A Database of Biomedical Research Funded By the National Institutes of Health (on file with author).

<sup>211</sup>*Id.*

2006, are dedicated to recruiting one-thousand pairs of *homosexually affected* sibling pairs.<sup>212</sup> Researchers will spend the last two years completing a “genome scan, fine-mapping, association analyses, and the secondary analysis for the fraternal birth order effect and the quantitative trait of childhood gender nonconformity.”<sup>213</sup>

This study may confirm Hamer’s findings. More importantly, this study implies that our federal government has a strong need to determine whether or not sexual orientation is genetic, otherwise it would be unlikely to fund such a large project. Although it is possible that the government seeks this knowledge in order to prove that homosexuals do not deserve extra protection because their trait is not biological, homosexuals can claim immutability without the finding of a gay gene. While the results of this study will not be available at least until after the summer of 2008,<sup>214</sup> the continuing research gives homosexuals hope that they will soon have definitive proof of the immutability of sexual orientation.

#### V. CONCLUSION: WHAT THE SCIENTIFIC AND MEDICAL STUDIES ON SEXUAL ORIENTATION MEAN FOR HOMOSEXUALS AND EQUAL PROTECTION

Scientists, psychiatrists, and doctors do not agree on any one cause for sexual orientation, and the current consensus is that there are probably many reasons for a person’s sexual orientation.<sup>215</sup> Whatever the cause or causes, experts agree that homosexuals do not choose their sexual orientation and it cannot be changed.<sup>216</sup> Because there is agreement that sexual orientation is a trait that is “not capable of or susceptible to change,”<sup>217</sup> it is clear that sexual orientation, whether heterosexual or homosexual, is at least a trait as immutable as race or gender. New scientific evidence, while unable to pinpoint one direct cause of homosexuality, constantly provides more support to the argument that homosexuality is fixed and unchangeable. While a finding of a gay gene would provide concrete evidence of immutability, such a finding is unnecessary because of the immense research in favor of a finding of immutability of homosexuality. The large number of studies providing support to this idea are enough to earn homosexuals classification as a suspect class deserving of a heightened level of review.

Although it has been argued that immutability is not a decisive factor in the quest for heightened protection for homosexuals in equal protection suits,<sup>218</sup> homosexuals must continue to argue the immutability of their sexual orientation. The Court has been unwilling to recognize new suspect classifications.<sup>219</sup> With current disputes

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<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>*Id.*

<sup>215</sup>Am. Psychological Ass’n, *Answers to Your Questions About Sexual Orientation and Homosexuality: What Causes a Person To Have a Particular Sexual Orientation?*, <http://www.apa.org/pubinfo/answers.html> (last visited Sept. 20, 2005).

<sup>216</sup>Is Sexual Orientation a Choice?, *supra* note 132; *see also* Homosexuality and Bisexuality, *supra* note 132.

<sup>217</sup>WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 602 (9th ed. 1987).

<sup>218</sup>Halley, *supra* note 86, at 503.

<sup>219</sup>*See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

over same-sex marriage,<sup>220</sup> same-sex adoption,<sup>221</sup> the “Don’t Ask, Don’t Tell Policy,”<sup>222</sup> and other issues involving the legal rights of homosexuals, it is clear that homosexuals are fighting a new civil rights battle, like those fought before by women and African-Americans. Sex and race are both recognized as suspect classifications and they both receive a heightened level of review in equal protection suits. The extra protection these classifications receive has helped to stop discriminatory practices against these groups. Homosexuals cannot risk losing the opportunity to have the Court determine them to be a suspect classification. Therefore, they must invoke the immutability argument in order to meet all four factors of the *Frontiero* test.

The United States Supreme Court recognizes the need to protect groups from discrimination on the basis of immutable traits.<sup>223</sup> The Court protects immutable traits because the parties did not choose the traits and are unable to control them.<sup>224</sup> Currently, race and gender are recognized as immutable.<sup>225</sup> Scientific and medical studies continue to provide new evidence supporting the claim that homosexuality is determined at birth and cannot be changed. Evidence strongly indicates a biological cause for homosexuality. Researchers have discovered genetic and familiar links to homosexuality. These studies, and the common sense notion that a person would not choose a trait that would cause them to suffer a lifetime of hatred, show the Court the immutability of homosexuality.

Homosexuals, in pursuit of the same protection, must, as race and gender have, meet all four factors of the *Frontiero* test. In asking the Court to grant extra protection, homosexuals must prove that sexual orientation perfectly fits the test. The medical and scientific evidence, while unable to find one definitive cause for sexual orientation, has shown that sexual orientation is not susceptible to change and is determined without the choice of the affected party. Therefore, homosexuals are classified by a trait, their sexual orientation, which meets the Court’s definition of immutability. Provided the other three factors are met, homosexuals as a group should be considered a suspect class deserving of a heightened level of review in equal protection lawsuits. Recognition of sexual orientation as a suspect classification would provide homosexuals with safeguards similar to those provided for race and gender. Once the Court recognizes the special needs of homosexuals, the public hopefully will begin to treat homosexuals equally. A heightened standard

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<sup>220</sup>In the November 2004 election, eleven states passed constitutional amendments limiting marriage to heterosexual couples, but opponents to the amendments prepare to fight to keep them from being written into the state constitutions. See Elizabeth Mehren, *11 States Vote to Approve Bans on Same-Sex Marriage; Strong Majorities in Georgia and Ohio Also Opt to Deny Benefits to All Domestic Partners*, L. A. TIMES, Nov. 3, 2004, at A 21.

<sup>221</sup>*Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 377 F.3d 1275 (2004) (denying request to rehear issue of constitutionality of Florida statute barring adoption by homosexuals).

<sup>222</sup>10 U.S.C.S. § 654 (Law. Co-op. Supp. 2005).

<sup>223</sup>*Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>224</sup>*Id.*

<sup>225</sup>*Id.*

of review would truly provide homosexuals equal protection of the law.

KARI BALOG