

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 17716

ELIZABETH KERRIGAN, ET AL.

PLAINTIFF-APPELLANTS

v.

COMMISSIONER OF PUBLIC HEALTH, ET AL.

DEFENDANT-APPELLEES

**BRIEF AMICI CURIAE OF PROFESSORS OF PSYCHOLOGY AND PSYCHIATRY IN
SUPPORT OF DEFENDANTS-APPELLEES**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
ISSUES PRESENTED	ii
TABLE OF CITATIONS	iii
INTEREST OF AMICI CURIAE	v
STATEMENT OF FACTS AND PROCEEDINGS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THERE IS NO SCIENTIFIC AGREEMENT ON THE DEFINITION OF HOMOSEXUALITY.....	2
II. THERE IS NO SCIENTIFIC CONSENSUS THAT SEXUAL ORIENTATION IS PRIMARILY A GENETIC, INNATE CHARACTERISTIC LIKE RACE OR SEX.....	5
CONCLUSION	8

ISSUES PRESENTED

- I. Did the trial court correctly conclude that the plaintiffs have not suffered a legally cognizable harm because they have been granted all the rights and benefits of marriage?

- II. Do Connecticut's state laws, which define "marriage" as the union of one man and one woman, but permit same-sex couples to enter into "civil unions" with all the rights and benefits of marriage, violate the equal protection provisions of the Connecticut Constitution set forth in Article First, §§ 1 and 20?

Pages 1-8.

- III. Do Connecticut's state laws, which define "marriage" as the union of one man and one woman, but permit same-sex couples to enter into "civil unions" with all the rights and benefits of marriage, violate the due process provisions of the Connecticut Constitution set forth in Article First, §§ 8 and 10?

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EDWARD O. LAUMANN, ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290 (1994).	2, 3, 4
J. Michael Bailey et al., <i>Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample</i> , 78(3) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 524, 533 (2000)	6
J.M. Bailey & R.C. Pillard, <i>A Genetic Study of Male Sexual Orientation</i> 48 ARCHIVES OF GENERAL PSYCHIATRY 1089 (1991)	7
J.M. Bailey, et al., <i>Heritable Factors Influence Sexual Orientation in Women</i> 50 ARCHIVES OF GENERAL PSYCHIATRY 217 (1993)	7
Joseph P. Stokes, et al, <i>Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men</i> , 43 JOURNAL OF SEX RESEARCH 304, 305 (1997)	4
Karen L. Bridges & James M. Croteau, <i>Once-Married Lesbians: Facilitating Changing Life Patterns</i> 73 Journal of Counseling and Development 134, 135 (Nov./Dec. 1994).....	5
Lisa M. Diamond & Ritch C. Savin-Williams, <i>Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women</i> 56 JOURNAL OF SOCIAL ISSUES 297 (2000).....	4
Peter S. Bearman & Hannah Bruckner, <i>Opposite-Sex Twins and Adolescent Same-Sex Attraction</i> , 107 AMERICAN JOURNAL OF SOCIOLOGY 1179, 1180 (2002).....	6, 7, 8
RICHARD C. FRIEDMAN AND JENNIFER I. DOWNEY, SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE 39 (2002).....	6

Robert L. Spitzer,
*Can Some Gay Men and Lesbians Change Their Sexual Orientation?
 200 Participants Reporting a Change from Homosexual to Heterosexual
 Orientation* 32 ARCHIVES OF SEXUAL BEHAVIOR 403 (2003)5

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 PERSPECTIVES 27 (Anthony R. D’Augelli & Charlotte J. Pattersons, eds.)
 (New York: Oxford University Press) (2001).....6, 7

INTEREST OF *AMICI CURIAE*

Amici curiae are professors of psychiatry and psychology and/or professors at medical schools with a professional interest in human sexuality and orientation issues. Plaintiffs and other amici have suggested to this Court that sexual orientation is an immutable characteristic analogous to race and sex, and that gay and lesbian people therefore are a class that should trigger strict scrutiny. We offer the Court information on the current state of scientific research on the nature and origin of sexual orientation that is directly relevant to the Court's judgment on this issue.

Dr. Paul McHugh, M.D. is Henry Phipps Professor of Psychiatry and Director of the Department of Psychiatry and Behavioral Sciences at Johns Hopkins University School of Medicine. Dr. M. Gawain Wells, Ph.D., is Professor of Psychology at Brigham Young University. Institutional affiliations are provided for identification purposes only.

STATEMENT OF FACTS AND PROCEEDINGS

Amici curiae adopt the Counter-Statement of Facts and Proceedings in the Brief of Defendant-Appellees.

SUMMARY OF ARGUMENT

Plaintiffs and their *amici* argue that the law of marriage discriminates against a fixed class and should be subject to strict scrutiny because sexual orientation “is a core aspect of personal identity and selfhood that . . . cannot be changed.” (Brief of Plaintiff-Appellants at 35.)¹

As experts in psychiatry and psychology, we offer scientific information that is directly relevant to assessing this claim, specifically: (1) there is no scientific consensus on what homosexuality is, and the number of people who fit in the class “gay and lesbian” varies widely depending on which definition of homosexuality is used; and (2) there is no scientific consensus that homosexuality is primarily genetic in origin. In fact, the most recent studies on identical twins cast increasing doubt on genetic explanations as the primary reason for sexual orientation.

In the absence of a social and scientific consensus that orientation is an immutable or fixed class, Connecticut’s marriage laws should not trigger strict scrutiny on the grounds that orientation is analogous to race or gender.

¹ Plaintiffs argue that immutability is not necessary to a suspect classification analysis, but that sexual orientation is nonetheless immutable. Brief of Plaintiff-Appellants at 35-36.

ARGUMENT

I

THERE IS NO SCIENTIFIC AGREEMENT ON THE DEFINITION OF HOMOSEXUALITY.

The brief submitted in support of the Plaintiffs by the American Psychological Association (Brief of the American Psychological Association et al., as Amici Curiae in Support of Plaintiff-Appellants, hereinafter “the APA brief”) describes sexual orientation as “an enduring pattern or disposition to experience sexual, affectional, or romantic attractions,” while also acknowledging that “sexual orientation ranges along a continuum.” *Id.* at 4. The APA brief notes that “sexual orientation” as an individual characteristic is simplistic because “sexual orientation is always defined in relational terms and necessarily involves relationships with other individuals.” *Id.* These relationships vary widely and may be difficult to quantify. According to the APA, they include quantifiable things like “sexual acts” but also subjective factors like “romantic attraction” or “desiring to act.” *Id.*

Plaintiffs’ *Amici’s* expert brief thus reflects our view of the current state of scientific evidence: homosexuality does not describe a fixed, easily discernable class of people.

In the scientific literature there are three basic definitions of sexual orientation, based on either (a) sexual behavior, (b) sexual attraction, or (c) self-ascribed social identity. EDWARD O. LAUMANN, ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290 (1994).

Within each category there are also significant variations. For example, if homosexuality is defined behaviorally (e.g., “men who have sex with men”) does the class of gay men include any man who reports ever having sex with a man? In the last year? *Id.* at 294-295. In the last five years? If orientation is defined instead by desire or attraction, do we use physical or romantic attraction as the primary criterion? *Id.* at 297. In addition,

attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes. If a man identifies himself as a “2” or a “3” on a scale in which 1 represents “only attracted to men” and 7 represents “only attracted to women” is he gay or straight or something else?

These are not minor variations on a theme but fundamentally different ways of understanding what homosexuality is that produce large variations in estimates of who counts as a member of this class. The class of people who count as “gay or lesbian,” far from being fixed and easily identifiable will increase or decrease significantly depending on the equally scientifically legitimate classifications the scholar, or the government, or the court, chooses to adopt.

The clearest definition of homosexuality is self-ascription: people are gay or lesbian if they say they are, that is, if they adopt these as social identities. But such a definition also makes orientation fundamentally different in kind than race or gender.

Laumann and colleagues faced the difficulties of definition in the highly-regarded scholarly “Chicago Sex Survey.” Their research, the authors report,

raises quite provocative questions about the definition of homosexuality. While there is a core group (about 2.4 percent of the total men and about 1.3 percent of the total women) in our survey who define themselves as homosexual or bisexual, have same-gender partners, and express homosexual desires, there are also sizable groups who do not consider themselves to be either homosexual or bisexual but have had adult homosexual experiences or express some degree of desire. . . . [T]his preliminary analysis provides unambiguous evidence that no single number can be used to provide an accurate and valid characterization of the incidence and prevalence of homosexuality in the population at large. In sum, homosexuality is fundamentally a multidimensional phenomenon that has manifold meanings and interpretations, depending on context and purpose.”

LAUMANN at 300-301.

How much difference do varying definitions of homosexuality make?² If we use the criteria of self-identification with 2000 Census data (and assume national rates identified in the Chicago Sex Survey apply), 34,110 men and 18,839 women in Connecticut are gay or lesbian. If we define homosexuality by sexual attraction, however, 100,924 women and 93,804 men are gay and lesbian. LAUMANN at 297. Who is gay in Connecticut? The number of men varies from 34,000 to 94,000 and the number of women from 19,000 to 101,000. Thus the class of people who count as gay and lesbian may more than quadruple or be cut by three-fourths, depending on which of the equally scientifically legitimate and commonly used definitions are employed.

Moreover, research that asks individuals to rate themselves on the homosexuality continuum finds considerable flux in self-identification, with some individuals reporting they are more “gay” and some becoming less “gay” in their own estimation over time. “[W]e realize that homosexuality is not some monolithic construct one moves toward or from in a linear way; . . . We also acknowledge that changes in sexual feelings and orientation over time occur in all possible directions.” Joseph P. Stokes, et al, *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 43 JOURNAL OF SEX RESEARCH 304, 305 (1997).

Lesbian self-identification appears particularly vulnerable to fluctuations over time, and scholars increasingly uncover many women who insist their lesbian self-identity is in fact a personal choice, rather than an innate constraint. Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women* 56 JOURNAL OF SOCIAL ISSUES 297 (2000). As found by Diamond and Savin-

² LAUMANN at 293 (reports that “2.8 percent of the men and 1.4 percent of the women” surveyed in the U.S. “reported some level of homosexual (or bisexual) identity”).

Williams, “. . . 50% of the respondents had changed their identity label more than once since first relinquishing their heterosexual identity.” Id. at 301. Charbonneau and Lander interviewed 30 women who had spent half their lives as heterosexuals, married, and had children and then in midlife became lesbian. Some of these women explained their lesbianism as a process of self-discovery. But a “second group of women . . . regarded their change more as a choice among several options of being lesbian, bisexual, celibate or heterosexual.” Karen L. Bridges & James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns* 73 *Journal of Counseling and Development* 134, 135 (Nov./Dec. 1994) (describing C. Charbonneau and P.S. Lander, *Redefining Sexuality: Women Becoming Lesbian in Mid-Life* in *LESBIANS AT MID-LIFE* 35 (B. Sang, et al., eds., 1991)).

Recent scientific research also suggests that at least a few strongly motivated individuals can change their orientation, both in terms of self-identity, behavior and self-reported sexual attraction. Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation* 32 *ARCHIVES OF SEXUAL BEHAVIOR* 403 (2003).

II

THERE IS NO SCIENTIFIC CONSENSUS THAT SEXUAL ORIENTATION IS PRIMARILY A GENETIC, INNATE CHARACTERISTIC LIKE RACE OR SEX.

Many people believe that homosexuality is genetic in origin, and therefore structurally similar to race or gender. There is, however, no scientific consensus on this point, and recent scientific research and opinion is moving away from genetics as the chief explanation. As two Columbia University sociologists suggest in a recent study, the efforts to establish genetic or hormonal effects on sexual orientation have been “inconclusive at

best.” Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 *AMERICAN JOURNAL OF SOCIOLOGY* 1179, 1180 (2002). As two scholars recently put it, “. . . [T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.” RICHARD C. FRIEDMAN AND JENNIFER I. DOWNEY, *SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE* 39 (2002).

Identical twin studies, used to tease out genetic influence, suffer from some of the same recruitment problems that other “convenience” samples face. Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and several early studies rely on one twin’s estimates of their other twin’s orientation, reports which have been shown to be unreliable. Columbia professors Bearman and Bruckner note that “[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines.” Bearman & Bruckner at 1184; *see also* J. Michael Bailey et al., *Genetic and Environmental Influences on Sexual Orientation and its Correlates in an Australian Twin Sample*, 78(3) *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 524, 533 (2000) (“[C]oncordances from prior studies were [likely] inflated because of concordance-dependent ascertainment bias. In those studies, twins deciding whether to participate in a study clearly related to homosexuality probably considered the sexual orientation of their co-twins before agreeing to participate.”)

Concordance rates in orientation among identical twins have varied considerably from one study to the next, ranging from 13 percent to 100 percent in the eight small-scale studies (ranging in size from 5 to 71 identical twin pairs in which at least one twin was homosexual) in one recent review of the literature. Scott L. Hershberger, “Biological Factors

in the Development of Sexual Orientation,” *in* LESBIAN, GAY, AND BISEXUAL IDENTITIES AND YOUTH: PSYCHOLOGICAL PERSPECTIVES 27, 40 (Anthony R. D’Augelli & Charlotte J. Pattersons, eds.) (New York: Oxford University Press) (2001).

For example, 1991 and 1993 studies involving twin pairs recruited through gay publications reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. J.M. Bailey, et al., *Heritable Factors Influence Sexual Orientation in Women* 50 ARCHIVES OF GENERAL PSYCHIATRY 217 (1993); J.M. Bailey & R.C. Pillard, *A Genetic Study of Male Sexual Orientation* 48 ARCHIVES OF GENERAL PSYCHIATRY 1089 (1991). However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other identical twins are gay, just as in 100 percent of identical twin pairs in which one twin is black or female, the other twin is also black or female). Moreover, as sociologists Bearman and Bruckner note, common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests “substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (58%), and riding a taxi (38%).” Bearman & Bruckner at 1185, note 8.

Bearman and Bruckner’s own study focused on “same-sex romantic attraction” in the Add-Health study, a large, nationally representative sample of teens in school. Concordance rates for identical twins were only 6.7 percent, about the same as for fraternal twins. (7.2 percent). *Id.* at 1197-1198. They conclude: “[W]e find no support for genetic influences on same-sex preference net of social structural constraints. . . . Finally, we find

substantial indirect evidence in support of a socialization model at the individual level.” *Id.* at 1199.

Let us underscore this finding: While there is not yet any scientific consensus on the origins of sexual orientation, one of the most recent and rigorous identical twin studies (using large, nationally representative data) found no evidence of any genetic influence at all.

CONCLUSION

There is no scientific consensus that orientation is a genetic trait; scientific research suggests individuals’ identity as gay, straight or bisexual may shift over time, and some gay people describe their orientation as a chosen identity, not an immutable characteristic. Moreover, depending on equally scientifically legitimate and commonly used definitions, the size of the class of people who count as gay in Connecticut may vary by as much as 400 percent. This makes orientation fundamentally different in character from race or gender.

Society is moving towards greater acceptance of and accommodations for the legitimate social needs of gay and lesbian individuals at a rapid rate. It would be a mistake for this court to freeze into law a view of sexual orientation as a fixed class that may well not hold up under future scientific scrutiny, or to strike down Connecticut’s marriage laws on this basis.

For these reasons the Court should affirm the judgment below.

Dated:

Respectfully submitted,

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CERTIFICATION

This is to certify that the brief of amici curiae complies with the formatting requirements set forth in Practice Book § 67-2, and that a copy of the foregoing was mailed via first class mail, postage prepaid, this ____ day of April, 2007, to:

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