

Beyond Immutability: Sexuality and Constitutive Choice

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Abstract: Advocates for the equality and dignity of LGBT persons often suggest that the immutability of sexual orientation is their strongest argument. I believe that it is a weak one. First, the individual freedom that liberalism accords to people, absent harm to others, as necessary for human flourishing applies to sexuality as well as to other areas of existence. Second, the distinction often made between status and conduct is a false one, and the argument from immutability effectively protects neither. Third, I examine the notion of constitutive choice, arguing that the line between immutability and choice is more complex than many realize. Finally, greater attention to the notion of constitutive choice may broaden liberalism's hospitality to conceptions of the good in ways that better respect human moral agency and autonomy.

A common argument for equal treatment for lesbians, gays, bisexuals, and transgender (LGBT) persons rests on the argument from immutability. From the perspective of moral force, argues constitutional law scholar Samuel Marcossou, "few arguments offered on behalf of ending discrimination or inequality resonate more powerfully than immutability. It reflects the universal appeal of the concept that it is unfair to disadvantage people based on a characteristic over which they exercise no control."¹ Antigay hostility has often centered on the idea that because individuals can choose those with whom they express their sexuality, therefore they choose to be gay and could correspondingly choose to be straight if they so desired. Ongoing research into the possible biological roots of same-sex attraction has been greeted as a promising development. If sexual orientation can be shown to be a status beyond individual control, discrimination would therefore lack justification in a way similar to discrimination on the basis of race and sex. "Calling sexual orientation a status may not require the conclusion that

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¹Samuel A. Marcossou, "Constructive Immutability," *University of Pennsylvania Journal of Constitutional Law* 3, no. 2 (2001): 673.

being gay is immutable rather than a choice, but it certainly suggests it."² Or as put by lesbian feminist scholar Vera Whisman, "The claim of 'no choice' is a pro-gay stance as the claim of 'choice' is an anti-gay one: a foundational argument."³ How or whether this conclusion should inform public policy, however, is a more complex issue.

The argument from immutability is problematic in general. Most obviously, race (without passing) and sex (without sex change) are immutable characteristics. These facts, however, have not prevented discrimination against African Americans and women. Correspondingly, sociopaths, rapists, kleptomaniacs, and those who suffer from personality disorders do not earn a pass for antisocial behavior even if its causes are shown to stem from immutable characteristics. On the view of philosopher and law professor Edward Stein, "no human trait is strictly the result of genetics or strictly the result of environmental factors; all human traits are the result of both."⁴ Whatever the makeup of what individuals believe are their sexual attractions, convictions that these are determined and not a choice do not prove the truth of essentialism, especially in view of the fact that some gays and lesbians "actually experience their sexual orientations as choices."⁵ The argument from immutability as a basis for equal treatment, then, is both overinclusive and underinclusive. The law does not accord a pass to all behaviors rooted in immutable characteristics. Similarly, it does protect many behaviors and practices that may be central to individual self-understanding but result from choice.

On what basis, then, should arguments for equal treatment for LGBT persons rest? Over time, most citizens have concluded that African Americans and women are invested with moral worth equal to that of whites and males. This conclusion has both reflected and been reflected in constitutional amendments, laws, and their interpretations in court decisions that require equal treatment. A liberal society and its political institutions should protect citizens as equal moral agents and their self-regarding actions as expressions of personal autonomy, whether or not these actions result from choice. The First Amendment to the Constitution, for example, protects the free exercise of religious belief regardless of how these beliefs are acquired. What this protection requires is often a subject of controversy. We do not, however, accord greater protection to an individual who cannot

²Adam Liptak, "Looking for Time Bombs and Tea Leaves on Gay Marriage," *New York Times*, November 20, 2012.

³Vera Whisman, *Queer by Choice: Lesbians, Gay Men, and the Politics of Identity* (New York: Routledge, 1996), 3. See also Charles Anthony Smith, "Gay, Straight, or Questioning? Sexuality and Political Science," *PS: Political Science and Politics* 44, no. 1 (2011): 35–38.

⁴Edward Stein, *The Mismeasure of Desire: The Science, Theory, and Ethics of Sexual Orientation* (New York: Oxford University Press, 1999), 101.

⁵*Ibid.*, 112.

imagine himself following any religion other than that of the community into which he was born than we do to someone who discovers that a different religious practice more accurately reflects her beliefs and therefore converts. The Constitution does not protect sexual practices as it explicitly protects religious practices. Moreover, sexual orientation, unlike race, is not a suspect category that requires a compelling state interest if individuals are to be treated differently without violating the Fourteenth Amendment's equal protection clause. Nevertheless, the point holds that individuals should be accorded the freedom, absent harm to others, to conduct their personal relationships as they see fit regardless of whether the type of relationship stems from an immutable characteristic or instead results from choice. Social and political institutions have historically denied LGBT persons this freedom, both by pressuring them to be closeted as to their sexual attractions and by resisting their desires to formalize their relationships through the public commitment of civil marriage.

I first address the issue of personal autonomy, arguing that the individual freedom liberalism accords to individuals as necessary for human flourishing applies to sexuality as it does to other areas of human existence. This may require not only that the government within broad limits refrain from interference with individuals' sexual practices, but also that it provide through positive action the space necessary for individuals to form and formalize supportive relationships such as marriage. Second, I consider the distinction often made between status and conduct, suggesting that this distinction is a false one and that the argument from immutability effectively protects neither. Third, I examine a notion of constitutive choice, arguing that the line between immutability and choice is more complicated than many realize. I conclude with some observations about how greater attention to the notion of constitutive choice may broaden liberalism's hospitality to conceptions of the good in ways that better respect human moral agency and autonomy.

Personal Autonomy

The work of John Stuart Mill is instructive regarding people's attachments to the institutionalized customs of the dominant culture. "Laws and systems of polity always begin by recognizing the relations they find already existing between individuals."⁶ In his 1869 work *The Subjection of Women*, Mill lamented the fact that those who advocate equal legal rights for women are forced to argue for equality, when in his opinion equal legal rights should be the initial assumption and opponents should bear the burden of proving that women are *not* fit for equality. The difficulty, however, is that entrenched

⁶John Stuart Mill, *The Subjection of Women*, in *On Liberty and Other Writings*, ed. Stefan Collini (New York: Cambridge University Press, 1969), 122–23.

convictions are often based on feelings, not on reasoned arguments. Simultaneously, legal systems congeal over time in ways that are hostile to change even in the presence of reasoned argument for it. Mill cited chattel slavery and absolute monarchy as examples of the power of established systems that long went unquestioned in the same way male domination was unquestioned in his own time. “But was there ever any domination which did not appear natural to those who possessed it?”⁷ Similarly, superior legal treatment for heterosexuals and exclusively traditional marriage appear natural to those who do not question the historical heteronormativity of the dominant culture. As Mill elaborated, “So true is it that unnatural generally means only uncustomary, and that everything which is usual appears natural. The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural.”⁸ In the current example, because confining marriage to opposite-sex couples is viewed by its proponents as a universal custom, the idea of including same-sex couples “naturally appears unnatural.”

Mill’s familiar arguments for autonomous moral agency in *On Liberty* scarcely require rehearsal. Individuals too often form their moral judgments on the basis of their own feelings and preferences, “and if the reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people’s liking instead of one.”⁹ Difficulties arise not when people simply behave on the basis of their own subjective preferences, but when they seek to impose their preferences on others even when these do not harm others. “They have occupied themselves rather in inquiring what things society ought to like or dislike, than in questioning whether its likings or dislikings should be a law to individuals.”¹⁰ For Mill, although the free development of human individuality is undervalued, it carries intrinsic worth. Human moral powers are exercised only through choice. “The mental and moral, like the muscular powers, are improved only by being used. The faculties are called into no exercise by doing a thing merely because others do it, no more than by believing a thing only because others believe it.” A person may be guided along a virtuous path and thus preserved from harm, “but what will be his comparative worth as a human being?”¹¹

Mill blames religious zealots in particular for discouraging the development of individuality. They often harbor “a determination not to tolerate others in doing what is permitted by their [own] religion, because it is not permitted by the persecutor’s religion,” or “a belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him

⁷Ibid., 129; see also 119.

⁸Ibid., 130; see also 127–31 and John Stuart Mill, *On Liberty*, in *On Liberty and Other Writings*, 9–10.

⁹Mill, *On Liberty*, 9.

¹⁰Ibid., 11.

¹¹Ibid., 59; see 56–61.

unmolested."¹² Humans differ so much in what causes them pain and pleasure "that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable."¹³ A similar contemporary argument concerning sexuality appears in the work of constitutional law professor David A. J. Richards. He argues that the abridgment of individual freedom and/or rights of conscience must be "justified on compelling secular grounds of protecting public goods reasonably acknowledged as such by all persons," or on "a compelling public reason, not on grounds of reasons that are today sectarian (internal to a moral tradition not based on reasons available and accessible to all)."¹⁴ On Richards's view, in the American constitutional tradition "the right to intimate life is as much a basic human right as the right to conscience; conscience is so personally engaged with the issues of intimate sexual life because both involve the resources of thought, conviction, feeling, and emotion at the heart of the ultimate concerns of moral personality."¹⁵

Whether or not one agrees with Richards that sexual intimacy may from a moral standpoint be equated with rights of conscience, the point stands that the religious beliefs of some or even of a majority should not be enshrined in ways that interfere with the self-regarding practices of others, whether these are religious, cultural, or sexual. Similarly, for Karen Struening, freedom in intimate association is analogous to freedom of religion and expression, because the process of forming one's own judgment in these areas is a central constituent of self-definition. "The regulation and expression of non-coercive and consensual sexual practices between adults is a direct assault on moral pluralism" — often intentionally so.¹⁶ Although admitting the legitimacy of competing understandings of the good can complicate the traditionalist's effort to perpetuate his or her own mode of life, Struening observes, "we do not take from him what he needs to live *his life*,"¹⁷ whereas we do take the necessities of life from the dissident when we censor practices concerning his or her own life. Private sexual conduct between consenting

¹²Ibid., 91; see also 10–11.

¹³Ibid., 68.

¹⁴David A. J. Richards, *Identity and the Case for Gay Rights: Race, Gender, and Religion as Analogies* (Chicago: University of Chicago Press, 1999), 18, 78.

¹⁵David A. J. Richards, *The Case for Gay Rights: From "Bowers" to "Lawrence" and Beyond* (Lawrence: University Press of Kansas, 2005), 110; see also 103–4 and Lauren Hall, "Rights and the Heart: Emotions and Rights Claims in the Political Theory of Edmund Burke," *Review of Politics* 73, no. 4 (2011): 609–31.

¹⁶Karen Struening, "Privacy and Sexuality in a Society Divided over Moral Culture," *Political Research Quarterly* 49, no. 3 (1996): 509; see 507–13.

¹⁷Ibid., 512. See also Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010), 57–60, 171–75.

adults constitutes neither harm nor direct offense to others; it is what Mill calls a contingent or constructive injury, a feeling of offense that may attend disapproval of others' practices. As Mill argued, "There is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended by his holding it, no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it."¹⁸ Similarly, no parity exists between the centrality of an individual's practices to his own life, and the centrality of these practices to the person who wants to prevent his engaging in them or to encourage others to disrespect him for them.

Continuing the Millian theme, political theorist Gordon Babst argues that heteronormativity, or the assumption that heterosexuality should be the norm, is grounded on monism, or the idea that only one way of being is normal and that alternatives are deviations from that norm. The norm of heterosexuality in the West, he explains, springs from the Hebrew Bible. "The identity formed by heteronormativity, to the extent that it is moored in religion, is forged antithetically to any rival, with just the same consequences for pluralism in thinking about sexuality as the Hebrew Bible allowed for any rival religious identity." Nevertheless, "humanity turns out always to have been all along more pluralist in its religious understandings, as well as in its actual sexual practices, whether sanctioned or not."¹⁹ Put differently, heteronormativity establishes a particular kind of sexuality as the norm, superior to all others, just as surely as an establishment of religion—formal or informal—posits a particular kind of belief system as the norm, superior to all others. The consequences of this parallel have hindered the recognition of human pluralism, with often predictable consequences for the free exercise either of sexuality or of religion. For Babst, heterosexuality's alternative is not homosexuality, but human sexual pluralism, premised on the assumption "that human beings are sexual beings, not types of sexual beings."²⁰

As Mill recognized, individuality requires both "freedom, and variety of situations."²¹ If the exercise of human moral powers requires choice, both freedom to choose and a variety of options among which to choose must exist. These are the conditions of pluralism. What Mill valorized was not the freedom to follow a path toward which one is pointed by innate or immutable attributes, but personal autonomy, or the liberty to choose one's path on the basis of rational scrutiny of and critical reflection on the available options. Personal autonomy requires no particular object of choice, but it does require

¹⁸Mill, *On Liberty*, 84; see 82–84, 89–90.

¹⁹Gordon A. Babst, "Consuming Its Own? Heteronormativity *contra* Human Plurality," in *Moral Argument, Religion, and Same-Sex Marriage: Advancing the Public Good*, ed. Gordon A. Babst, Emily R. Gill, and Jason Pierceson (Lanham, MD: Lexington Books, 2009), 187–90.

²⁰*Ibid.*, 183–90.

²¹Mill, *On Liberty*, 58, drawing on Wilhelm von Humboldt.

the exercise of one's mental and moral powers in making it. That is, the presence of autonomy must be judged on the way we form our preferences. "We can act in *accordance* with habit and custom and still act autonomously, as long as we do not act simply from *force* of habit, unthinkingly taking the path of least resistance, as it were."²² Significantly, in his dissent in *Bowers v. Hardwick*, which upheld the Georgia antisodomy law, Justice Harry Blackmun argued that the state protects rights to family relationships neither because they contribute directly to the public welfare nor because we prefer traditional households, but rather because these rights are so central to individual life and happiness. He argued that the centrality of sexual intimacy suggests that in a diverse nation, "there may be many 'right' ways of conducting these relationships, and that much of the richness of a relationship will come from the freedom of an individual to *choose* the form and nature of these intensely personal bonds."²³

The right of adults to pursue within broad limits the intimate lives that they choose has been variously based on respect for privacy and on equality as well as on personal autonomy. Privacy arguments, however, do not necessarily defend the moral value or worth of the activities they purport to protect. The defense of privacy is often a stand-in, moreover, for equal respect for persons as moral agents or choosers. Finally, the right to privacy is ill suited to prohibiting discrimination in the workplace, in the public square, and most especially in the seeking of legal recognition for one's intimate relationship through marriage or some alternative public status.²⁴ Patricia Boling suggests that "our privacy is not always empowering or protective. Keeping something private—our preference for same-sex partners, for example—may keep others from finding out about something we do not want them to know. But it may also make it more difficult for us to claim that the ability to choose sexual partners freely is a matter of legitimate public and political concern. Privacy is protective, but it can also *deprive* issues of public significance."²⁵ Privacy can be a liberatory value, but it can also operate as a conservative value used by the dominant consensus to reinforce traditional relationships and forms of intimacy.²⁶ An emphasis on privacy also valorizes negative freedom from interference, as opposed to positive freedom that can ground state action in recognizing same-sex relationships.

²²Emily R. Gill, *Becoming Free: Autonomy and Diversity in the Liberal Polity* (Lawrence: University Press of Kansas, 2001), 2; see also 17–20, 28–30.

²³*Bowers v. Hardwick*, 478 U.S. 186, 204–5 (1986); see also 205–6.

²⁴Nicholas Bamforth and David A. J. Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of the New Natural Law* (New York: Cambridge University Press, 2008), 191–200.

²⁵Patricia Boling, *Privacy and the Politics of Intimate Life* (Ithaca, NY: Cornell University Press, 1996), 146; see 146–48, 56–59.

²⁶*Ibid.*, 103. See 85–90, 101–3.

Equality arguments alone are also insufficient. They do not indicate whether the parties under discussion merit similar treatment, why those particular parties are in fact comparable, or why differences in treatment are wrong. As Nicholas Bamforth and David Richards explain, both privacy and equality arguments “ultimately depend for their force upon a deeper underlying value or values. This suggests that in the interests of clarity, it is the underlying value(s) we should invoke directly.”²⁷ Legal scholar Carlos Ball argues that the “dispute over the legal status of same-sex relationships is not whether the State should remain morally neutral on the goodness and value of those relationships, but is instead the underlying (and value-driven) question of whether same-sex relationships are *worthy* of legal recognition and protection.”²⁸

Legal scholar Michael Sandel, for example, argues that specific practices are better defended for their “intrinsic value or social importance” than as instances of privacy, autonomy, and individual choice.²⁹ Both same-sex and traditional intimate relationships “realize important human goods”³⁰ by providing opportunities for mutual support and self-expression in ways that other relationships do not. The choice-based justification “is parasitic—politically as well as philosophically—on some measure of agreement that the practices protected are morally permissible.” Moreover, voluntarist justifications of choice may secure merely “a thin and fragile toleration. A fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live.”³¹ Agreeing with Sandel, legal scholar Chai Feldblum notes that when people who say they disapprove of same-sex relationships nevertheless support civil rights bills prohibiting discrimination against LGBT persons, they often indicate that their opinions stem from a sense of fairness. Although they may not realize it, she continues, they are making a substantive moral judgment that supports positive freedom. Just as social conservatives have successfully promoted *their* moral values as such in public discourse, gay rights supporters, including supporters of same-sex marriage, need to claim their own values as substantive support for the equality of LGBT persons.³²

²⁷Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender*, 211; see 200–211.

²⁸Carlos Ball, “Against Neutrality in the Legal Recognition of Same-Sex Relationships,” in *Moral Argument, Religion, and Same-Sex Marriage*, 76; see also 84–86; Carlos Ball, *The Morality of Gay Rights: An Exploration in Political Philosophy* (New York: Routledge, 2003), 91–99; and Chai R. Feldblum, “The Moral Values Project: Call to Moral Action in Politics,” in *Moral Argument, Religion, and Same-Sex Marriage*, 205–14.

²⁹Michael J. Sandel, *Democracy’s Discontents: America in Search of a Public Philosophy* (Cambridge, MA: Belknap Press of Harvard University Press, 1996), 93.

³⁰*Ibid.*, 104.

³¹*Ibid.*, 107.

³²Feldblum, “Moral Values Project,” 205–11; see also Chai R. Feldblum, “Moral Conflict and Conflicting Liberties,” in *Same-Sex Marriage and Religious Liberty*:

Caution is required, however, in deploying arguments based on the intrinsic value of intimate relationships. Just as the argument from privacy can be used either to liberate individuals from legal strictures or to pressure them to closet unpopular practices, the argument from moral worth can either garner support for previously unpopular ways of life or it can promote a backlash. That is, if the value or importance of something is rooted in the dominant understanding of a particular community's traditions, that understanding will be used to measure the legitimacy of individuals' private beliefs and practices, protecting them in some instances but leaving them vulnerable in others. William Lund argues, "Grounding coercive or even merely hortatory legislation on contested accounts of what is 'intrinsically good' inevitably puts into play a publicly backed appraisal of citizens and their conceptions of the good. In the absence of various liberal constraints, those will be used to justify unequal distributions of the opportunities and costs of various lives, and they will be so used whether or not those who are penalized actually accept the worth of the 'good' in question."³³

Although Sandel's and Feldblum's exhortations to appeal to substantive moral values have merit, this move works only if a community is open to new definitions or interpretations of what constitutes moral values. As theorist Bonnie Honig points out, this approach may grant equal respect—and by extension civic equality—only to those who want to enter committed relationships and who therefore most closely resemble the heterosexual majority.³⁴ In other words, toleration of sexual intimacy and its expression may vary directly with the extent to which it resembles traditional marriage. This process may narrow the definition of deviancy. But the category still exists, and it functions to exclude some individuals as alien or other, because they attempt to participate in the community on terms that the community will not accept. Although communities properly criminalize some behaviors and decline to support others, they should not do so merely because of majoritarian moral disapproval. As Justice Anthony Kennedy wrote for the Supreme Court in *Lawrence v. Texas*, which struck down that state's antisodomy law, "Our obligation is to define the liberty of all, not to mandate our own moral code."³⁵

Emerging Conflicts, ed. Douglas Laycock, Anthony R. Picarello Jr., and Robin Fretwell Wilson (Lanham, MD: Becket Fund for Religious Liberty and Rowman & Littlefield, 2008), 131.

³³William R. Lund, "Communitarian Politics and the Problem of Equality," *Political Research Quarterly* 46, no. 3 (1993): 595.

³⁴Bonnie Honig, *Political Theory and the Displacement of Politics* (New York: Cornell University Press, 1993), 186–95. See also Gordon A. Babst, "Community, Rights Talk, and the Communitarian Dissent in *Bowers v. Hardwick*," in *Playing with Fire: Queer Politics, Queer Theories*, ed. Shane Phelan (New York: Routledge, 1997), 147–57.

³⁵*Lawrence v. Texas*, 539 U.S. 558, 571 (2003), quoting from *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992).

Therefore, I believe that the autonomy argument is the soundest grounding for the rights of consenting adults to intimate lives of their own choosing, including the right to marry. As put by Bamforth and Richards, “Sexual/emotional desires, feelings, aspirations, and behavior ... are of central importance for human beings,” both because any sexual encounter involves “an unparalleled degree of human interdependence,” reciprocity, and exchange, and also because of the infinite variety of sexual tastes that human beings possess.³⁶ Individuals’ understandings of their sexual identities as well as their freely chosen sexual and emotional relationships deserve respect. Furthermore, as Ball suggests, sexual intimacy that satisfies not only basic human needs but also capabilities for committed love and care merits not only privacy and noninterference, but also the “creation of the necessary conditions that will promote and protect the ability of individuals to meet those additional needs and exercise those additional capabilities.”³⁷ The argument from autonomy protects both individual freedom from interference and also supports the positive creation of a space within which same-sex couples who so desire may formalize their long-term relationships through the institution of civil marriage.

Immutability

If the argument from personal autonomy effectively grounds the rights of LGBT persons to protection, support, and respect for their intimate lives, it should not matter whether the ways individuals experience their particular sexual attractions are immutable or not. The line between determinism and choice, moreover, is less clear than many suppose. On Stein’s view, despite evidence that most people claim that they never chose a sexual orientation, individuals may still make indirect choices. According to what he terms non-determinism, people may make choices unrelated to their sexuality that later affect their sexual attractions.³⁸ Even the concept of indirect choice, however, may appear to some gay rights advocates to increase the vulnerability of gays or lesbians. For antigay groups, the onus would then be on individuals to avoid making choices that might later have the unintended effect of pointing them towards same-sex relationships.

The determinist view, however, is not necessarily protective of LGBT rights or recognition. Although persons’ sexual orientations might be determined, actions such as engaging in same-sex relationships, publicly identifying as gay or lesbian, or establishing a same-sex household are direct and undetermined choices. For some religious conservatives, same-sex desire is not a sin, but engagement in same-sex relationships is an appropriate target of

³⁶Bamforth and Richards, *Patriarchal Religion, Sexuality, and Gender*, 212; see 211–27.

³⁷Ball, *Morality of Gay Rights*, 106; see 105–12.

³⁸Stein, *Mismeasure of Desire*, 273; see 265–74.

condemnation and sometimes discrimination. That is, status is blameless, but conduct is not. Notes Stein, “This view about homosexuality—which is surely incompatible with any robust version of lesbian and gay rights—is compatible with the determinist argument” that sexual attraction is not a matter of choice.³⁹ Although hypothetically we might argue that both the status of being gay and behavior of engaging in same-sex relationships are biologically determined, “this would only show that one should not be blamed for one’s sexual orientation and all its facets, but this would not entail lesbian and gay rights since the lack of blame is not itself grounds for rights.”⁴⁰ Finally, even if, however determined, certain traits are immutable beyond a certain point in individual development, critics might still want to penalize indirect choices behind the development of some immutable traits as well as subsequent choices concerning the expression of these traits.⁴¹

Furthermore, if sexual orientation were proven to be biologically determined, Stein argues that in some cultures prospective parents might well use possible prenatal orientation-selection procedures to screen for and select a fetus that would develop as straight rather than as gay. “The emergence of orientation-selection procedures in cultures with negative attitudes towards homosexuals will reinforce the preference for heterosexual over homosexual children and will likely encourage the view that homosexuals and bisexuals are diseased,”⁴² just as the availability and use of sex-selection procedures in countries such as India may arguably lower the status and worsen the condition of women. If, on the other hand, sexual orientation were shown to be significantly determined by varied environmental factors, tension might arise between parents’ rights to influence their children’s upbringing and the state’s right to intervene against extreme measures that might be used, such as electroshock or conversion therapy, to change their sexual orientations. “Conversion therapy is no more an appropriate response to social conditions facing lesbians and gay men than bleaching the skin of nonwhites is an appropriate response to racial injustice.”⁴³ Although Stein does not argue that scientists should forgo research into the origins of sexual orientation, he concludes that people’s choices of sexual behaviors, their choices of self-identifications, and their decisions to form families “should be the centerpiece of lesbian and gay rights.”⁴⁴

In this context, Vera Whisman interviewed a number of individuals to seek their views on whether they saw their sexual attractions as

³⁹Ibid., 288–89; see also 295, 347.

⁴⁰Ibid., 290; see also 286–91.

⁴¹Ibid., 291–93.

⁴²Ibid., 316; see 305–17.

⁴³Ibid., 326; see 322–27 and Whisman, *Queer by Choice*, 16–17.

⁴⁴Stein, *Mismeasure of Desire*, 347; see 328–48 and Whisman, *Queer by Choice*, 103.

determined, matters of choice, or mixed. A number of men and women classified their attractions as partly determined and partly chosen. One gay man, for example, responded that although the actual desire was not a choice, the lifestyle, or the decision to be “open and positive about it,” was a conscious choice.⁴⁵ A lesbian similarly responded that although her feelings toward women were not chosen, her pursuit of emotional and sexual relationships was in fact a choice.⁴⁶ Overall, these types of respondents said that their desires were not chosen, but that their actual sexual behaviors and their adoptions of personal identities were matters of choice.⁴⁷ To put this differently, status is innate, but conduct is chosen. Individuals may be aware of their sexual or affectional desires but refrain from acting on them and/or publicly affirming them if they do so act. Therefore, no conduct, or observable behavior, exists to which the larger society may react. Because some of these respondents rejected the entire concept of sexual orientation as a fixed attraction, behavior is all there is. Because behavior is a matter of choice, nothing is determined. Status disappears; only conduct remains.

Whisman suggests that many gays, lesbians, and their allies shrink from the notion of choice because the typical sterile image of choice “is the legacy of consumer capitalism.”⁴⁸ She responds, “They’re right. We don’t choose our sexualities the way we choose a breakfast cereal. We most fondly hope that our sexuality tags into emotions, desires, and fears that run deeper than that. ... Individual sexualities may not be endlessly changeable, but they are more changeable than most of us think.”⁴⁹ For Whisman, moreover, basing the legitimacy of same-sex attraction on its being unchosen is both “profoundly heterosexist” and androcentric. It is heterosexist because its underlying assumption can imply that if individuals experiencing same-sex attraction could choose to become heterosexual, they would.⁵⁰ It is androcentric because gay men more than lesbians tend to understand their sexual orientations as unchosen. The argument from immutability amounts to “treating a common male experience as generically human.”⁵¹ On Whisman’s view, lesbians are affected by both heterosexism and sexism. Therefore, although some women feel that they cannot be anything but lesbian, for others it seems like a choice in the face of societal pressures to be with men, representing not only sexual preference, but also political choice.⁵²

⁴⁵Whisman, *Queer by Choice*, 42.

⁴⁶*Ibid.*, 44.

⁴⁷*Ibid.*, 41–48, 51–52, 65.

⁴⁸*Ibid.*, 23.

⁴⁹*Ibid.*, 122.

⁵⁰*Ibid.*, 6; see also 23–25.

⁵¹*Ibid.*, 6.

⁵²*Ibid.*, 28, 34–35, 25–30, 91, 110, 114–17.

The Inseparability of Status and Conduct

Although some of Whisman's respondents viewed their status as innate, they asserted that their conduct was a matter of choice. People's status refers to their experience of their sexual attractions, whatever their origin, on which they may or may not choose to act. Conduct, as I use this term, refers to sexual behavior about which individuals are open and affirming. It is therefore known and possibly judged by the larger society, the negative judgments and actions of which may explain in part the lure of the argument from immutability. Marcossou argues that a characteristic such as same-sex attraction may be a product of social construction rather than essentialist in nature, yet may be and ought to be considered immutable for legal and political purposes. "The power of a constructed category can be so overwhelming, and its terms, assumptions, and normative social requirements so deeply ingrained into the members of society, that it is experienced at the individual level as immutable."⁵³ He terms this the argument from constructive immutability.

The difference between the conventional argument from immutability and constructive immutability is that for Marcossou, the underlying legal and political structure is largely responsible for the fact that a characteristic or trait is experienced as immutable. "Even a characteristic that is entirely contingent on the social reality constructed in a particular culture at a particular time can be immutable, and can be *experienced by individuals within that culture as immutable.*" Categories such as race, sexual orientation, or citizenship are socially constructed by a society as a means of drawing distinctions between people. Classifications such as white, gay, or United States citizen, on the other hand, are specific divisions within these categories into which individuals fall. "Constructive immutability posits that even if a category is socially constructed, individual classifications can be immutable." The proper question is whether people "in *this* time and culture experience their classification as immutable."⁵⁴

Consider the example of citizenship as a constructed category. A citizen who is not native born cannot become president of the United States. Although the classification of noncitizen is mutable because some noncitizens can become citizens, the classification of naturalized citizen is immutable because a naturalized citizen can never become president. "Having been born on one side of a socially constructed line dividing two socially constructed political units, she is immutably disqualified."⁵⁵ Although the Constitution could be amended to allow naturalized citizens to run for president, this change cannot be effected by individual choice. Therefore, in Marcossou's terms it has been constructed as immutable for practical purposes.

⁵³Marcossou, "Constructive Immutability," 650; see 650–51.

⁵⁴*Ibid.*, 681; see also 655–57, 683–86.

⁵⁵*Ibid.*, 689; see 689–91.

Similarly, although the modern category of sexual orientation has been socially constructed, those who live within the subsequent classifications that have privileged straight persons and subordinated LGBT persons experience them as immutable. To Marcossou, it does not matter whether individual lesbians, gay men, or bisexuals view their own sexual desires as determined, chosen, or a combination. They are still embedded in a system of legal and social pressure within which these desires function as immutable in the context of the larger culture. The overall system of subordination can ensure “that part of what is immutable is the sense of being an outsider in a culture with different expectations and norms.”⁵⁶ The argument from immutability, then, possesses two facets. Whether the experience of same-sex attraction is determined or chosen on the individual level, *all* individuals experience their same-sex desires as immutable because of the way these may be treated within a social context of heteronormativity. Marcossou therefore argues for treating sexual attraction or orientation as a suspect classification.

Where Marcossou and others advocate some version of the argument from immutability as the best route to equal treatment and respect, I, on the other hand, have argued for respect for personal autonomy regardless of the origin of same-sex attraction. Those who concede that the nature of individuals’ sexual attractions is immutable on some definition do not necessarily want LGBT persons to be open and affirming about them. That is, they may nominally accept the LGBT status of those who experience same-sex attraction, but they maintain the façade of heteronormativity by repressing conduct that may follow from these attractions, and by doing so in a way that actually rejects status as well as conduct. The recent policy of “don’t ask, don’t tell” (DADT) in the United States armed forces, repealed in 2010, provides a notorious example of penalties on conduct that in effect penalized status as well.

As DADT was passed by Congress in 1993, “the ultimate policy defined ‘homosexual conduct’ as any physical activity that a ‘reasonable person would understand to demonstrate a propensity or intent to engage in homosexual acts.’”⁵⁷ Although President Clinton averred “that people should be disqualified from serving in the military based on something they do, not based on who they are,”⁵⁸ implementation was such that any acknowledgement or suspicion of homosexual status created a “presumption that the service member is engaging in homosexual acts or has the propensity or intent to do so.”⁵⁹ The military in 1995 issued an additional memo stipulating

⁵⁶Ibid., 711; see 710–12.

⁵⁷Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America* (New York: Thomas Dunne Books of St. Martin’s Press, 2008), 83. See also 110 and Evan Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* (Chicago: University of Chicago Press, 1999), 73–74.

⁵⁸Frank, *Unfriendly Fire*, 84.

⁵⁹Ibid., 110.

that a service member could only rebut this presumption by actually proving that he or she did not in fact have the propensity, later reinterpreted as a “likelihood” of engaging in homosexual acts.⁶⁰ As historian Nathaniel Frank concludes, “While lawyers can argue that ‘don’t ask, don’t tell’ targets only conduct, it clearly targets status. In fact, with the help of the rebuttable presumption and the propensity clause, the policy defines conduct so broadly that it makes a mockery of the distinction between conduct and status. And this was the point.” It was the presence of same-sex desire itself that alarmed many heterosexuals.⁶¹ “The notion that gays and lesbians must conceal their true selves to preserve the comfort of other troops is based on resistance not to the *presence* of gays in the barracks but to *knowledge* of that presence.”⁶²

Furthermore, in a policy colloquially known as “Queen for a Day,” homosexual conduct did not lead to discharge if “‘such conduct is a departure from the member’s usual and customary behavior’ and it is ‘unlikely to recur.’” Straight troops could engage in spontaneous same-sex behavior following a drinking spree, for example, without consequence, “because when heterosexuals engage in homosexual conduct, it’s not a threat.”⁶³ The status, not the conduct, was what mattered. Meanwhile, the pretense that DADT was targeting only conduct, not status, played into the hands of conservatives who held not only that same-sex attraction was not immutable, but that no such status actually existed. “Instead, we were all heterosexuals, and unfortunately some of us had to battle against evil impulses, ranging from alcoholism to theft to adultery or sodomy.”⁶⁴ In a 1991 military separation case, the judge opined that individuals choose their sexual orientation, and that gays and lesbians are like illegal aliens because “both groups willingly choose to break the law.”⁶⁵

Tensions between status and conduct emerge in civilian venues as well. Evangelical Christian institutions of higher learning generally do not object to admitted same-sex attraction, but only to “behavior” or “activity,” which may include not only same-sex relationships but also public assertiveness about one’s gay identity.⁶⁶ Public self-identification as LGBT, like particular sexual behaviors or decisions to form families, is a choice, as Stein notes, and therefore some will reject the idea that it deserves protection. An example of this dynamic appears in the firing of a Roman Catholic college’s

⁶⁰Ibid., 174–76.

⁶¹Ibid., 177.

⁶²Ibid., 292.

⁶³Ibid., 178. See also xvii–xviii and Georgia Warnke, *After Identity: Rethinking Race, Sex, and Gender* (Cambridge: Cambridge University Press, 2007), 214–16.

⁶⁴Frank, *Unfriendly Fire*, 36.

⁶⁵Ibid., 21.

⁶⁶Erik Eckholm, “Even on Religious Campuses Students Fight for Gay Identity,” *New York Times*, April 19, 2011.

education program director not because she was a lesbian, which was known when she was hired five years earlier, but because an announcement of her Iowa wedding to her partner was published in a newspaper. According to the college's president, "By publicizing the marriage ceremony in which she participated in Iowa she has significantly disregarded and flouted core religious beliefs which, as a Catholic institution, it is our mission to uphold."⁶⁷ Although a religious institution may make its own rules, this example again illustrates the targeting of status through conduct. As with DADT, the college was resistant not to the presence of a lesbian in the administration but to others' *knowledge* of that presence.

Given such examples, it is unsurprising that the standard argument from immutability appears to be a pervasive defense both of status and also of the conduct that flows from it. Marcossou's argument from constructive immutability shifts the burden of the argument from whether a characteristic is determined to how the larger society views such characteristics. Nevertheless, both the standard and the constructive arguments become enmeshed in attempted proofs of immutability. The example of DADT shows that where conservatives in the military elided status and conduct to condemn both for practical purposes, avoiding this outcome is better accomplished by arguing for the autonomy of LGBT persons so that the question of immutability does not matter. Sexual conduct of any type may still be restricted if it actually interferes with the operation of the military or of any other enterprise. Such restrictions, however, should not rest on futile attempts to separate status and conduct.

Legal scholar Kenji Yoshino notes that "gays are increasingly permitted to be gay and out as long as we do not 'flaunt' our identities. The contemporary resistance to gay marriage can be understood as a covering demand. *Fine, be gay, but don't shove it in our faces.*"⁶⁸ In other words, those who do not assimilate to mainstream norms regarding race, ethnicity, gender, or religion have often been expected to "cover" or minimize their differences. Although less egregious than DADT, covering demands implicitly target status as well as conduct. Those uncomfortable with difference sometimes want to avoid reminders of it. Although Yoshino does not mention this, legislation in some European countries prohibiting various coverings adopted by some Muslim women attests to this dynamic. It is fine to be a Muslim, but don't shove it in people's faces. Ironically, "uncovering" can be a form of covering. For Yoshino, status and conduct are intertwined and must be addressed as

⁶⁷David Bakke, "Lesbian Loses Job after Wedding Notice," *Peoria Journal-Star*, November 12, 2010.

⁶⁸Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (New York: Random House, 2007), 19. See also 17–19, 76–79, 22, 24–25, 131–32, 176–82, and Janet R. Jakobsen and Ann Pellegrini, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (Boston: Beacon, 2004), 91–100, 128.

one. "So long as there is a *right to be* a particular kind of person, I believe it logically and morally follows that there is a *right to say what one is*."⁶⁹

Individuals whose commitments and allegiances lie outside the dominant consensus are too often expected to mute their differences from the norm, whatever the source of these differences. Arguments from immutability, however, do not protect individuals from expectations that they cover. To Yoshino, when gays and lesbians maintain that they cannot change, rather than that they will not change, their argument implies an apology. "It suggests that electroshock treatment for homosexuals is wrong because it does not work. But such treatment would be no less wrong if it did."⁷⁰ Those uncomfortable with difference can still exert pressure to cover on those who fail to assimilate. Arguments from autonomy, or the idea that individuals as moral agents should reflect on and form their own judgments about their lives and within broad limits should be free to act upon them, can better resist such demands. Respect for autonomy demands no less.

Religious Belief, Autonomy, and Constitutive Choice

The experience of "being an outsider in a culture with different expectations and norms"⁷¹ accrues not only to individuals with unconventional sexual attractions, but also to adherents of unconventional religious beliefs. Both sexual attraction and religious belief and conscience are central to human existence. As such, pursuing them is central, in Millian terms, to the free development of human individuality. Within broad limits, the Constitution protects the free exercise of religion regardless of the origins of one's beliefs, which we should remember may change over time. We do not conduct research into the origins of people's religious beliefs, because we generally do not object to either beliefs or practices unless certain practices are determined to be harmful to others. Although unlike religious belief and practice, sexuality is not constitutionally protected, an examination of the role of choice in religious belief and practice is instructive to our understanding of the function of choice and its protection in sexual attraction and its expression.

Despite the fact that opposition to same-sex relationships and same-sex marriage is frequently defended for religious reasons, religion and sexuality share an affinity that often goes unnoticed. In theory, both are regarded as private matters. In practice, however, the dominant consensus enshrines majoritarian views in ways that marginalize dissenters from that consensus.

⁶⁹Yoshino, *Covering*, 70.

⁷⁰*Ibid.*, 48. See also 46–49; Whisman, *Queer by Choice*, 30; and Andrew F. March, "Speech and the Sacred: Does the Defense of Free Speech Rest on a Mistake about Religion?," *Political Theory* 40, no. 3 (2012): 334.

⁷¹Marcosson, "Constructive Immutability," 711.

“Christianity, and often conservative Christianity, functions as the yardstick and measure of what counts as ‘religion’ and ‘morality’ in America.”⁷² Ethical views that do not fit within or at least overlap this consensus often go unrecognized as moral values. In the realm of sexuality, the role of Christianity is occupied by heteronormativity, which “describes the moral and conceptual centrality of heterosexuality in contemporary American life.”⁷³ That is, heterosexuality represents the norm, and the idea that alternative sexual practices could possess ethical significance is unconsciously overlooked or ignored.

Attempts to curtail ostensibly harmful religious practices, moreover, may function to target status as well as conduct. A classic example appears in *Church of the Lukumi Babalu Aye v. City of Hialeah*,⁷⁴ in which this Florida city had intentionally outlawed the Santeria religion’s practice of live animal sacrifice. In striking down the ordinance, the Supreme Court unanimously suggested that the law was grounded on animus toward the Santeria religion. The transcript of the meeting in which the city discussed the proposed ordinance indicates that some city councilmen and others held “that it is a Christian moral duty to ban animal sacrifice.”⁷⁵ This ordinance ostensibly targeted conduct alone, but it also penalized the status of being a Santeria follower. It also indicates the centrality of Christianity to the essence of public norms.

Political theorist Andrew Murphy questions the application of religion and conscience to the realm of sexuality, arguing that the identity politics we associate with equal respect and the positive affirmation of race, gender, and sexual attraction is alien to a conscience paradigm based on freedom to believe.⁷⁶ Early advocates for religious toleration simply desired the negative liberty of noncoercion and state neutrality, or “a public space in which individuals and groups of differing persuasions could live out their own conceptions of religious truth and the demands it placed on human life.”⁷⁷ Because conscience was conceptualized as a faculty of human understanding, not as will that might be coerced,⁷⁸ liberty of conscience became grounded in religious voluntarism, or the conviction that one must not only worship correctly but also do so voluntarily. Yet “voluntarism is not the same thing, strictly speaking, as *choice*: in other words, tolerationists did not claim that

⁷²Jakobsen and Pellegrini, *Love the Sin*, 13; see also 21–22, 47, 97–100, 104, 109–10.

⁷³*Ibid.*, 28. See also Marcossou, “Constructive Immutability,” 673–75.

⁷⁴*Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

⁷⁵Corey Brettschneider, “A Transformative Theory of Religious Freedom: Promoting the Reasons for Rights,” *Political Theory* 38, no. 2 (2010): 190.

⁷⁶Andrew R. Murphy, *Conscience and Community: Revisiting Toleration and Religious Dissent in Early Modern England* (University Park: Pennsylvania State University Press, 2001), 281–82.

⁷⁷*Ibid.*, 242; see also 240, 287.

⁷⁸*Ibid.*, 228; see also 112.

one *chose* one's beliefs, but rather that the understanding was persuaded, inexorably so, of the truth of a given faith."⁷⁹ Although the meaning of conscience broadened over time to connote nonreligious standards of morality and a more subjective character, for Murphy "conscience-based politics boils down to the claim that states must recognize individuals' beliefs and values about truth and the good ... as sacrosanct. ... Within the parameters of civil peace and social order, government must grant liberty to act on those values, as a necessary corollary to the free workings of the human mind."⁸⁰ To put this differently, liberty of conscience in both belief and practice is a necessary corollary to the recognition of human moral agency and autonomy.

Murphy admits, however, that because beliefs about truth, religious or not, are foundational in one's sense of self, "conscience contains within it at least a latent notion of identity."⁸¹ If conscience as religious voluntarism is explained as one's understanding being persuaded that a particular set of beliefs is true, this concept also applies to sexuality. People's understandings are "persuaded, inexorably so, of the truth"⁸² of their sexual desires, just as their understandings are persuaded of the truth of their religious commitments. In the cases of both sexuality and religion, moreover, certain practices will flow from these understandings that are necessary for bringing meaning to these facets of moral personality. Therefore, both involve conscience-based politics, or in Murphy's terms "the claim that the state must recognize individuals' beliefs and values about truth and the good ... as sacrosanct" if it is to honor "the free workings of the human mind."⁸³

Similarly, the affirmation of religious belief, or what Murphy terms religious voluntarism, is on the cusp between immutability and free choice as this is commonly understood. It does not matter how or why individuals come to hold the religious beliefs that they do, or even whether they hold religious beliefs at all. Some individuals adhere to religious beliefs they never question, but others may reflect on their beliefs and over time reject them or come to different understandings of their religious commitments and of the practices these mandate. Although they may view their newly affirmed understandings as central to their identities as moral persons, their beliefs are neither immutable nor, in Whisman's terms, objects of consumer choice like a breakfast cereal. We should regard sexuality similarly. As Evan Gerstmann notes, the Supreme Court has protected aliens from discrimination even under circumstances when continuing in that status was voluntary.⁸⁴ If DADT shows that the immutability of a characteristic is not a sufficient condition to warrant protection against status-based discrimination, protection of alienage demonstrates

⁷⁹Ibid., 229; see also 254.

⁸⁰Ibid., 279.

⁸¹Ibid., 281.

⁸²Ibid., 229.

⁸³Ibid., 279.

⁸⁴Gerstmann, *Constitutional Underclass*, 76–80.

that it is not a necessary condition either, even without First Amendment-related guarantees.

In exploring the tension between immutability and choice, Sandel is well known for his critique of what he takes to be the liberal view of an unencumbered self, self-made and independent of purposes and ends. To him, deontological theorists, who view the individual as an unsituated, autonomous chooser, impoverish the self by emphasizing the voluntarist dimension of human agency, “in which the self is related to its ends as a willing subject to the object of choice,” at the expense of the cognitive dimension, “in which the self is related to its ends as a knowing subject to the objects of understanding.”⁸⁵ Because we are “subjects constituted in part by our central aspirations and attachments,”⁸⁶ for self-understanding the self must not only choose, but must also reflect on its current attachments in constituting its identity.⁸⁷ Because the self is made up of past reflections and experiences, it cannot experience freedom from constitutive ends and interests without becoming disempowered and actually dissolved. I believe, however, that the voluntarist and cognitive dimensions of agency are not competitive, as Sandel sometimes implies, but instead reinforce each other. If preferences and goals have been endorsed or affirmed by an agent, they have in some sense been chosen. Yet once affirmed, they become constitutive of the agent, although potentially subject to reexamination, and thus become the standpoint from which subsequent choices are made. This sort of critical reflection in fact constitutes personal autonomy.

A helpful conception of freedom of conscience that implicitly draws on this distinction, and at the same time complementarity, between a choosing and a knowing self appears in the work of Yael Tamir, who identifies conscience with what she calls constitutive choice. If we reconsider the culture or religious allegiance into which we are born, our subsequent cultural or religious membership may be viewed as chosen, or as affirmed as the result of a particular and persuasive understanding, but we subsequently view such membership as imposing particular imperatives on us.⁸⁸ Whether we are adhering to a religion into which we were born or, alternatively, affirming our understanding of one to which we have converted on being persuaded of its truth, we would expect our religious practices that are not harmful to others to be respected and perhaps even accommodated. They have become constitutive of the way we understand ourselves. It is for this reason, Tamir argues, not because they are innate or inborn, that religious belief and the practices flowing from it carry special weight. “Religious

⁸⁵Michael Sandel, *Liberalism and the Limits of Justice*, 2nd ed. (New York: Cambridge University Press, 1998), 58; see 57–58.

⁸⁶*Ibid.*, 172.

⁸⁷*Ibid.*, 153.

⁸⁸Yael Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993), 39–40; see 35–42.

allegiances take priority over the choice of a restaurant, and political ideologies are more important than a preference for a specific make of car. We are therefore likely to agree to give people a day off to vote, but not to visit a car exhibition.”⁸⁹ I suggest that sexuality plays a role analogous to religious belief in the constitution of our self-understandings.

On Tamir’s interpretation, cultural membership, religious belief, and by extension sexual attraction or orientation should be accorded equal treatment and recognition not because *they* are ascribed or unchosen constituents of moral personality, but because minority *status* in living out these central features of identity is unchosen.⁹⁰ Accordingly, these may require positive action by the state to enable individuals to live in accordance with their conscientiously chosen or affirmed convictions about how they should live their lives. Richards points out that the protection of religious belief “never turned on its putative immutable and salient character (people can and do convert, and can and do conceal religious convictions), but on the traditional place of religion in the conscientious reasonable formation of one’s moral identity in public and private life and the need for protection ... against the state’s imposition of sectarian religious views.”⁹¹ In other words, it does not matter how people’s religious convictions—and by extension sexual attractions—are acquired. What do matter are the legal or social impediments that may block their attempts to live out their convictions.

Tamir’s conception of constitutive choice encompasses both aspects of conscientious belief, that of recognizing the nature of our self-understanding, and also that of determining or choosing how that understanding should be lived out as we interpret its meaning for ourselves. An example of the irrelevance of immutability can be extrapolated from Tamir’s discussion of *Goldman v. Weinberger*,⁹² in which the Supreme Court upheld an Air Force prohibition that prevented an Orthodox Jewish captain from wearing a yarmulke while serving in a clinic, regardless of whether the Air Force could show that a religious exception would impair military discipline. On Tamir’s view, this decision was incorrect not because religious affiliation is constitutive of identity independent of choice, but because identity is chosen or affirmed. Although Goldman was born a Jew, if he had converted to Judaism and had therefore chosen or voluntarily assumed responsibility for particular religious observances, would we accord less weight to his request because it did not stem from a birthright encumbrance? “If it cannot be proven that this ought to have made a difference, then the issue is not that Captain Goldman’s Jewish feelings are so deeply embedded that he cannot but act

⁸⁹Ibid., 41.

⁹⁰Ibid., 37; see also 7–8, 41–42, and Philip Gleason, “Americans All: World War II and the Shaping of American Identity,” *Review of Politics* 43, no. 4 (1981): 483–518.

⁹¹Richards, *Identity and the Case for Gay Rights*, 93; see 87, 91–97.

⁹²*Goldman v. Weinberger*, 475 U.S. 503 (1986).

in a particular way, but that he has chosen a certain course of action."⁹³ As put by Andrew March, "Just as the fact that the innateness or immutability of an attribute does not suffice to explain why persons should not be made to suffer for that attribute, so does the mutability of a personal or group identity not exclude that attribute from certain protection."⁹⁴

To culture and religion, then, I would add sexuality as an instance of constitutive choice and as therefore in some contexts worthy of equal treatment and recognition as a manifestation of conscientious belief. Because religious belief and sexual attraction may be objects of reflection and are not necessarily automatic or given, their affirmation is in some sense a choice. But because on that affirmation they may become core constituents of moral personality, the nonharmful practices that flow from them merit recognition and equal treatment. In Sandel's terms, some with particular religious beliefs or sexual attractions are willing subject to objects of choice, while others are knowing subjects to objects of understanding. Whether chosen or discovered, core constituents of moral personality merit equal treatment and recognition within broad limits if endangered. In defending his beliefs at the Diet of Worms, Martin Luther concluded, "Here I stand; I can do no other. God help me. Amen."⁹⁵ Although Luther evidently felt that in one sense he had no choice, in another sense his testimony was voluntary, chosen because only affirmation and action in accordance with his beliefs would express the self-understanding of his own identity that he then possessed. His emphasis, I believe, was not on whether he could help possessing the beliefs he was affirming. It was instead on the necessity of affirming and acting on his beliefs if he was to be true to this self-understanding. Moral autonomy involves both understanding and choice.

Liberal theory such as Mill's supports freedom within broad limits from interference with individuals' decisions about how they should lead their lives. This formulation points to equality and recognition for LGBT persons whatever the source of their sexual attractions and their understandings of themselves. It is not explicit, however, as to why the government should support the formalization of LGBT relationships through the public commitment of civil marriage. Although some religious beliefs and sexual attractions are best protected by the classical liberal stance of state neutrality and noncoercion, others may require positive state action if those who experience them are to be on an equal footing with those who subscribe to the dominant consensus. I shall conclude with some observations about what this might mean in the context of constitutive choice.

⁹³Tamir, *Liberal Nationalism*, 39.

⁹⁴March, "Speech and the Sacred," 335; see 333–36.

⁹⁵John Bartlett, *Familiar Quotations* (Boston: Little, Brown, 1980), 155.

Conclusion

Many modern liberal theorists hold that a hallmark of liberalism is the state's neutrality among rival conceptions of the good. This claim has rested sometimes on moral skepticism, or the idea that no rational basis exists for making the best choice among different ways of life, and sometimes upon moral autonomy, or the idea that each individual must define the good to be pursued in his or her own manner. For libertarians, the state should neither discriminate against nor protect particular ways of life. Some contemporary liberals argue, however, that even a liberal polity cannot espouse neutrality among rival conceptions of the good. William Galston maintains, for example, that like any other, the liberal state must make binding determinations of public policy that are implicitly grounded in specific assumptions about human nature, proper conduct, well-ordered institutions, and just practices. "In such cases, neutrality is never violated, because it is never possible. Every polity, then, ... establishes at least a partial rank-order among individual ways of life and competing principles of right conduct."⁹⁶ Unlike nonliberal states, however, "the liberal state rests solely on those beliefs about the good shared by all its citizens, whereas every other state must coercively espouse some controversial assumptions about the good life."⁹⁷

Unless a state proceeds on libertarian premises and comprises only libertarians, however, even a liberal state is premised on beliefs about the good that not all citizens will share. People are sharply divided, for example, as to the degree and types of support that the government should afford to religious groups and to same-sex couples that seek to participate in the institution of civil marriage. Galston is correct, nevertheless, that neutrality is never possible if he means neutrality across the board. Putting this differently, Patrick Neal notes that despite the liberal state's respect for diversity, one cannot there become part of a society constituted like a homogeneous Athenian *polis*. One cannot even pursue this conception of the good privately (unless as a facsimile in a cloistered community). The *polis*-seeking individual and the typical liberal citizen each support a different *conceptualization* of conceptions of the good, or metatheory of the good. Although a liberal society or state allows choice within a range of preferences, it cannot afford choice among all preferences that might conceivably exist, because its very espousal of core commitments acts to produce one range of preferences and not others. That is why, on Neal's account, "the positive defense of liberalism cannot be that it is neutral amongst preferences; it must be a defense of the *kind* of

⁹⁶William A. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (New York: Cambridge University Press, 1991), 96–97.

⁹⁷*Ibid.*, 93.

preferences liberalism produces.”⁹⁸ A defense of liberalism must be grounded on the particular range of values or preferences that a given interpretation of liberalism puts forward. It includes hospitality to diverse conceptions of the good, but it cannot include within that range conceptualizations that rely for their effectiveness upon a perfectionist identification with only one conception of the good such as might be realized in a voluntary and cloistered community.

The purpose of this essay has been to complicate the popular supposition that innate or immutable attributes deserve protection and recognition where mutable ones do not or should not. Greater attention to the notion of constitutive choice could broaden our conceptualization or metatheory of conceptions of the good, in Neal’s terms, to be more inclusive of unconventional kinds of sexual attraction and religious belief as well as the practices, absent harm to others, that flow from them. Constitutional scholar Andrew Koppelman, for example, suggests that just as religion holds a special place as a good in American culture, yet is defined with sufficient abstraction that at least ideally it affords respect to a wide range of beliefs and practices, we could also socially endorse the good of sexuality in a similar manner. Narrow definitions of the range of religious protection have been partly superseded in that “many people now think that the good of religion is realized, albeit imperfectly, in denominations that are not their own.” Similarly, “perhaps we can agree that the claims gay people have made that their intimacy realizes something valuable is at least as colorable as the claims of members of unconventional religions that their religious activity realizes something valuable.”⁹⁹ In the cases of both religion and sexuality, then, “the state can recognize, promote, and protect the pursuit of the good in question, but should define that good at a sufficiently high level of abstraction as to be neutral between the competing factions.”¹⁰⁰

Another example of how the notion of constitutive choice could broaden our conceptualization of conceptions of the good appears in Ball’s work. For him, “our concern ... should be with the societal conditions that promote or impede the exercise of basic human capabilities, not with whether individuals choose to exercise them or with how they do so, as long as others are not harmed.”¹⁰¹ Although the state should provide a framework within which individuals may implement their capabilities, this may require positive action such as antidiscrimination laws or the inclusion of same-sex couples in civil marriage if individuals are to be accorded true

⁹⁸Patrick Neal, *Liberalism and Its Discontents* (New York: New York University Press, 1997), 28; see also 34–47.

⁹⁹Andrew Koppelman, “Sexual and Religious Pluralism,” in *Sexual Orientation and Human Rights in American Religious Discourse*, ed. Saul M. Olyan and Martha C. Nussbaum (New York: Oxford University Press, 1998), 223–24.

¹⁰⁰*Ibid.*, 225–26.

¹⁰¹Ball, *Morality of Gay Rights*, 84; see also 89–94.

opportunities for self-development. Many Supreme Court decisions ostensibly freeing individuals from state interference, whether concerning birth control, marriage, or the rearing of children, focus on the right of individuals to define their relationships with others. What Ball terms moral liberalism “recognizes that we both define ourselves and pursue our life goals largely through our affiliations with others. It is through these affiliations that we form a sense of identity and belonging that both nurtures and accounts for our well-being and autonomy.”¹⁰²

For Ball, if same-sex intimacy, like heterosexual intimacy, were regarded positively, or as a means through which people exercise their basic human capabilities, “then whether one ‘chooses’ to be a lesbian or a gay man would become as irrelevant a question as whether one chooses to be a heterosexual.”¹⁰³ This idea fleshes out Koppelman’s idea of the good of sexuality and its recognition, however particular persons in particular relationships might express this. As with religious freedom, the creation of spaces through antidiscrimination laws or the availability of civil marriage within which individuals may live out their self-understandings does not mandate specific practices, but allows for the meaningful exercise of human rights to freedom and autonomy. Just as religious freedom does not mean that agnostics and atheists must participate in religious observances, same-sex couples’ access to civil marriage does not mean that gays and lesbians should be pressured to marry. Autonomy in liberal theory requires that individuals shape their lives for themselves within broad limits. The point is that the opportunity to exercise human capabilities central to individual self-understanding should be protected and facilitated. Whether they are initially innate or chosen, their exercise can become instances of constitutive choice.

A public stance of neutrality and noncoercion may appear neutral to those who are part of a dominant consensus, but it may function as anything but neutrally for those who stand outside this consensus. Protecting the free exercise of individuals’ sexual and religious capabilities may require positive state action to promote equal treatment and recognition in civil society by individuals and groups who sometimes think it is their religious duty to minimize the influence of those they believe are wrong. This is especially true when the dominant consensus is willing to tolerate behavior only when it is believed to be beyond individual control. Although the argument from immutability can function to advocate for equality for LGBT persons, it can only go so far. Constitutive choice, on the other hand, recognizes human moral agency and autonomy and protects the exercise of capabilities central to self-understanding without judging individuals on the basis of how they came by them.

¹⁰²Ibid., 98; see 98–99.

¹⁰³Ibid., 101; see also 104, 106.