

Let your
research do
the **talking**.

Let **Wiley Editing Services** provide you with expert help to ensure your manuscript is ready for submission

Find out more and submit your manuscript

WILEY

[Go to old article view](#)

Hastings Center Report

Volume 44, Issue s4

September–October 2014

Pages S32–S39

Special Issue:

LGBT Bioethic Edited by Tia Powell and Mary Beth Foglia

Special Report

Legal and Ethical Concerns about Sexual Orientation Change Efforts

[Tia Powell](#), [Edward Stein](#)

First published:

17 September 2014 [Full publication history](#)

DOI:

10.1002/hast.368 [View/save citation](#)

Cited by:

0 articles [Check for new citations](#)



Tia Powell and Edward Stein, "Legal and Ethical Concerns about Sexual Orientation Change Efforts," *LGBT Bioethics: Visibility, Disparities, and Dialogue*

Abstract

The United States has recently made significant and positive civil rights gains for LGB people, including expanded recognition of marriages between people of the same sex. Among the central tropes that have emerged in the struggle for the rights of LGB people are that they are "born that way," that sexual orientations cannot change, and that one's sexual orientation is not affected by choice. Writer Andrew Sullivan put it this way: "[H]omosexuality is an essentially involuntary condition that can neither be denied nor permanently repressed.... [S]o long as homosexual adults

as citizens insist on the involuntary nature of their condition, it becomes politically impossible to deny or ignore the fact of homosexuality.... [The strategy for obtaining LGB rights is to] seek full public equality for those who, through no fault of their own, happen to be homosexual .”

This idea of linking LGB rights to empirical claims about sexual orientations has become so central that casting doubt on these claims is, in many circles, tantamount to opposing LGB rights. Nonetheless, claims about innateness, immutability, and lack of choice about sexual orientation should not be the primary basis for LGB rights .

Enhanced Article Feedback

Essay

The United States has recently made significant and positive civil rights gains for lesbian, gay, and bisexual people,[1] including expanded recognition of marriages between people of the same sex.[2] Among the central tropes that have emerged in the struggle for the rights of LGB people are that they are “born that way,” that sexual orientations cannot change, and that one's sexual orientation is not affected by choice. Writer Andrew Sullivan put it this way:

[H]omosexuality is an essentially involuntary condition that can neither be denied nor permanently repressed.... [S]o long as homosexual adults as citizens insist on the involuntary nature of their condition, it becomes politically impossible to deny or ignore the fact of homosexuality.... [The strategy for obtaining LGB rights is to] seek full public equality for those who, through no fault of their own, happen to be homosexual.[3]

This idea of linking LGB rights to empirical claims about sexual orientations has become so central that casting doubt on these claims is, in many circles, tantamount to opposing LGB rights.[4] Nonetheless, claims about innateness, immutability, and lack of choice about sexual orientation should not be the primary basis for LGB rights.

In this essay, we take a critical look at laws that ban certain attempts to change sexual orientations. In 2012, California passed a law that prohibits “a mental health provider” from “engag[ing] in sexual orientation change efforts with a patient under 18.”[5] Although the two federal district courts that considered constitutional challenges to this law reached opposite results,[6] the federal appellate court that heard the consolidated appeal upheld the constitutionality of the California law.[7] In 2013, New Jersey passed a law virtually identical to California's, which was also upheld in federal court.[8] As of this writing, legislatures in the District of Columbia, Florida, Hawaii, Illinois, Massachusetts, Minnesota, New York, Ohio, Pennsylvania, and Washington are considering very similar laws,[9] while Maryland, Virginia, and Wisconsin considered and withdrew or rejected such laws.[10] By contrast, the Texas Republican Party, at its state convention this year, included in its party platform support for “the legitimacy and efficacy of counseling, which offers reparative therapy and treatment for

those patients seeking healing and wholeness from their homosexual lifestyle” and, for this reason, declared that “no laws or executive orders shall be imposed to limit or restrict access to this type of therapy.”[11]

We strongly reject attempts to change sexual orientations. Such practices reflect bias against sexual minorities and are harmful to recipients. Nonetheless, we question what seem to be presumptions undergirding laws banning sexual orientation change efforts, namely that sexual orientation is always innate and immutable and does not reflect choices. We suggest that such presumptions about sexual orientations are not only weak starting points for laws like California's and New Jersey's but also, more generally, that immutability, innateness, and lack of choice are poor arguments for the rights of LGB people. In sum, such claims about the nature and origins of sexual orientation are neither good science nor good politics and are not an appropriate foundation for prohibiting sexual orientation change efforts or for LGB rights generally. Instead, support for LGB rights should be grounded in an intellectually rigorous and appropriately humble approach to science and the limits of scientific knowledge. Arguments for LGB rights should be grounded within the context of justice, fairness, equality, and human rights.

Sexual Orientation Change Efforts

For centuries, including for much of the twentieth century, LGB people were subject to various forms of medical intervention, including surgeries such as castration, removal of the clitoris and ovaries, and lobotomy; electroconvulsive treatment (commonly referred to as electroshock therapy); hormone therapy; and wrenching psychoanalysis.[12] Much changed, however, starting in 1973, the year that homosexuality was eliminated from the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders (DSM)*, the authoritative catalogue of mental illnesses used in the United States and throughout much of the world.[13] Since 1973, all major professional associations in mental health care have produced position statements documenting that same-sex sexual orientation is not a mental or physical illness and explicitly opposing efforts to change orientation.[14] These statements are both influenced by and shape social attitudes and public opinion toward LGB people and help remove stigma toward people with same-sex attractions. These position statements also have additional practical effects: for example, health insurance will not cover treatments for something that is not an illness nor support techniques rejected by mainstream therapeutic groups.

As more mental health organizations rejected the view of homosexuality as a disorder, researchers and practitioners who still wished to engage in invasive interventions to “treat” LGB people faced significant hurdles. Mainstream institutions that conduct and oversee human subjects research would not approve research aimed at eradicating same-sex orientation, even for voluntary adult research participants, since there was no accepted benefit to offset the risks. Thus, there could be no approved research to study the efficacy of invasive interventions. Performing these treatments in the clinical context also became more difficult, since invasive interventions typically require a medical or mental health degree, a license, and malpractice insurance. Since these radical attempts to change orientation fall outside of best practice standards delineated by professional societies, licensed practitioners risk losing the ability to work if they engage in practices so far from the mainstream.

As a result, interventions that at least appear less damaging—for example, talk therapy, cognitive-behavioral therapy, and prayer—have taken center stage. However, a substantial body of research and numerous patient accounts indicate that such methods can cause significant psychological damage. Attempted and completed suicide, substance abuse, depression, anxiety, and a range of other symptoms have been attributed to therapies that attempt to change sexual orientations.[15] Though most current attempts to change sexual orientations focus on nonphysical modalities like those mentioned above, a few practitioners also still try to change orientation through aversive therapies such as administration of electric shocks and nausea-inducing medications. We will refer to all such attempts as “sexual orientation change efforts,” or “SOCE,” though these interventions may be referred to by proponents by other names, including “reparative therapy” or “conversion therapy.”

Disturbed by reports of harms caused by attempts to change sexual orientations[16] and inspired by the desire to protect LGB people and advance LGB rights, various state legislatures have introduced laws addressing such practices. In 2012, California became the first state to pass such a law. The California law sets out various findings of fact, including (1) “[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming”; (2) “[m]inors who experience family rejection based on their sexual orientation face especially serious health risks; and (3) “California has a compelling interest in protecting the physical and psychological well-being of minors... and ... protecting [them] against exposure to serious harms caused by sexual orientation change efforts.” The law also quotes reports from eleven professional organizations in support of these findings.[17] The law prohibits “a mental health provider [from] engag[ing] in sexual orientation change efforts with a patient under 18 years of age”[18] and says that engaging in such efforts is “unprofessional conduct and shall subject a mental health provider to discipline by the [relevant] licensing entity.”[19]

The law defines the prohibited practices as follows:

“Sexual orientation change efforts” means any practices by mental health providers that seek to change an individual's sexual orientation. This includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex.

“Sexual orientation change efforts” does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients’ coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.[20]

The New Jersey law is virtually identical to the California law except that it explicitly excludes “counseling for a person seeking to transition from one gender to another” from the definition of sexual orientation change efforts.[21] The laws proposed by other states are, for the most part, substantively similar to the California and New Jersey laws, although some omit the lengthy findings of

fact. The Texas Republican party plank supporting sexual orientation change efforts was a reaction to these laws and proposed laws.

The rationale for these laws is that the prohibited practices (a) attempt to cure that which is not a disease and (b) are ineffective in attaining this stated goal and yet (c) cause harm to the very people these practices are allegedly supposed to help. These points are correct, but they do not alone justify the laws. Not every harmful and ineffective procedure a doctor or mental health professional might perform is subject to direct legal stricture. (For example, so-called rebirthing therapy—whereby a practitioner attempts to reenact the birthing process through physical techniques involving restraints designed to create emergence from an artificial “womb”—a practice that is risky and completely lacking in any scientific or therapeutic basis, has been banned by only two U.S. jurisdictions.[22]) More importantly, support for the laws stems in part from the belief that sexual orientation is innate, immutable, and not chosen and, also, that these empirical claims have desirable legal and ethical implications.

Consider two quotations from supporters of these laws. In an interview about the New Jersey law before Governor Chris Christie signed it, Troy Stevenson, the head of a state LGBT organization that lobbied for the law said,

[Therapy to change sexual orientations] is an abuse of the term therapy and it is abuse in no uncertain terms. Any attempt to take an immutable and fundamental aspect of a person's character and change it to suit someone else's will is selfish and often soul destroying for the victim. The [New Jersey] legislation... will save lives; it will protect our youth; and it is vital that the Governor sign [it] as soon as possible.”[23]

A lobbyist for the National Center for Lesbian Rights, an LGBT rights organization that supported the California law, summarized part of the argument made to Governor Jerry Brown for signing it:

[T]he California Legislature, the California Supreme Court, the Federal District Court and the Ninth Circuit in upholding the Federal District Court decision in *Perry* [24] have all found sexual orientation to be an immutable characteristic. If it is immutable, then the state shouldn't be licensing individuals who are saying they can change this immutable characteristic and who take money from the public to engage in this discredited practice.[25]

Plainly, empirical claims about the immutability of sexual orientations played a role in the support of laws prohibiting sexual orientation change efforts.

These laws and proposed laws have various limitations. First, they fail to prohibit persons who are not licensed mental health care professionals from engaging in sexual orientation change efforts, thus excluding from regulation clergy and other unlicensed individuals who engage in these practices,[26] and they fail to prohibit attempts to change the sexual orientations of people over the age of eighteen. Second, one might plausibly argue that the California law undermines the autonomy of minors by not

allowing them to make certain decisions about their own mental health treatment, as they are generally allowed to do.[27] Third, the laws may be unnecessary because state licensing bodies can already sanction (including by revoking licenses) those who engage in inappropriate treatment practices.[28] Similarly, malpractice actions punish practitioners who use unsafe or ineffective treatment modalities rejected by their professional peers, and a first-of-its-kind consumer fraud lawsuit brought in New Jersey has a similar goal.[29]

Innateness, Immutability, and Choice

We find these forms of existing regulation, coupled with educational efforts within medicine and the larger society, of greater likely efficacy and efficiency than state-by-state bans.[30] We want to focus, however, on the linkage between these laws and claims that sexual orientation is innate, immutable, and unassociated with choice. These linkages oversimplify important issues and are dangerous to LGB rights.

Innateness

Are LGB people “born that way”—that is, are sexual orientations the result of genetic or other factors present at birth, or are they shaped by factors emerging after birth, particularly from the environment? This question is based on false premises. First, it is impossible to discern whether a trait is present at birth when it consists in thoughts and feelings that an infant cannot demonstrate. Second, insofar as the idea that LGB people are “born that way” makes a claim about a genetic basis for sexual orientation, it falls short because human traits are rarely the result of only genes or the environment. Rather, complex human traits generally result from interactions between genes and the environment. Genetic factors affect seemingly environmental traits (for example, what a person's major will be in college), and environmental factors contribute to the expression of genetic traits (for example, skin color). Traits can be placed on a continuum associated with the extent to which they are constrained by genetic factors—genetic factors more tightly constrain one's blood type than one's college major. Properly understood, whether sexual orientation is innate is a question about where sexual orientation fits on the continuum between blood type and college major. While many scientists conducting research on sexual orientation and the majority of people in the United States think that sexual orientation is innate, we think this is far from proven.[31] For instance, among gay men who have an identical twin, between fifty and eighty percent of the twin brothers are not gay.[32] Plainly, both biological and environmental factors shape the development of sexual orientations—in heterosexual as well as in gay people. Could genes play a role in forming gay or heterosexual sexual orientation? Yes. Is there a “gay gene” that alone determines orientation?[33] No, and it is a misrepresentation of existing research to make such a claim.[34]

Could sexual orientation be in some way predetermined but not visible at birth, by a combination of genetic and uterine environmental factors? Certainly other traits arise in this way, such that they will unfold with development but are not seen in newborns. Eye color is one example, for a child may be born with brown eyes that shift to blue over the first few months. Though intriguing as a hypothesis, current research data fall far short of proving such a claim, particularly if it is applied to all persons. As we will discuss later, there is evidence that sexual orientation is somewhat fluid for some members of

the population, undermining the notion that orientation is always firmly predetermined at birth and simply awaiting the right developmental moment for expression.

Immutability

Some advocates for LGB rights focus on immutability in light of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.[35] Supreme Court jurisprudence has interpreted the Fourteenth Amendment's requirement of "equal protection" to require heightened scrutiny of laws that make use of suspect classifications like race, ethnicity, national origin, and illegitimacy. In seeking to define those classifications that warrant heightened scrutiny, the Supreme Court has sometimes focused on "obvious, immutable, or distinguishing characteristics." [36] There is, however, considerable legal debate about the importance of immutability in supporting rights for various minority groups,[37] and the Supreme Court has not mentioned immutability in its recent equal protection or its recent LGB rights cases. We find several objections to linking LGB rights to immutability.

First, true immutability is a problematic legal criterion, for there are very few human traits that are legally salient and yet cannot be changed. For example, established medical procedures make sex change possible, but surely the mutability of gender does not change the legal standard that should be applied to laws that might discriminate on the basis of gender.

Second, some equate being "born that way" with immutability, but there is no necessary connection between a characteristic's being innate and its being immutable. Hair color is clearly a genetic trait yet one that changes radically across the lifespan (even without chemical intervention); a person can have blond hair in early childhood, dark hair in adulthood, and gray hair in old age. Further, immutability does not require innateness. Having an antibody in one's bloodstream might be something that can't be changed once the antibody has developed, but it is not innate. By analogy, sexual orientation does not need to be innate in order to be immutable, and it can be innate without being immutable. Thus, while current research suggests that genetic and other biological factors likely play a role in the development of sexual orientations, this does not tell us that orientations are unchangeable.

Immutability and Alternative Models for Sexual Orientation Development

A growing body of research suggests that the development of sexual orientation can follow different trajectories for different people. In the standard account of same-sex sexual orientation development, a person has childhood experiences of same-sex attractions, matched by a growing realization of difference from others, followed by an emerging capacity to integrate a positive gay identity. Research supporting this model is generally based upon querying adults about childhood recollections.[38] Such a research model is inherently problematic in that it relies on the adult's current understanding of past events rather than on the real-time process of development, which may be quite different.[39] An additional problem is that current research suggests that this model is applicable to more men than women.

Indeed, emerging evidence collected over some decades indicates significant differences between men and women in the development of sexual orientation. In an important book, Lisa Diamond summarizes the work of other scholars and presents new findings through her longitudinal studies of sexual minority women.[40] She finds that women's orientation corresponds more to a range of

sexual attractions rather than a discrete category, with most respondents in her sample showing at least some degree of a mixture of same-sex and different-sex attraction. The degree of fluidity in attractions to same-sex or different-sex partners differs between individuals and within one individual over time. Diamond further finds that one's identity as gay or straight is not a perfect predictor of the ability to form a sexual attraction to a person in the unexpected category. Women who identify as lesbian can be attracted to men; women who identify exclusively as heterosexual may develop, even in later life, a sexual attraction within the context of an intimate same-sex relationship.

One of the strong ethical insights that emerges from the work of Diamond is that women with variable degrees of same-sex and different-sex attractions have been led to believe that they are rare, anomalous, psychologically immature, and unstable based on their fluctuating sexual attractions. Diamond argues that, while women with fluctuating degrees of same- and other-sex attractions do not fit the "standard account" of the development of sexual orientation, their trajectory is normal, not uncommon, and consistent with psychological and sexual maturity. Indeed, Diamond finds that a mixture of sexual attraction to same- and other-sex partners is the norm in her longitudinal study of sexual minority women. Insisting on immutability in same-sex orientation both inside and outside the LGB community undermines the sense of self-acceptance and normalcy for women whose experience does not follow this standard account.[41] In contrast, we support a strategy for enhancing LGB rights that will not exclude or marginalize those whose sexual orientation is fluid. This point is crucial to our reservations about the wisdom and ethical implications of linking immutability to support for LGB rights.

By analogy, it is helpful to compare Diamond's work, and the controversy surrounding it, to the work of Carol Gilligan in the 1970s on sex differences in the development of moral choice.[42] Gilligan found that in the standard model of moral development, a model derived from research involving men and boys, women tended to fall lower on the developmental scale. Gilligan proposed an alternative model for moral development based on research involving women, placing greater emphasis on relationships and responsibilities and less on abstract principles. Gilligan's work played a role in the process of addressing sex discrimination in research by pointing out that it was scientifically unsound to exclude women from research on the grounds that they would "muddy" the data and then make the claim that the results of such research could simply be applied to women, who would then be found wanting in their ability to attain standards based exclusively on men.

Diamond notes a similar process in her work on sexual orientations and women. Far from seeing women with fluid sexual orientations as "muddying" the data, Diamond insists that the experiences of these women *are* the data—that this diversity is key to understanding the complexity of sexual orientations in women and in people generally. Indeed, views on fluidity in orientation have the potential to shift the understanding of changes in male sexual orientation, particularly for men who have had heterosexual relationships in one period of their lives and then move toward same-sex relationships. Current practice often encourages such men to view early other-sex relationships as false steps on the road to maturity. While this may be true for some, for others, sexual orientation may have shifted in a manner similar to that described by Diamond in her study of women.

Choice

Whether sexual orientation is the result of choice is a distinct question from whether it is immutable or

innate. Although issues involving sexual orientation and choice are complicated,[43] the evidence is strong that people's conscious choices do not play a strong role in the development of sexual orientations.[44] Though Diamond has documented incidents of shifting sexual orientation, her research subjects view this change as outside their deliberate control and not as a matter of choice. As one young woman stated, regarding her gradual diminution of same-sex attractions: "I mean straight culture—yuck, bad! I never really wanted to be heterosexual but I don't have much choice in the matter." [45]

We concur, therefore, with the widespread view that attraction to same or other-sex partners is not a matter of conscious choice. However, even if sexual orientation is not chosen, most of what is legally and ethically relevant about being an LGB person *is* the result of conscious choice. Actually engaging in sexual acts with a person of the same sex, publicly or privately identifying as an LGB person, and marrying a person of the same sex and raising children together are *choices*. In other words, an LGB person could decide to be celibate, closeted, single, and childless. Support for LGB rights is precisely support to make these *choices* and to do so without fear of discrimination or violence. The right simply to have same-sex attractions, without the right to act on these desires or to express the related identities, would be an empty right indeed. By analogy, the right of a free expression of religion is among the most central in U.S. law, and this is a right based on choice. We reject the argument that a right cannot be vigorously protected if it reflects a choice. Thus we retreat from arguments in support of LGB rights that insist on lack of choice. To the contrary, it is the right to make choices that reflect the legal equality of those with a same-sex orientation that is under attack, and it is the right to make such choices that we support.

Accepting Change

We unequivocally reject efforts to eradicate, reduce, or disguise same-sex attraction. We wish, however, to remove the stigma attached to sexual minorities who experience shifts in sexual attraction, and note that this stigma can arise from those who oppose LGB rights as well as from those who support them. An insistence on immutability reiterates an oppressive script, in which the lived experiences of some sexual minorities are denied by others, in part for political purposes. The efforts of a majority to deny the experience of sexual desires and attractions of some members of a minority, as well as the identities associated with them, is not an acceptable path to justice. The careful and respectful study of the development of sexual orientations across the spectrum of human experience, and the acknowledgement that scientific knowledge on this topic is far from complete, are better foundations for supporting LGB rights and respect for LGB persons than linking rights to claims about etiology based on uncertain scientific foundations.

The key aim of laws banning sexual orientation change efforts is to prevent a practice that shores up prejudice and undermines a stable and positive identity for LGB individuals. We strongly believe that sexual orientation change efforts ought to be abandoned, but—like LGB advocates in Maryland who withdrew the proposed law in the state's legislature[46]—we doubt that laws banning sexual orientation change efforts provide the best route to promoting LGB rights and the social situation for LGB people. Ineffective and harmful treatments disappear over time and in response to a range of existing mechanisms, including changing societal views, research documenting harm and measuring

efficacy or lack thereof, guidance documents from professional societies, insurance coverage, and malpractice and other kinds of lawsuits—such as the recent consumer fraud suit brought in New Jersey.[47] We believe all these mechanisms currently operate to decrease the attempts to change sexual orientations.

To the extent that laws against sexual orientation change efforts are supported on the basis of the belief that sexual orientations are immutable, they actually contribute to a distorted view of sexual orientation. We urge supporters of LGB rights not to cleave to unproven scientific tenets regarding immutability as a basis for rights. Rather, thoughtful and respectful analysis of the development of crucial aspects of human identity, including the development of the full variety of sexual orientations, is a better route toward understanding and civil rights. We are unlikely to promote human flourishing for minorities by denying key aspects of their experience. Indeed, such an approach mirrors the worst aspects of prejudice.

We support a legal strategy that moves away from claims that orientation is innate, immutable, and unrelated to choice. These claims are not only based on shaky science, but they also do not promote freedom and equality for all members of the LGB community. For some people, claims about immutability in sexual orientation create yet another oppressive mold they fail to fit. Instead, we favor efforts that support LGB rights that include encouraging people to maintain key aspects of their identity, rather than hiding distinguishing characteristics in deference to the prejudice of the majority. Our laws and jurisprudence do not push women and racial and ethnic minorities to hide or simplify their identities. The same should be true for sexual minorities. Attraction to people of the same sex, whether inborn, changeable, or chosen, does not reflect disease or defect and should not serve as the basis of discrimination. Within the context of health care, we must work to eradicate practices that indicate otherwise, not only regarding efforts to change orientation but also including more subtle aspects of medical culture that undermine the dignity of the LGBT community. Similarly, within the law, efforts must support the rights of LGBT people to work, love, parent, and live in equality.⁴⁸

1 We do not in this paper address the broader group of sexual minorities, including transgender persons. Our arguments focus specifically on sexual orientation rather than gender identity, so we limit our discussion to lesbians, gays, and bisexuals, represented by the “LGB” acronym. We are fully supportive of transgender rights, but this paper does not consider the arguments for such rights, although we do think that there are also problems with making arguments for transgender rights that appeal to innateness, lack of choice, and immutability, especially since some transgender persons seek to adapt and change some aspects of the self (typically, parts of their bodies) to align them with other aspects of self (their gender identities).

2 See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013).

3 Andrew Sullivan, *Virtually Normal* (New York: Knopf, 1995), 170–71.

[Web of Science®](#)

4 Edward Stein, “Immutability and Innateness Arguments about Lesbian and Gay Rights,” *Chicago-Kent Law Review* 89 (2014): 597–640.

5 2012 Cal. Legis. Serv. Ch. 835 (S.B. 1172) (codified at Cal. Bus. & Prof. Code §§ 865(a) & 865.1 (2012)).

- 6 Compare *Welch v. Brown*, 907 F.Supp.2d 1102 (E.D. Cal. Dec. 3, 2012) (finding that plaintiffs—(i) a licensed marriage and family therapist and minister, (ii) a medical doctor and therapist who treats patients “struggling with homosexuality and bisexuality” and engaging in “sexual orientation change efforts” as defined in the law, and (iii) an adult with “same-sex attractions” who, having personally undergone “sexual orientation change efforts,” wants to become a therapist who provides such treatments to others—were likely to succeed in establishing that the law unconstitutionally violated their First Amendment right to freedom of speech, and thereby enjoined the state from enforcing the law against these plaintiffs) with *Pickup v. Brown*, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012) (finding that plaintiffs—four licensed therapists who practice “sexual orientation change efforts,” two professional associations of such therapists, two minors currently undergoing “sexual orientation change efforts” with the plaintiff therapists, and the parents of each minor—were *not* likely to succeed in demonstrating that the law was unconstitutional because the state has a legitimate interest in the physical and psychological well-being of minors and that the law in question was rationally related to this interest).
- 7 *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).
- 8 An Act of August 19, 2013, ch. 150, 2013 N.J. Sess. Law Serv. 3371 (S 2278) (codified at N.J. Stat. 45–1–55). This law was upheld in *King v. Christie*, 2013 WL 5970343 (D.N.J. Nov. 8, 2013).
- 9 B20–0501, D.C. City Council (D.C. 2013); H.B. 221 (Fla. 2014); S.B. 2204, 27th Legis. (Haw. 2014); S.B. 3575, 98th Gen. Ass. (Ill. 2014); H3907, 188th Gen. Ct. (Mass. 2014); H.F. 1906, 88th Sess. (Minn. 2014); S. 4917B, 2013 Leg. 2013–2014 (N.Y. 2013); S.B. 188, 130 Gen. Assembly, Reg. Sess. 2013–14 (Ohio 2013); S. 872, 197 Gen. Ass. 2013–14 (Penn. 2013); H.B. 2451, 63rd Leg., 2014 Reg. Sess. (Wash. 2014).
- 10 H.B. 91 (Md. 2014) (withdrawn March 15, 2015); HB 1135, 2014 Sess. (Va. 2014) (failed in committee January 30, 2014); S.B. 481, 2013–14 Leg. Sess. (Wisc. 2014) (adversely disposed April 3, 2014).
- 11 C. Wetzstein, “Gay Conversion Therapy Moving to Culture War Front,” *Washington Times*, June 9, 2014.
- 12 V. Bullough, *Science in the Bedroom: A History of Sex Research* (New York: Basic Books, 1994); J. Terry, *An American Obsession: Science, Medicine and Homosexuality in Modern Society* (Chicago: University of Chicago Press, 1999);
- [CrossRef](#)
J. N. Katz, *Gay American History: Lesbians and Gay Men in the U.S.A.*, revised edition (New York: Penguin, 1992), 129–207;
- [Web of Science® Times Cited: 6](#)
T. F. Murphy, “Redirecting Sexual Orientation: Techniques and Justifications,” *Journal of Sex Research* **29** (1992): 501–23, at 505–06.
- [CrossRef](#)
- 13 R. Bayer, *Homosexuality and American Psychiatry* (New York: Basic Books, 1981).
- 14 See, e.g., Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (2009), at <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>; American Psychiatric Association, “Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies): Position Statement,” 2000, at http://www.psychiatry.org/File%20Library/Learn/Archives/ps2000_ReparativeTherapy.pdf;

- National Association of Social Workers, "‘Reparative’ and ‘Conversion’ Therapies for Lesbians and Gay Men: Position Statement," January 21, 2000, at <http://www.naswdc.org/diversity/lgb/reparative.asp>;
Pan American Health Organization, "‘Therapies’ to Change Sexual Orientation Lack Medical Justification and Threaten Health," 2012, at http://new.paho.org/hq/index.php?option=com_content&view=article&id=6803&Itemid=1926.
- 15 American Psychological Association, "Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts," 2013, at <http://www.apa.org/about/policy/sexual-orientation.aspx>;
J. Drescher and K. Zucker, eds., *Ex-gay Research: Analyzing the Spitzer Study and Its Relation to Science, Religion, Politics, and Culture* (New York: Harrington Park, 2006);
D. Haldeman, "Gay Rights, Patient Rights: The Implications of Sexual Orientation Conversion Therapy," *Professional Psychology: Research and Practice* **33** (2002), 200–04.
- 16 R. Kendall, "Prop 8: Advancing Civil Rights through Cultural and Constitutional Change," *NYU Review of Law and Social Change* **37** (2013), 29–34, at 33–34.
- 17 2012 Cal. Legis. Serv. § 835, Section 1. 2013 N.J. Sess. Law Serv. 3371, Section 1.
- 18 *Id.*, § 865.1. "Mental health provider" is explicitly defined, *id.*, § 865 (a).
- 19 *Id.*, § 865.2.
- 20 *Id.*, § 865(b).
- 21 N.J. Stat. 45–1–55 (2014).
- 22 See Colo. Rev. Stat. § 12–43–222(1)(t)(IV) (prohibiting "using or recommending rebirthing or any therapy technique that may be considered similar to rebirthing as a therapeutic treatment"); N.C. Gen. Stat. § 14–401.21 (prohibiting practicing techniques that "reenact the birthing process in a manner that includes restraint and creates a situation in which a patient may suffer physical injury or death").
- 23 S. Brydum, "New Jersey Lawmakers Want to Ban Ex-Gay Therapy; Does Gov. Christie?," *The Advocate*, June 28, 2013, <http://www.advocate.com/politics/2013/06/28/new-jersey-lawmakers-want-ban-ex-gay-therapy-does-gov-christie>.
- 24 See *Perry v. Schwarzeneger*, 704 F. Supp.2d 921 (N.D. Cal 2010) (federal district court decision finding unconstitutional a California constitutional amendment defining marriage as between one man and one woman); *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (appellate court decision upholding the district court decision). Ultimately, the U.S. Supreme Court vacated the decision of the appellate court and thereby reinstated the decision of the trial court on procedural ground. *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).
- 25 K. Ocamb, "NCLR Urges CA Gov to Sign Gay Child Abuse Bill," *The Bilerico Project*, September 17, 2012, http://www.bilerico.com/2012/09/nclr_urgues_ca_guv_to_sign_gay_child_abuse_bill.php.
- 26 One of the proposed state laws, introduced in the Illinois House, prohibited mental health professionals from referring clients or patients to any individual for the purpose of changing their sexual orientation, H.B. 5569 98th Gen. Ass. (Ill. 2014) (this bill died in committee), while another proposed law, introduced in

Maryland, would have *allowed* licensed health care professionals to “recommend[] sexual orientation change efforts to patients” and “refer[] patients to unlicensed individuals, such as religious leaders” in order to seek sexual orientation change. H.B. 91 (Md. 2014).

- 27 See *Pickup v. Brown*, 2012 WL 6021465 (E.D.Cal. Dec. 4, 2012). The proposed Pennsylvania law specifically indicated that “nothing in this act shall be construed to prevent a minor from voluntarily consenting to mental health care”; S. 872, 197 Gen. Ass. 2013–14 (Penn. 2013).
- 28 Maryland Delegate Jon Cardin, who sponsored H.B. 91, concluded that the law was not necessary because patients who feel that they have been harmed by SOCE can file a complaint with the state health occupation boards. In a joint statement with Equality Maryland, an LGB advocacy group, Cardin said, “If the investigation uncovers proof that a licensed health care professional violated the standard of care, then the board has an array of regulatory tools to keep this from happening again.” Kevin Rector, “Gay ‘Conversion Therapy’ Bill Withdrawn as Advocates Pursue Regulatory Oversight,” *Baltimore Sun*, March 14, 2014.
- 29 Four young men who had undergone a program designed to change their sexual orientations and two of their parents sued an organization that offered to change their sexual orientation and some of the individuals working there for damages under the consumer fraud statute. This lawsuit has survived a motion to dismiss and a motion for summary judgment by defendants. *Ferguson v. JONAH*, Case Number L-5473, Hudson County Superior Court, New Jersey, June 6, 2014 and July 19, 2013. This litigation, supported by the Southern Poverty Law Center, strikes us as a promising way of undermining sexual orientation change efforts.
- 30 Steven Colbert’s celebrated mockery of these therapies may have contributed more than any law to ending the practice. See, for example, “Ex-Gay Therapy Debate,” *The Colbert Report*, December 11, 2012, at <http://www.colbertnation.com/the-colbert-report-videos/422103/december-11-2012/ex-gay-therapy-debate>.
- 31 E. Stein, *The Mismeasure of Desire: The Science, Theory and Ethics of Sexual Orientation* (New York: Oxford University Press, 1999), 190–257.
- 32 J. M. Bailey and R. Pillard. “A Genetic Study of Male Sexual Orientation,” *Archives of General Psychiatry* **48** (1991), 1089–96 (50 percent concordance rate);
[CrossRef](#) | [PubMed](#) | [CAS](#)
J. M. Bailey, M. Dunne, and N. Martin, “Genetics and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample,” *Journal of Personality and Social Psychology* **78** (2000), 524–36 (20 percent concordance rate). For discussion, see Stein, *Mismeasure of Desire*, 193–5.
[CrossRef](#) | [PubMed](#) | [CAS](#)
- 33 D. Hamer and P. Copeland, *The Science of Desire: The Search for the Gay Gene and the Biology of Behavior* (New York: Simon and Schuster, 1994).
- 34 Stein, *Mismeasure of Desire*, 216–21.
- 35 U.S. Constitution, 14th Amendment, § 1.
- 36 *Lyng v Castillo*, 477 U.S. 635 (1986).

- 37 J. Halley, "Sexual Orientation and the Politics of Biology: A Critique of the New Argument from Immutability," *Stanford Law Review* **46** (1994), 503–68;
[CrossRef](#) | [Web of Science® Times Cited: 110](#)
Stein, *Mismeasure of Desire*, 277–304; Kenji Yoshino, "Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of 'Don't Ask, Don't Tell,'" *Yale Law Journal* **108** (1998), 485–571.
[CrossRef](#) | [Web of Science® Times Cited: 75](#)
- 38 R. Green, *The "Sissy Boy" Syndrome and the Development of Homosexuality* (New Haven: Yale University Press, 1987).
- 39 Stein, *The Mismeasure of Desire*, 234–43.
- 40 L. Diamond, *Sexual Fluidity: Understanding Women's Love and Desire* (Cambridge, MA: Harvard University Press, 2008).
- 41 K. Kinnish, D. Strassberg, and C. Turner, "Sex Differences in the Flexibility of Sexual Orientation: A Multidimensional Retrospective Assessment," *Archives of Sexual Behavior*, **34**, no. 2 (2005), 173–83;
[CrossRef](#) | [PubMed](#) | [Web of Science® Times Cited: 35](#)
K. Brooks and K. Quina, "Women's Sexual Identity Patterns: Differences among Lesbians, Bisexuals, and Unlabeled Women," *Journal of Homosexuality*, **56** (2009), 1030–45.
[CrossRef](#) | [Web of Science® Times Cited: 3](#)
- 42 C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1993).
- 43 Stein, *The Mismeasure of Desire*, 258–74; V. Whisman, *Queer by Choice: Lesbians, Gay Men, and the Politics of Identity* (New York: Routledge, 1995);
C. Card, *Lesbian Choices* (New York: Columbia University Press, 1995).
- 44 J. Drescher, "Sexual Conversion ('Reparative') Therapies: History and Update," in *Mental Health Issues in Lesbian, Gay, Bisexual, and Transgender Communities*, ed. B. Jones and M. Hill (Arlington, VA: American Psychiatric Publishing, 2002), 71;
A. Shidlo et al., eds., *Sexual Conversion Therapy: Ethical, Clinical, and Research Perspectives* (Boca Raton, FL: CRC, 2002).
[Web of Science® Times Cited: 59](#)
- 45 Diamond, *Sexual Fluidity*, 157.
- 46 See note 29.
- 47 See note 30.

Help **Browse by Subject** **Browse Publications** **Resources**

[Agents](#) | [Advertisers](#) | [Cookies](#) | [Contact Us](#) | [About Us](#)

[Privacy](#) | [Site Map](#) | [Terms & Conditions](#) | [Media](#)

WILEY

[Wiley.com](#)

[About Wiley](#)

[Wiley Job Network](#)

Copyright © 1999-2015 John Wiley & Sons, Inc. All Rights Reserved