

Cleveland-Marshall College of Law



Research Paper 05-112
June 2005

Many are Chilled but Few are Frozen: How Transformative Learning in Christianity, Science, and Popular Culture Will Lead to the Eventual Demise of Discrimination Against Sexual Minorities in the United States

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Working Paper

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Note to reviewers: I would especially appreciate feedback on where material should be condensed or deleted.

FYI, I do not fill in specific “supra” cites until changes requested by the publisher have been incorporated; this greatly reduces the number of times such cites have to be revised and lessens the potential for error.

If no author is given for a publication it is because the author was not identified in the source

I. Introduction

The title of this article “Many are chilled but few are frozen” is derived from the Christian Biblical verse “Many are called but few are chosen.”¹ This line concludes a parable about a king enraged by a guest’s failure to wear appropriate attire to a wedding. The king orders the man bound hand and foot and carried off to an uncertain but undoubtedly unpleasant fate in the wilderness.²

This passage finds renewed meaning in the current crusade against gay, lesbian, and bisexual persons³ being executed by conservative zealots in the United States.⁴ Like the king in the parable, some conservatives⁵ advocate that any person not properly attired in the robe of heteronormativity⁶ should be banished not only from wedding celebrations (especially their own) but from meaningful participation in many aspects of U.S. society.⁷ According to many media

¹ Matthew 22:14.

² Matthew 22:1 – 14.

³ “Sexual minorities” used here primarily means gay, lesbian, and bisexual persons who have a preference for partnering with a person of the same biologic sex due to the mental, emotional, and physical satisfaction derived from such relationship. This article also highlights but does not definitively address many issues faced by intersexed individuals (i.e. persons whose genitalia, gonads, chromosomes and other indicia of sex are not 100 percent congruent with the classic definition of male or female), transgender persons (i.e. people whose biologic sex, outward gender appearance or presentation is incongruent with their internal gender identities), and transsexual individuals (i.e. individuals undergoing medically supervised gender transition). Transgender individuals’ struggle for equality is well chronicled in DEBORAH RUDACILLE, *THE RIDDLE OF GENDER: SCIENCE, ACTIVISM AND TRANSGENDER RIGHTS* (2005); Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: On DOMA, Full Faith and Credit, and Statutory Interpretation*, 2 HOUSTON J. L. & POL’Y 301 (2003). For thoughtful consideration of the medical, social and legal challenges encountered by intersex persons, see Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

⁴ See Bob Moser, *Holy War*, 117 SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT 8 (Spring 2005)(providing an historical overview and contemporary account of the anti-gay crusade that began in the 1970s). Many attribute current crusaders’ zealotry to the decision in *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003), which made Massachusetts the first state to recognize same-sex marriage. See generally Symposium, *The Legislative Backlash to Advances in Rights for Same-Sex Couples*, 40 TULSA L. REV. 371 (2005); Alan Cooperman, *Same-Sex Bans Fuel Conservative Agenda*, WASH. POST, Nov. 4, 2004, at A39. The most extreme attack against sexual minorities is being headed by Fred Phelps, pastor of the Westboro Baptist Church in Topeka, Kansas, sponsor of the infamous web site www.godhatesfags.com (last visited June 13, 2005). The crusade is not of recent origin. See CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENT IN THE U.S.* 121-154 (2002)(describing the Christian Rights’ s organized opposition to gay rights since the early 1960s); John GALLAGHER & CHRIS BULL, *PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT* (2001).

⁵ The author readily acknowledges that many conservatives are fair minded and potentially open to transformative learning about sexual minorities. This article critiques the positions of conservatives who refuse to engage in honest discourse about the lives of sexual minorities.

⁶ Heteronormativity is society’s acceptance of heterosexual relationships as the elemental basis for all human relationships, accompanied by the belief that heterosexuality is essential to the continued existence of society. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 41-88 (1999). Heteronormativity has been more expansively defined as “the complex social, political, legal, economic and cultural systems that construct the primacy, normalcy, and dominance of heterosexuality.” Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence*, 5 NEV. L. J. 260, 260 (2004).

⁷ See Moser, *supra* note X.

reports, conservatives are winning this cultural battle.⁸ As demonstrated in this article, however, reports of the demise of the sexual minority civil rights movement are premature. Rather, it is discrimination against gay, lesbian, and bisexual persons that is on its deathbed.

This country's historically chilly reception to lesbian, gay, and bisexual persons cannot be denied. Today, however, evidence of warming trends abound. Prediction of the inevitable demise of such discrimination is grounded in a wide range of trends, events and developments, including the six summarized immediately below and more fully articulated throughout this article.

First, decades of momentum garnered by the civil rights movements for sexual minorities, paired with the movement's proven ability to weather setbacks and adversity, suggests that contemporary challenges will also be weathered.⁹

Second, while the political clout of Christian and secular conservatives should not be underestimated, it is nothing new. More importantly, emerging voices from within Christianity now advocate greater acceptance of sexual minorities within denominations and throughout society.¹⁰

Third, medical researchers and social scientists continue to build an impressive body of empirical data that confronts the tradition of reserving "normalcy" solely for heterosexuals who fit the classic male-female dichotomy. These scientific discoveries directly influence courts faced with issues related to biological sex, gender roles and sexual identity as well as the public's perception of sexual minorities.¹¹

Fourth, gay, lesbian, and bisexual people have become highly visible within their own families and in public venues including academic, workplace, and community settings. This openness, in turn, destroys stereotypes and facilitates positive perceptions of sexual minorities as ordinary and contributive members of society.¹²

Fifth, globalization has moved from the realm of political theory to fact. The liberalization of laws and extension of rights to sexual minorities in other countries¹³ already has, and will continue, to influence social and legal trends in this country.¹⁴

⁸ Events such as the passages of anti-gay marriage initiatives in thirteen states in 2004 and re-election of a president who endorses amending the U.S. Constitution to outlaw same-sex marriage support the media's analyses. See Jim VandeHei, *Freedom, Culture of Life United Bush and Pope; Disputes Focused on Methods*, WASH. POST, April 7, 2005, at A-19 (reporting on President Bush's continued endorsement of a federal constitutional ban on same-sex unions and other ultra conservatives views common to Bush and the late Roman Catholic pontiff John Paul II); Lornet Turnbull, *Gay Couples Pinning Hopes for Marriage on High Court, Sidebar: Laws from State to State*, SEATTLE TIMES, March 6, 2005 at B1 (reporting that voters passed constitutional amendments in 2004 banning same sex marriages in Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah and that state constitutional bans already existed in Alaska, Hawaii, Nebraska and Nevada).

⁹ See Milestones and Momentum, *infra* §II.

¹⁰ See Onward Christian Solders *infra* §IV.B.

¹¹ See Science and Sexuality *infra* §IV.C.

¹² See Increased Visibility and Enhanced Public Perception *infra* §IV.A.

¹³ See Mike Hudson, *You and Me Against the World*, THE ADVOCATE, June 21, 2005, at 89, 92 (listing twenty-two countries which do or will soon recognize same-sex unions).

Six and finally, all of the above factors are coalescing to create a climate that encourages transformative learning, a cognitive process engaged in by virtually all adults that results in reassessment of individual beliefs, and which ultimately inspires social change.¹⁵ Significant transformation has already taken place among medical and social scientists¹⁶ and has established nascent roots in Christianity.¹⁷ Extension of equal rights and privileges to sexual minorities is an inevitable consequence of this transformative growth.

The suppositions that sexual minority discrimination is on its deathbed and that transformative learning is hastening its demise are supported in the following manner. Following this introduction, Part II compares today's status of sexual minorities in the U.S. to their legal and social standing in the late 1970s. Part II also places these advancements in the context of challenges the movement previously has weathered. Part III explains why facts about sexual minorities will inevitably overtake the fictions commonly repeated about them. This section identifies the fatal flaws in the primary tool used to fictionalize the lives of sexual minorities, a device this author characterizes as "behavior-identity compression." Part III then enlists transformative learning theory to explain how and why people are willing to revise and sometimes reverse long held, negative views about sexual minorities. Part IV more closely examines three societal mechanisms that are both experiencing and facilitating this transformative learning process: (A) increased visibility of sexual minorities; (B) an emerging tradition in Christianity that embraces rather than rejects gay, lesbian and bisexual people, and (C) scientific developments that support definitions of normalcy related to sex, sexuality and sexual identity that exceed the traditional heterosexual, binary norm. Part V offers a brief conclusion.

II. Milestones and Momentum

The civil rights movements of the 20th century resulted in significant federal and state legislation prohibiting discrimination due to race, gender and disability.¹⁸ In contrast, legal assurances of equal treatment for lesbian, gay and bisexual persons lag considerably behind.¹⁹

¹⁴ See, e.g., *Lawrence v. Taylor*, 539 U.S. 558, 573 (2003)(citing developments in English law and under the European Convention to support decision striking down U.S. sodomy laws). See generally Arthur S. Leonard, *The Impact of International Human Rights Developments on Sexual Minority Rights*, 49 N.Y. LAW SCHOOL L. REV. 525 (2004-2005); Betty C. Burke, Note, *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform*, 64 LA. L. REV. 643 (2004); Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J. L. & MED. 41 (2004)(arguing that U.S. should follow lead of Columbian courts in providing remedies for intersexed persons injured through premature or inappropriate genital surgery).

¹⁵ See Transformative Learning *infra* §III B.

¹⁶ See Mental Health Perspectives on Homosexuality *infra* §IV.C.2; Physiological Evidence and the Nature/Nurture Debate *infra* §IV.C.3.

¹⁷ See Transformation and the Emerging Paradigm *infra* §IV.B.3.

¹⁸ See, e.g., Americans with Disabilities Act, 42 U.S.C.A. §12112(a) (1990)(prohibiting employment and public accommodation discrimination against a person who is or is perceived as disabled); Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. §2000e (1991)(prohibiting discrimination in employment "because of an individual's race, color, religion, sex, or national origin").

¹⁹ Differential (and usually less favorable) treatment of sexual minorities is commonly found in contract law, criminal law, education law, entitlement law, estates and trusts laws, family law, federal constitutional law, health care law, immigration law, labor law, military law, private employment law, property law (real and personal), public

As one family law expert opined, “[t]he story of the last thirty years is the story of advances followed by repercussions.”²⁰ While this assessment is accurate, comprehensive consideration of the civil rights successes achieved by sexual minorities over the past several decades reveals that the proverbial glass is at least half full and that the water continues to rise.

A. Three Decades of Advancements

1. Legal Status in the Late 1970s

The legal status of sexual minorities in the U.S. remained grim throughout the 1970s. In her exhaustive review of law as applied to homosexual and bisexual persons,²¹ Professor Rhonda R. Rivera documented rampant employment discrimination.²² Workplace discrimination pervaded the military,²³ in law, medicine and other professions requiring licensure²⁴ and in public school teaching.²⁵ Courts’ routine and unsympathetic rejections of employment discrimination claims brought by sexual minorities²⁶ were based on stereotypical characterizations of plaintiffs as persons who chose a life of sexual perversion, criminal behavior, innate immorality, and promiscuity.²⁷

Family law matters followed a similar pattern.²⁸ For example, courts refused to extend marriage rights to same-sex couples,²⁹ morally condemned persons whose sexual minority status

employment law, state constitutional law, tax law, and tort law. See WILLIAM D. ESKRIDGE, JR. AND NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2d ed. 2004).

²⁰ Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts* (hereafter Polikoff I), in *CREATING CHANGE, SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305, 334 (John D’Emilio et al. eds. 2000)(hereafter *CREATING CHANGE*).

²¹ Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799 (1978-1979).

²² *Id.* at 806-811. See also PATRICIA A. CAIN, *RAINBOW RIGHTS, THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 103-128 (2000).

²³ Rivera, *supra* note XX, at 837-855.

²⁴ *Id.* at 855-860. Even a businessperson’s ability to obtaining a liquor license was compromised, if not defeated, if the establishment employed or was patronized by homosexuals. *Id.* at 913-924; Ira Henry Freeman, *Café Drive Turns to Homosexuals*, *N.Y. TIMES*, Dec. 1, 1960, at 30 (reporting on police chief’s intensified investigations into liquor establishments that employed or served homosexuals).

²⁵ Rivera, *supra* note XX, at 860-874.

²⁶ *Id.* at 805-874.

²⁷ In *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969), for example, the court upheld plaintiff’s dismissal from employment on the grounds that a homosexual’s presence would undermine morale and efficiency of workplace because fellow employees know “that a homosexual act is immoral, indecent, lewd, and obscene.” In *Gaylord v. Tacoma School District No. 10*, 559 P.2d 1340, 1345-46 (Wash. 1977), the court affirmed a school board’s decision to fire a teacher with 12 years of excellent evaluations because “homosexuality is widely condemned as immoral and was so condemned during biblical times;” because the teacher knew his homosexuality was had “serious consequences;” because the teacher has indicated no intent to change; and because he had “made a voluntary choice for which he must be held morally responsible.” These cases are discussed in Rivera, *supra* note XX, at 820 (*Schlegel*) and 871-874 (*Gaylord*). Rivera also points to Navy policy describing homosexuals as “military liabilities who cannot be tolerated” because those who engage “in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct.” Rivera, *supra* XX, at 847. These decisions also demonstrate the courts’ readiness to equate homosexual acts and homosexual identity. See *Behavior-Identity Compression infra* §III.A..

²⁸ Rivera, *supra* note XX, at 874-908.

²⁹ *Id.* at 874-878.

was revealed during (heterosexual) divorce proceedings,³⁰ routinely denied child custody, and frequently imposed severe restrictions on visitation rights granted a gay or lesbian parent.³¹ As in the employment cases, the family law courts asserted blanket immorality against homosexual spouses and parents rather than evaluating the individual strengths and weaknesses of particular litigants. Even parents imprisoned for committing serious crimes were “treated to less spurious moralizing and discrimination” than were homosexual parents.³² As Rivera concluded, “[j]ustice for the homosexual parent” did “not come cheaply or often”³³ through the late 1970s.

Transgender and intersex individuals faced similar legal obstacles. Attorney and activist Mary Dunlap³⁴ observed in the late 1970s that while scientific “data and theories alike counsel against an absolute two-sex presumption, the United States legal system appears to be fastened firmly to the presumption” that “two, and only two, distinct and immutable sexes exist.”³⁵ Dunlap provided numerous examples of “explicit and implicit legal consequences”³⁶ in education, family law, and employment that attach to the state’s determination of a person’s sex, further explaining that a person who refuses to conform to his or her assigned sex “almost certainly will experience an array of legal coercions toward conformity with the norms of the majoritarian, dominant culture as to male/female indicia of identity.”³⁷ Penalties for nonconformity ranged from being prohibited from marrying to being involuntarily committed to a mental institution.³⁸

2. Current Legal Status of Sexual Minorities

Today’s social and legal standing of sexual minorities contrasts sharply with the descriptions provided by Rivera, Dunlap and others a quarter-century ago. The U.S. Supreme Court has declared that certain discriminatory laws “born of animosity” toward gay men,

³⁰ *Id.* at 879-883.

³¹ *Id.* at 883-904.

³² Anne T. Payne, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAMILY LAW 797, 818 (1977-1978).

³³ Rivera, *supra* note XX, at 904. *See also* Payne, *supra* n. XX, at 799 (concluding that courts deemed homosexual parents *per se* unfit or neglectful more often than were mentally compromised and imprisoned parents).

³⁴ Dunlap was a founder of the Equal Rights Advocates public interest law firm. Her many contributions to the movement are chronicled in CAIN, *supra* note XX, at 65-67.

³⁵ Mary Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1131 (1978-1979).

³⁶ *Id.* at 1133.

³⁷ *Id.* at 1135.

³⁸ *Id.* Adherence to the binary view of sex resulted in intersexed people being subjected to surgery shortly after birth to conform ambiguous genitalia to set male or female biological standards without regard for other physiological factors or the psychosexual orientation of the child. Such premature gender assignment to an intersex child may have disastrous consequences later in life when the surgically constructed gender conflicts with the person’s internal gender identity. *See* RUDACILLE, *supra* n XX, at 102-140. Among other things, dissonance between an intersexed person’s surgically assigned gender and internal gender identity could result in the additional stigma of being labeled transgender and/or gay, lesbian or bisexual in adulthood.

lesbians and bisexuals cannot withstand Equal Protection Clause scrutiny³⁹ and that sexual minorities are entitled to constitutionally-assured privacy in their intimate relationships.⁴⁰

Same-sex marriage is legal in Massachusetts [and California, Washington and New York? – update as cases progress], civil unions are available in Vermont and Connecticut [and Oregon - update], and various domestic partner rights are established by law in California, Hawaii, Maine, New Jersey [and ?? - update as legislation progresses] and the District of Columbia.⁴¹

In many states, sexual minorities are no longer labeled as per se unfit parents for child custody or visitation purposes. Instead, individuals are being evaluated under the “best interest of the child” analysis used for their heterosexual counterparts.⁴² Every state except Florida allows gay, lesbian and bisexual individuals to adopt children, and about half the states have permitted a same-sex partner to adopt a partner’s child (i.e. “second parent adoptions”).⁴³ No laws expressly prohibit transsexuals or intersexed persons from adopting children.⁴⁴

The federal government and sixteen states prohibit discrimination based on sexual orientation in public employment; some of these states and many municipal and county governments prohibit discrimination in private employment, public accommodation, education, housing, and other areas.⁴⁵ Well over eight thousand private employers provide domestic partner benefits, and more than eighty percent of the Fortune 500 companies include sexual orientation in corporate non-discrimination policies.⁴⁶ A significant number of sexual minorities are successfully pursuing political careers.⁴⁷

³⁹ *Romer v. Evans*, 517 U.S. 620, 634 (1996).

⁴⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴¹ (no author) *Marriage: A Patchwork of Partner Rights*, THE ADVOCATE, June 21, 2005, at 98 (providing chart illustrating various protections for same-sex couples and their children). Frequently updated information on state domestic partnership laws is provided by the Human Rights Campaign at http://www.hrc.org/Template.cfm?Section=Domestic_partners1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=10326.html.> (last visited May 11, 2005).

⁴² Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Same-Sex Marriage Issue Dominates Headlines*, 38 FAM. L. Q. 777, 790 (2005)(stating that when U.S. parents litigate care and custody of children, judges are authorized to resolve the disputes “according to the child’s best interests.”). *See generally id.* at 810, Chart 2 (providing custody criteria for 50 states and D.C.); Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with Best Interests of Children*, 11 Cardozo Women’s L. J. 1 (2004); Polikoff I, *supra* note XX, at 305 (noting generally more positive attitude of courts towards sexual minority parents but also explaining backlash and remaining challenges remaining to full equality). *See also*, Nancy D. Polikoff, *Lesbian and Gay Parenting: the Last Thirty Years*, 66 Mont. L. Rev. 51 (2005)(providing succinct summary of developments)(hereafter Polikoff II).

⁴³ The current status of adoption laws are provided by Lambda Legal Defense and Education Fund (LLDEF) at <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=399> (last visited May 1, 2005).

⁴⁴ Of course, transgender and intersexed persons may be discriminated against by a biased judge exercising the extremely elastic “best interest of the child” standard. *See generally* Polikoff I, *supra* note XX; Polikoff II, *supra* note XX (discussing custody and visitation standards used by courts for gay men, lesbians, and bisexuals).

⁴⁵ LLDEF provides a comprehensive chart of the various antidiscrimination laws, titled *Summary of States, Cities, and Counties which Prohibit Discrimination Based on Sexual Orientation*, at <http://www.lambdalegal.org/cgi-bin/iowa/news/resources.html?record=217.html>.> (last visited June 10, 2005).

⁴⁶ HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS (2004), at <http://www.hrc.org.sotw> . About ten percent of Fortune 500 companies include transgender people in their discrimination standards. *Id.* *See also* LAMBDA LEGAL DEFENSE AND EDUCATION FUND,

Of the forty-seven states with hate crime laws, twenty-nine states and the District of Columbia provide enhanced sentencing for crimes motivated by hatred towards the victim's sexual orientation, and eight of those and the District of Columbia also enhance sentencing for crimes fueled gender identity animosity.⁴⁸

Comprehensive equality is a yet unattained goal, as the rights and benefits available to sexual minorities are fortuitously determined by where individuals live and work. As Professor Rivera acknowledged in 1999, however, the patchwork protection available today represents a positive sea change compared to slightly more than one generation ago.⁴⁹

3. Shifts in Public Opinion

In dissenting from the Supreme Court's extension of privacy rights to sexual minorities,⁵⁰ Justice Anton Scalia opined that "many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as borders in their home."⁵¹ Rather than accepting sexual minorities, Justice Scalia continued, most U.S. citizens prefer to protect "themselves and their families from a lifestyle they believe to be immoral and destructive."⁵²

Justice Scalia's assessment of public attitudes towards sexual minorities at the dawn of the 21st century is not accurate. While it may be true, as Catherine MacKinnon posits, that sexual minorities are "among the most stigmatized, persecuted, and denigrated people on earth,"⁵³ public opinion about sexual minorities has improved vastly in recent decades.⁵⁴ Stated differently, significant transformative learning has occurred.

Relationship Recognition and Benefits, OUT AT WORK: A GUIDE FOR LGBT EMPLOYEES (2005), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1493.html>.

⁴⁷ See Christopher Lisotta, *Ballot Box Trailblazers*, THE ADVOCATE, June 21, 2005, at 106, 112 (profiling Dallas County Sheriff Lupe Valdez and openly gay and lesbian public office holders in Georgia, Idaho, Kansas, and elsewhere, and noting that such officials are currently found in all but ten states).

⁴⁸ Hate crime information is tracked by the Human Rights Campaign at http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19445 html> (last visited May 11, 2005)

⁴⁹ See Rhonda R. Rivera, *Our Straight Laced Judges: Twenty Years Later*, 50 HASTINGS L. J. 1179 (1999).

⁵⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵¹ *Id.* at 602.

⁵² *Id.*

⁵³ CATHERINE A. MACKINNON, *SEX EQUALITY: LESBIAN AND GAY RIGHTS* 1057 (2003). Participants in a nationwide survey also identified gay men and lesbian women as suffering the most prejudice and discrimination in this country; followed by Blacks, Hispanics and the disabled. Kaiser Family Foundation (KFF), *Views on Issues and Policies Related to Sexual Orientation Survey* (2000), available at www.kff.org/healthpollreport/archive_Dec2002/3.cfm and on file with author.

⁵⁴ Results of public opinion polls can be swayed by the phrasing of a question, the order in which questions are asked, the size and location of the respondent pool, and myriad other factors. See generally FRANK NEWPORT, *POLLING MATTERS* (2004) (explaining how polls are conducted and results analyzed). While not an exact science, well constructed and conducted polls provide keen insights into the public psyche. Bill Sloat, *Taking the Pulse of the Nation*, THE PLAIN DEALER SUNDAY MAGAZINE, Oct. 3, 2004, at 11, 14-16 (explaining the polling process). Interpreting survey data dealing with sexual minorities, however, can be especially challenging. See GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION 89-169 (Ellen D.B. Riggle & Barry L. Tadlock eds. 1999) (containing essays on how respondents' educational levels and other demographic characteristics affect responses in surveys about gay and lesbian rights, the potential

In a nationwide poll conducted in April 2005, for example, twenty seven percent of respondents believed that same-sex couples should be allowed to marry and an additional twenty-nine percent believed that civil unions were appropriate,⁵⁵ meaning that fifty-six percent of respondents favored legal recognition of same-sex relationships. These numbers help explain why fourteen state legislatures resisted pressure to amend state constitutions to ban same sex marriage in 2004, with six more following suit as of May 2005.⁵⁶

In terms of employment, the number of nationwide respondents who believed that homosexuals should have equal job opportunities rose from fifty-six percent in 1977 to between eight-seven and ninety percent in 2004.⁵⁷ Almost eighty percent of the populace believes that openly gay and lesbian people should be able to serve in the military.⁵⁸

Between 1992 and 2005, the number of respondents who approve of the hiring of homosexuals as medical doctors increased from fifty-three to seventy-eight percent; approval of the hiring of homosexuals as clergy rose from forty-three to forty-nine percent; approval of the hiring of homosexuals as elementary school teachers climbed from forty-one to fifty-four percent; approval of the hiring of homosexuals as high school teachers soared from forty-seven to sixty-two percent; and approval of the hiring of homosexuals as members of the President's cabinet grew from fifty-four to seventy-five percent.⁵⁹ More than three-quarters of the public now support enactment of laws or policies that protect gay men, lesbians, and bisexual persons against discrimination in employment.⁶⁰ And contrary to Justice's Scalia's views, a significant

conflicting interpretations of survey data indicating support for equal employment rights for sexual minorities, and the relationship between public opinion and voting behavior relative to gay and lesbian rights).

⁵⁵ ABC News/Washington Post Poll, April 21-24 (2005), at www.pollingreport.com/civil.htm and on file with author. See also CBS/New York Times Poll, Feb. 24-28 (2005) at www.pollingreport.com/civil.htm and on file with author (showing that twenty-three percent of adults nationwide favor same-sex marriage and an additional thirty-four percent favor civil unions).

⁵⁶ HUMAN RIGHTS CAMPAIGN, *THE BACKLASH MYTH: PROGRESS TOWARD GAY, LESBIAN, BISEXUAL AND TRANSGENDER EQUALITY SINCE MAY 17, 2004* at 2 and note 3 (2005)(hereafter "THE BACKLASH MYTH"), available at HRC website (www.hrc.org) and on file with author.

⁵⁷ The Gallup Organization, *Homosexual Relations*, available at <http://www.gallup.com/poll/content/?ci=1651&pg=1> (last visited May 17, 2005)(also on file with author). The difference in numbers was apparently due to wording of the questions. Eighty-seven percent of respondents agreed that "homosexuals" should have equal job opportunities, while ninety percent agreed when the question against about "gay or lesbian people."

⁵⁸ *Id.* (reporting results of May 2005 poll showing that seventy-six percent favored gay men and lesbians openly serving in the U.S. military.

⁵⁹ *Id.* Although the percentage of respondents who approved of gay men or lesbians working in each of these professions increased dramatically since 1992, the 2005 approval ratings were several percentage points below the 2004 numbers. This is likely due to the legalization of same-sex marriage in Massachusetts and the anti-gay crusade being orchestrated by conservatives throughout this country in response. One pollster had theorized that recent child sex abuse scandals in the Catholic Church "may have spilled over into attitudes about homosexuals serving as teachers or clergy." Lydia Saad, *Gay Rights Attitudes a Mixed Bag: Broad Support for Equal Job Rights, But Not for Gay Marriage*, GALLUP NEWS SERVICE, May 20, 2005, available at <http://www.gallup.com/poll/content/?ci=15889&pg=1> and on file with author. Whatever the cause, these slight declines represent the type of recurring setbacks that the sexual minorities continue to face (and to overcome) discussed *infra* at §II C of this article.

⁶⁰ Seventy-six percent of respondents in a nationwide survey conducted in 2000 approved of measures that protect gay men and lesbians from discrimination in employment. Kaiser Family Foundation *Inside – OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public's Views on Issues and Policies Related*

majority of people in the U.S. would allow their children to attend a high school or grade school where the teacher was openly gay or lesbian.⁶¹

B. The Relationship of Setbacks and Success

*“Backlash itself...points to the success of the movement, not its failure.”*⁶²

Recent proclamations that the sky is falling on the sexual minorities’ civil rights movement⁶³ prove specious when evaluated from the long-term perspective. Most of the major legal and social advances that sexual minorities have realized were achieved despite hostile political climates and in the face of contrary developments that equal, if not exceed, today’s noxious atmosphere for civil rights.⁶⁴

From a legal standpoint, for example, the Supreme Court’s 1986 decision in *Bowers v Hardwick*⁶⁵ upholding sodomy laws dealt sexual minorities a stunning setback. *Hardwick* explicitly condoned criminal prosecution for sexual minorities who engaged in adult, private, consensual sex: in so doing, the decision implicitly authorized states to continue discriminating against homosexuals in child custody, visitation, employment, housing and many other areas.⁶⁶ As the Supreme Court acknowledged when it overturned *Bowers* in 2003, the stigma attached to the criminalization of homosexual conduct served as “an invitation to subject homosexual persons to discrimination both in the public and private spheres.”⁶⁷ Despite this setback, sexual minorities recorded many major victories during the seventeen years when discrimination against them carried the imprimatur of the highest Court in the land.⁶⁸

to Sexual Orientation 8 (2001)(hereafter KFF Inside-OUT), available at www.kff.org/content/2001/3193 and on file with author.

⁶¹ Seventy-one percent of respondents to a nationwide poll would send their children to a high school and sixty-one would send their children to elementary school if the children had an openly gay or lesbian teacher. *Id.* at 6.

⁶² RUDACILLE, *supra* n XX, at 152 (commenting on the “interruptions” to the transformation in cultural attitudes about sexual minorities that occurred when sexual orientation was exploited as a wedge issue during the 2004 presidential campaign). Some claim that no backlash has occurred. See THE BACKLASH MYTH, *supra* note XX.

⁶³ See, e.g., Stevenson Swanson, *In Other States, Opposition Solidifies*, CHICAGO TRIBUNE, May 17, 2005 at C1 (reporting that “the backlash has been widespread” and citing same-sex marriage bans passed in 14 states in 2004 as evidence of the movement’s set backs).

⁶⁴ Progress and regression in the movement have been chronicled in THE ADVOCATE since the late 1960s. See generally (multiple authors), *35th Anniversary Collector’s Issue*, THE ADVOCATE, Nov. 12, 2002; WITNESS TO REVOLUTION, THE ADVOCATE REPORTS ON GAY AND LESBIAN POLITICS 1967-1999 (Chris Bull ed. 1999)(reprinting full text of select articles).

⁶⁵ 478 U.S. 186 (1986). The Court affirmed a similar decision a decade earlier. See *Doe v. Commonwealth’s Attorney for City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975), *summarily aff’d without opinion*, 425 U.S. 901 (1976)(upholding Virginia’s sodomy statute as applied to acts between consenting adults of the same sex).

⁶⁶ For example, the Supreme Court of Ohio upheld the Secretary of State’s rejection of The Greater Cincinnati Gay Society’s application to form a nonprofit corporation on the grounds that homosexuality was a crime in Ohio when the articles of incorporation were filed; even though Ohio law had been revised to decriminalize private consensual adult sexual conduct prior to the court’s decision, the court agreed with the Secretary that “promotion of homosexuality as a valid life style is contrary to the public policy of the state.” *Grant v. Brown*, 39 Ohio St. 2d 112, 113-114, 313 N.E.2d 847, 848 (1974). See also *Lawrence v. Texas*, 539 U.S. 558, 590, n.2 (2003)(providing illustrative cases that reflect broad application of *Bowers*).

⁶⁷ *Lawrence*, 539 U.S. at 575.

⁶⁸ See, e.g., *Romer v. Evans*, 517 U.S. 620, 634 (1996)(upholding challenge to state wide ballot initiative disenfranchising homosexuals and holding that a state cannot deem sexual minorities “a class of persons” who are strangers to the law); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997)(striking down

Similarly, one cannot dismiss the significant legal and social setbacks inflicted by the AIDS pandemic that exploded in the early 1980s,⁶⁹ resisted containment in the 1990s,⁷⁰ and continues, perhaps in its most virulent form, today.⁷¹ AIDS devastates families and communities, demands major re-alignment of resources to fight for research and treatment and to challenge discriminatory practices against those infected with the virus, and re-enforces the stereotype of sexual minorities, especially gay men, as sexually promiscuous and socially irresponsible.⁷² Despite the overwhelming and ongoing legal, political, and personal ramifications that the AIDS epidemic has heaped upon sexual minorities,⁷³ the movement towards equality continued.

Additionally, and perhaps most importantly, the sexual minority civil rights movement has progressed despite its uniqueness, major dissent among persons dedicated to the cause, and decades of heightened socio-political conservatism.

The uniqueness of the sexual minority equality movement is found in the types of oppression that sexual minorities have endured, “the role that religion played in it, the psychological effect of it, the way gay men and lesbians [and bisexual and transgender persons] do and don’t relate to each other, the fractious nature of the movement, [and] its difficulty in

Alabama statutes that disallowed funding and recognition to any organization that promoted homosexual lifestyle because law violated First Amendment rights of student groups); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996)(upholding right of student to pursue claim against school district for failing to protect student from sexual orientation harassment); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1996)(finding Equal Protection Clause violation in selective prosecution based on defendants’ sexual orientation); *Weaver v. Nebo School District*, 29 F.Supp. 2d 1279 (D.Utah 1998)(concluding that lesbian teacher’s rights to free speech and equal protection were violated by district’s termination of coaching assignment); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000)(recognizing that lesbian couple had formed a family that entitled same-sex partner to visit their children following termination of the parents’ relationship); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999)(holding that state constitution requires equal treatment of same-sex couples and opposite sex couples); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998)(striking down the Georgia sodomy statute that was upheld in *Bowers v. Hardwick* because it violated state constitution’s right of privacy); *In re Matter of Jacob*, 660 N.E.2d 397 (N.Y. 1995)(permitting lesbian to adopt her partner’s child, thus vesting full parental rights in both women); *Tanner v. Oregon Health Science University*, 971 P.2d 435 (Ore. App. 1998)(requiring university to extend insurance benefits to same-sex domestic partners); *City of Dallas v. England*, 846 S.W.2d 957 (Tx.Ct.App. 1993)(holding that sodomy statute was unconstitutional and prohibiting city from refusing to hire lesbians and gay men for police force); *Kentucky v. Wasson*, 842 S.W.2d 487 (Ky. 1992)(striking down state sodomy statute because it violated state constitutional guarantees of privacy and equal protection); *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y. 1989)(classifying same-sex lifetime partners as “family” for purposes of rent control law).

⁶⁹ An excellent discussion of the impact of AIDS on individual activists and the movement from the early 1980s to early 1990s is provided in the chapter entitled *In the Shadow of AIDS* in *MAKING GAY HISTORY*, *supra* note XX, at 243-341.

⁷⁰ See Chris Bull and John Gallagher, *The Lost Generation: A Second Wave of HIV Infections Among Young Gay Men Leaves Educators Worried About the Future of the Epidemic*, *THE ADVOCATE*, May 31, 1994, at 36.

⁷¹ See Marc Santora, *Rare AIDS Strain is Very Aggressive, Study Says*, *N.Y. TIMES*, March 19, 2005, at B3 (reporting on strain of virus that is resistant to virtually all drugs and is extremely aggressive in advancing from H.I.V. status to full blown AIDS).

⁷² The increase in gay men who use illegal drugs and engage in unprotected sex has created new concerns among sexual minorities and generated publicity that tends to support stereotypes of gay men as reckless and sexually obsessed. See, e.g., Stephen Smith, *Crystal Meth Threat Growing: Gays’ Use in N.E. Fueling HIV Fears*, *BOSTON GLOBE*, April 24, 2005 at A1.

⁷³ See *AIDS, IDENTITY, AND COMMUNITY: THE HIV EPIDEMIC AND LESBIANS AND GAY MEN* (Gregory M. Herek & Beverly Greene eds. (1995).

finding leaders and a voice.”⁷⁴ The trails blazed by the emancipatory efforts of women and blacks in this country provide useful guideposts,⁷⁵ but the distinguishing characteristics of each civil rights movement necessitate construction of a unique road map by and for sexual minorities.⁷⁶

Overarching themes of diversity and inclusion in the sexual minority movements have made charting that course all the more difficult.⁷⁷ Activists questioned whether the movement would be defeated by its own diversity⁷⁸ even while reveling in the inspirational glow of the Stonewall riots.⁷⁹ Dissonance has been recorded in the clashes between male and female activists;⁸⁰ by racial divides,⁸¹ and by conflicting perspectives on the movement offered by homosexual, bisexual⁸² and transgender leaders.⁸³ Matters of class, gender, religion, political ideology, goals and priorities have historically divided the movement⁸⁴ and continue to do so.⁸⁵

⁷⁴ DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* 13 (1999)(bracketed words supplied).

⁷⁵ See PATRICIA A. CAIN, *RAINBOW RIGHTS, THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 12-44, 69-71 (2000)(summarizing civil rights movements seeking racial and gender equality and noting how lawyers for lesbians and gay men relied on legal strategies developed by lawyers working in those causes).

⁷⁶ Sexual minority activists cannot “simply plug ‘sexual preference’ or ‘sexual orientation’ into a receptacle built for ‘race’ and ‘sex’ especially when lobbying for inclusion in anti-discrimination laws.” William B. Turner, *Lesbian/Gay Civil Rights in the Carter and Reagan Administrations*, in *CREATING CHANGE*, *supra* note XX, at 3, 26. See also CAIN, *supra* note XX, at 277-282.

⁷⁷ As early as 1951, for example, members of the gay rights group known as the Mattachine Society promised “in every possible way, to respect the rights of all racial, religious, and national minorities” and try “to interest other responsible people” in the organization “without regard to their race, color, or creed.” Membership Pledge of the Mattachine Society (April 1951), *reproduced in* *THE GAY RIGHTS MOVEMENT* 52-53 (Jennifer Smith ed. 2003).

⁷⁸ See Lige Clark & Jack Nichols, *N.Y. Gays: Will the Spark Die?*, *THE ADVOCATE*, Nov. 12, 2002 *reprinted in* *WITNESS TO REVOLUTION, THE ADVOCATE REPORTS ON GAY AND LESBIAN POLITICS 1967-1999* (Chris Bull ed. 1999).

⁷⁹ On June 23, 1969, gay and transgender patrons of the Stonewall bar in New York City’s Greenwich Village physically confronted the police who tried to arrest them, triggering several days of intermittent rioting. See generally MARTIN DUBERMAN, *STONEWALL* (1984); ERIC MARCUS, *MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS* 121-123, 126-132 (2002); Dick Leitsch, *Police Raid on N.Y. Club Sets off First Gay Riot*, *THE ADVOCATE* Sept. 1969, *reprinted in* *WITNESS TO REVOLUTION*, *supra* note XX, at 11-15. This unprecedented and radical rebellion served as a flash point for the nascent gay liberation movement, sparking “the birth of gay pride on a massive scale.” TOBIN & WICKER, *supra* note XX, at 9. The Stonewall riots “touched the spirits of gay people everywhere,” resulting in thousands of individuals coming out of the closet and the permanent establishment of gay rights organizations that set an agenda for the gay rights movement. ESKRIDGE AND HUNTER, *supra* note XX, at 224. The riots also invigorated political activism by transsexuals. RUDACILLE, *supra* n XX, at 151-178. Within three years of the Stonewall riots, over 300 organizations were advocating equal rights for sexual minorities. TOBIN & WICKER, *supra* note XX, at 9.

⁸⁰ Lesbian organizations such as the Daughters of Bilitis originated in the 1950s and thrived, for example, due to their lesbian leaders’ perception that “[t]he male-oriented gay groups wanted to use us as secretaries, coffee makers, and hostesses,” leading to the conclusion that absent founding their own organizations, lesbian women “would have had to fight tooth and toenail to get into any policy-making positions.” TOBIN & WICKER, *supra* note XX, at 52, quoting Del Martin. See also CLENDINEN & NAGOURNEY, *supra* note XX, at 85-105 (addressing the conflicts between men and women in the movement circa 1970).

⁸¹ See *DANGEROUS LIAISONS: BLACKS AND GAYS AND THE STRUGGLE FOR EQUALITY* (Eric Brandt, ed. 1999); Cathy J. Cohen, *Contested Membership: Black Gay Identity and the Politics of AIDS*, in *CREATING CHANGE*, *supra* note XX, at 382

⁸² See RUTH COLKER, *HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW* (1996); Rebecca Shuster, *Beyond Defense: Considering Next Steps for Bisexual Liberation*, in *BI ANY OTHER NAME:*

Such friction undermined the movement's ability to reach consensus on critical strategic issues, including whether equality should be sought through quietly advocating for small incremental steps or by aggressively demanding immediate and full participation in society.⁸⁶ Indeed, diverse politics within the movement continue to spawn arguments "over which tactics are appropriate, over which politicians should be supported and which ones attacked, over which institutions should be challenged or ignored."⁸⁷ While such fractures jeopardize the movement's ultimate goals, significant progress has occurred despite the political and social fragmentation of persons whom the movement seeks to embrace. Experience thus proves that the sexual minority emancipation movement can move forward even as it stumbles.

Finally, significant progress in extending civil rights to sexual minorities has been recorded despite tidal waves of political and social conservatism. The 1960s featured huge political unrest ignited by the black civil rights movement and the war in Vietnam; the 1970's were defined by a free press's toppling of a corrupt U.S. president and rebirth of the "women's liberation" movement. The accelerated pace of social-political change throughout these two decades suggested that all minorities would soon be accorded full rights and benefits associated with U.S. citizenship.

The promise of a truly egalitarian society came to a screeching halt, however, with the 1980 election of Republican President Ronald Reagan,⁸⁸ an event that signaled a return to right wing politics and inspired conservative uprisings.⁸⁹ What did not halt, however, were efforts to extend equality to sexual minorities and numerous successes from 1980 to today.

BISEXUAL PEOPLE SPEAK OUT page?? (Loraine Hutchins & Lani Kaahumanu eds. 1991)(discussing rejection by homosexual communities and other marginalizing challenges bisexuals face).

⁸³ See RUDACILLE, *supra n.* XX, at 154-161, 168-172, 185-186 (reporting on long-standing tensions between gay and lesbian activists and transgender leaders); John Gallagher, "For Transsexuals, 1994 is 1969:" *Transgendered Activists are a Minority Fighting to be Heard within the Gay and Lesbian Community*, THE ADVOCATE, August 23, 1994; at 59.

⁸⁴ See generally CLENDINEN & NAGOURNEY, *supra* note XX.

⁸⁵ Patrick J. Egan & Kenneth Sherrill, *Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays*, PS: POLITICAL SCIENCE AND POLITICS ONLINE 229 (April 2005) <www.apsanet.org/imgtest/PSApr05EganSherrill.pdf>

⁸⁶ The clash of philosophies has intensified over same-sex marriage, with some activists advocating that smaller steps such as domestic partnerships or civil unions should be sought first, and others arguing that nothing less than legally sanctioned marriage is appropriate. These contemporary disputes reflect long-standing philosophical quarrels on whether the movement should quietly strive for assimilation or make radical demands for immediate and equal rights. See, e.g., CLENDINEN & NAGOURNEY, *supra* note XX, at 28-32 AND 51-56 (discussing friction between assimilation strategies of organizations such as the Daughter of Bilitis and Mattachine Society, both founded in the 1950s, and the more radical activism of groups like the Gay Liberation Front established in 1969 and the Gay Activists Alliance created in 1970).

⁸⁷ TOBIN & WICKER, *supra* note XX, at 10.

⁸⁸ See, e.g., Larry Bush & Richard Goldstein, *A Chill Wind for Gay Rights*, THE ADVOCATE, July 9, 1981; at 1, 18 (reporting on the high level of hostility sexual minorities were enduring due to the growing political strength of Christian conservatives and the belief of newly elected President Ronald Reagan that "in the eyes of the Lord" homosexuality was "an abomination.").

⁸⁹ Although providing respite from an otherwise unrelenting swing to the right, it is difficult to characterize the two-term presidency of William Clinton as reversing the trend toward conservative views. Clinton backed down on his promise to end the military ban against homosexual service members and also signed the Defense of Marriage Act (DOMA) into law, codifying the federal government's discriminatory stance against same sex couples and allowing

In sum, the significant civil rights victories achieved by gay, lesbian and bisexual people during the past three decades have not come at a particularly steady or predictable pace, and certainly not at the speed desired by most sexual minority activists. And yet, the movement “has come further and faster, in terms of change, than any other that has gone before it in this nation.”⁹⁰ History proves that those dedicated to the cause can overcome whatever new challenges are thrown in their paths, and at times, even be inspired by them.⁹¹

III. Separation of Fact and Fiction

Why does the equal rights movement for sexual minorities continue to advance despite the many challenges outlined above? Exploration of two independent yet intersecting phenomena - behavior-identity compression and transformative learning - help answer that question.

A. Behavior-Identity Compression

“If we could separate sexual behavior from the identity of the people who are in gay families, I think we’d be a lot better off.”⁹²

Classification of sexual minorities as “homosexuals,” “lesbians,” and “transgender” stems from socio-scientific constructs of sexual personalities that occurred primarily in the 20th century.⁹³ As with identity politics in general, “these social categories...are artifacts of particular prevalent belief systems and of their apparatuses of societal control”⁹⁴ that predate the

states to exhibit the same discrimination with impunity. See Craig A. Rimmerman, *A “Friend” in the White House? Reflections on the Clinton Presidency*, in *CREATING CHANGE*, *supra* note XX, at 42.

⁹⁰ CLENDINEN & NAGOURNEY, *supra* note XX, at 13.

⁹¹ See, e.g., Joe Dignan, *Big Show of Fence Mending: HRC Joins 21 Other National LGBT Groups in Tele-Conference Announcing Statement of Purpose*, BAY CITY NEWS, Jan. 13, 2005 available at www.gaycitynews.com/gcn_355/bigshowoffense.html and on file with author (reporting that after the “fractious two months of controversy” that followed the 2004 November elections, the major national advocacy groups issued a joint statement designed to provide a roadmap for attaining major goals and intended to provide hope and inspire those seeking equality for sexual minorities); John Gallagher, *California Explodes After Governor Kills Workplace Bias Ban*, THE ADVOCATE, Nov. 5, 1991, at 16 (characterizing the veto of pro-gay legislation by a governor who had pledged to support it as “Stonewall II”); Peter Freiberg, *The March on Washington Hundreds of Thousands Take the Gay Cause to the Nation’s Capitals*, THE ADVOCATE, Nov. 10, 1987, at 11 (identifying the Reagan administration’s disregard of the AIDS crisis as a major motivation for people marching on Washington to demand an end to discrimination against sexual minorities); Peter Freiberg, *Supreme Court Decision Sparks Protest: “New Militancy” Seen in Angry Demonstrations*, THE ADVOCATE, Aug. 5, 1986, at 12 (reporting on heightened activism following Supreme Court decision upholding criminalization of sodomy in *Bowers v. Hardwick*).

⁹² Gillian Pieper, who along with her lesbian partner and their three children were enveloped in controversy for appearing in the *Sugartime* episode of the children’s television show *Postcards from Buster*. Pieper was quoted in Adam B. Vary, *The Battle for Kids’ TV*, THE ADVOCATE, March 15, 2005, at 64, 65.

⁹³ See generally CELIA KITZINGER, *THE SOCIAL CONSTRUCTION OF LESBIANISM* (1987); MICHEL FOUCAULT, *HISTORY OF SEXUALITY*, Volume 1, 42-43 (Robert Hurley Trans. 1978); Larry Cata Backer, *Constructing a “Homosexual” For Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996).

⁹⁴ Francisco Valdes, *Keynote Address: Recalling Race, Gender and Sexuality: OutCrit Reflections on Legal Education, Social Identities and the “Rule of Law” – A Call Toward Collective Insurrections*, 5 GEO. JOURNAL OF GENDER & LAW 881, 884 (2004).

founding of this country.⁹⁵ The existence and extent of contemporary discrimination against sexual minorities in law, religion, science, and other intersecting disciplines is explained by reference to the archaic, EuroAmerican-heteropatriarchal roots of sexual minority identity.⁹⁶ These historic and deeply imbedded roots also explain why negative identities assigned to sexual minorities remain so difficult to deconstruct.⁹⁷

As conceived by the author, behavior-identity compression is the ongoing process through which individuals within the heteronormative paradigm create an identity for sexual minorities as one-dimensional deviants, thus rendering them appropriate subjects for legal disenfranchisement, social contempt, criminal prosecution, and even physical violence.⁹⁸ Behavior-identity compression is a socially constructed, multi-step progression where errors and assumptions at each stage are compounded in a manner that creates and re-enforces derogatory stereotypes of sexual minorities.

In the first instance, certain sexual conduct – such as sodomy or oral sex - is branded deviant, immoral and a threat to civilized society. Persons from respected disciplines such as psychology and medical science join religious leaders and other moralists to promote the pejorative – and even criminal - classification of certain behaviors.⁹⁹ The immorality of certain acts becomes widely embedded in the culture.¹⁰⁰

⁹⁵ Valdes traces the social categories prevalent in the U.S. today to those imported from Europe at the founding of this country. *Id.* at 883-884.

⁹⁶ According to Valdes, EuroAmerican-heteropatriarchy “encapsulates not only the national chauvinisms of Europe and its colonial powers but also their particular brands of belief regarding race, ethnicity, gender, sexuality, economic relations and similar fault lines of societal organizations.” *Id.* at 884. In the U.S., the law has played a major role in creating group identities based on such beliefs. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423-439 (2001)(providing sociological model of the law’s influence on the creation of group identities).

⁹⁷ See generally JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (2D. ED. 1998); Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in *HOMOSEXUALITY, WHICH HOMOSEXUALITY?* (1999); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 3 (1995); Kenneth L. Karst, *Myths of Identity: Individual and Group Portrait of Race and Sexual Orientation*, 43 U.C.L.A. L. REV. 263 (1995); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and after Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

⁹⁸ VIOLENCE AND SOCIAL INJUSTICE AGAINST LESBIAN, GAY AND BISEXUAL PEOPLE 5-68 (Lacey M. Sloan & Nora S. Gustavsson eds. 1998)(explaining relationship between social disenfranchisement of and violence against sexual minorities including intersexed and transgender adults and gay and lesbian youths).

⁹⁹ It is curious that science has proven influential on this topic, since judgments about the appropriateness of sexual acts are “Based on value judgments about the worth or morality of this behavior” rather than on the types of empirical evidence science usually demands prior to espousing any theory. SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 232 (1996). See also Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 5 (2004)(explaining that science requires “a method of producing knowledge in which general statements – hypotheses and theories – are tested empirically under controlled conditions”)(footnote omitted).

¹⁰⁰ See, e.g., Joseph Carroll, *Society's Moral Boundaries Expand Somewhat This Year*, GALLUP NEWS SERVICE, May 16, 2005 at <http://www.gallup.com/poll/content/?ci=16318&pg=1> and on file with author (reporting that fifty-two percent of adults believe that homosexual behavior is morally wrong); KFF Inside-OUT *supra* note XX, at 6 and Chart 13 (reporting that fifty-one percent of respondents to a nationwide poll believe that homosexual conduct is immoral).

Second, all sexual minorities, and especially gay men, lesbians, and bisexuals are assumed to engage in the “deviant” sexual behavior. Again, no empirical confirmation is offered or requested. Empirical evidence demonstrating that people who identify as “normal” heterosexuals also engage in the condemned behavior is conveniently ignored.¹⁰¹ Governmental policy toward and public opinion about sexual minorities remain “unsupported by scientific research or basic logic.”¹⁰²

Third, once sexual minorities have been adjudged non-normal, additional assumptions about their personalities and behaviors are thoughtlessly accepted as fact.¹⁰³ For example, the assumption that all sexual minorities not only engage in occasional “deviant” acts, but rather suffer uncontrollable impulses to constantly engage in inappropriate sexual conduct, is taken as fact.¹⁰⁴ The assumptions that sexual minorities molest children, recruit youths and even persuade vulnerable adults to change their sexual orientation are taken as fact.¹⁰⁵ The assumptions that sexual minorities are inherently defective¹⁰⁶ and untrustworthy are taken as fact.¹⁰⁷ The assumption that sexual orientation is a choice which individuals can freely reject by simply abstaining from the “immoral” sexual behaviors is taken as fact.¹⁰⁸

¹⁰¹ See, e.g., Tori DeAngelis, *Our Erotic Personalities are as Unique as our Fingerprints: Research Debunks Long-held Notions About Sexual Orientation*, 31 MONITOR ON PSYCHOLOGY, April 2001, available at <http://www.apa.org/monitor/apr01/erotic.html> (reporting that “hundreds of studies” debunk the belief that sexual orientation can be defined by sexual behavior; rather, studies consistently demonstrate “that people display a range of sexual and affectional proclivities”); Richard C. Friedman & Jennifer I. Downey, *Homosexuality*, 331 NEW ENGLAND JOURNAL OF MEDICINE 923, 924 (1994)(concluding that “diverse sexual practices occur in different groups regardless of sexual orientation”).

¹⁰² John G. Culhane, *Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools*, 24 ST. LOUIS UNIVERSITY PUBLICATIONS OF LAW 129, 130 (2005).

¹⁰³ *Id.* (observing that historic treatment of sexual minorities “is explainable only by unfounded assumptions”). See also *Symposium: Homosexuality: The Truth Be Told*, 14 REGENT UNIVERSITY LAW REVIEW 242-511 (2001-2002). Published by a Christian affiliated law school, this symposium that contains numerous articles asserting as “fact” many stereotypes long rejected by medical and social scientists, including the myth that homosexuals are child molesters, *id.* at 278, that “homosexuality is correlated with a disorder,” *id.* at 286, and that homosexuals actively recruit youths. *Id.* at 296. The Christian Right attacks transsexual and transgender persons based on similar false assumptions about their identities and behaviors. See, e.g., Traditional Values Coalition, *Special Report, A Gender Identity Disorder Goes Mainstream: Cross-Dressers, Transvestites and Transgenders Become Militants in The Homosexual Revolution*, at http://www.traditionalvalues.org/pdf_files/TVCSpecialRptTransgenders1234.PDF (last visited June 11, 2005)(arguing that “transgenders” are “mentally disordered” persons who undermine society by “normalizing the abnormal”).

¹⁰⁴ Promiscuity of sexual minorities is a favorite theme of conservative crusaders. Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA LAW REVIEW 401, 462 (2001). Characterization of homosexuals as child molesters has been authoritatively rebutted by empirical data. See Gregory Herek, *Facts about Homosexuality and Child Molestation* (2005), available at http://psychology.ucdavis.edu/rainbow/html/facts_molestation.html and on file with author (refuting claims by psychologist Paul Cameron and others that homosexuals prey on children).

¹⁰⁵ Knauer, *supra* note XX, at 468-489.

¹⁰⁶ See, e.g., Carolyn Lochhead, *Conservatives Brand Homosexuality a “Tragic Affliction,”* SAN FRANCISCO CHRONICLE, June 20, 1997 at A4.

¹⁰⁷ Such assumptions fueled the 1950s’ McCarthy witch hunts aimed at homosexuals in federal positions and that reverberates in today’s military’s “don’t ask, don’t tell (but do persecute)” policy toward sexual minorities. See (no author given), *Perverts are Called Government Peril: Gabrielson, G.O.P. Chief, Says They are as Dangerous as Reds*, N.Y. TIMES, Apr 19, 1950, at 25 (reporting on Republican National Chairman’s assertions that “sexual perverts who have infiltrated our Government in recent years” were “perhaps as dangerous as the actual

The damage inflicted through society's reliance on false but oft-repeated assumptions is compounded by further compaction of these myths into a comprehensive (and deviant) "lifestyle" assigned to all sexual minorities. This cascading and consolidation of assumptions leads inescapably to the conclusion that sexual minorities are sick and evil individuals, unworthy of full participation in a civilized society.¹⁰⁹ And because people in this group differ so radically from the heterosexual norm, any rights they seek are "special" rather than equal,¹¹⁰ with extension of such rights significantly endangering society.¹¹¹

Fourth and finally, political and religious leaders whose status and financial standing are enhanced by creating and exploiting rifts throughout society¹¹² re-image the deviant lifestyle as group identity.¹¹³ Grounded in false assumptions and loaded with negative stereotypes, this fictitious group identity justifies legal and social disenfranchisement of gay, lesbian, and bisexual people and other sexual minorities.

Flawed though it may be, behavior-identity compression remains a powerful tool, especially in the hands of conservative political forces. It allows lawmakers to pass discriminatory laws while arguing that the blatantly discriminatory legislation they pass does not unfairly disadvantage anyone. Rather, they contend, the law serves society's best interest by refusing to condone a voluntary behavior that threatens the welfare of the state. Moreover, because the identity of the disenfranchised group is defined by behaviors, persons disadvantaged by the law can simply choose to change their behavior to avoid discriminatory treatment.

Behavior-identity compression similarly allows conservative religious leaders to claim that they are not condemning gay men, lesbians, or other sexual minorities per se, but only the behavior in which such individuals (presumptively) engage. Behavior-identity compression allows conservative clergy to hide behind the mantra of "love the sinner, hate the sin"¹¹⁴ while

Communists" due to their lack of trustworthiness). *See also Uniform Discrimination: the "Don't Ask, Don't Tell" Policy of the U.S. Military*, 15 HUMAN RIGHTS WATCH REPORT 1 (2003)(concluding that this policy has intensified rather than reduced mistreatment and expulsion of sexual minority soldiers).

¹⁰⁸ This belief is reflected in "conversion therapy." Advocated by Christian groups but soundly rejected by mainstream mental health professionals, conversion therapy seeks to change person's sexual orientation through a combination of psychotherapy and prayer. *See Barry Yeoman, Gay No More?*, 32(2) PSYCHOLOGY TODAY, March/April 1999, at 26 (explaining conversion therapy and questioning its validity). *See also* Mental Health Perspectives on Homosexuality *infra* §IV.C.2 (discussing contemporary mental health view of sexual minorities including conversion therapy).

¹⁰⁹ Such individuals are also deemed unworthy of their own children. *See Carnahan, supra* note XX, at 11-23 (describing custody and visitation decisions in which courts have relied on stereotypes about sexual minorities).

¹¹⁰ Knauer, *supra* note XX, at 489-493; GALLAGHER & BULL, PERFECT ENEMIES, *supra* note XX, at 97-124.

¹¹¹ As explained almost four decades ago, many conservatives believe that "The danger in homosexuality is part of an overall danger to our society and culture in that it gives the rights of the individual supersedence over the rights of the community in far too many instances." University of Pennsylvania Medical School Professor Samuel B. Hadden, *quoted in Notes on Homosexuality: Excerpts from a Consultation*, 58 SOCIAL PROGRESS 26, 29 (Nov.-Dec. 1967). Such arguments negate the "individual rights" cornerstone on which this country was built, and that disenfranchisement of individuals due to unfounded prejudice is not a majoritarian/community right. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

¹¹² *See Rob Boston, The Religious Right's Gay Agenda: How Jerry Falwell, Pat Robertson and Other Religious Right Leaders Use Gay-Bashing to Fill their Coffers and Rally their Troops*, 52 CHURCH & STATE 205 (1999).

¹¹³ *See Valdes, supra* note XX; Karst, *supra* note XX; Halley, *supra* note XX.

¹¹⁴ The Biblical origins for this philosophy are found in Matthew 9:14, Mark 2:17 and Luke 5:32.

actively campaigning for further disparate and degrading treatment of the individuals they purport to love.¹¹⁵

Behavior-identity compression is disingenuous for many reasons. Since Kinsey's groundbreaking work on human sexuality in the later 1940s and early 1950s, researchers have documented that human beings engage in a wide range of sexual activities regardless of sexual orientation or identity.¹¹⁶ Indeed, human sexual behavior and identity have proven more fluid than previously thought.¹¹⁷ As two researchers recently explained:

In spite of history's attempt to first pathologize gay and lesbian sexuality and then to distinguish it clearly from other enactments of sexuality, the truth may be that it is not possible to categorize sexuality so easily. Developmental models and clear distinctions demarcating one sexual identity or orientation may be too confining for the ways in which humans grow into and enact sexuality. The complexity and multiplicity of sexuality may exceed either developmental or sexual identity theory.¹¹⁸

In short, it simply defies logic to condemn sexual minorities on the basis of sexual activity that cannot be associated exclusively with them, in which they may have never have engaged,¹¹⁹ and which may, or may not, change over the course of their lifetimes.¹²⁰

¹¹⁵ As the founder of the gay Christian organization Soulforce explains, "you can't love the sinner and hate the sin, when the sin is what I *am*." Rev. Mel White, *quoted in A Thorn in Their Side*, 117 SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT 28 (Spring 2005). White believes that "love the sinner but hate the sin" equates with saying "I love you, but I have reservations," which actually means "I don't love you." *Id.* Failure to love your neighbor, of course, is contrary to Christian mores. See e.g., THE HOLY SEE, THE VATICAN, CATECHISM OF THE CATHOLIC CHURCH paragraph 2196 (1994)(identifying God's commandment to "love your neighbor as yourself" as one of the most important).

¹¹⁶ See ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 638-641 (1948) (placing human sexual behavior on a continuum ranging from exclusively heterosexual to exclusively homosexual, and reporting that adults often move on the continuum throughout their lives). More recent studies on the incidence of intimate same-sex encounters vary significantly, probably due to the questions used to solicit the data. *Cp.* EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES 294-296 (1994) (reporting that about nine percent of men and four percent of women have engaged in same-sex behavior) with SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR 69 (1993)(concluding that 17 percent of women and 22 percent of men had sexual experiences with a person of the same sex).

¹¹⁷ See, e.g. (various authors), LESBIAN, GAY AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES (Anthony R. D'Augelli & Charlotte J. Patterson eds. 1995).

¹¹⁸ Kathleen Edwards & Ann K. Brooks, *The Development of Sexual Identity*, reprinted in AN UPDATE ON ADULT DEVELOPMENT THEORY: NEW WAYS OF THINKING ABOUT THE LIFE COURSE 53 (Eds. M. Carolyn Clark and Rosemary S. Caffarella)(1999).

¹¹⁹ Friedman & Downey, *supra* note XX, at 924 (stating that "a substantial minority of adults in the United States abstain from sex, regardless of sexual orientation.").

¹²⁰ Sexual fluidity was acknowledged half a century ago in Great Britain's oft-cited SIR JOHN WOLFENDON, et al., REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957). The WOLFENDON REPORT'S extensive analysis of homosexuality's affect on society noted that "according to the psycho-analytic view, a homosexual component (sometimes conscious, often not) exists in everybody; ...homosexuality in this sense is universal." *Id.* at ¶ 20. Accordingly, it was "abundantly confirmed by the evidence submitted" that homosexuality

Even if sexual conduct were a legitimate distinction or identifier (which it is not), it certainly seems inappropriate to reduce human beings – creatures who by definition are magnificently multifaceted - to a single trait or behavior.¹²¹ In the legal arena, for example, state and federal anti-discrimination laws prohibit disparate treatment based upon a single factor such as race, religion, sex, or national origin. Similarly, religious groups – including those who once suffered discrimination because of their religious identity¹²² - do not advocate social ostracism and legal disenfranchisement against people based on a single “sin” for which those individuals allegedly have a propensity to engage.¹²³ Even the ultra-conservative Roman Catholic Church recognizes that “The human person, made in the image and likeness of God, can hardly be adequately described by a reductionist reference to his or her sexual orientation.”¹²⁴

Despite its fundamental flaws, behavior identity compression is not a new phenomenon, and it is unlikely that the conservative powerbrokers exploiting it now will voluntarily acknowledge its shortcomings. To the contrary, behavior-identity compression will remain a powerful force as long as it remains useful in promoting heteronormativity and compulsory heterosexuality.¹²⁵ But opposing forces are now exposing behavior-identity compression’s many vulnerabilities. Somewhat amazingly, the dismantling forces emanate from the same popular culture, scientific, and religious sources that once conspired to create and maintain behavior-identity compression. Motivation for this reversal is understood by reference to the phenomena of transformative learning, addressed immediately below.

B. Transformative Learning

*Common sense suggests that it takes more information and time to change the minds of strong adherents than weak ones, but sometimes even loyalists do change.*¹²⁶

was not an “all or none” status, but rather “all gradations can exist from “apparently exclusively homosexuality ... to apparently exclusive heterosexuality.” *Id.* at ¶ 22.

¹²¹ This point crystallized for the author when participating in a time-management workshop. Participants were asked to list all the roles that currently demanded time and attention in their lives. Most participants listed 15 to 20 roles such as child, parent, teacher, co-worker, friend, sibling, aunt, uncle, mentor, teacher, student, spouse, partner, and the like. Roles related to sexual identity constituted a single entry on each person’s list. Validated by common sense and experience rather than science, these responses confirm that for most people, including sexual minorities, sexual identity is but one aspect of a complex personality.

¹²² WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 293-323 (1999). Eskridge argues that “religion and sexual orientation have much in common as identity categories” and “that antireligious prejudice is systematically similar to antigay prejudice.” *Id.* at 295.

¹²³ One never hears, for example, of Christian coalitions lobbying state or federal representatives for laws disadvantaging divorcees, adulterers, fornicators, gluttons, substance abusers or others whose acts are considered sinful.

¹²⁴ The Vatican Congregation for the Doctrine of the Faith, Oct. 1, 1986, Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons, *reprinted in* VOICES OF HOPE: A COLLECTION OF POSITIVE CATHOLIC WRITINGS ON GAY AND LESBIAN ISSUES 176 (eds. Jeannine Gramick and Robert Nugent 1995).

¹²⁵ Professor Adrienne Rich crafted the phrase “compulsory heterosexuality” to describe “the erasure of lesbian existence” which she observed in scholarly feminist literature and to challenge the way “lesbian experience is perceived on a scale ranging from deviant to abhorrent or simply rendered invisible.” Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, in *THE LESBIAN AND GAY STUDIES READER* 227, 229 (Henry Abelove et al. eds. 1993). The phrase has since been expanded to include repression of sexual minorities in general.

¹²⁶ Robert M. Entman, *How the Media Affect What People Think: An Informational Processing Approach*, 51 *JOU. OF POLITICS* 347, 350 (1989).

Human beings never stop learning. This means “our present interpretations of reality are always subject to revision or replacement.”¹²⁷ Although this practicality has long been recognized, it was not until the 1970s that social scientists began intensively focusing on the processes and results of learning throughout the adult stages of life.¹²⁸ Since that time, a multitude of theories about adult learning, or andragogy,¹²⁹ have been proposed, critiqued, tested, and refined.¹³⁰

Andragogy is grounded in the principle that “as a person matures, his or her self-concept moves from that of a dependant personality toward one of a self-directing human being.”¹³¹ The roads taken and the results recorded in this maturation process are greatly affected by the transformative learning experiences in which adults engage on a daily basis. It is therefore not surprising that transformative learning, as experienced by groups and organizations as well as individuals,¹³² has become a central theme in adult learning theory.¹³³

¹²⁷ JACK D. MEZIROW, TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING xiv (1991)(hereafter MEZIROW, TRANSFORMATIVE DIMENSIONS).

¹²⁸ See MALCOLM S. KNOWLES, THE ADULT LEARNER: A NEGLECTED SPECIES (1973); CYRIL O. HOULE, THE DESIGN OF EDUCATION (1972)(theorizing about adult learning).

¹²⁹ The concept of andragogy originated in Europe and is defined as “the art and science of helping adults learn.” MALCOLM.S. KNOWLES, MODERN PRACTICES OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY 43 (1980).

¹³⁰ See generally SHARAN B. MERRIAM & ROSEMARY S. CAFFARELLA, LEARNING IN ADULTHOOD 267-366 (1999)(hereafter “MERRIAM & CAFFARELLA)(laying our various adult learning theories and the critiques and evolution of each).

¹³¹ KNOWLES, *supra* note XX, at 44. See also PATRICIA M. KING & KAREN STROHM KITCHENER, DEVELOPING REFLECTIVE JUDGMENT (1994)(identifying seven stages of cognitive development from childhood through adulthood, starting with stages in which people do not question authority figures and in which all problems have a definite and correct answer, moving through stages marked by increased comfort with uncertainty and ambiguity, and ending in two stages where fully matured adults are receptive to creating and re-evaluating knowledge to accommodate new situations); M. BAXTER MAGOLDA, KNOWING AND REASONING IN COLLEGE: GENDER-RELATED PATTERNS IN STUDENTS’ INTELLECTUAL DEVELOPMENT 29 (1992)(identifying “four qualitatively different ways of knowing, each characterized by a core set of epistemic assumptions;” i.e. absolute, transitional, independent, and contextual knowing; the author concluded that students developed from being absolutely certain about what they knew to becoming more independent and finally being able to assemble information from diverse sources to apply in a specific context, and that certain patterns of thinking were related to gender); W.G. Perry, *Cognitive and Ethical Growth: The Making of Meaning*, in THE MODERN AMERICAN COLLEGE 79 (A.W. Chickering ed. 1981)(concluding that maturation occurs when adult learners move from the dualistic perspective of something being either right or wrong to one in which things are viewed in specific contexts and where values are relativistic depending on context).

¹³² MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note XX, at 185 (referring to such occurrences as “collective transformations”); Lisa M. Baumgartner, *An Update on Transformational Learning*, in THE NEW UPDATE ON ADULT LEARNING THEORY 15, 19-20 (Sharan B. Merriam ed. 2001).

¹³³ MERRIAM & CAFFARELLA, *supra* note XX, at 318. See also E.W. Taylor, *Building upon the Theoretical Debate: A Critical Review of the Empirical Studies of Mezirow’s Transformative Learning Theory*, 48(1) ADULT EDUCATION QUARTERLY 34 (1997)(reviewing 39 empirical studies that used Mezirow’s model). Similar analyses of adult learning have been organized under the category of self-directed learning, which has many parallels to transformative theory. See MERRIAM & CAFFARELLA, *supra* note XX, at 288-317. Like other learning theories, transformative learning has its critics, including those who believe that Mezirow’s theory overly emphasizes rationality when transformative learning is, as Mezirow readily acknowledges, also intuitively, emotionally and creatively driven. See PATRICIA CRANTON, UNDERSTANDING AND PROMOTING TRANSFORMATIVE LEARNING: A GUIDE FOR EDUCATIONS OF ADULTS (1994)(describing Mezirow’s theories and also summarizing critiques).

Transformative learning takes place “in the real world in complex institutional, interpersonal, and historical settings [and] must be understood in the context of cultural orientations embodied in our frame of reference.”¹³⁴ Like other forms of self directed learning, transformative learning has as a primary goal “the promotion of emancipatory learning and social action.”¹³⁵ In short, “The goal of transformative learning is independent thinking.”¹³⁶

Columbia University Professor Jack D. Mezirow has been “the primary architect and spokesperson” for transformative learning theory.¹³⁷ Transformative theory, according to Mezirow, “attempts to describe and analyze how adults learn to make meaning of their experience.”¹³⁸

Mezirow views adult learning “as the process of using a prior interpretation to construe a new or revised interpretation of the meaning of one’s experience in order to guide future action.”¹³⁹ He divides adult learning into two categories: meaning schemes and meaning perspectives.¹⁴⁰ Meaning schemes consist of “specific beliefs, feelings, attitudes, and value judgments.”¹⁴¹ Adults frequently transform their meaning schemes, as this process often involves a relatively a minor correction of fact or interpretation rather than extensive self-reflection.¹⁴²

In contrast to meaning schemes, meaning perspectives are “broad, generalized, orienting predispositions.”¹⁴³ Transformation of a meaning perspective requires intense examination of “our sense of self ” and always requires “critical reflection upon the distorted premises sustaining our structure of expectations.”¹⁴⁴ Perspective transformation further entails “becoming critically aware of how and why our presuppositions have come to constrain the way we perceive, understand, and feel about our world; of reformulating these assumptions to permit a more inclusive, discriminating, permeable, and integrative perspective; and of making decisions or otherwise acting on these new understandings.”¹⁴⁵

The key to transformation of meaning perspectives is critical self- reflection of assumptions (CSRA) that are grounded in social, political, spiritual, scientific or other life

¹³⁴ Jack D. Mezirow, *Learning to Think Like an Adult: Transformation Theory Core Concepts*, in *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS* 24 (Jack D. Mezirow et al. eds. 2000).

¹³⁵ Sharan B. Merriam , *Andragogy and Self-Directed Learning: Pillars of Adult Learning Theory*, in *THE NEW UPDATE ON ADULT LEARNING THEORY* 3, 9 (Sharan B. Merriam ed. 2001).

¹³⁶ Sharan B. Merriam, *The Role of Cognitive Development in Mezirow’s Transformational Learning Theory*, 55 *ADULT LEARNING QUARTERLY* 60, 61 (2004).

¹³⁷ MERRIAM & CAFFARELLA, *supra* note XX, at 319. See MEZIROW, *TRANSFORMATIVE DIMENSIONS*, *supra* note XX. The writings of Brazilian educator Paulo Friere’s informed Mezeriow’s theories. Freire’s classic works include *PEDAGOGY OF THE OPPRESSED* (1970) and *EDUCATION FOR CRITICAL CONSCIOUSNESS* (1973).

¹³⁸ MEZIROW, *TRANSFORMATIVE DIMENSIONS*, *supra* note XX, at 198.

¹³⁹ Jack D. Mezirow, *Contemporary Paradigms of Learning*, 46(3) *ADULT LEARNING QUARTERLY* 158, 162 (1996).

¹⁴⁰ *Id.* at 163.

¹⁴¹ *Id.*

¹⁴² MEZIROW, *TRANSFORMATIVE DIMENSIONS*, *supra* note XX, at 167.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Jack D. Mezirow, *How Critical Reflection Triggers Transformative Learning*, in *FOSTERING CRITICAL REFLECTION IN ADULTHOOD: A GUIDE TO TRANSFORMATIVE AND EMANCIPATORY LEARNING* 14 (Jack D. Mezirow et al. eds. 1990).

experiences.¹⁴⁶ CSRA plays a particularly poignant role when values and morals are re-evaluating through transformative learning of meaning perspectives.¹⁴⁷

Because transformative produces a “dramatic, fundamental change in the way we see ourselves and the world in which we live,”¹⁴⁸ resistance is not uncommon. Many people “are richly enmeshed in a fabric of relationships” with friends, relatives, co-workers and others who “do not wish to see them change.”¹⁴⁹ The complex and challenging renegotiation of relationships and other aspects of one’s life that change necessitates make the status quo highly attractive.¹⁵⁰ In addition, transformative learning requires a significant emotional journey as well as a cognitive one.¹⁵¹

With so many factors militating in favor of stagnation, what motivates people to exchange comfortable, long held beliefs for new and perhaps daring ones?

Mezirow posits that the transformative process is usually inspired by a disorienting dilemma, like the loss of employment, death of a loved one or other major event that the individual cannot resolve using past beliefs, assumptions, or coping strategies.¹⁵² But not all transformative learning starts with a major upheaval. Professor M. Carolyn Clark, for example, found that an “integrating circumstance” could also generate perspective transformation.¹⁵³ As she explains:

In contrast to the abrupt and dramatic appearance of the disorienting dilemma, the integrating circumstance occurs after and seems to be the culmination of an earlier stage of exploration and searching. ...This is an indefinite period in which the person consciously or unconsciously searches for something which is missing in their life; when they find this “missing piece,” the transformational learning process is catalyzed.¹⁵⁴

¹⁴⁶ Jack D. Mezirow, *On Critical Reflection*, 48(3) ADULT LEARNING QUARTERLY 185, 186 (1998)(hereafter Mezirow, *On Critical Reflection*). In this respect, CSRA closely parallels philosopher Michel Foucault definition of “criticism” that ultimately results in “making facile gestures difficult.” MICHEL FOUCAULT, *Practicing Criticism, in POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984* 152,155 (Lawrence D. Kritzman ed., Alan Sheridan trans.1988). Foucault describes criticism as “a matter of flushing out thought, and trying to change it: to show that things are not as self-evident as one believed, to see what is accepted as self-evident will no longer be accepted as such.” *Id.*

¹⁴⁷ *Id.* at 188.

¹⁴⁸ MERRIAM & CAFFARELLA, *supra* note XX, at 318. See also Jack D. Mezirow, *Transformative Learning: Theory to Practice*, 74 NEW DIRECTIONS FOR ADULT AND CONTINUING EDUCATION 5 (1997).

¹⁴⁹ L.A. Daloz, *The Story of Gladys Who Refused to Grow: A Morality Tale for Mentors*, 11 LIFELONG LEARNING: AN OMNIBUS OF PRACTICE AND RESEARCH 4, 7 (1988).

¹⁵⁰ *Id.*

¹⁵¹ E.W. Taylor, *Analyzing Research on Transformative Learning Theory*, in LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS 291-292 (Jack D. Mezirow et al. eds. 2000). See also Valerie Grabove, *The Many Facets of Transformative Learning Theory and Practice*, 74 NEW DIRECTIONS FOR ADULT AND CONTINUING EDUCATION 89 (1997)(noting in introduction to symposium edition on transformative learning that “[t]he transformative learner moves in and out of the cognitive and the intuitive, of the rationale and the imaginative, of the subjective and the objective, [and] of the personal and the social.”).

¹⁵² MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note XX, at 168 (1991).

¹⁵³ M. Carolyn Clark, *quoted in* MERRIAM & CAFFARELLA, *supra* note XX, at 321.

¹⁵⁴ *Id.*

The transformative learning process can also be sparked simply by realizing that information recently received is inconsistent with what the person previously held to be true,¹⁵⁵ or by a lengthy accumulation of knowledge rather than a single revelation or event.¹⁵⁶ The CSRA at the heart of transformative learning may also be activated “by becoming aware that we are making a premature value judgment or are being inconsistent in acting out our values.”¹⁵⁷

Once motivated to re-examine extant beliefs and the assumptions on which they are based, persons engaging in transformative learning do not always follow the same path.¹⁵⁸ Mezirow believes, however, that the triggering event is commonly followed by phases of self-examination (which may include feelings of shame or guilt), critical examinations of assumptions on which the individual has previously relied (i.e. CSRA), recognition that others may have experienced the same thing, and exploration of options that eventually produces a plan of action.¹⁵⁹ Developing an action plan, in turn, requires several additional steps such as “acquiring knowledge and skills, trying out new roles, renegotiating relationships and negotiating new relationships, and building competence and self confidence.”¹⁶⁰ Reintegration of the self with a transformed perspective into existing relationships and life circumstances is the final stage of the transformation.¹⁶¹

Acquiring new knowledge and engaging in CSRA regarding existing and perhaps outdated meaning schemes and perspectives are key stages of transformative learning. Both aspects require engaging in a special type of conversation with persons knowledgeable about the subject. Using insights provided by German philosopher Jurgen Habermas, Mezirow uses the term “discourse” to describe the process of gathering and assessing information about a situation or issue.

Discourse, Mezirow explains, is “dialogue devoted to...critically examining the widest range of evidence and arguments...to find understanding and agreement on the justification of beliefs.”¹⁶² Discourse “involves an effort to set aside bias, prejudice, and personal concerns and to do our best to be open and objective in presenting and assessing reasons and reviewing the evidence. ...”¹⁶³ It may also require entertaining viewpoints “that we initially find discordant, distasteful, and threatening but later come to recognize as indispensable to dealing with our

¹⁵⁵ Lisa M. Baumgartner, *An Update on Transformational Learning*, in *THE NEW UPDATE ON ADULT LEARNING THEORY* 15, 17 (Sharan B. Merriam ed. 2001).

¹⁵⁶ *Id.* at 18-19.

¹⁵⁷ Mezirow, *On Critical Reflection*, *supra* note XX, at 195.

¹⁵⁸ Jack D. Mezirow, *Transformation Theory of Adult Learning*, in *IN DEFENSE OF THE LIFEWORLD* 39, 50 (Michael R. Welton, ed., 1995).

¹⁵⁹ Jack D. Mezirow, *Transformative Theory Out of Context*, 48(1) *ADULT LEARNING QUARTERLY* 60, 60 (1997); MERRIAM & CAFFARELLA, *supra* note XX, at 321.

¹⁶⁰ MERRIAM & CAFFARELLA, *supra* note XX, at 321.

¹⁶¹ MEZIROW, *TRANSFORMATIVE DIMENSIONS*, *supra* note XX, at 185.

¹⁶² Mezirow, *On Critical Reflection*, *supra* note XX, at 196.

¹⁶³ Jack D. Mezirow, *Transformation Theory of Adult Learning*, in *IN DEFENSE OF THE LIFEWORLD* 39, 53 (M.R. Welton, ed., 1995).

experience.”¹⁶⁴ Transformative discourse “can occur in one-to-one relationships, in groups, and in formal educational settings.”¹⁶⁵

CSRA offers, according to Mezirow, “the emancipatory dimensions of adult learning, the function of thought and language that frees the learned from frames of reference, paradigms, or cultural canon (frames of reference held in common) that limit or distort communication and understanding.”¹⁶⁶ CSRA requires both objective¹⁶⁷ and subjective¹⁶⁸ re-framing of issues, and ultimately, of beliefs.

In the objective reframing realm, the learner must critically examine whether persons contributing to the discourse are telling the truth or disingenuously “echoing some party line.”¹⁶⁹ “The truth or justification of taken-for-granted assumptions” held or advocated by others must be fully assessed.¹⁷⁰

In the subjective reframing phase, the learner must perform a “critical analysis of the psychological or cultural assumptions that are the specific reasons for one’s conceptual and psychological limitations, the constitutive processes or conditions of formation of one’s experience and beliefs.”¹⁷¹ This step may demand critical examination of the learner’s assumptions reflected in her own narrative of “lived experiences;”¹⁷² of the assumptions grounded in the individual’s educational, political, religious, and other cultural systems;¹⁷³ of the assumptions embedded historically and culturally with the organization(s) in which the individual operates that have impacted the person’s “thoughts and action;”¹⁷⁴ of assumptions that have provided “the norms governing one’s ethical decision-making;”¹⁷⁵ and of assumptions that control “the way one feels and is disposed to act upon his or her feelings.”¹⁷⁶ Succinctly stated, the subjective aspects of CSRA implicate examination of “the causes (biographical, historical, cultural), the nature (including moral and ethical dimensions), and consequences (individual and interpersonal)”¹⁷⁷ of the frames of reference in which a person’s meaning schemes and meaning perspectives are grounded. Transformation on this level requires a commitment to re-examine “specific assumptions about oneself and others until the very structure of assumptions becomes transformed.”¹⁷⁸

¹⁶⁴ MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note XX, at 185.

¹⁶⁵ MERRIAM & CAFFARELLA, *supra* note XX, at 322.

¹⁶⁶ Mezirow, *On Critical Reflection*, *supra* note XX, at 191-192.

¹⁶⁷ *Id.* at 192.

¹⁶⁸ *Id.* at 193-196.

¹⁶⁹ *Id.* at 188.

¹⁷⁰ *Id.* at 192.

¹⁷¹ *Id.* at 193.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 194.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 195.

¹⁷⁸ Jack D. Mezirow, *A Critical Theory of Adult Learning and Education*, 32(1) ADULT EDUCATION 3, 8 (1981).

The ultimate test of transformative learning is whether the learner acts upon the new learning. The action can range from making a relatively routine personal decision to engaging in radical social or political action.¹⁷⁹ Individual change, in turn, can lead to social change. As Mezirow explains, “[p]ersonal transformation leads to alliances with others of like mind to work toward effecting necessary changes in relationships, organizations, and systems.”¹⁸⁰

Although humans are often reluctant to engage in reflection that is painful, exhaustive, and perhaps contrary to existing power relationships,¹⁸¹ Mezirow believes that adults are open to perspective transformation because it allows them “to better understand the meaning of their experience,”¹⁸² and because “[n]o need is more fundamentally human than our need to understand the meaning of our experience.”¹⁸³

As Mezirow acknowledges, not all opportunities for transformative learning result in change. Individuals must decide to move past the triggering event and through the discourse participation and CSRA phases, and a breakdown or a suspension of growth can occur before change is actualized. And because transformative learning is based on the learner’s personal exposure and experience,¹⁸⁴ the decision to learn and change must be internally motivated.¹⁸⁵ In addition to a willingness to undergo a transformation, those who attempt transformative learning must have sufficient cognitive skills to allow for active construction and deconstruction of knowledge.¹⁸⁶

In sum, transformative learning provides a model for explaining individuals’ conscious and unconscious adjustments in their meaning schemes (specific beliefs) and meaning perspectives (general orientations). Change is occasioned by a wide range of triggering events, such as a major disorienting dilemma, an integrating opportunity to find a piece missing from a scheme, the revelation of new information that is inconsistent with existing schemes, a lengthy accumulation of knowledge that eventually conflicts with extant schemes, or an epiphany that previous value judgments were premature. The triggering event sets the individual on a course of self examination (i.e. CSRA) and discovery (i.e. discourse) in which assumptions that inform the person’s schemes are critically examined and new factual information is obtained. Transformative learning often resulting in substantial alterations of how individuals view

¹⁷⁹ MERRIAM & CAFFARELLA, *supra* note XX, at 323.

¹⁸⁰ Jack D. Mezirow, *Transformation Theory: Critique and Confusion*, 42(2) ADULT LEARNING QUARTERLY 250, 252 (1992). Brazilian educator Paulo Freire also believed that “personal empowerment and social transformation are intertwined and inseparable processes.” MERRIAM & CAFFARELLA, *supra* note XX, at 324.

¹⁸¹ *Id.* at 28 (2000 article).

¹⁸² Mezirow, *Critical Reflection*, *supra* note XX, at 14.

¹⁸³ *Id.* at 11.

¹⁸⁴ Jack D. Mezirow, *Transformation Theory of Adult Learning*, in IN DEFENSE OF THE LIFEWORLD 39, 58 (M.R. Welton, ed., 1995).

¹⁸⁵ See DOROTHY MACKERACHER, MAKING SENSE OF ADULT LEARNING 79 (1996)(concluding from review of literature on adult learning that motivation must arise “from within the learner” and that “facilitators cannot do this directly.”).

¹⁸⁶ Sharan B. Merriam, *The Role of Cognitive Development in Mezirow’s Transformational Learning Theory*, 55(1) ADULT LEARNING QUARTERLY 60, 631 (2004).

themselves, others and the world around them.¹⁸⁷ Transformation is complete when individuals or organizations act in accord with their revised schemes.

IV. The Intersection of Compression and Transformation

The fatal logic of behavior-identity compression and humans' willingness to seek enlightenment through CSRA and transformative learning explain why gay, lesbian and bisexual people have managed to record impressive social and political victories despite the ongoing obstacles previously outlined.¹⁸⁸ Many individuals maintain negative meaning schemes (i.e. specific beliefs and value judgments) and meaning perspectives (i.e. broad and generalized predispositions) about sexual minorities because of the persistent impact that behavior-identity compression exerts on society. Certainly, some people – especially members of ultra-conservative religious or political communities – will likely continue to embrace behavior-identity compression and resist every opportunity to engage in transformative learning about sexual minorities.

The ever increasing profile of sexual minorities, however, provides numerous triggers for people of more moderate socio-political orientations to re-examine their false assumptions about sexual minorities. Whether the issue is one of national concern, such as amending the federal Constitution to ban same sex marriage, or uniquely personal, such as having a friend or relative reveal his or her sexual minority status, the increased visibility of sexual minorities and the issues their lives present offer myriad opportunities for transformative learning. Persons willing to engage in meaningful discourse about the subjects will be exposed – perhaps for the first time – to accurate factual information about sexual minorities from a variety of credible sources, including their own personal experiences.

The availability of accurate data, in turn, will foster reflection on, and likely abandonment of, the myths and assumptions underlying behavior-identity compression. New and positive perspectives on sexual minorities will replace outdated stereotypes. Ultimately, people will take action consistent with their transformed perspective, ranging from minor behaviors such as not using derogatory language to describe sexual minorities to major acts such as voting only for candidates who favor extension of full civil rights to sexual minorities.

As previously noted, not every transformative learning opportunity results in a transformed populace. But current evidence strongly suggests that ongoing developments within Christianity and science, paired with the increased visibility of sexual minorities, provide both the transformative sparks that inspire re-examination of meaning schemes and meaning perspectives and the honest discourse that effectuates significant, positive transformative learning about sexual minorities. While the function that heightened visibility of sexual minorities plays in transformative learning is somewhat intuitive, the roles of Christianity and science in promoting CSRA are more complicated.

Christianity and science provide appropriate lenses for further examination of transformative learning about sexual minorities for three reasons. First, both disciplines play

¹⁸⁷ MERRIAM & CAFFARELLA, *supra* note XX, at 107-109.

¹⁸⁸ See Milestones and Momentum *supra* §II.

highly influential roles in contemporary U.S. culture and law¹⁸⁹ and have been especially outspoken in ongoing debates about sexual minorities.¹⁹⁰

Second, the relationship between science and religion is intermittently synergetic and antagonistic.¹⁹¹ It is synergetic because religion has often provided “presupposition, sanction, and even motivation for science,” while also regulating “discussions of method” and even performing “a selective role in the evaluation of rival [scientific] theories.”¹⁹² It is antagonistic because Christianity’s faith-based understanding of the world clashes with science’s demand for empirical proof, resulting in public conflict that informs popular beliefs about contentious issues.¹⁹³

Third, the views of science and Christianity on sexual minorities are inextricably intertwined. The field of psychology was born in the late nineteenth century, a time when “Christian morals strongly influenced definitions of sexuality, family, and social order.”¹⁹⁴ As a result, the scientific classification of homosexuality as a mental disease was grounded in Christian ethics rather than solid empirical data.¹⁹⁵

The specific roles that increased visibility, Christianity and science are playing in transforming public perception about sexual minorities are further delineated below.

A. Increased Visibility and Enhanced Public Perception

*I’ve hear them whisper, “We understand you’ve got a homosexual here-can we see her?”*¹⁹⁶

In 2000, almost three-quarters of respondents to a nationwide survey reported knowing someone who is gay or lesbian¹⁹⁷ compared to less than one-quarter in 1983¹⁹⁸ and one-ninth in

¹⁸⁹ See *infra* §IV.B.1 Biblical Influence on U.S. Law and §IV.B.1The Influence Science on U.S. Law; STEVEN GOLDBERG, CULTURE CLASH: LAW AND SCIENCE IN AMERICA (1994)(hereafter GOLDBERG, CULTURE CLASH).

¹⁹⁰ See *infra* §IV B.2 Biblical Condemnation of Homosexuality and §IV C.2 Mental Health Perspectives on Homosexuality. Compare HOMOSEXUALITY AND HOPE: STATEMENT OF THE CATHOLIC MEDICAL ASSOCIATION (2003), available at <http://www.cathmed.org/publications/homosexuality.html> (setting forth assertions by Catholic medical professionals that homosexuality is an illness that can be cured) with Randy Geogemiller & Michael R. Stevenson, “Homosexuality and Hope” Revisited, 35 DIGNITYUSA JOURNAL 11 (2003)(arguing that credible scientific data rejects the Catholic physicians’ position).

¹⁹¹ GOLDBERG, CULTURE CLASH, *supra* note XX, at 176-177 (arguing that religious perspectives should be given more weight than scientific data when values are involved).

¹⁹² JOHN HEDLEY BROOKE, SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES 33 (1991).

¹⁹³ See generally WHEN SCIENCE & CHRISTIANITY MEET (David C. Lindberg & Ronald L. Numbers eds. 2003)(explaining the historic interaction of Christianity and science). As one author noted, the recurring obfuscation of science “to placate the religiously correct” ultimately undermines “American’s ability to make crucial distinctions between scientific fact and theological opinion.” SUSAN JACOBY, FREETHINKERS: A HISTORY OF AMERICAN SECULARISM 361 (2004).

¹⁹⁴ Chuck Stewart, *Research on Sexual Orientation*, in CONTEMPORARY LEGAL ISSUES: HOMOSEXUALITY AND THE LAW 230 (2001).

¹⁹⁵ *Id.* See generally DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE AND THE LAW (1999)(discussing the common roots of religion and science).

¹⁹⁶ Phyllis, describing her experience in the 1960s, as quoted in KAY TOBIN AND RANDY WICKER, THE GAY CRUSADERS 54 (1975). Lyons was a co-founder of Daughters of Bilitis, an early lesbian rights group, and remains active today.

1969.¹⁹⁹ Sexual minorities are coming out – and staying out – at an earlier age than previous generations.²⁰⁰ These developments are telling, as studies have repeatedly shown that personal relationships play a major role in terminating “blind acceptance of stereotypes”²⁰¹ about sexual minorities.²⁰² Thus, increased visibility of sexual minorities is playing a major role in triggering and effectuating CSRA and transformative learning about sexual minorities.

Reflecting on the 1990s, for example, Professor Nancy D. Polikoff made the following observation about the impact of increased visibility of families headed by sexual minorities:

The number of planned lesbian and gay families has skyrocketed, bringing unprecedented visibility in the media, in schools, in churches, in synagogues, and in the courts. ... Dozens of articles appear in daily papers each year, in such places as Dayton, Ohio, Sarasota, Florida, and Greensboro, North Carolina, as well as all major cities, describing local lesbian and gay families and their children. News coverage this decade has included the relatively recent phenomenon of gay fathers raising biologically related children born to a surrogate mother....²⁰³

¹⁹⁷ KFF Inside-OUT, *supra* note XX, at 5 and Chart 10. Thirty-two percent of respondents to 2000 nationwide survey said they work with someone who is gay, up from twenty percent in 1992; a quarter of respondents said they have a family member who is gay, up from nine percent in 1992. *Id.* at Chart 10.

¹⁹⁸ *Id.*

¹⁹⁹ *Changing Morality: The Two Americas – A Time-Louis Harris Poll*, TIME, June 6, 1969 at 26 (hereafter *Changing Morality*).

²⁰⁰ Brent Hartinger, *Gay Teen Revolution*, THE ADVOCATE, June 7, 2005, at 11; Etelka Lehoczky, *Young, Gay, and OK*, THE ADVOCATE, Feb. 1, 2005, at 25.

²⁰¹ Annie L. Cotton-Huston & Bradley M. Waite, *Anti-Homosexual Attitudes in College Students: Predictors and Classroom Interventions*, 38 JOURNAL OF HOMOSEXUALITY 117, 128 (2000). Sexual minority youth are also more visible than their predecessors, perhaps leading to greater tolerance among younger people. See John Caldwell, *Gay Straight Revolution: An Explosion of Gay-Supportive Clubs at High Schools Across the Country is Helping a Generation Become Crusaders for Equality*, THE ADVOCATE, June 21, 2005, at 69, 70 (asserting that over 3,000 gay-straight alliances exist with chapters in all 50 states, and further noting that while these numbers represent only fifteen percent of U.S. high schools, new chapters are born almost daily); Jamall Abdul-Alim, *She Loves Her: Gay-Straight Alliances are Increasing in Schools*, HERALD NEWS, May 5, 2005 at D12 (reporting that several thousand gay-straight alliances exist at the high school level). Such efforts have raised the ire of conservatives. See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, N.Y. TIMES, June 9, 2005, at A18 (explaining political right's efforts to eliminate school programs that educate students about sexual minorities or that promote acceptance of such individuals).

²⁰² Cotton *supra* note XX, at 127 (reporting that “personal acquaintance with a gay man, lesbian, or bisexual person” provided the strongest predictor of positive attitudes toward sexual minorities). See also KFF Inside-OUT *supra* note XX, at 6 (concluding from nationwide survey results that people “who do not have lesbian and gay co-workers, friends or family members” are among those “least likely to have accepting attitudes towards lesbians, gays and bisexuals.”). Some social scientists who study the “contact hypothesis,” however, question whether favorable contact with a single member of a minority group facilitates “positive attitude change that generalizes to the larger out-group.” Angela Simon, *The Relationship between Stereotypes and Attitudes Toward Lesbians and Gays*, in STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS 63, 75 (Gregory M. Herek, ed. 1998). The transformative power of personal relationships cannot be denied in the context of sexual minorities, however. See Bruce Shenitz, *The Grande Dame of Gay Liberation: Evelyn Hooker's Friendship with a UCLA Student Spurred Her to Studies that Changed the Way Psychiatrists View Homosexuality*, L. A. TIMES SUNDAY MAGAZINE; June 10, 1990, at 20.

²⁰³ Polikoff I, *supra* note XX, at 326.

This heightened (and for the most part, positive) coverage of families has led to “an increased number of heterosexual allies” who “influence mainstream organizations.”²⁰⁴ The role of allies is critical, as “the fullest burden for achieving change falls on progressive and moderate straights and their ability to convince fair-minded conservatives to accept gay people.”²⁰⁵

Openness about nontraditional family structure – regardless of whether the children were born of a prior heterosexual relationship or from a same-sex couple’s decision to have children – also allows children from traditional families to befriend the children of sexual minorities, “thereby learning about gay and lesbian families in ways that breakdown myths, stereotypes, and fear.”²⁰⁶ The existence of households headed by same-sex partners in virtually every county in the U.S. provides extensive opportunity for such interactions to occur.²⁰⁷

The relationship between visibility and transformative learning is confirmed by the Massachusetts experience.²⁰⁸ Since becoming the first state to legalize same-sex marriage in May 2004, Massachusetts has served as a laboratory on the impact of such unions. More than 6,100 same-sex couples have now wed.²⁰⁹ Sharing that experience and opening their lives to co-workers, family members, and neighbors has culminated in increased public support for same-sex marriage.²¹⁰ As a result, eighty-four percent of Massachusetts voters believe that gay marriage either had a positive or no impact on the quality of life in the state.²¹¹ In short, predictions of havoc following legalization of same sex marriage have “been trumped by boring, everyday reality” as “couples got married and went on with their lives” in Massachusetts.²¹²

²⁰⁴ *Id.*

²⁰⁵ Gene Huff, *Debating Homosexuality*, CHRISTIAN CENTURY, March 8, 2000, at 280 (reviewing HOMOSEXUALITY AND CHRISTIAN FAITH: QUESTIONS OF CONSCIENCE FOR THE CHURCHES (Walter Wink ed. 2000)).

²⁰⁶ Polikoff I, *supra* note XX, at 326.

²⁰⁷ Gary J. Gates and Jason Ost, *Getting Us Where We Live*, THE GAY & LESBIAN REVIEW, Sept-Oct. 2004, at 19 (reporting on data from 2000 U.S. Census that found same-sex unmarried partners in 99.3 percent of all counties in this country).

²⁰⁸ The relationship is also confirmed by the experiences in the few countries where same-sex marriages are legal. See Michael Valpy, *Dutch, Belgians take Gay Marriage in Stride*, GLOBE AND MAIL, June 6, 2005, at A16.

²⁰⁹ Periscope, *GAY to Wed*, NEWSWEEK, May 23, 2005 at 12 (hereafter “*Gay to Wed*”); Sue Hyde, *The Math Facts on the Marriage Equality Ground*, National Gay and Lesbian Task Force Press Release, May 17, 2005, available at www.TheTaskForce.org and on file with author.,

²¹⁰ *Gay to Wed*, *supra* note XX (stating that public support in Massachusetts had increased by May 2005 to fifty-six percent compared with thirty-five percent a year earlier); Hyde *supra* note XX (reporting on recent state-wide poll showing that sixty-two percent of surveyed voters supported same-sex marriage and sixty-one percent support the state supreme court decision allowing same-sex marriage); Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage: Split Seen by Region, Age, Globe Poll Finds*, THE BOSTON GLOBE, May 15, 2005, at A1 (reporting that state-wide public support for same sex marriage had increased from fifty-four to fifty-six percent in the year following its legalization in Massachusetts).

²¹¹ *Gay to Wed*, *supra* note XX.

²¹² Adrian Walker, *Calm after the Storm*, THE BOSTON GLOBE, May 16, 2005 at B1. Gay and lesbian individuals and families are becoming more visible in conservative states as well. See, e.g., Chad Graham, *Gay in the Red States*, THE ADVOCATE, Feb. 15, 2005, 34 (explaining how sexual minorities in Oklahoma are “winning their neighbors’ hearts and minds”).

Once news events such as same-sex marriage trigger individuals' willingness to engage in transformative learning, discourse about sexual minorities is widely available.²¹³ Indeed, it is difficult to pick up a daily newspaper or a weekly newsmagazine that does not have at least one story about same-sex marriage, civil unions or domestic partnerships, scientific discoveries related to sexual orientation and identity, or other social and political issues centering on sexual minorities.²¹⁴

Pop culture similarly produced an "explosion" of the visibility of gay, lesbian, and bisexual persons in recent years²¹⁵ that further informs the discourse. Television, for instance, offers shows that focus on the lives of gay and lesbian individuals (e.g. *Will & Grace*, *Queer as Folk*, *Queer Eye for the Straight Guy*, and *The L Word*) and programs that regularly feature gay or lesbian characters (e.g. *Sisters*, *NYPD Blue*, *ER*, *Six Feet Under*, *Buffy the Vampire Slayer*, *The Great Race*, and *The Real World*).²¹⁶ Numerous other television series have offered "the almost obligatory" episode addressing the collision of heteronormativity with the lives of sexual minorities.²¹⁷ Documentaries, docudramas and movies about sexual minorities and the many issues they encounter also abound,²¹⁸ as do print and broadcast advertisements that assimilate sexual minorities.²¹⁹

Efforts to censor positive messages about sexual minorities continue,²²⁰ and not all portrayals of sexual minorities are accurate or positive. To the contrary, some exposures may do

²¹³ See, e.g., Keith W. Swain, *Marriage in a Loving Family*, DENVER POST, Feb. 23, 2005 at B7 (describing support from 80-year old matriarch to her grandson's union with another man); Herb Brock, *Late Partner Inspires Local Gay Woman's "Mission,"* DANVILLE ADVOCATE-MESSENGER 1, Feb. 6, 2005 at 1 (describing closeted 38 year partnership of two women and survivor's efforts to tell their story).

²¹⁴ Suzanna Danuta Walters, ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA 3 (2001).

²¹⁵ *Id.*

²¹⁶ See generally *Id.* at 59-80 (discussing lesbian and gay visibility on television from the early 1970s through 2001). Efforts to launch cable channels "intended for mainstream gay Americans" are also underway, see Geraldine Fabrikant, *A Foray into Gay and Lesbian Networks*, N.Y. TIMES, April 11, 2005, at C1, and Showtime network broadcast a number of gay-themed documentaries and movies in June 2005 in recognition of Gay Pride Month. *Showtime Preps Slate for Gay Pride Month*, WORLD SCREEN NEWS, May 18, 2005, available at www.worldscreen.com/newscurrent.php?filename=show518.htm.

²¹⁷ Walters, *supra* note XX, at 97. Communication researchers exploring the "parasocial contact hypothesis" believe "that TV viewers' exposure to gay characters...can reduce prejudice in a manner similar to direct contact with people." University of Minnesota Professor Edward Schiappa, *quoted in* (no author given), *Television, Not Just Jack*, THE ADVOCATE, June 21, 2005 at 34.

²¹⁸ See generally Walters, *supra* note XX, at 103 (docudramas), 75-80 (documentaries), 131-148 (films). See also Adam V. Vary, *Here Comes the New Queer Cinema*, THE ADVOCATE, April 26, 2005 at 40.

²¹⁹ See Howard Buford, *The Gay Market Goes Mainstream*, GAY & LESBIAN REVIEW, Jan/Feb. 2005 at 22 (commenting on the trend toward "more complete, less divisive portrayals of GLBT people in advertising" and predicting that it will help diffuse negative stereotypes).

²²⁰ See Julie Salamon, *Culture Wars Pull Buster Into the Fray*, N.Y. TIMES, Jan. 27, 2005, at E6 (explaining decision by Public Broadcasting System (PBS) not to distribute an episode of the children's show "Postcards from Buster" in which Buster visited children of lesbian parents); David D. Kirkpatrick, *Conservatives Pick Soft Target: A Cartoon Sponge*, N.Y. TIMES, Jan. 20, 2005, at 16A (commenting on Focus on the Family's James Dobson's condemnation of cartoon character SpongeBob SquarePants for advocating tolerance and acceptance); Shirley Ragsdale, *SpongeBob Debate Stirs Media Frenzy*, DES MOINES REGISTER, Feb. 5, 2005, at 1E (offering comments by newspaper's religion editor that Dobson characterization of SpongeBob "is likely to be more fear and loathing of people who aren't just exactly like the current majority in power."); Frank Rich, *The Plot Against Sex in America*, N.Y. TIMES, DEC. 12, 2004, at Section 2, p. 1 (reporting on the level of conservatives' protests aimed at a recently

more to affirm negative stereotypes than to dispel them.²²¹ As one expert on popular culture notes, “gay life and identity, defined so much by problems of invisibility, subliminal coding, double entendres and double lives, has now taken on the dubious distinction of public spectacle.”²²²

Spectacle or not, fictionalized and factual depictions of sexual minorities ubiquitously broadcast by contemporary media mean that heterosexual society can no longer pretend that gay, lesbian, and bisexual people do not exist, or that the lives of sexual minorities are universally and radically different from heterosexual citizens. The positive shifts in public opinion about sexual minorities over the past several decades²²³ indicate that, despite significant opposition,²²⁴ some truths about sexual minorities are being communicated and received. These truths play a critical role by informing the examination and rejection of previously held assumptions (i.e. CSRA), ultimately leading to transformative revision of meaning schemes and perspectives about sexual minorities. It is through this process that the false assumptions underlying behavior-identity compression²²⁵ are slain and rationales for continued discrimination against sexual minorities wither on the vine.

B. Onward Christian Soldiers

*You can safely assume you've created God in your own image when it turns out he hates all the same people you do.*²²⁶

Media reports equating the November 2004 election results with (1) a seismic shift in Christian influence and (2) unprecedented public agitation over “moral issues”²²⁷ overstate both

released movie about sex researcher Alfred Kinsey). Concerns have also been raised that the current federal government is censoring and manipulating the media, especially on controversial issues. See David Barstow and Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, March 13, 2005, at 1.

²²¹ Monica Trasandes, *Are We Visible Yet?*, THE ADVOCATE, Feb. 1, 2005, at 44 (stating that “American TV fans are seeing a wider slice of lesbian life than ever before,” but questioning whether such portrayals are realistic or “just a disappointing rehash of stereotypes”); Simon, *supra* note XX, at 73 (concluding that negative stereotypes and prejudice are linked). The Gay and Lesbian Alliance Against Discrimination (GLADD) monitors movies, television shows, and other media and registers protests when sexual minorities are represented in stereotypical or harmful ways. Walters, *supra* note XX, at xv., 96, 137. Information about GLADD is available at www.glaad.org.

²²² Walters, *supra* note XX, at 9-10.

²²³ See Shifts in Public Opinion *infra* §II.B.3.

²²⁴ This progress has been made despite conservatives’ long-standing efforts to keep sexual minorities out of the public’s eye. See Walters, *supra* note XX, at 114-116 (explaining pressure placed on networks and sponsors by The Christian Coalition, Traditional Values Coalition, Family Research Council and other groups to discourage the production and broadcasting of programs that include sexual minorities characters or issues).

²²⁵ Behavior-Identity Compression, *supra* §III.A.

²²⁶ Novelist Anne Lamott, quoted in Connie Schultz, *Building Bridges Instead of Walls*, PLAIN DEALER, May 24, 2004, at D1. Lamott’s works include TRAVELING MERCIES (1999).

²²⁷ See, e.g., Debra Rosenberg & Karen Breslau, *Winning the “Values” Vote*, Newsweek, Nov. 15, 2004, at 23 (claiming that anti-gay marriage initiatives influenced vote on president); Todd S. Purdum, *An Electoral Affirmation of Shared Values*, N.Y. TIMES, Nov. 4, 2004, at A1 (same).

cases.²²⁸ Rather, Christianity has *always* played a major role in the legal and political activities of this nation - especially regarding laws and policies that embody moral judgments²²⁹ - and concerns about morality have been frequently voiced.²³⁰

Christianity significantly impacted the laws of this land from the time the Puritans landed on its eastern shore. Many of the Puritans who colonized the U.S. were devout Calvinists²³¹ who embraced a worldview in which governments should be Christianized and the church controlled by a combination of clergy and laymen. Calvinists “wished to remake society itself into the image of a religious community, with all people living stern, disciplined, and saintly lives, and kings themselves doing the Lord’s work.”²³² Calvinists found support for their views through literal and unforgiving application of scripture.²³³ The governments of the early colonies generally reflected the Calvinists preference for a coalescing of church and state: prior to the American Revolution, most of the 13 colonies established an official religion by operation of law.²³⁴

²²⁸ See Janet Hook, *The Nation: Survey of Voters Maps Subtle Splits*, L.A. TIMES, May 11, 2005, at A16 (reporting on conclusions from Pew Research Center’s analysis of extensive survey data that Republicans’ leadership on national security issues rather than domestic “morals” issue was greatest influence in 2004 election); Gregory B. Lewis, *Same-Sex Marriage and the 2004 Presidential Election*, PS:POLITICAL SCIENCE AND POLITICS ONLINE 195, 197 (April 2005) <www.apsanet.org/imgtest/PSApr05Lewis.pdf> (concluding from election data that “the war in Iraq, the economy, and terrorism all had larger impact on voter choices” than did same-sex marriage). Perhaps the media was misled by the relatively quiet period of the anti-gay crusade that followed the re-election of Democratic president William Clinton; however, sexual minority advocates had remained keenly aware of the religious right’s strength and persistence. See John Gallagher, *Silent But Deadly: The Religious Right Hasn’t Disappeared*, THE ADVOCATE, March 4, 1997, at 26. And those who labeled George W. Bush as the first born-again Christian President have short memories, as Jimmy Carter was also a born-again Christian. PATRICK ALLITT, RELIGION IN AMERICAN SINCE 1945: A HISTORY 148-150 (2003). See also DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 269-290 (1999)(describing Carter’s campaign promises to gay citizens and the role of that Christianity played in his campaign and presidency); JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT (1982)(explaining the role his religious beliefs played in his presidential decisions).

²²⁹ For instance, “sodomy” – i.e., the crime that includes certain sexual acts in which homosexuals are assumed to engage - is derived from the Christian biblical story of Sodom and Gomorrah in which God allegedly destroyed two cities due to citizens’ immoral behavior. Current objections in the U.S. to same-sex marriage are also deeply rooted in Christian tradition. Josephine Mazzuca, *Gay Rights: U.S. More Conservative than Britain, Canada*, GALLUP POLL NEWS SERVICE, Oct. 12, 2004, available at <http://www.gallup.com/poll/content/?ci=13561&pg=1> and on file with author (reporting that citizens of Britain and Canada are much more supportive of legal unions between same sex partners and positing that the higher level of religiosity demonstrated by U.S. citizens “seems to be a key driver of sentiment on gay marriage and civil unions.”).

²³⁰ See e.g., *What’s Happening to American Morality*, U.S. NEWS & WORLD REPORT, October 13, 1975 at 39 (relating that a “moral crisis” exists in America and offering cleric’s opinion that “We must return to that ‘old-time religion’ to cure societal ills”); *Changing Morality*, *supra* note XX, at 26 (reporting that “Americans are more concerned than ever before about ...morals and ethics.”).

²³¹ ELIZABETH BREUILLY et al., RELIGIONS OF THE WORLD 50-51. (1997). The Puritan minority controlled England for a brief time during the dictatorial government of Oliver Cromwell. When the English monarchy was restored in 1660, the Church of England was also resurrected. The displaced Puritans (referred to as “Dissenters”) were excluded from participation in the political process and forbidden from practicing their religion, a situation which inspired many of them to migrate to colonial America. PALMER & COLTON, *supra* note XX, at 147-151.

²³² *Id.* at 75.

²³³ Historians have observed that “In all things Calvin undertook to regulate his church by the Bible.” *Id.* at 76.

²³⁴ LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1 (1986). The Church of England (Anglican) had “an exclusive legal union” with Virginia, the most powerful of the colonies, *id.*, and also

Establishment of an official Christian religion in each colony had serious ramifications. While the clergy and congregants of the sanctioned religion enjoyed full rights and privileges of citizenships, outliers were ostracized and prosecuted. In Virginia, for instance, lay persons and ministers were jailed for participating in a non-Anglican liturgy or other religious activity.²³⁵ Even if not criminally prosecuted, major disadvantages befell those who dared dissent from the colony's official religion. One scholar explained the nonconformists' situation in language that resonates in today's disenfranchisement of sexual minorities:

An establishment of religion had an official creed or articles of faith, and its creed alone could be publicly taught in the schools or elsewhere. Its clergy alone had civil sanction to perform sacraments or allow them to be performed. Subscribers to established faith enjoyed their civil rights, but the law handicapped dissenters, even if it tolerated their worship, by the imposition of civil disabilities. Dissenters were excluded from universities and disqualified from office, whether civil, religious, or military. Their religious institutions (churches, schools, orphanages) had no legal capacity to bring suits, hold or transmit property, receive or bequeath trust funds. Test oaths usually discriminated against dissenters. Every establishment employed such oaths, although some governments ... also imposed religious tests on office holders to make certain that only believers in the gospel could be entrusted with an official capacity.²³⁶

The serious inequities worked by official state religions proved untenable.²³⁷ After the American Revolution, the colonies transformed themselves into states with constitutions that prohibited establishment of an official state religion, but still allowed intermingling of church and governmental affairs.²³⁸ The U.S. Constitution, forged in 1787, had no provisions respecting religion save for prohibiting a religious test as a prerequisite for persons holding federal office.²³⁹ Comments made by the Constitution's drafters reflect a common belief that the federal government was not empowered "to enact laws that benefited one religion or church in particular

held sway in Maryland, North Carolina, South Carolina and Georgia. *Id.* at 5. Anglicans believed that "religious observance, good moral conduct, and love of neighbor held out the promise of a heavenly reward." ALLITT *supra* note XX, at 5. Massachusetts and Connecticut officially embraced the Congregationalist religion. LEVY *supra* note XX, at 2, 17-18, 23. Congregationalists held "to a severe Puritan theology teaching that God predestined every soul to heaven or hell and that people were powerless to change their fate." ALLITT *supra* note XX, at 5. New York first embraced the Dutch Reformed Church (Calvinism) and then disestablished that religion in favor of multiple Protestant religions, including Calvinism. LEVY *supra* note XX, at 11-13. The colonies of Rhode Island, Pennsylvania, New Jersey and Delaware never established an official religion. *Id.* at 11. Roman Catholics represented a very small minority in colonial days, as immigrants from England, Scotland, Wales, the Netherlands, Norway, Sweden and north German lands were overwhelmingly Protestant. ALLITT *supra* note XX, at 5.

²³⁵ LEVY *supra* note XX, at 1-6.

²³⁶ LEVY *supra* note XX, at 5.

²³⁷ See generally THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

²³⁸ LEVY, *supra* note XX, at 27-78. Intermingling of religious and secular matters was demonstrated, for example, in some states continued collection of taxes to support clergy and religious institutions. See, e.g., *Id.* at 31-33 (discussing Massachusetts religious tax system), 43-45 (New Hampshire system), and 45-49 (Connecticut system).

²³⁹ U.S. CONST. art. VI, §3.

or all of them equally and impartially.”²⁴⁰ Founding fathers did not intend the government to be areligious, however, and George Washington was not alone in his belief “that ‘no true patriot’ would strive to erode the political influence of religion.”²⁴¹

Adoption of the First Amendment in 1791 introduced constitutional text prohibiting the federal government from establishing or interfering with religion,²⁴² but neither the language of the amendment, nor its legislative history, provide a clear path to interpretation.²⁴³ In general, however, “preventing the establishment of religion has never meant, either historically or in court, that religious perspectives cannot be expressed in public debates over morality.”²⁴⁴ Moreover, it may be the attempted separation of church and state, however ambiguously set forth in the Bill of Rights, that has produced “the quiet sway” of Christianity over this country.²⁴⁵ As one scholar observed, “Because the domains of religion and government remain separated, religion in the United States, like religious liberty, thrives mightily... .”²⁴⁶

In fact, from its founding to throughout the 19th Century, “[m]any Americans understood themselves as having created a republic that corresponded to the theological insights of the Reformation.”²⁴⁷ Legal equality of all citizens was firmly rooted in the Christian concept of equality of all people in God’s eyes, and clergy, politicians and the common man all believed that the country would survive and prosper only if populated by true followers of Christ.²⁴⁸ “Manifest Destiny,” the political rhetoric that inspired wars against both native Americans and Mexicans, embodied a conviction that God had singled out the U.S. to rule over North America due to the righteousness of its people, just as God has once selected Abraham and the ancient Jews as his chosen people.²⁴⁹

Viewed through this historical lens, the current “culture wars” pitting conservative Christians against progressive members of society cannot be deemed of recent vintage.²⁵⁰ And

²⁴⁰ LEVY *supra* note XX, at 83. For example, James Madison commented that “There is not a shadow of right in the general government to intermeddle with religion.” *Id.*

²⁴¹ Patrick M. Garry, *The Myth of Separation: America’s Historical Experience with Church and State*, 33 HOFSTRA L.REV. 475, 486 (2004)(footnote omitted).

²⁴² In relevant part, the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. CONST. amend. I.

²⁴³ The nonpreferentialists school of thought contends that the First Amendment’s Establishment Clause prohibits the government from favoring one religion over another, but does not ban aid to religions on an equal basis. LEVY *supra* note XX, at 112 - 113. Chief Justice William H. Rehnquist is among the judges, scholars, and politicians who embrace this view. *Id.* at 113. An opposing school, comprised of separationists, argues that the Establishment Clause is a wall that prohibits government funding or support of any religious activity. *Id.* at 238-240.

²⁴⁴ GOLDBERG, CULTURE CLASH, *supra* note XX, at 179.

²⁴⁵ This was the observation of Alexis de Tocqueville upon visiting the U.S. about 50 years after its independence. Tocqueville expressed “astonishment” that all of the people he met in this country, lay and cleric alike, attributed the pervasive religious atmosphere in the country to the freedom generated by complete separation of church and state. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 271-272 (ed. J.P. Mayers & Max Lerner; trans. George Lawrence 1969)

²⁴⁶ LEVY *supra* note XX, at 246.

²⁴⁷ ALLITT *supra* note XX, at 6.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ JACOBY, *supra* note XX, at 186-226. Jacoby believes culture wars commenced shortly after the Civil War due to the arrival of unprecedented numbers of immigrants, the additional work needed to truly emancipate slaves, the birth

with more than 80 percent of U.S. citizens currently identifying as Christian,²⁵¹ it is unlikely that Christianity's de facto appointment as arbiter of secular moral standards will be revoked anytime soon.²⁵²

Christianity's continuous influence on U.S. law and public morality related to sexual orientation is best documented by this country's long-standing deference to the moral standards derived from the Christian Bible. Thus, a brief synopsis of Biblical influence is provided here.

1. Biblical Influence on U. S. Law

The Bible²⁵³ has been particularly dominant in the formation and moral underpinnings of U.S. law. This country's "historic intimacy" with the Christian Bible is described by theologian Peter Gomes as follows:

Indeed, the first book printed in New England on the seventeenth-century press of Harvard College was the Bible. Our presidents are sworn into office on the Bible, and oaths in court are taken on them. In the culture wars we argue about the place of the Bible in our civic society, and politicians quote from the Bible in justification of their policy positions on moral questions. The ubiquity of the Bible in American public life has long been an object of comment on the part of observers of the American scene.²⁵⁴

of the women's movement, the efforts of labor to be recognized and respected in an expanding, industrialized economy, and the shift in population from rural to urban environments. *Id.* at 187. Jacoby observes that "In the cultural and political debate over these issues, there was always a strong undercurrent of conflict over the proper role of religion and the limits of religious influence in civil society." *Id.*

²⁵¹ See Jeffrey M Jones, *Tracking Religious Affiliation, State by State*, GALLUP POLL NEWS SERVICE, June 22, 2004 available at <http://www.gallup.com/poll/content/?ci=12091&pg=1> and on file with author.

²⁵² An insightful explanation of the relationship between law and morality generally is provided in Suzanne B. Goldberg, *Morals-Based Justification for Lawmaking Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2004).

²⁵³ The Bible consists of 66 books authored by early Christians and ancient Hebrews and edited over many centuries into a single work. PETER J. GOMES, *THE GOOD BOOK* 13 (1996). *ee generally* CHRISTOPHER DE HAMEL, *THE BOOK: A HISTORY OF THE BIBLE* (2001). The Old Testament of the Christian Bible was primarily reconfigured from the Hebrew Bible, the Jewish holy book with origins that predate the birth of Jesus by nearly a thousand years. GOMES, *supra* note XX, at 16. The New Testament consists of scriptures selected from a vast body of writings, with the authorship of many texts remaining uncertain. A major debate remains, for example, as to whether the men to whom the major Gospels are attributed – Matthew, Mark, Luke and John – were actual persons who knew Jesus, or were "merely invented names attached to collections of stories which were finally committed to writing" long after the last living witnesses to the life and death of Jesus had died. DE HAMEL, *supra* note XX, at 321. Many Biblical scholars believe that the authors of the Gospels of Matthew and Luke must have drawn upon a common but now lost written source, commonly referenced as simply "Q." If it existed, Q would have been a primary source of the sayings and parables attributed to Jesus and other stories such as the Temptation of Christ. *Id.* at 322.

²⁵⁴ GOMES, *supra* note XX, at 53. The Bible's overwhelming popularity in the U.S. finds further witness in the success of organizations like the American Bible Society. Founded in 1816 to print and distribute the King James Version of the Bible, the Society printed over six million Bibles in its first 30 years, and by 1862 was selling a million per year. DE HAMEL, *supra* note XX, at 261.

Christian Biblical passages also provided moral justification for centuries of slavery in this country,²⁵⁵ with disagreements over the proper interpretations of scripture culminating in the Civil War.²⁵⁶ Biblical interpretations supplied the “moral” grounds for prohibition²⁵⁷ laws requiring racial segregation,²⁵⁸ and the numerous state laws outlawing interracial marriages²⁵⁹ that remained constitutional until 1967.²⁶⁰ Both the name and the moral underpinnings of the crime of sodomy are attributable to the Biblical story of the destruction of Sodom and Gomorrah, which some Christians cite as proof of God’s displeasure with homosexual conduct.²⁶¹ And, of course, Biblical passages related to the creation of Adam and Eve and other Biblical passages are frequently cited by those who oppose same-sex marriage.²⁶²

2. Biblical Condemnation of Homosexuality

Strong religious convictions often correlate with heightened prejudice against sexual minorities, especially gay men and lesbians, in this country.²⁶³ Conservative Christians’ condemnation of sexual minorities emanates from a view of the Bible that rejects the possibility of transformative learning and which animates behavior-identity compression.²⁶⁴

²⁵⁵ Biblical passages cited to support slavery include: “Slaves, be obedient to those who are your earthly masters, with fear and trembling, in singleness of heart, as to Christ.” Ephesians 6:5. Slavery was one of the “social givens” in the New Testament and Jesus did not condemn it. GOMES, *supra* note XX, at 88. Baptists, Presbyterians, Methodists and other denominations “split into proslavery Southern branches and antislavery Northern ones” before the Civil War due to their differing interpretation of scripture. ALLITT, *supra* note XX, at 7.

²⁵⁶ GOMES, *supra* note XX, at 87-91. It has been argued that “brothers went to war and shed blood in the most divisive form of human conflict, a civil war, ... in large measure on the authority of mutually exclusive readings of scripture.” *Id.* at 97.

²⁵⁷ The Eighteenth Amendment forbid “the manufacture, sale, or transportation of intoxicating liquors” into or within the country. U.S. CONST., AMEND. XVIII (1920). It’s passage was championed by Women’s Christian Temperance Union (WCTU) members. Founded in 1874, the WCTU focused “as much on the need to protect American families from obscene literature and popular entertainment as on the drive to criminalize drinking.” JACOBY, *supra* note XX, at 196. Working closely with Protestant ministers, the WCTU grew to more than 200,000 members in the late 1800s. *Id.* at 212. The WCTU’s political clout is documented by its successful crusade for passage of the Eighteenth Amendment when women were not allowed to vote. *See* U.S. CONST., AMEND. XIX (1920)(giving women the right to vote the year after the Eighteenth Amendment took affect).

²⁵⁸ ALLITT, *supra* note XX, at 52-53. Christians cited God’s separation of Noah’s white sons Shem and Japheth from their brother Ham, whom God made black and cursed after the great flood, and racial purity laws for Jews in both the Old and New Testaments as evidence “that God himself created segregation.” *Id.* at 53.

²⁵⁹ *Id.*

²⁶⁰ *Loving v. Virginia*, 338 U.S. 1 (1967). At the time *Loving* was argued, 16 states had anti-miscegenation law. *Id.*

²⁶¹ A gay-compassionate interpretation of the Bible is discussed *infra* in §IV B.2 Biblical Condemnation of Homosexuality. The evolution of sodomy from a religious to a criminal offense is recounted in Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 U.M.K.C. L. REV. 495, 497-499 (2002).

²⁶² Larry Cata Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAPITAL U. LAW REV. 221, 234-237 (2002); Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 453 (2001).

²⁶³ Cotton-Huston & Waite, *supra* note XX, at 128; L.A. Kirkpatrick, *Fundamentalism, Christian Orthodoxy, and Intrinsic Religious Orientation as Predictors of Discriminatory Attitudes*, 32 JOU. SCIENTIFIC STUDY OF RELIGION 256 (1994).

²⁶⁴ *See* Behavior-Identity Compression *supra* §III A.

In patterns that both reflect and re-enforce behavior-identity compression, many Christian believe that sexual minorities are appropriately defined solely by their sexual behavior;²⁶⁵ that sexual minorities can control their sexual desires, and, by doing so, determine their sexual orientation and overcome their tendency toward sin;²⁶⁶ that sexual minorities are extremely promiscuous;²⁶⁷ and that sexual minorities are a menace to society “and especially a threat to the values of the family.”²⁶⁸ Many Christians also believe that sexual minorities have two paths to salvation and acceptance, in this world and the next: sexual abstinence²⁶⁹ or conversion to heterosexuality.²⁷⁰

Christian condemnation of sexual minorities and their refusal to engage in CRSA on the subject are largely predicated on a fundamentalist interpretation of the Bible that denies all opportunities for transformative learning. Conservative Christians frequently cite a handful of Biblical passages for proof that God condemns any sexuality that does not match the heterosexual, binary model of Adam and Eve.²⁷¹ Labeled by progressive theologians as the “terrible texts,”²⁷² these passages include the story of God’s destruction of the city of Sodom for alleged homosexual depravity,²⁷³ characterization of a man lying with another man as an “abomination” that justifies putting both men to death,²⁷⁴ condemnation of “fornication,”²⁷⁵ several passages attributed to Saint Paul that the gates to the kingdom of heaven are not open to homosexuals,²⁷⁶ language condemning behavior which is “against nature,”²⁷⁷ and the creation story of Adam and Eve.²⁷⁸

²⁶⁵ JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 41 (4th ed. 1993).

²⁶⁶ ALLITT *supra* note XX, at 232 (reporting the views of conservative religions that homosexuality is “a horrible sin,” that “sin and temptation are always among us,” and that “individuals who felt tempted to act on same-sex attraction ought to resist the temptation rather than succumb and then rationalize their action” by claiming their condition was natural). *See also* Editorial, *Walking in Truth*, CHRISTIANITY TODAY 44 (Sept. 4, 2000)(urging Christians to help homosexuals overcoming their sinful tendencies and encouraging homosexuals not to act on their sinful inclination); Josephine Mazzuca, *Origins of Homosexuality? Britons, Canadians Say “Nature,”* GALLUP POLL NEWS SERVICE, Nov. 2, 2004, available at <http://www.gallup.com/poll/content/?ci=13930&pg=1> and on file with author (finding in nationwide U.S. poll that only twenty-six percent of persons who attended church weekly believed that homosexuality was set at birth).

²⁶⁷ MCNEILL *supra* note XX, at 111-113.

²⁶⁸ *Id.* at 197.

²⁶⁹ STANLEY J. GRENZ, *WELCOMING BUT NOT AFFIRMING: AN EVANGELICAL RESPONSE TO HOMOSEXUALITY* 157 (1998)(arguing that Christian communities cannot affirm those “old sinful practices” that homosexuals must “leave behind”); John F. Harvey, *Sexual Abstinence for the Homosexual Person*, 28 JOURNAL OF PASTORAL COUNSELING 40 (1993).

²⁷⁰ MCNEILL *supra* note XX, at 1, 13, 196-198; Symposium, *Homosexuality: Challenges for Change and Reorientation*, 28 JOURNAL OF PASTORAL COUNSELING 1 (1993). *See also* JOE DALLAS, *A STRONG DELUSION: CONFRONTING THE “GAY CHRISTIAN” MOVEMENT* (1996)(offering opinion of “former homosexual” author that sexual minority Christians can and must reject their orientation and embrace heterosexuality).

²⁷¹ *See generally* JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980)(discussing and refuting the various Biblical passages cited for condemnation of homosexuality).

²⁷² JOHN SHELBY SPONG, *THE SINS OF SCRIPTURE* 111-112 (2005)(setting forth scriptures cited for condemnation of homosexuality).

²⁷³ Genesis 19:1-9.

²⁷⁴ Leviticus, 18:22 and 20:13.

²⁷⁵ Acts 21:25; 1 Cor. 8:10.

²⁷⁶ I Corinthians 6:9, I Timothy 1-10.

Scholars, historians, and theologians have offered extensive arguments that the original texts of these passages, construed in light of the linguistic, historical, political and social context in which they were written²⁷⁹ - and in which they were repeatedly translated²⁸⁰ - were not intended as blanket condemnation of homosexuality, at least not sufficient to form a basic tenet of Christian faith.²⁸¹ The late Yale historian John Boswell championed a more neutral interpretation of these scriptures.²⁸²

Boswell and other theologians believe, for example, that God's destruction of the city of Sodom reported in Genesis was not due to homosexual behavior, but rather the residents' deadly sin of pride and their failure to honor the "sacred right of hospitality."²⁸³ Boswell and others similarly contend that the teaching from Leviticus that a man lying with another man is an "abomination" means that such behavior was "ceremonially unclean rather than inherently evil," with the real "abomination" found in "the interior infidelity of the soul" rather than physical behavior.²⁸⁴ According to Boswell, the "extreme selectivity" employed by Christian theologians in interpreting other Levitical laws provides "clear evidence that it was not their respect for the law which created their hostility to homosexuality, but their hostility to homosexuality which led them to retain a few passages from a law code largely discarded."²⁸⁵

²⁷⁷ Romans 1:26-27.

²⁷⁸ Genesis 1-2.

²⁷⁹ Victor Paul Furnish, *The Bible and Homosexuality: Reading the Texts in Context*, in *HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE* 18 (J. Siker ed. 1994).

²⁸⁰ For example, the word "sodomite" is not found in the Hebrew text of the Old Testament or in the Greek text of the New Testament; that word was employed in fairly modern English translations. Furnish, *supra* note XX, at 19. In this and other instances, multiple translations of the collection of books that form the Bible complicate its interpretation. The Old Testament was composed in ancient Hebrew and translated to ancient Greek. BREUILLY et al. *supra* note XX, at 47. The New Testament was written in ancient Greek, *id.* at 47, and then translated into Syriac, Coptic, Ethiopic, Old Latin and other languages. DE HAMEL, *supra* note XX, at 305. The accuracy of the early translations, especially from Greek to Latin, is uncertain, as each voluminous part of the collection of manuscripts was copied by hand. Serial corruption of original texts was highly probable, as each error may have been either repeated by subsequent scribes or compounded by erroneous corrections. *Id.* at 15. Translating and printing of the Bible in English was illegal until the Protestant Reformation took strong hold in England around 1538. *Id.* at 189.

²⁸¹ See, e.g., DERRICK SHERWIN BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* (1955); BOSWELL, *supra* note XX, at 91-117; DANIEL A. HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY* (2000); Perry, *supra* note XX, at 454-468 (arguing for interpretation of biblical text about homosexuality in light of current knowledge and experience). In a similar vein, feminist theologians have argued for interpretations of the Bible from original text that reject patriarchy and misogyny to give women a more powerful role in Christianity. Their efforts are succinctly summarized in ALLITT, *supra* note XX, at 127-133. See generally MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* (1973); ROSEMARY RUETHER, *SEXISM AND GOD TALK* (1983); Phyllis Trible, *Feminist Hermeneutics and Biblical Studies*, in *FEMINIST THEOLOGY: A READER* 25 (Ann Loades ed. 1990).

²⁸² BOSWELL, *supra* note XX.

²⁸³ BOSWELL, *supra* note XX, at 94, 96. See also SPONG, *supra* note XX, at 127-133; GOMES, *supra* note XX, at 150-152; HELMINIAK *supra* note XX, at 43-50; Simon John DeVries, *Scenes of Sex and Violence in the Old Testament*, in *1 THE DESTRUCTIVE POWER OF RELIGION: VIOLENCE IN JUDAISM, CHRISTIANITY AND ISLAM* 75, at 96 (J. Harold Ellens ed. 2004); MCNEILL, *supra* note XX, at 42-50.

²⁸⁴ BOSWELL, *supra* note XX, at 102. See also SPONG, *supra* note XX, at 121-126; GOMES, *supra* note XX, at 153-155; HELMINIAK *supra* note XX, at 51-73; MCNEILL, *supra* note XX, at 56-60.

²⁸⁵ BOSWELL, *supra* note XX, at 105.

In addition to challenging traditional interpretations of extant Biblical text as condemning homosexuality, Boswell and other scholars and theologians also note the absence of references to homosexuality elsewhere in the Bible. If condemnation of sexual minorities was meant to be a primary tenet of Christianity, they argue, it would have been given prominent mention in the Ten Commandments, the Summary of the Law, the teachings of Major Prophets and by Jesus himself.²⁸⁶ When one turns to pre-translation text, Boswell explained, neither the word “homosexual” nor equivalent language appeared in these manuscripts. Thus, Boswell concluded, “it is ...quite clear that nothing in the Bible would have precluded homosexual relations among the early Christians,”²⁸⁷ in part because the ancient world in which the Bible was written “knew no such hostility to homosexuality.”²⁸⁸

By presenting these and other gay-friendly interpretations,²⁸⁹ Boswell and other Biblical scholars presented factual information that could both trigger CSRA and transformative revisions of Christians’ meaning schemes and perspectives on sexual minorities. To date, however, these academic dissections of the Bible have not had a transformative influence on the official teachings of the predominant Christian denominations in the United States.²⁹⁰ The continued Christian condemnation of homosexuality is not due to perceived flaws in the exegesis *per se* undertaken by Boswell and others.²⁹¹ Rather, the lack of receptivity is grounded in many Christians’ beliefs as to what the Bible is and how it is to be used in the modern world, both of which create major obstacles to transformative learning about sexual minorities or other contemporary matters.

²⁸⁶ GOMES, *supra* note XX, at 147-148, 159-162.

²⁸⁷ BOSWELL, *supra* note XX, at 92.

²⁸⁸ *Id.* at 103. See also MCNEILL, *supra* note XX, at 50-53.

²⁸⁹ Boswell and other scholars have concluded that Levitical precepts on purity – such as circumcision, not eating pork, shellfish and rabbit, not wearing clothing made from more than one fabric, not sewing two kinds of seeds in one field, and not cutting the beard or hair – have never been elevated to the status of condemnation leveled by Christians against homosexuals. BOSWELL, *supra* note XX, at 102-105. See also SPONG, *supra* note XX, at 121-126; WILLIAM L. COUNTRYMAN, *DIRT, GREED AND SEX: SEXUAL ETHICS IN THE NEW TESTAMENT AND THEIR IMPLICATIONS FOR TODAY* (1988)(contending that the purity codes of the Old Testament were largely superseded by the New Testament’s internalization of matters related to purity). For refutations of other scriptures that allegedly condemn sexual minorities, see BOSWELL, *supra* note XX, at 105-117; HELMINIAK *supra* note XX, at 75-116; GOMES, *supra* note XX, at 155-172; MCNEILL *supra* note XX, at 53-66. Refutation of Saul/St. Paul’s alleged condemnation is perhaps best articulated in SPONG, *supra* note XX, at 135-142.

²⁹⁰ SPONG, *supra* note XX, at 113-119. Boswell’s and other theologians’ work has resounded with certain leaders within denominations, but not sufficient to change official church teachings in conservative denominations. In a column written by the Catholic Archbishop of Milwaukee 25 years ago, for example, the Archbishop acknowledged that “Current biblical scholarship has been of tremendous help” in bringing the Old and New Testament passages referring to homosexuality “into a total cultural context.” Archbishop Rembert Weakland, *Who is our Neighbor?*, THE CATHOLIC HERALD, July 19, 1980, reprinted in VOICES OF HOPE at 20 – 22. See also Deirdre Good, *The New Testament and Homosexuality: Are we Getting Anywhere?*, 26 RELIGIOUS STUDIES REV. 307, 310 (2000)(concluding that there is “no likelihood that debates about the Bible and homosexuality will end anytime soon.”).

²⁹¹ See GOMES, *supra* note XX, at 368-370, n. 1 (discussing and largely refuting various criticisms of Boswell’s work); see generally HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE (J.S. Siker ed. 1994).

Conservative Christians conceive the Bible as recorded by human scribes but containing the word of God.²⁹² Thus, they believe that the miracles and other events described in the Bible actually occurred (like the casting out of the Garden of Eden and the great flood that only Noah and his family survived), that modern interpretations should be interpreted on a literal reading of the contemporary version of the Bible, and that these literal interpretations reveal the doctrine and morals that must be followed as the exclusive means of obtaining eternal salvation²⁹³

Also known as Bible Fundamentalism, this literal reading rejects the possibility of historical-critical reading, at least to the extent that such reading undermines basic Christian tenets embraced by conservative congregants.²⁹⁴ As one fundamentalist explained, “with respect to the matter of homosexual sin Holy Scripture has traced a most distinct and unmistakable line in stone.”²⁹⁵ Biblical Fundamentalism does not offer a satisfactory explanation as to why some scriptures are literally enforced while others are ignored,²⁹⁶ but it does explain why the intellectual explanations offered by Boswell and others have not transformed conservative Christians’ attitudes toward sexual minorities.²⁹⁷ In short, Christians whose meaning schemes and perspectives are based on a fundamentalist Biblical perspective are unlikely candidates for transformative learning about sexual minorities,²⁹⁸ either in this country²⁹⁹ or elsewhere.³⁰⁰ As

²⁹² No less than U.S. presidents have embraced this philosophy. When campaigning for president, for example, Jimmy Carter was called upon to reconcile comments supporting an end to discrimination against homosexuals with his evangelical Christian faith. In language reflecting Biblical fundamentalism, Carter retreated from his previous pro-gay stance, stating “I can’t change the teachings of Christ! I believe in them, and a lot of people in this country do, as well.” Jimmy Carter, *quoted in* CLENDINEN & NAGOURNEY, *supra* note XX, at 282. The comments were made during Carter’s infamous interview with writer Robert Scheer for an article published in Playboy magazine. *Id.* at 280-283.

²⁹³ MARCUS J. BORG, *THE HEART OF CHRISTIANITY* 15, 43-44 (2003)(hereafter “BORG”).

²⁹⁴ HELMINIAK *supra* note XX, at 33. Biblical Fundamentalism among Protestant denomination is somewhat ironic in that all Protestant Christian denominations owe their existence to Martin Luther, a 16th century Catholic monk who argued that Christians could find their own truth in the Bible without intervention by the Pope or lesser clergy. PALMER & COLTON, *supra* note XX, at 70.

²⁹⁵ Patrick Henry Reardon, *The Churches & the Homosexual Agenda*, 13 TOUCHSTONE 8, 8 (Oct. 2000).

²⁹⁶ For example, Leviticus 11:1-12 forbids the eating of all unclean animals, including pigs, rabbits and shellfish; Leviticus 23 contains detailed regulations about resting on the Sabbath; Leviticus 19:19 prohibits wearing a garment made of two types of material; and Leviticus 19:27 prohibits men from shaving their beards. Leviticus 26:14-16 warns that failure follow all of these commandments will result in punishments and terror. Despite the clarity of such passages, modern Christians are not known to condemn clean-shaven males, people who wear polyester clothing, pork eaters, or Sunday laborers, and no plagues have been reported by those who engage in one or more of these activities. Leviticus also requires that anyone who curses his father or mother, commits adultery, or becomes a fortuneteller should be put to death. Leviticus 20: 9, 10, 27. Again, there has been no organized Christian movement to make such offenses death eligible.

²⁹⁷ Results from a nationwide survey conducted in 2000, for example, showed that sixty percent of those who identified as conservative, Evangelical Christians “completely agree” that homosexuality is morally wrong, compared to thirty one percent of non-Evangelical Christians and twenty-seven percent of Catholics. KFF Inside-OUT *supra* note XX, at 6 and Chart 14.

²⁹⁸ In a nationwide survey of adults conducted in 2003, 42% of respondents believed that “the Bible is the “actual Word of God,” 37% believed it “is the Word of God but not everything in it should be taken literally,” 14% believed it was written by man and is not the Word of God. Virginia Commonwealth University Life Sciences Survey, Sept. 3-26, 2003. The survey is available at www.pollingreport.com/religion.html and on file with author.

²⁹⁹ Views on both side of the debate are presented in *BIBLICAL ETHICS AND HOMOSEXUALITY: LISTENING TO SCRIPTURE* (Robert L. Brawley ed. 1996).

explained immediately below, however, some Christians are demonstrating significant alterations in their meaning schemes and perspectives about sexual minorities.

3. Transformation and the Emerging Paradigm

*Of course, bigotry will have its day, and will claim to have God on its side.... Thus it has always been. But more reasoned voices also emerge from within religion.*³⁰¹

In contrast to the Fundamentalist perspective, Christians in what theologian Marcus Borg describes as “the emerging paradigm”³⁰² view the Bible as written by humans inspired by God, but not the exact word of God; rather, it is an ancient book written to guide a different people in a different time.³⁰³ Emerging Christians perceive Biblical text as living rather than static, demanding that Christianity’s adherents “determine in what ways it can, and possibly cannot, speak to its present hearers and readers.”³⁰⁴ Christians who follow this path do so as “a response to the Enlightenment,”³⁰⁵ embracing the stories of the Bible as metaphor,³⁰⁶ and seeing Christianity “as a life of relationships and transformation.”³⁰⁷

As Borg acknowledges, emerging Christians are open to the possibility of transformative learning about sexual minorities and other topics of theological debate. As another theologian explained, “while the text itself does not change, we who read that text do change. ... Thus we hear not as first-century Christians, or even as eighteenth-century Christians, but as men and women who live here and now.”³⁰⁸

Viewed through a 21st century prism that reflects accurate factual information about sexual minorities and encourages rather than rejects CSRA, the Bible’s alleged proscriptions against homosexuality are relegated to near irrelevancy, and the stage is set for transformative learning about sexual minorities. As a Lutheran clergyman explained, “[f]or many denominations, human sexuality is not simply a matter of faithfulness to biblical teachings, but one of scriptural interpretation and compassionate application.”³⁰⁹ A Christian congregation in Ohio made the point even more succinctly. “Our faith is over 2000 years old,” the church declared on billboards and posters. “Our thinking is not.”³¹⁰

³⁰⁰ Cece Cox, *To Have and to Hold--or not: the Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 LAW & SEXUALITY 1 (2005).

³⁰¹ HELMINIAK, *supra* note XX, at 18.

³⁰² BORG, *supra* note XX, at 6.

³⁰³ *Id.* at 13.

³⁰⁴ GOMES, *supra* note XX, at 74.

³⁰⁵ BORG, *supra* note XX, at 13.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 14.

³⁰⁸ GOMES, *supra* note XX, at 20.

³⁰⁹ Peter Mikelic, *Lutherans Address Same-Sex Unions*, TORONTO STAR, March 12, 2005 at M6.

³¹⁰ Billboard message purchased and displayed as part of a church growth campaign in North Jackson, Ohio, in the summer and fall of 2004. The church is a combination of United Church of Christ, Presbyterian and Disciples of Christ members who formed a community with a significant number of members who do not claim specific denomination. Brad Jagger, *God is Still Speaking, in North Jackson*, UNITED CHURCH NEWS, OHIO CONFERENCE EDITION, Nov. 2004 at A-7.

Borg believes that Christians started moving towards the emerging paradigm more than a century ago, but that it become a “major grassroots movement among both laity and clergy” in this country only in the past two or three decades.³¹¹ This evolution is not limited to U.S. Christians.³¹²

According to Borg, many mainline Protestant denominations have responded favorably to the movement, becoming more open and affirming to sexual minorities in the process.³¹³ Churches moving forward on Borg’s progressive scale include the United Church of Christ, the Episcopal Church, the United Methodist Church, Disciples of Christ, the Presbyterian Church USA, and the Evangelical Lutheran Church in America.³¹⁴ Borg even notes some signs of movement within the Roman Catholic Church,³¹⁵ the largest Christian denomination in this country.³¹⁶

³¹¹ BORG *supra* note XX, at 6.

³¹² See, e.g., Christopher Morgan, *Bishop Sanctions Service for Gays*, SUNDAY TIMES (LONDON), Jan. 9, 2005 at home news 6 (reporting that “a senior Anglican Bishop has commissioned the Church of England’s the first official service to recognise gay couples”).

³¹³ *Id.*

³¹⁴ *Id.* In the Brief Amicus Curiae of Clergy Members in Support of Marriage filed in *Lewis v. Harris*, Case No. A-002244-03T5, Superior Court of New Jersey, Appellate Division, for example, more than 100 clergy urged the court to find unconstitutional the state’s denial of marriage to same sex couples. Amici included Unitarian, Episcopal, United Methodist, Lutheran, United Church of Christ, Congregational, Presbyterian, and nondenominational Christian pastors as well as a number of Jewish rabbi. (Copy of Brief on file with author). Even dominations that have a generally liberal bent, however, often find themselves split on issues related to sexual minorities. See, e.g., Jane Gordon, *A Debate Filled with Faith*, N.Y. TIMES, March 6, 2005, at 14CN (discussing ongoing tensions within Episcopal Church, United Church of Christ, Methodist and other denominations over the ordination of gay ministers and same-sex marriage); Laurie Goodstein, *Changes in Episcopal Church Spur Some to Join, Some to Go*, N.Y. TIMES, Dec. 29, 2003, at A1 (reporting the impact from the N.H. Episcopal Diocese’s decision to elect openly gay Rev. V. Gene Robinson as their bishop).

³¹⁵ BORG *supra* note XX, at 6. Borg’s characterization of the Catholic Church as potentially progressive seems overly optimistic in light of the late Pope John Paul II’s repeated characterization of homosexuality as evil and the Church’s 2005 selection of ultra-conservative Cardinal Joseph Ratzinger as John Paul’s successor. See Christopher Dickey & Melinda Heneberger, *The Vision of Benedict XVI*, NEWSWEEK, May 2, 2005, at 40 (reporting on pope’s conservative views); Michael Paulson, *Pope says Gay Unions are False, Sees a Weakening of Marriage*, BOSTON GLOBE, June 7, 2005, at A1 (reporting on Pope Benedict XVI’s intent to continue “the hard-line defense of traditional Catholic teachings that made him controversial in his role as Pope John Paul II’s chief enforcer of church doctrine.”). See generally, MCNEILL, *supra* note XX, at 42-50 (describing Roman Catholic position on homosexuality and reticence to changing that position); THE VATICAN AND HOMOSEXUALITY: REACTIONS TO THE “LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS” (Pat Furey & Jeannine Gramick eds. 1988)(explaining and critiquing then-Cardinal Ratzinger’s views on homosexual congregants); DIALOGUE ABOUT CATHOLIC SEXUAL TEACHING (Charles E. Curran & Richard A. McCormick eds. 1993)(providing official Church positions and discussions of same on a range of sexual issues including homosexuality). On the other hand, U.S. Catholic Bishops issues a directive on Sept. 10, 1997 urging parents to love and support their gay children. National Conference of Catholic Bishops, *Always Our Children*, at <http://www.nccbuscc.org/laity/always.htm> (last visited June 13, 2005). The Catholic Church also takes this universal position regarding discrimination against sexual minorities: “The number of men and women who have deep seated homosexual tendencies is not negligible. They do not choose their homosexual condition....They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.” THE HOLY SEE, THE VATICAN, CATECHISM OF THE CATHOLIC CHURCH paragraph 2358 (1994).

³¹⁶ About 24% of the U.S. population identifies as Roman Catholic, 49% consider themselves Protestants, and 10% identify with some other form of Christianity. Joseph Carroll, *American Public Opinion About Religion*, THE

Regardless of the official status of their church, lay persons and clergy within virtually every major Christian denomination regularly petition church leaders to reverse policies and practices that discriminate against sexual minorities.³¹⁷ Groups formed by sexual minorities and their allies include Dignity and New Ways Ministry (Catholic), Honesty (Baptist), Integrity (Episcopalian), Acceptance (United Methodist), Lutherans Concerned, Integrity (Episcopal), Gay LDS Young Adults (Mormon), and More Light Presbyterians.³¹⁸ Interdenominational groups³¹⁹ also continue to engage church leaders about issues affecting the spiritual and secular lives of people residing outside the heterosexual paradigm.³²⁰ Their outness also provides opportunities for fellow Christians to engage in CSRA that challenges stereotypes and myths about sexual minorities.³²¹

The visibility of sexual minorities within congregations and the continuing cross-denominational advocacy have resulted in religious groups taking high-profile stands on civil rights issues. The current controversy over same-sex marriage has become the divining rod for dividing Christian denominations and congregations into the fundamentalist or emerging camps.³²² For example, more than 146 religious leaders in New York State, including Baptist, Episcopal, Presbyterian, Unitarian and United Methodist leaders, submitted a joint amicus brief supporting same-sex marriage.³²³ In contrast, Catholic clergy,³²⁴ Southern Baptists,³²⁵ and other conservative Christians continue to vociferously condemn same-sex unions.

GALLUP POLL, March 2, 2004, available at <http://www.gallup.com/poll/content/?ci=10813&pg=2> and on file with author.

³¹⁷ As one historian observes, “by the 1990s every religious group in America was aware, often uncomfortably aware, that some of its members were homosexual.” ALLITT, *supra* note XX, at 231.

³¹⁸ Each group has an Internet home page that can be accessed through any general search engine. See also LISA BENNETT, *MIXED BLESSINGS: ORGANIZED RELIGION AND GAY AND LESBIAN AMERICANS IN 1998* (1998) (reporting in monograph prepared for Human Rights Campaign on developments affecting and caused by sexual minorities in many U.S. Christian denominations and Judaism).

³¹⁹ The Human Rights Campaign, for example, recently launched its Religion Project “to engage people and communities of faith, as well as their leaders, in an open dialogue” and to “better establish in Americans’ minds the legitimate sacred foundations of equality in many, if not most, religious traditions.” April 2005 correspondence from HRC on file with author. HRC’s undertaking joins a host of existing collaborations including the United Church of Christ Coalition for Lesbian, Gay, Bisexual and Transgender Concerns; the National Religious Leadership Roundtable hosted by National Gay and Lesbian Task Force; and Soulforce founded by the Rev. Mel White.

³²⁰ Of course, dissent within Christian denominations, especially by sexual minorities, is not always well received. See e.g., MEL WHITE, *STRANGER AT THE GATE: TO BE GAY AND CHRISTIAN IN AMERICA* (1995); MELANIE MORRISON, *THE GRACE OF COMING HOME: SPIRITUALITY, SEXUALITY, AND THE STRUGGLE FOR JUSTICE* (1995).

³²¹ *From Wounded Hearts: Faith Stories of Lesbian, Gay, Bisexual, and Transgendered People and Those Who Love Them* (Roberta Showalter Kreider, ed., 1998) (documenting individuals’ struggles, courage, and success associated with being open about their minority sexual status in Christian communities).

³²² See Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAMILY L. QUARTERLY 427, 428-431, 437-439 (2004) (explaining role of religion in debate); Michael J. Perry, *supra* note XX, at 454-460 (same).

³²³ Doug Windsor, *Arguments Filed in NY Gay Marriage Suit*, 365GAY.COM, May 19, 2005, available at www.365Gay.com/newscon05/05/051905nyAppeal.htm. Progressive clergy have previously taken public stands on controversial issues including the exclusion of homosexuals from the military. See THE CHRISTIAN ARGUMENT FOR GAY AND LESBIANS IN THE MILITARY: ESSAYS BY MAINLINE CHURCH LEADERS (John J. Carey ed. 1993).

When analyzing the transformative learning that has or will occur within Christianity concerning sexual minorities, one must also consider that change generally occurs within individuals before it affects organizations. Although a person's religious beliefs clearly inform their secular actions (including voting and advocating for the adoption or rejection of particular governmental policies), adherence to a particular Christian denomination does not dictate adherence to all of the standards and norms of that denomination.

The 2004 presidential election provides a case in point. The so-called "blue states" in the northeast contain the largest numbers of Roman Catholics in the country.³²⁶ And yet, these states voted heavily in favor of John Kerry, the pro-choice presidential candidate in 2004, indicating that many Catholics in this region rejected their Church's denouncement of a pro-choice candidate.³²⁷ It is also well established that many of the 65 million U.S. Catholics³²⁸ reject their church's teachings on contentious issues including the use of birth control and the death penalty, both of which the church denounces.³²⁹ Indeed, one nationwide survey of Catholic adults revealed that eight-six percent of Catholics believed they could "disagree with the Pope on articles of faith and still be a good Catholic."³³⁰ In terms of transformation about sexual minorities, a national survey conducted in 2004 showed that the majority of Catholic youth approve of same-sex marriage, despite the Church's profound and repeated condemnation

³²⁴ Jenna Russell, *Bishops call SJC Decision "Tragedy,"* BOSTON SUNDAY GLOBE, Nov. 30, 2003, at B1 (reporting on Catholic bishops reaction to decision legalizing same-sex marriage in Massachusetts and calling for federal constitutional amendment to ban same-sex marriage).

³²⁵ John Kooper, *Southern Baptists Wage Savage Political Warfare Over Gay Couples,* THE TENNESSEAN, Nov. 19, 2003, at 19A. See generally Peter Steinfelds, *Southern Baptists Condemn Homosexuality as 'Depraved,'* N.Y. TIMES June 17, 1988, at B6.

³²⁶ States with the highest percentage of Catholics are Rhode Island (52% of the state's population), Massachusetts (48%), New Jersey (46%), Connecticut (46%), New York (40%), and New Hampshire (38%). Jeffrey M. Jones, *Tracking Religious Affiliation, State by State,* Gallup Poll News Service, June 22, 2004, available at www.gallup.com <http://www.gallup.com/poll/content/?ci=12091&pg=1> and on file with author.

³²⁷ In a nationwide poll, for example, 72% of Catholics opposed denying communion to Catholic politicians who favor abortion. ABC News/Washington Post Poll, May 20-23, 2004. Poll results are available at www.pollingreport.com/religion.html and are on file with author. ,

³²⁸ John Caldwell, *Can the Catholic Church be Saved,* THE ADVOCATE, May 10, 2005, at 34, 38 hereafter "Caldwell, *Catholic Church*").

³²⁹ See, e.g., Frank Newport, *U.S. Catholics Vary Widely on Moral Issues: Active Catholics Much More Conservative,* GALLUP POLL NEWS SERVICE, APRIL 8, 2005, available at <http://www.gallup.com/poll/content/?ci=15550&pg=1> and on file with author (reporting that significant number of Catholics find abortion, the death penalty, physician-assisted suicide, homosexual behavior, divorce and stem cell/embryonic research morally acceptable despite their Church's contrary teachings); Lisa Miller & Christopher Dickey, *Prayers for a New Life: Catholics Celebrate Legacy, and Contemplate Many Difficult Choices Ahead,* NEWSWEEK, April 18, 2005, at 31, 33 (reporting on recent Gallup poll showing almost 70 percent of U.S. church-going Catholics disagree with the church's ban on birth control and discussing other issues which separate the church from its congregants, such as its condemnation of pre-marital sex and its ban on priests marrying); Neela Banerjee, *Bishops Fight Death Penalty in New Drive,* NEW YORK TIMES, March 22, 2005 at A19 (reporting that approximately 50% of U.S. Catholics support the death penalty despite the church's opposition to capital punishment).

³³⁰ CNN/Time Poll, Jan. 20-21, 1999. Poll results are available at www.pollingreport.com/religion.html and on file with author.

of such unions.³³¹ Efforts to transform the Catholic Church by engaging its leaders in CSRA continues from within, with advocated refusing to be denied or discouraged even when faced with repressive official doctrine.³³²

Evidence further suggests that younger Christians in general may be receptive to –or have already engaged in - transformative learning about sexual minorities. A recent nationwide study of college students conducted by the Higher Education Research Institute (HERI) showed that approximately seventy-five of the students identified as Christian, 17% had no religious preference, and the remaining eight percent were Jewish, Islamic, Hindu or other religion.³³³ Researchers found that approximately eighty percent of college students believe in God, have an interest in spirituality, and discuss religion/spiritually with friends and family.³³⁴ After analyzing students’ responses to myriad questions about religion, spirituality, and social issues, researchers concluded that “[d]espite their strong religious commitments, students also demonstrated a high level of religious tolerance and acceptance,”³³⁵ and that more than seventy percent “are actively engaged in ‘trying to change things that are unfair in the world.’”³³⁶ Perhaps rectifying the many inequities experienced by sexual minorities in this country will fall within their spiritual agendas.³³⁷

No one can credibly assert that the grassroots, “emerging paradigm” described by Borg will in the near future result in universal changes in Christian doctrine concerning sexual minorities. Resistance to change of any type, especially in issues of sexuality, remains common in many conservative Christian denominations whose membership rolls are growing at significant rates³³⁸ and whose churches and leaders are spearheading the current crusade against sexual minorities.³³⁹ Nonetheless, the emerging paradigm cannot be lightly dismissed. As

³³¹ Albert L. Winseman, *Religion Colors Teen Views of Gay Marriage*, GALLUP POLL NEWS SERVICE, Sept. 14, 2004, available at <http://www.gallup.com/poll/content/?ci=13015&pg=1> and on file with author (finding that 52 percent of Catholic teens surveyed approve of marriage between homosexuals and attributing the results to the larger disconnect between official Catholic doctrine and the beliefs and practices of Catholic youth).

³³² See Caldwell, *Catholic Church*, *supra* note XX, at 38 (describing efforts of New Ways Ministry and other Catholics to support and increase gay-friendly parishes);

³³³ Higher Education Research Institute, *The Spiritual Life of College Students: A National Study of College Students’ Search for Meaning and Purpose* 17 (2005)(available on HERI home page and on file with author).

³³⁴ *Id.* at 5.

³³⁵ *Id.* at 4.

³³⁶ *Id.* at 5, 7-12.

³³⁷ Not surprisingly, college students with lower levels of “religious engagement” (measured by regular church attendance and reading of sacred scripture) responded more favorably to issues surrounding sexual minorities than did students with high levels of engagement in organized religion. For example, 76% of students with low religious engagement believed that same-sex couples should have the right to marry and only 16% agreed that the law should prohibit homosexual conduct; among students with high religious engagement, only 28% percent approved of same-sex marriage and 53% thought homosexual relationships should be banned. *Id.*, Table 3, at 10.

³³⁸ Over the past 40 years, the Southern Baptist Convention increased from 10 to 17 million members and Pentecostal adherents increased from less than two million to almost 12 million. David Greenberg, *Fathers and Sons*, THE NEW YORKER, vol. 80, July 12 and 19, 2004, at 97. See also Laurie Goodstein, *Conservative Churches Grew Fastest in 1990’s, Report Says*, N.Y. TIMES, Sept. 19, 2002 at A22 (reporting Southern Baptist membership at nearly 20 million and citing the Church of Jesus Christ of Latter-day Saints as the fastest growing due to the Mormons’ use of young missionaries to recruit door to door).

³³⁹ See Bob Moser, *A Mighty Army: A Dozen Major Groups Help Drive the Religious Right’s Anti-gay Crusade*, 117 SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT 22-26 (Spring 2005)(describing anti-gay agendas of

theologian Borg observed, the debates within and among religions about same-sex marriage, ordination of sexual minorities, and related topics were “virtually unimaginable a few decades ago.”³⁴⁰ Today it is hard for Christians to escape such debates.³⁴¹ Once such seeds of transformative learning about sexual minorities have been planted, whether across congregations or within individuals, they have significant potential to effectuate change.³⁴²

C. Science and Sexuality

“From the origins of the first homosexual rights movement...there has been an ongoing effort to use scientific knowledge as one means to emancipate homosexual men and women from the tyranny of moral ostracism, legal punishment, and medical treatment.”³⁴³ Science, however, was for many years more hostile than supportive of those efforts. The transformation of science on issues of sexuality and sexual identity, as well as science’s influence on law and the general public, are discussed in this section.

1. The Influence of Science on U.S. Law

Like Christianity, science has played a direct role in the behavior-identity compression of sexual minorities. The relationship between science and law, however, is less intimate than between Christianity and law. The historic and ongoing tensions between science and law are grounded in the fundamental differences between the disciplines. One major divide is that

Christian associated groups including the Alliance Defense Fund, American Family Association, Family Research Council, Focus on the Family, and the Traditional Values Coalition); Cynthia Burack and Jyl J. Josephson, *A Report from “Love Won Out: Addressing, Understanding and Preventing Homosexuality*, NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE (2005), available at www.TheTaskForce.org and on file with author (providing a first-hand account of factually incorrect information distributed at conference on homosexuality sponsored by Focus on the Family); Kooper, *supra* note XX.

³⁴⁰ BORG, *supra* note XX, at 3. See also James K. Wellman, Jr., *The Debate Over Homosexual Ordination: Subculture Identity Theory in American Religious Organizations*, 41 REV. OF REL. RESEARCH 184 (1999) (discussing approaches taken by churches over homosexual ordination).

³⁴¹ See generally HOMOSEXUALITY AND CHRISTIAN FAITH: QUESTIONS OF CONSCIENCE FOR THE CHURCHES (Walter Wink ed. 2000)).

³⁴² Debates over same-sex marriage, for example, have resulted in many Christian clergy voicing support for sexual minority equality. See, e.g., Diane Carroll, *Ministers Protest Proposed Gay-Marriage Ban*, KANSAS CITY STAR, March 26, 2005 at B4 (stating that more than 50 ministers, including those from United Methodist, Presbyterian, and Baptist faiths, signed a letter urging voters to reject the state constitutional amendment outlawing same-sex marriage); Anita Weier, *Christians Clash on Gay Unions: Opponents of State Ban Rally at Capitol*, THE CAPITAL TIMES, Feb. 23, 2005 at 3A (reporting that 30 pastors from various denominations around the state rallied in opposition to an amendment to the Wisconsin constitution to ban same-sex marriages); Vanessa Ho, *Religious Leaders Step Up Support of Gay Rights*, SEATTLE POST-INTELLIGENCER, Feb. 14, 2005 at B2 (reporting on founding of religious coalition to support civil rights for sexual minorities in Washington state); Dennis O’Brien, *Clergy Gather in Favor of Gay Marriage*, BALTIMORE SUN, Feb. 8, 2005 at 2B (reporting that 71 Christian clergy signed a petition supporting same-sex marriage); Ryan Lee, *Black Clergy United to Publicly Support Gay Rights*, SOUTHERN VOICE, Feb. 4, 2005, at <http://sovo.com/2005/2-4/news/localnews/clergy.cfm> (reporting that “more than 50 black clergy and theologians from metro Atlanta published a letter recently in the Atlanta Daily World calling on African-American churches to be more sympathetic to the political and spiritual struggles faced by gay men and lesbians.”).

³⁴³ HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* 3 (2002). Medical science also offers data critical to the equality movement for transgender persons. See Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality For Transgender People*, IV GEORGETOWN J. GENDER & LAW 721 (2003).

“science assumes behavior is based on biology and experience while the law assumes that humankind has free will.”³⁴⁴

Another fundamental difference is that science seeks to understand humanity by racing toward new discoveries and creating new knowledge,³⁴⁵ while law seeks to regulate humanity by holding on to the past, unapologetically anchored in tradition and precedent.³⁴⁶ The practical consequence is that once science finally convinces the law of a particular theory’s validity, the law resists other perspectives on the subject, even when science itself rejects that theory.³⁴⁷ This is especially true in the relationship between law and science’s view of sexual minorities.³⁴⁸ Science seems to have a similarly delayed impact on public perceptions,³⁴⁹ as culture has proven “far less flexible than biology” on matters pertaining to sexual orientation.³⁵⁰

The temporal disconnect between science and law explains why science’s past condemnation of sexual minorities still casts a shadow over contemporary law. This historic pattern also suggests, however, that the law will eventually incorporate contemporary scientific conclusions that variations in gender, sexual identity and sexual orientation are naturally occurring and harmless, rather than deviant and pathological.³⁵¹ The scientific developments about the benign nature of sexual minorities which are currently filtering into our legal system also offer opportunities for transformative learning by the general public.

This section explains how and why medical and social science researchers, clinicians and practitioners have removed the blinders that previously caused them to bestow their blessing of “normalcy” only on heterosexuals whose gender identity conformed to the classic male-female binary model. The role that science’s shifting perspective will play in not just changing the law, but also in society’s CSRA and transformative learning process about sexual minorities, is also noted.³⁵²

³⁴⁴ Michael B. Getty, *Insecurity with Science*, 83 *Judicature* 161 (Nov.-Dec. 1999), reviewing DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE AND THE LAW* (1999).

³⁴⁵ “Many scientists do care greatly about the ultimate practical impact of their work, but that concern is often secondary to the fundamental search for knowledge.” GOLDBERG, *CULTURE CLASH*, *supra* note XX, at 11.

³⁴⁶ As one long-time lesbian activist observed, “[l]aw is rooted in the past and its consistency over time is one of its values.” CAIN, *supra* note XX, at 281. For a general discussion of the limitations of using the courts to seek equality for sexual minorities, see ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 141-154 (2002).

³⁴⁷ Richard C. Friedman & Jennifer I. Downey, *Homosexuality*, 331 *NEW ENGLAND JOURNAL OF MEDICINE* 923, 928 (1994)(stating that sufficient scientific “data have been accumulated to warrant the dismissal of incorrect ideas once widely accepted about homosexual people” but observing that “many areas of law and public policy are still influenced by views discarded by behavioral scientists.”).

³⁴⁸ *Id.*

³⁴⁹ For example, while many scientists embrace it, the public remains skeptical about Charles Darwin’s theory of evolution. See Jerry Adler, *Doubting Darwin*, *NEWSWEEK*, Feb. 7, 2005, at 45.

³⁵⁰ Jill Neimark, *The Contours of Gender*, *SCIENCE & SPIRIT*, Nov./Dec. 2001, available at www.science-spirit.org/articles/html.

³⁵¹ See, e.g., Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 *U. MIAMI L. REV.* 1 (2004); Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 *WAYNE L. REV.* 1 (1994).

³⁵² The relationship between scientific developments and shifts in public opinion is grounded in the public’s respect for medical doctors and scientists and public interest in new scientific developments, especially medical discoveries.

2. Mental Health Perspectives on Homosexuality

*As a practicing psychiatrist, I view homosexuality as an illness. ...I regard homosexuality as essentially a symptom of an overall pattern of maladjustment.*³⁵³

*Somehow we must convey to you how your subjective value judgments deny homosexuals a part in the good life and how, to the contrary, you have become the guardians of mental illness rather than promoting ...mental health ...in our society.*³⁵⁴

Psychiatrists and psychologists historically characterized sexual minorities as mentally ill.³⁵⁵ This characterization supported behavior-identity compression and for many decades justified discriminatory treatment of sexual minorities who failed to conform to the “normal” (and therefore ideal) heterosexual, male or female binary model.³⁵⁶ In a divorce case involving the wife’s romantic involvement with another woman, for example, the court offered this rationale for designating the wife’s conduct as “extreme cruelty:”

It is difficult to conceive of a more grievous indignity to which a person of normal psychological and sexual constitution could be exposed than the entry by his spouse upon an active and continuous course of homosexual love with another person. Added to the insult of sexual disloyalty *per se* (which is present in ordinary adultery) is the natural revulsion arising from the knowledge ...that the spouse’s betrayal takes the form of perversion.

...

Few behavioral deviations are more offensive to American *mores* than is homosexuality. Common sense and modern psychiatric knowledge

See (no author given) *Science and Technology: Public Attitudes and Public Understanding*, NATIONAL SCIENCE FOUNDATION, SCIENCE & ENGINEERING INDICATORS Chapter 7 (2002) available at www.nsf.gov and on file with author (reporting that in 2001, two-thirds of respondents to NSF national poll said they were “very interested” in new medical discoveries and forty-seven percent said they were “very interested” in other scientific discoveries), Humphrey Taylor, *Doctors the Most Prestigious of Seventeen Professions and Occupations, Followed by Teachers (#2), Scientists (#3), Clergy (#4) and Military Officers (#5)*, Oct. 10, 2001, HARRIS INTERACTIVE, THE HARRIS POLL, available at www.harrisinteractive.com and on file with author (suggesting that public has high regard for medical doctors and scientists).

³⁵³ Hadden, *supra* note XX, at 26, 27.

³⁵⁴ Lesbian activist Del Martin testifying before the American Psychiatric Association in 1970, *quoted in* TOBIN & WICKER, *supra* note XX, at 61.

³⁵⁵ *See, e.g.*, EDMUND BERGLER, *HOMOSEXUALITY: DISEASE OR WAY OF LIFE?* (1956); IRVING BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* (1962); Irving Bieber, *Homosexuality*, 69 AM. JOURNAL OF NURSING 2637 (1969); Albert Ellis, *The Truth About Lesbians*, 30 SEXOLOGY 652 (1964).

³⁵⁶ *See, e.g.*, *Boutillier v. Immigration and Naturalization Service*, 387 U.S. 118 (1967) (upholding conclusion by INS officials that petitioner’s homosexual conduct rendered him a “psychopathic personality” subject to deportation under federal law). *See also* Rivera, *supra* note XX, at 934-942 (discussing influence of psychiatry’s labeling of sexual minorities as “pathological” on immigration law and policy).

concur as to the incompatibility of homosexuality and the subsistence of marriage between one so afflicted and a normal person.³⁵⁷

The American Psychiatric Association's (APA's) classification of homosexuals in its highly influential *Diagnostic and Statistical Manual of Mental Disorders (DSM)*³⁵⁸ cast one of the longest and darkest shadows over attempts to reform laws disadvantaging sexual minorities.³⁵⁹ In the first DSM published in 1952, the APA classified homosexuality as a mental disorder, and further advised that that homosexuals were "ill primarily in terms of society and of conformity with the prevailing cultural milieu."³⁶⁰

The APA's denouncement was largely grounded in the theory that homosexuality stemmed from unresolved conflicts between parents and offspring that started in early childhood and which rendered the child incapable of adjusting to a normal, heterosexual life as an adult.³⁶¹ Accordingly, psychiatrists reasoned that adult homosexuality represented "an inexhaustible source of unhappiness, discontentment, and a distorted sense of human values."³⁶²

The maladjustment theory was based in Sigmund Freud's model of human development even though mental health experts in the U.S. rejected Freud's view that homosexuality was not a mental illness.³⁶³ Instead, the profession followed the lead of Irving Bieber, Charles Socarides, and other mental health professionals who believed that "the homosexual is ill."³⁶⁴

The mental illness model enabled behavior-identity compression as science's pathologized model of sexual minorities made news headlines³⁶⁵ that reverberated throughout

³⁵⁷ H. V. H, 157 A.2d 721, 726-27 (N.J. App. 1959).

³⁵⁸ See HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM – THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS (1997).

³⁵⁹ See RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987).

³⁶⁰ American Psychiatric Ass'n, DIAGNOSTIC AND STATISTICAL MANUAL, MENTAL DISORDERS (DSM-I) 38 (1952).

³⁶¹ See, e.g., CHARLES W. SOCARIDES, HOMOSEXUALITY (1978); ?? WOLF, HOMOSEXUALITY 92 (1955)(concluding that homosexuality is connected "with particular kinds of upbringing," including situations where the only boy in a family "has a dominating, puritanical mother and no proper father," thus "provoking Oedipal conflicts and encouraging guilt dealings and sexual inhibitions."). See also, XX, Thompson, *Changing Concepts of Homosexuality in Psychoanalysis*, 10 PSYCHIATRY 183 (1947)(??).

³⁶² Franz J. Kallmann, *Twin and Sibship Study of Overt Male Homosexuality*, 4 AM. JOUR. HUMAN GENETICS 136, 146 (1952). The author was a member of the New York Psychiatric Institute of Columbia University.

³⁶³ When asked by an American mother if her homosexual son could be cured, Freud responded that "in the majority of cases" it is not possible, and further suggested that psychoanalysis may bring the son "'peace of mind" and "full efficiency" regardless of his sexual orientation. Sigmund Freud, *quoted in* THE GAY RIGHTS MOVEMENT 31 (Jennifer Smith ed. 2003). See also Henry Abelove, *Freud, Male Homosexuality, and the Americans*, in THE LESBIAN AND GAY STUDIES READER 381, 385 (Henry Abelove et al. eds. 1993)(explaining American psychiatrists' rejection of Freud's view on homosexuality).

³⁶⁴ Charles Socarides, *quoted in* DUBERMAN, *supra* note XX, at 97.

³⁶⁵ See, e.g., Howard Kurtz, *A Straight and Narrow Path: It Wasn't Long Ago That the Media Portrayed Gays as 'Sick' - Edward Alwood Found Proof*, WASH. POST, June 3, 1996, at B1 (concluding from extensive media analysis that a "sense of shame -- that being gay was a stigma and a sickness -- was relentlessly communicated in the '50s and '60s through the nation's newspapers, networks and newsmagazines."). See also Gerald Walker, *The Gay World*, by Martin Hoffman, N.Y. TIMES, March 9, 1969, at BR30 (concluding from Hoffman's book and THE

the portrayal of sexual minorities in popular culture³⁶⁶ and became embedded in societal views. Proof that the mental illness model infiltrated society is found, for example, in the comment of a New York City policeman involved in quelling Stonewall riots. The officer said he refrained from beating those he arrested because “they’re sick...you can’t hit a sick man.”³⁶⁷

The popular yet scientifically questionable mental illness model was repeatedly challenged on at least three grounds.

First, the “scientific” conclusions were not based on comprehensive studies of gay men and lesbians as they went about their day to day lives, but rather on psychologists’ clinical observations of homosexuals who sought (or were involuntarily subjected to) mental health care.³⁶⁸ As one psychotherapist explained in rejecting the “unnatural and sick” model of homosexuality almost forty years ago, “Issues of sickness are made seemingly more valid in the eyes of clinicians” because “they consistently see a sample of the population for whom homosexual tendencies are associated with severe guilt, conflict, or other neurotic disturbances.”³⁶⁹

Second, the internal emotional disturbance reported by clinical patients was largely due to external conflicts routinely encountered from living within a culture that, even on a family level, rejected them. In other words, “the neurotic traits ascribed to homosexuals are the same any individual who identifies him- or herself with a persecuted minority.”³⁷⁰

OVERT HOMOSEXUAL by Charles W. Socaridies that homosexuality “is not congenital, but rather an acquired behavioral reaction to some threatening factor in the homosexual’s life” and that “homosexuality is a painful, punishing, decidedly un-“gay” way of life”); Morton Friedman, *The Homosexual’s Value System*, N.Y. TIMES SUNDAY MAGAZINE, Jan 28, 1968, at 15 (setting forth comments of medical doctor about alleged depravity of homosexuals); *Therapy is Found Curing Deviates: Psychiatrist Urges Positive Attitude on Treatment*, N.Y. TIMES, Jan 31, 1965, at 61 (reporting psychiatrist’s claim that he had been successfully curing homosexuality for ten years); Irving Bieber, *Speaking Frankly: Taboo*, N.Y. TIMES SUNDAY MAGAZINE, Aug 23, 1964, at 75 (explaining his mental illness model of homosexuality); Robert C. Doty, *Growth of Overt Homosexuality In City Provokes Wide Concern: Key to Problem Called Medical*, N.Y. TIMES, Dec 17, 1963, at 1 (observing that the presence an openness of homosexuals in Manhattan “has become the subject of growing concern of psychiatrists, religious leaders, and the police;” that reporting that psychiatrists have “overwhelming evidence that homosexuals are created -- generally by ill-adjusted parents -- not born” and therefore “can be prevented and cured.”); Emma Harrison, *Women Deviates Held Increasing: Problem of Homosexuality Found Largely Ignored*, N.Y. TIMES, Dec 11, 1961, at 24 (reporting on talk by psychologist that lesbians also pose a threat to society).

³⁶⁶ See, e.g., Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 U.M.K.C. L. REV. 495, 499-502 (2002) (reporting on the historic absence of sexual minorities and depictions as depraved throughout popular culture and especially in movies).

³⁶⁷ Unidentified N.Y. police officer, *quoted in* D. leitsch, *Police Raid on N.Y. Club Sets Off First Gay Riot*, N.Y. MATTACHINE NEWSLETTER, August 1969 at 21, 23.

³⁶⁸ See, e.g., MCNEILL, *supra* note XX, at 117 (reporting in 1976 that “Only in recent times has any effort been made to study those individuals who live relatively discreet, stable, law-abiding, constructive and socially useful lives as homosexuals.”).

³⁶⁹ Clarence A. Tripp, *Who is a Homosexual?*, 58 SOCIAL PROGRESS 13, 18 (1967).

³⁷⁰ MCNEILL, *supra* note XX, at 115. See also JOHN CAVANAUGH, *COUNSELING THE INVERT* 37 (1960)(concluding that “homosexuality may be a symptom of neurosis or psychosis, but in such cases it represents the individual’s reaction to society or society’s reaction to the individual.”).

Third and finally, focus on homosexual desire or behavior inappropriately ignored the larger psychological complexity of the human mind and personality.³⁷¹

The failure of the mentally ill model to comport with the rigor normally required for establishing scientific standards was brought to light by internal APA dissenters and external pressure that featured “intense activism by gay and lesbian advocates.”³⁷² The APA board of trustees voted on Dec. 15, 1973, to discard its classification of homosexuality as a mental illness.³⁷³ On the same day, the APA passed a resolution urging repeal of laws criminalizing sodomy and encouraging “the enactment of civil rights legislation at the local, state and federal levels that would offer homosexual citizens the same protections guaranteed to others on account of race, creed, color, etc.”³⁷⁴

The APA trustees’ decision to depathologize homosexuality was challenged by “psychiatrists who charged the board with giving in to the political pressures of the gay liberation movement.”³⁷⁵ The trustees’ action withstood a vote of the full APA membership in an unprecedented referendum.³⁷⁶ Science’s turnaround on homosexuality made headlines³⁷⁷ and constituted a major step toward increased understanding of sexual minorities by the courts and in society.³⁷⁸

The APA, however, did not give sexual minorities a clean bill of mental health. Rather, in the DSM-III issued in 1980, the APA adopted the diagnosis of “ego-dystonic homosexuality”³⁷⁹ to describe homosexuals who desire to increase their interest in heterosexual

³⁷¹ Psychologist Evelyn Hooker, for example, noted these shortcomings in the 1961 report she prepared for the New York Council of Churches entitled *Foundations for Christian Family Policy*. Hooker’s conclusions are discussed in MCNEILL, *supra* note XX, at 118-119.

³⁷² Susan Etta Keller, *Crisis of Authority: Medical Rhetoric and Transsexual Identity*, 11 YALE J. OF LAW & FEMINISM 51, 69 (1999). Early lesbian rights activist Del Martin testified at an APA meeting in 1970, for example, that “the psychiatric profession has replaced the Church and the Law as the most destructive force in the life of the homosexual.” TOBIN & WICKER, *supra* note XX, at 60. Martin further chastised the mental health profession for cloaking its conclusions about sexual minorities in the guise of scientific fact when in truth those conclusions were based on “conjectures and rationalizations” and on “the value judgment that heterosexuality, because it is procreative, is the only acceptable form of sexual behavior or lifestyle.” *Id.*

³⁷³ The internal and external political struggles that led the APA to delete its characterization of homosexuality as a pathology in its DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM) are recounted in RUDACILLE, *supra* note XX, at 192-193. These battles included an unprecedented referendum in which the issue was submitted to a vote by the full APA membership, with 58 percent of the 10,000 APA voters affirming the board’s decision. *Id.* at 193. See also William Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOUSTON L. REV. 817, 930-939 (1997)(discussing APA battle).

³⁷⁴ Resolution of APA passed on Dec. 15, 1973, reprinted in WITNESS TO REVOLUTION, *supra* note XX, at 65.

³⁷⁵ MINTON, *supra* note XX, at 219.

³⁷⁶ *Id.* See also RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (rev. ed. 1987).

³⁷⁷ See, e.g., Harold M. Schmeck, *Psychiatrists Approve Change on Homosexuals*, N. Y. TIMES, April 9, 1974, at 12 (reporting on referendum vote); Richard D. Lyons, *Psychiatrics, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES, Dec. 16, 1973, at 1 (reporting on APA trustees original decision).

³⁷⁸ A small percentage of mental health professionals continue to advocate for the disease model of homosexuality. Their positions are presented and critiqued in David B. Cruz, *Controlling Desires: Sexual Orientation, Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1311-1333 (1999).

³⁷⁹ DSM-III 281 (1980).

conduct due to their explicit complaint that their homosexuality constituted an “unwanted and a persistent source of distress.”³⁸⁰ This category implicitly classified sexual orientation as a choice, lending legitimacy to conversion therapy³⁸¹ even though DSM III acknowledged that the success of such therapy was in dispute.³⁸² The category of ego-dystonic homosexuality also subtly re-enforced homosexuals as defective for lack of sufficient coping skills, rather than faulting society’s prejudicial treatment of sexual minorities that caused stress to rise to unmanageable levels.

The APA dropped the ego-dystonic category in its 1987 revisions to DSMIII,³⁸³ but it added the diagnosis of “gender identity disorder (G.I.D.)” Both the DSM-IV, published in 1994, and the most current version, the DSM-TR, issued in 2000, authorize a diagnosis of G.I.D. for adults “preoccupied with their wish to live as a member of the opposite sex,” possibly accompanied by “an intense desire to adopt the social role of the other sex through hormonal or surgical manipulation.”³⁸⁴

The G.I.D. label is now “the diagnosis most frequently assigned to children and adults who fail to conform to socially accepted norms of male and female identity and behavior.”³⁸⁵ On a positive note, this diagnostic category provides a medical classification for transgender persons, opening the door to potential (though rarely available) insurance coverage for treatment including sexual reassignment surgery.³⁸⁶ It also affirms the medical legitimacy of gender variation, elevating its status to “something more than the perverse lifestyle choice that fundamentalist Christians and other critics believe it to be.”³⁸⁷

Less positively, the G.I.D. diagnosis suggests a medically recognized deficiency in transgender and other individuals for failing to conform to gender stereotypes and/or being unable to cope with the stigma of being nonconformist. As one commentator concludes, “It is disingenuous to pretend ...that the continued inclusion of gender variant people in the DSM has not retarded their efforts to be recognized as healthy, functioning members of society.”³⁸⁸ While

³⁸⁰ *Id.* See also RUDACILLE, *supra* note XX, at 193.

³⁸¹ Conversion therapy has as its goal changing homosexuals to heterosexuals. See Barry Yeoman, *Gay No More?*, PSYCHOLOGY TODAY, March/April 1999, at 26 (explaining conversion therapy and controversy surrounding it). “The vast majority of mental-health professionals...view reorientation programs with skepticism and alarm.” *Id.* at 29.

³⁸² DSM-III, *supra* note XX, at 282.

³⁸³ The deletion was reflected in the DSM IIR edition.

³⁸⁴ DSM IV 532, 533 (1994); DSM-TR 576, 577 (2000).

³⁸⁵ RUDACILLE, *supra* note XX, at 193.

³⁸⁶ Some have labeled the potential insurance benefits stemming from G.I.D. as a “red herring,” arguing that insurance coverage is virtually non-existent for treatments most often sought by transgender patients, and contending that gender variant conditions should be considered a medical diagnosis rather than a psychological one to remove the stigma. Dr. Dana Beyer, *quoted in* RUDACILLE, *supra* note XX, at 211 (Dr. Beyer is a retired eye surgeon who underwent male-to female sex reassignment surgery in 2003). See also RUDACILLE, *supra* note XX, at 215 (citing other experts who urge a medical rather than psychological diagnosis, possibly placed in a prestigious medical reference book such as the World Health Organization’s INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES).

³⁸⁷ RUDACILLE, *supra* note XX, at 216.

³⁸⁸ *Id.* at 211.

still not ideal, the finger wagging implicit in G.I.D. poses far less harm to sexual minorities than previous DSM diagnostic categories.³⁸⁹

In the process of de-pathologizing sexual minorities, mental health professionals and other social scientists have generated an impressive body of evidence demonstrating that variations in sexual identity, physicality and orientation represent simple variations in human diversity and are not a threat to society or civilization.³⁹⁰ Social scientists have documented, for example, that sexual minorities demonstrate levels of mental health comparable to their heterosexual counterparts,³⁹¹ enter lasting and rewarding unions,³⁹² make excellent parents³⁹³ and form highly functional, productive, and happy families.³⁹⁴ These extensive and consistent empirical data on sexual minorities resulted in the American Psychological Association's and the American Psychiatric Association's endorsement legally recognized same-sex marriage as a way to support the mental health of sexual minorities and potential benefit society.³⁹⁵ In sum, mental

³⁸⁹ DSM-V will be published in 2010; at present it is unclear whether it will retain the G.I.D. diagnosis. *Id.*

³⁹⁰ As early as the 1950s, psychologist Evelyn Hooker determined that gay men showed no signs of psychopathology based on three state-of-the-art tests used to evaluate mental health. See Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 *JOU. OF PROJECTIVE TECHNIQUES* 18 (1957); Evelyn Hooker, *Male Homosexuality in the Rorschach*, 22 *JOU. OF PROJECTIVE TECHNIQUES* 33 (1958). These and more recent psychological findings are incorporated in the American Psychiatric Association's GAY AND LESBIAN ISSUES, available at www.psych.org/public_info/homose~1/cfm? (last visited May 25, 2005)(hereafter APA GAY AND LESBIAN ISSUES) and the American Psychological Association's RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (JULY 2004), available at www.apa.org/pi/lgbcpolicy/marriage/pdf. See also MINTON, *supra* note XX, at 219-235 (explaining content and impact of Hooker's work).

³⁹¹ Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 (5) *PSYCHOLOGICAL BULLETIN* 674 (2003)(concluding that social disenfranchisement influences mental health); Tori De Angelis, *New Data on Lesbian, Gay and Bisexual Mental Health: New Findings Overturn Previous Beliefs*, 33 *MONITOR ON PSYCHOLOGY*, Feb. 2002, <<http://www.apa.org/monitor/feb02/newdata.html>> and on file with author (summarizing the results of five recent studies documenting strong levels of mental health among sexual minority adults and youth, but also suggesting that continued discrimination fuels depression and stress in this population).

³⁹² American Psychological Association's RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (JULY 2004), available at www.apa.org/pi/lgbcpolicy/marriage/pdf (containing extensive data on same-sex couples); Friedman & Downey, *supra* note XX, at 927.

³⁹³ The American Psychological Association summarized extensive empirical literature and concluded that "not a single study has found children of gay and lesbian parents to be disadvantages in any significant respect compared to children of heterosexual parents. APA, LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS 8 (1995). See also American Psychological Association's RESOLUTION ON SEXUAL ORIENTATION, PARENTS AND CHILDREN (July 2004), available at www.apa.org/pi/lgbcpolicy/parentschildren/pdf; Jennifer L. Wainwright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 *CHILD DEVELOPMENT* 1886, 1895 (2004) (concluding from first national study of its kind "that on nearly all of a large array of variables related to school and personal adjustment, adolescents with same-sex parents did not differ significantly from a matched group of adolescents living with opposite sex parents."); Charlotte J. Patterson, *Children of Lesbian and Gay Parents: Research, Law, and Policy*, in *CHILDREN, SOCIAL SCIENCE AND THE LAW* 176 (Bette L. Bottoms et al. eds. 2002).

³⁹⁴ See e.g. American Psychological Association's RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (JULY 2004), available at www.apa.org/pi/lgbcpolicy/marriage/pdf (containing extensive data on same-sex couples); American Psychological Association's RESOLUTION ON SEXUAL ORIENTATION, PARENTS AND CHILDREN (July 2004), available at www.apa.org/pi/lgbcpolicy/parentschildren/pdf.

³⁹⁵ The American Psychological Association's RESOLUTION ON SEXUAL ORIENTATION AND MARRIAGE (JULY 2004), available at www.apa.org/pi/lgbcpolicy/marriage/pdf, was approved in July 2004; the American Psychiatric Association followed suite in July 2005. See [need cite after resolution passes]

health professionals' original condemnation of homosexuality has given way to the position that "homosexuality...implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."³⁹⁶ These scientific findings have greatly influenced the courts in this country.³⁹⁷

Modern psychiatry has also rejected the view that sexual minorities should be encourage or forced to "convert" to heterosexuality.³⁹⁸ Contrary to the belief advocated by conservative religious groups,³⁹⁹ the American Psychological Association has concluded that "There is no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation."⁴⁰⁰ In addition, mental health experts have long recognized that such therapy significant harms sexual minorities by increasing the sense of isolation, anxiety and depression accompanying social disapproval.⁴⁰¹ The theory that sexual minorities should be "cured" because they compromise society's health and wellbeing has also been rejected by the vast majority of mental health professionals. As one therapist explained:

[I]t is highly questionable whether any sexual behavior exercised between consenting adults is of any real social importance. From a psychiatric point of view, the thing that counts seems to be the efficiency with which an individual functions in life – his usefulness, his enjoyment, and the success of his human interactions. If society has an interest here, it is certainly in the maintenance of high personal efficiency and low neurotic effects. In terms of this ideal, the particular sexual responses of an individual hardly seem to be of any major concern.⁴⁰²

³⁹⁶ American Psychiatric Association, Homosexuality and Civil Rights Position Statement (December 1973), available at www.psych.org/edu/other-res/lib_archives/197310.pdf and on file with author

³⁹⁷ See Falk, *supra* note XX. Social science data that positively portrays non-heterosexual parents has few - but very vocal - critics. See e.g., Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOCIOLOGICAL REV. 159 (2001).

³⁹⁸ Yeoman, *supra* note XX, at 29.

³⁹⁹ Knauer, *supra* note XX, at 458-463 (describing nationwide campaign by religious groups to publicize the "ex-gay movement"). Not all voices within Christianity have accepted this position. See, e.g., Archbishop Rembert Weakland, *Who is our Neighbor?*, THE CATHOLIC HERALD, July 19, 1980, *reprinted in* VOICES OF HOPE, *supra* note XX, at 21 (offering opinion by Catholic theologian that "Experience shows that very few, even with the best therapists, are capable of changing their sexual orientation.").

⁴⁰⁰ APA Position Statement on Homosexuality (December 1992), in APA GAY AND LESBIAN ISSUES, *supra* note XX. See also Yeoman, *supra* note XX, at 70 (noting that two of the founders of "ex-gay" Christian organization Exodus International left the organization after falling in love with one another); *Ex-Gay Leader Disciplined for Gay Bar Visit*, CHRISTIANITYTODAY, Oct. 6, 2000, available at www.christianitytoday.com/ct/2000/140/53.0.html (reporting on Exodus North America board chairman John Paulk, described as "the ex-gay movement's most visible leader," who exercised a "serious lapse in judgment" by visiting a gay bar and then lying about it).

⁴⁰¹ Yeoman, *supra* note XX, at 29 (stating psychologists' belief that trying to force sexual minorities "into a mold that doesn't really fit," leads to "depression, addition, even suicide."); Tripp, *supra* note XX, at 18-19 (1967)(offering same opinion almost 40 years ago).

⁴⁰² Tripp, *supra* note XX, at 21.

The mental health profession's evolving views about sexual minorities have been widely covered by the media.⁴⁰³ This stream of factually correct information provides numerous triggering events that prompt individuals and institutions to engage in CSRA on stereotypes that falsely link sexual minorities with mental illness, child molestation, and deviance that harms society. Ultimately, this CSRA may cause fictions to be replaced with fact, resulting in positive transformation of meaning schemes and meaning perspectives about sexual minorities. This unraveling of the assumptions underlying behavior-identity compression will lead to its demise.

3. Physiological Evidence and the Nature/Nurture Debate

*We have no doubt that properly co-ordinated research into the aetiology of homosexuality would have profitable results.*⁴⁰⁴

Many early sexologists posited that sexual orientation was biologically determined, that it constituted "a natural, if not normal, biological variation,"⁴⁰⁵ and that sexual minorities "should be accorded equal social and legal treatment."⁴⁰⁶ In his pioneering 1886 work on sexuality titled *Psychopathia sexualis*,⁴⁰⁷ for example, physician and psychiatry professor Richard von Krafft-Ebing concurred with Magnus Hirschfeld, Havelock Ellis and others who believed that homosexuality was biologically based.⁴⁰⁸

⁴⁰³ [Add post-July 05 news accts of APA x 2 endorsement of same sex marriage] See, e.g., Daniel Goleman, *Studies Find No Disadvantage In Growing Up in a Gay Home; Childhood Teasing may be the Worst Burden*, N.Y. TIMES, Dec. 2, 1992, at C14; Jane R. Brody, *Study Finds Some Homosexuals Are Happier Than Heterosexuals; Most Comprehensive Look* N.Y. TIMES, Jul7 9, 1978, at 22 (reporting that "A major new study on homosexuality concludes that many homosexual men and women lead stable lives without frenetic sexual activity and that some are considerably happier and better adjusted than heterosexuals as a whole.); Peter Kihss, 'A New Study Urges Homosexuals to Speak Out; Psychiatrists' Vote Cited', N.Y. TIMES, May 19, 1974, at 49 (reporting that "A new study of homosexual men in the United States, the Netherlands and Denmark has found their "psychological well being" as good as other men's and urges that homosexuals 'end their tradition of silence' to fight discrimination.").

⁴⁰⁴ REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION ¶214 (1957). This opinion was offered in a document known as the WOLFENDON REPORT, a detailed study of law and homosexuality which led to the decriminalization of private consensual adult sexual acts in Great Britain.

⁴⁰⁵ Knauer, *supra* note XX, at 410 (discussing among others the work of German physician Karl Westphal who in 1870 used the term "contrary sexual feelings" in an article credited with being the first medical piece on homosexuality).

⁴⁰⁶ MINTON, *supra* note XX, at 11 (discussing work of Karl Heinrich Ulrich and Karl Maria Kertbeny in the 1860s).

⁴⁰⁷ RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-FORENSIC STUDY* (1886)(Harry E. Wedeck trans. 1965).

⁴⁰⁸ MINTON, *supra* note XX, at 12; *PSYCHOPATHIA SEXUALIS*, *supra* note XX, at 291 (opining that "the various grades of congenital sexual inversion represent various grades of sexual anomaly inherited by birth," greatly influenced by "the law of progressive heredity."). See also *Id.* at 285 – 297 (reviewing psychological and physiological theories for origin of homosexuality); MAGNUS HIRSCHFELD, *THE HOMOSEXUALITY OF MEN AND WOMEN* (Michael A. Lombardi-Nash trans. 2000)(presenting homosexuality from both "biological occurrence" and "sociological occurrence" perspectives and advocating for the end of victimization, persecution and prosecution of homosexual men and women); JENNIFER TERRY: *AN AMERICAN OBSESSION: SCIENCE, MEDICINE, AND HOMOSEXUALITY IN MODERN SOCIETY* 36, 45 (1999); LUCY BLAND & LAURA DOAN, *SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE* (1998)(providing key excerpts from the writings of Ellis, Hirschfeld, Krafft-Ebing and others on homosexuality, bisexuality, transsexuality and related topics); Knauer, *supra* note XX, at 413-418 (discussing work of early sexologists).

Although *Psychopathis sexualis* “became a classic far beyond professional circles” immediately after publication,⁴⁰⁹ its biologic theory of sexual minority status was not widely accepted. Rather, as discussed in the preceding section, scientists gravitated toward a psychosocial explanation for persons who deviated from heteronormativity.⁴¹⁰ Thus, scientists’ historic condemnation of sexual minorities is premised on the belief “that heterosexuality is the *biologic* norm, and that unless interfered with all individuals are heterosexuals.”⁴¹¹

Scientists’ rejection of a purely biologic determinant for sexual orientation raised a major and yet unresolved question: is the alleged interference on the path to heterosexuality caused by a contributing or determinative biologic component (the “nature” argument), environmental factors (the “nurture” argument), or a combination of nature and nurture?⁴¹² This dilemma led early medical sex researchers to distinguish “between the congenital (passive) male homosexual and the acquired (active) male homosexual,”⁴¹³ and to argue that biological determinants like a high level of female hormones were present in the former and not in the latter.⁴¹⁴

Scientific discoveries regarding possible physiological mechanisms or components of sexual orientation over the past few decades offer interesting insights on, but no firm resolution of, the nature versus nurture debate.⁴¹⁵ Scientists have explored, for example, the possible relationship between biology and sexual orientation by examining humans’ genetic makeup,⁴¹⁶

⁴⁰⁹ Ernest van den Hagg, *Introduction*, in *PSYCHOPATHIA SEXUALIS*, *supra* note XX, at 8.

⁴¹⁰ MINTON, *supra* note XX, at 12.

⁴¹¹ IRVING BIEBER, *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* 5 (1962). Intersexed individuals have similarly suffered from a biological model that demands defining a person as either male or female. See Kate Haas, *Who Will Make Room for the Intersexed?*, 30 *AM. J. L. & MED.* 41 (2004); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices*, 40 *HARVARD CIV. RTS.-CIV. LIB. L. REV.* 71 (2005); Kate Haas, *Who Will Make Room for the Intersexed*, 30 *AM. J. L. & MED.* 41 (2004); Greenberg, *supra* note XX.

⁴¹² See, e.g., BERGLER, *supra* note XX, at 4 (reporting that “all psychoanalytic theories assume that adult homosexuality is psychopathologic and assign different weights to constitutional and experiential components.”); MINTON, *supra* note XX, at 41-46 (discussing *The Sex Variants Study* published by Psychiatrist George W. Henry in 1941 that presented both genetic and environmental theories present in the medical literature).

⁴¹³ MINTON, *supra* note XX, at 164 and n. 10 at 310-311.

⁴¹⁴ Proponents of this theory included physician Clifford A. Wright who published extensively on the topic in the late 1930s. *Id.* Opponents included famed sexologist Dr. Alfred Kinsey. *Id.* at 164-169.

⁴¹⁵ See generally CHANDLER BURR, *THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (1997).

⁴¹⁶ Brian S. Mustanski et al., *A Genomewide Scan of Male Sexual Orientation*, *HUMAN GENETICS*, March 2005, at 272, 276-277 (reporting identification of several genetic regions possibly influencing homosexuality following scan of entire human genetic makeup); Kenneth S. Kendler, *Sexual Orientation in a U.S. National Sample of Twin and Nontwin Sibling Pairs*, 157 *AM. JOURNAL OF PSYCHIATRY* 1843, 1845 (Nov. 2000)(reporting “that “genetic factors may provide an important influence on sexual orientation); Stella Hu et al., *Linkage Between Sexual Orientation and Chromosome Xq28 in Males but not in Females*, 11 *NATURE GENETICS* 248 (Nov. 1995)(concluding that the Xq28 region likely contains a locus that influences sexual orientation in men); Dean H. Hamer et al., *The Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 *SCIENCE* 321 (July 16, 1993)(finding genetic trail for sexual orientation); J. Michael Bailey et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 *ARCH GENERAL PSYCHIATRY* 217, 221 (March 1993)(concluding from study of twins that “although we found evidence that female sexual orientation is at least somewhat heritable, the question of what, precisely, is inherited remains.”); J. Michael Bailey et al., *A Genetic Study of Male Sexual Orientation*, 48 *ARCH GENERAL PSYCHIATRY* 1089, 1093 (Dec. 1991)(concluding from studies of twins that genetic factors play a role in determining sexual orientation but not resolving issue of magnitude of genetic influence). But see Jennifer Kabbany, *Scientific Studies Fail to Corroborate “Gay Gene” Theory: Homosexual Activists Split in Issue*,

genetic programming,⁴¹⁷ brain structure,⁴¹⁸ pre-natal exposure to male hormones,⁴¹⁹ birth order within a male sibling set,⁴²⁰ preference for using the left or the right hand,⁴²¹ startle responses,⁴²² the length of fingers,⁴²³ gay men's reactions to the odor of testosterone compared to estrogen based compounds,⁴²⁴ and the structure⁴²⁵ and effectiveness of ears.⁴²⁶ Scientific studies have also suggested a biologic component for transsexualism.⁴²⁷ The nature argument has been

WASHINGTON TIMES, Aug. 1, 2000, at A2; George Rice et al., *Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28*, 284 SCIENCE 665 (April 23, 1999)(reporting results that “do not support an X-linked gene underlying male homosexuality.”). A gene that affects sexual orientation in male and female fruit flies has also been identified. Barry J. Dickson & Ebru Demir, *fruitless Splicing Specifies Male Courtship Behavior in Drosophila*, CELL, June 3, 2005, at 785.

⁴¹⁷ Sven Bockland et al., NEW SCIENTIST, May 10, 2003 at 42 (finding that mothers of gay sons were much more likely to have one, rather than the other, of their two X chromosomes rendered inactive through the chemical markers - i.e. “methyl groups” – that shut down genes).

⁴¹⁸ Vittorio Gallo and Phyllis R. Robinson, *Is there a “Homosexual Brain?”*, THE GAY & LESBIAN REVIEW WORLDWIDE, Jan. 31, 2000, at 12 (summarizing existing studies, finding them inconclusive, and suggesting need for additional studies “based on brain function and physiology” that consider “the complex interactions occurring between the brain and the environment.”); SIMON LEVAY, THE SEXUAL BRAIN (1993)(placing brain studies in context of other evidence suggesting biological components of sexual orientation and behavior); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991)(finding certain regions of the brain more than twice as large in heterosexual men than homosexual men).

⁴¹⁹ Heino F.L. Meyer-Bahlburg et al., *Prenatal Estrogens and the Development of Homosexual Orientation*, 31 DEVELOPMENTAL PSYCHOLOGY 12 (1995)(analyzing sexual orientation of women with prenatal exposure to nonsteroidal synthetic estrogen and concluding hormones may play a role in development of orientation).

⁴²⁰ James M. Cantor, et al., *How Many Gay Men Owe their Sexual Orientation to Fraternal Birth Order?*, ARCHIVES OF SEXUAL BEHAVIOR, Feb. 2002, at 63, 67-68 (finding that boys with 2.5 older brothers are twice as likely to be gay as those with no older brothers, and that a boy with four older brothers is three times more likely to be gay); Alison Motluk, *The Big Brother Effect*, NEW SCIENTIST, March 29, 2003, at 44 (summarizing science to date).

⁴²¹ Martin L. Lalumiere et al., *Sexual Orientation and Handedness in Men and Women: A Meta-Analysis*, 126 PSYCHOLOGICAL BULLETIN 575 (2000)(analyzing twenty previous studies showing that high percentage of homosexual men and women are left handed, and concluding that neurodevelopmental mechanisms underlie sexual orientation).

⁴²² Qazi Rahman, *Sexual Orientation-Related Differences in Prepulse Inhibition of the Human Startle Response*, 117 BEHAVIORAL NEUROSCIENCE 1096 (2003)(finding that lesbian women show significantly masculinized patterns of hardwired startle reactions compared to heterosexual women).

⁴²³ Terrance J. Williams et al., *Finger-Length Ratios and Sexual Orientation*, SCIENCE, March 30, 2000 at 455 (finding correlation between prenatal exposure to androgens, finger length, and sexual orientation).

⁴²⁴ Ivanka Savic et al., *Brain Response to Putative Pheromones in Homosexual Men*, 102 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCE (PNAS) 7356, 7360 (May 17, 2005)(finding that brain's reaction to compound was determined by sexual orientation rather than biologic sex). See also Nicholas Wade, *For Gay Men, an Attraction to a Different Kind of Scent*, N.Y. TIMES, May 10, 2005 at A1. (explaining results in lay person's terms).

⁴²⁵ Dennis McFadden and Edward G. Pasanen, *Spontaneous Otoacoustic Emissions in Heterosexuals, Homosexuals, and Bisexuals*, JOURNAL OF ACOUSTICAL SOC. AM., April 1999, at 2403 (finding cochleas of homosexual and bisexual females partially masculinized).

⁴²⁶ Dennis McFadden and Craig A. Champlin, *Comparison of Auditory Evoked Potentials in Heterosexual, Homosexual, and Bisexual Males and Females*, JOURNAL OF ASS'N RESEARCH IN OTOLARYNGOLOGY, August 2000, at 89 (finding significant differences in hearing responses based on sexual orientation and positing that homosexuals' prenatal exposure to higher level of androgens may account for the differences).

⁴²⁷ R. Green, *Biological Bases of Gender Identity Disorder*, 74(6) JOURNAL OF NEUROLOGY, NEUROSURGERY & PSYCHIATRY 836 (June 2003)(discussing common patterns in transsexuals' hand use preference, fingerprint pattern, family tree patterns, and sibling order).

bolstered by the same-sex partnering of humans across cultures⁴²⁸ and the “ubiquitous” same sex behaviors among non-human animals.⁴²⁹ In some quarters, scientific dialogue has move past the issue of whether the so-called “gay gene” (or biological basis) exists to theorizing on how such a gene survived among a population that did not generally procreate.⁴³⁰

Many of these studies suggest that biology plays a role, and perhaps an important one, in sexual orientation and identity. Nonetheless, the scientists who have produced this empirical data caution that “strictly biological, genetic, social or familial explanations rarely explain how each of us develops a particular sexual orientation.”⁴³¹ Ambiguity in scientific results has caused leading scientists to suggest that significant additional study is needed before the “nature” component of sexual orientation is fully understood.⁴³² Not surprisingly, Christian and political conservatives are highly critical of studies supporting the nature theory.⁴³³

Studies that support (and those that fail to identify) a biological component of sexual orientation are widely publicized.⁴³⁴ Regardless of science’s conclusions on the nature-nurture debate, public assimilation of this scientific information may trigger CSRA on the assumptions

⁴²⁸ THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR (EVELYN BLACKWOOD, ED. 1986).

⁴²⁹ BRUCE BAGEMHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999)(reviewing scientific papers on more than 450 species throughout the animal kingdom and concluding that homosexuality is ubiquitous); Charles E. Roselli et al., *Sexual Partner Preference, Hypothalamic Morphology and Aromatase in Rams*, PHYSIOLOGY AND BEHAVIOR, Nov. 15, 2004, at 233 (finding that as many as ten percent of male rams exhibit preference for male sexual partner and concluding that brain structure of male-oriented rams are not completely masculinized, possible due to prenatal hormonal exposure); Paul V. Vasey, *Same-Sex Sexual Partner Preference in Hormonally and Neurologically Unmanipulated Animals*, 13 ANN. REV. OF SEX RESEARCH 141 (2002)(reviewing research to date and concluding that not all homosexual behavior in animals can be explained by social conventions such as dominance or submissiveness).

⁴³⁰ Andrea Camperio-Ciani et al., *Evidence for Maternally Inherited Factors Favouring Male Homosexuality and Promoting Female Fecundity*, 271 PROCEEDINGS OF THE ROYAL SOCIETY: BIOLOGICAL SCIENCES 2217 (2004)(finding that women tend to have more children when they inherit the yet unspecified genetic factor linked to homosexuality and thus compensate the gene pool for the lack of offspring fathered by gay men).

⁴³¹ Tori DeAngelis, *Our Erotic Personalities are as Unique as our Fingerprints: Research Debunks Long-held Notions About Sexual Orientation*, 31 MONITOR ON PSYCHOLOGY, April 2001, available at <http://www.apa.org/monitor/apr01/erotic.html>.

⁴³² Brian S. Mustanski et al., *A Critical Review of Recent Biological Research on Human Sexual Orientation*, 13 ANN. REV. OF SEX RESEARCH 89 (2002).

⁴³³ See, e.g., Stanton L. Jones & Mark A. Yarhouse, *The Incredibly Shrinking Gay Gene*, CHRISTIANITY TODAY, April 1999, at 53 (denouncing efforts to link sexual orientation and genetic predisposition).

⁴³⁴ See, e.g., Elisabeth Rosenthal, *For Fruit Flies, Gene Shift Tilts Sex Orientation*, N.Y. TIMES, June 3, 2005, at A1; Jennifer Warner, *Genes Linked with Male Sexual Orientation Found*, FOX NEWS, Jan. 28, 2005, at <http://www.foxnews.com/story/0,2933,145754,00.htm>; Wade, *supra* note XX (reporting on scent research); Eric Vilain, *Gender Bender: Intersexual? Transsexual? Male, Female Aren't So Easy to Define*, L.A. TIMES, April 19, 2004, at B 11 (presenting commentary by chief of medical genetics at UCLA medical school about difficulty in determining appropriate sex for intersexed babies and arguing that sex and sexual orientation pose complicated genetic questions); Judy Foreman, *The Biological Basis of Homosexuality*, BOSTON GLOBE, Dec. 2, 2003, at C3 (Foreman’s article was also carried in the L.A. TIMES on Dec. 8, 2003 at F8); Mary Challender, *Why do we Feel Male or Female? Sexual Identity Rooted in Biology*, DES MOINES REGISTER, Nov. 17, 2003, at 1E (reporting on scientific study showing that “sexual identity is rooted in every person’s biology before birth and springs from a variation in our individual genes.”); Mark Schoofs, *Gene Ocide: Can Scientists “Cure” Homosexuality by Altering DNA?*, THE VILLAGE VOICE, July 1, 1997, at 40 (reporting on possible “geneocide” of gay genes); Chandler Burr, *Homosexuality and Biology*. ATLANTIC MONTHLY, March 1993, at 47(summarizing scientific research).

about sexual orientation and choice that currently support behavior-identity compression.⁴³⁵ A comparison of public views in Canada, Great Britain, and the U.S. illustrates this point.

In Canada and Great Britain, fifty-four and fifty-five percent respectively of the public believe that homosexuality is “something a person is born with.”⁴³⁶ In the U.S., only thirty-seven percent believe that nature is the predominant factor in sexual orientation.⁴³⁷ The significantly greater legal protections available to sexual minorities in Canada⁴³⁸ and Great Britain⁴³⁹ and more positive attitudes towards gay rights in general⁴⁴⁰ compared to the U.S. may be directly linked to the Canadian and English belief that sexual orientation is not a volitional condition, and thus not appropriate grounds for discrimination.

In this country, scientific confirmation of a biological etiology would support the argument that sexual orientation is an immutable characteristic, thus entitling sexual minorities to the highest levels of constitutional scrutiny when challenging governmental laws and policies that disenfranchise them.⁴⁴¹ Of course, even if a direct biological source were discovered, some would find reason to continue to discriminate against sexual minorities. The worst case scenario is that a biological or genetic marker for homosexuality will serve as a socially and medically

⁴³⁵ Medical discoveries and other information related to intersexed and transgender persons is also widely publicized. See Mike Lafferty, *Views Change on Deciding Gender: More Choices Await Babies Whose Sex is Unclear at Birth*, COLUMBUS DISPATCH, Feb. 19, 2005, at 3A (discussing changed medical consensus on immediate surgery for intersexed babies); Mireya Navarro, *When Gender Isn't a Given*, N.Y. TIMES, Sept. 19, 2004, at 9-1 (discussing pressure from parents to immediately assign a sex to intersexed babies and medical profession's increasing reluctance to do so); John Cloud, *His Name is Aurora*, TIME, Sept. 25, 2000, at 90 (explaining why parents agreed to request from their six-year old son to be treated as a female and the ensuing custody battle between the parents and the state).

⁴³⁶ Josephine Mazzuca, *Origins of Homosexuality? Britons, Canadians Say "Nature,"* GALLUP POLL NEWS SERVICE, Nov. 2, 2004, at <http://www.gallup.com/poll/content/?ci=13561&pg=1> and on file with author.

⁴³⁷ *Id.* See also David W. Moore, *Modest Rebound in Public Acceptance of Homosexuals: Public Remains Divided on Cause of Homosexuality*, GALLUP POLL NEWS SERVICE, May 20, 2004, at <http://www.gallup.com/poll/content/?ci=11755&pg=1> and on file with author.

⁴³⁸ See Miriam Smith, *The Politics of Same-Sex Marriage in Canada and in the United States*, PS:POLITICAL SCIENCE AND POLITICS ONLINE 225, 225 (April 2005) <www.apsanet.org/imgtest/PSApr05Smith.pdf> (contrasting the extensive employment protections and family rights available to sexual minorities in Canada compared to the U.S.).

⁴³⁹ Effective Dec. 6, 2005, the United Kingdom's Civil Partnership Act of 2004 provides homosexual couples in England, Wales, Scotland and Northern Ireland with many of the legal protections of heterosexual marriage. See Carola Towle, *The Civil Partnership Bill will Present a Great Leap Forward Once it Becomes Law*, THE INDEPENDENT (LONDON), Oct. 28, 2004, at 3 (explaining benefits of new law); Social change and the Employment Equality (Sexual Orientation) Regulations of 2003) have greatly opened up employment opportunities in the UK for sexual minorities. See Cathryn Janes, *Office Hours: Coming Out in Favour – Sexuality Used to be a Secret in the Workplace but a new survey celebrates the UK's Most Gay Friendly Firms*, GUARDIAN (LONDON), Jan. 17, 2005, at Office Hours Pages 4. The full text of the lengthy Civil Partnership Act is available at www.opsi.gov.uk/acts/acts2004/20040033.htm (last visited June 8, 2005).

⁴⁴⁰ Heather Mason Kiefer, *Public Opinion Favors Gay Rights in Britain, Canada*, Gallup Poll News Service, May 24, 2005, at <http://www.gallup.com/poll/content/?ci=16456&pg=1> and on file with author.

⁴⁴¹ Dan Brook et al., *Is Sexual Orientation Immutable? Presenting Scientific Evidence in Litigation to Gain Strict Scrutiny*, 27 FORDHAM URBAN L. J. 348 (1999); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 517 (1994).

approved basis for altering or aborting such “defective” fetuses⁴⁴² or for implementing social policy based on the “natural distinctions” between sexual minorities and other individuals.⁴⁴³ Political pressure on social and medical scientists to avoid research about sexual minorities,⁴⁴⁴ significant cuts in public funding for scientific research⁴⁴⁵ and the disregard and misuse of scientific data by the federal government⁴⁴⁶ also pose serious obstacles to the development of scientific data on sexuality and sexual identity. The Christian Right’s creation and distribution of “scientific” data about homosexuality is similarly troubling.⁴⁴⁷

Despite these obstacles and concerns, scientific curiosity about sexuality in general and sexual minorities in particular will continue to generate scientifically sound empirical data in this country and around the world.⁴⁴⁸ These scientific studies will increase our understanding of

⁴⁴² Previous efforts to “improve” the U.S. gene pool resulted in the involuntary sterilization of mentally impaired persons. Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y. LAW SCHOOL L. REV. 537, 542-543 (2004). See also D.L. Gabard, HOMOSEXUALITY AND THE HUMAN GENOME PROJECT, 37 JOURNAL OF HOMOSEXUALITY 25 (1999); Schoofs, *supra* note XX.; Timothy F. Murphy, *Abortion and the Ethics of Genetic Sexual Orientation Research*, 4 Cambridge Quarterly of HealthCare Ethics 340 (1995). “Conversely and ironically, those who would like to cure our society of homosexual disruption may find that the therapeutic method – namely, abortion – is just as morally repugnant as the disease.” Ted Peters, *On the Gay Gene: Back to Original Sin Again?*, 33 DIALOG 30, 33 (1994). Further irony is perhaps found in the possibility that the tendency towards religiosity is also of genetic origin. DEAN HAMER, *THE GOD GENE: HOW FAITH IS HARD-WIRED INTO OUR GENES* (2004).

⁴⁴³ Dorothy Nelkin, *A Brief History of the Political Work of Genetics*, 42 JURIMETRICS 121, 123 (2002). Nelkin advises that scientifically identified “natural distinctions” were previously used to support reproductive control, limit immigration, and perpetuate racial stereotypes. *Id.* at 123-124. Based on this history, Nelkin cautions against use of “stereotypes and biases [to] frame the interpretation, use and management of genetic information.” *Id.* at 130. (bracketed word supplied).

⁴⁴⁴ Benedict Carey, *Long After Kinsey, Only the Brave Study Sex*, N.Y. TIMES, Nov. 9, 2004, at F1 (stating that “Americans ambivalence about the scientific study of sexuality” has remained constant since Kinsey’s work in the 1940s and that in recent years religious groups such as the Traditional Values Coalition have been especially vocal critics); Erica Goode, *Certain Words Can Trip Up AIDS Grants, Scientists Say*, N.Y. TIMES, April 18, 2003, at A10 (reporting on National Institute of Health’s warning to scientists to avoid using “gay,” “homosexual” and “transgender” in grant applications because conservative members of Congress find such research objectionable); Jocelyn Kaiser, *Studies of Gay Men, Prostitutes Come Under Scrutiny*, 300 SCIENCE 403, 403 (2003)(same).

⁴⁴⁵ See, e.g., Robert Pear, *Congress Trims Money for Science Agency*, N.Y. TIMES, NOV. 30, 2004, at A16 (reporting \$105 million reduction in National Science Foundation Budget).

⁴⁴⁶ See, e.g., UNION OF CONCERN SCIENTISTS, *RESTORING SCIENTIFIC INTEGRITY* (2004)(asserting in detailed report that Bush administration had misrepresented scientific data on numerous issues). The statement of concern circulated by the Union has been signed by more than six thousand scientists, including many National Medal of Science winners and Nobel Laureates. The Union’s report, its statement of concern and list of signators is available at www.ucsusa.org/global_environment/rsi/index.cfm (last visited May 25, 2005)..

⁴⁴⁷ Rimmerman, *supra* note XX, at 134-135 (discussing work of Family Research Institute).

⁴⁴⁸ Some scientific studies of sexual orientation and gender fall under the umbrella of the Human Genome Project, an international research efforts to analyze the structure of human DNA and to sequence the estimated 3 billion chemical base pairs and more than 20,000 genes in the human body. The basic mapping concluded in 2003 but the analyses of the data continues. Extensive information about the project is provided at the U.S. Department of Energy Office of Science’s Human Genome Program website located at http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml (last visited June 14, 2005). This project has greatly increased “the possibilities of tension between religion and science” because “cracking the human genetic code” may ultimately empower humans to create “human beings in their own image, rather than [in] the image of God.” David Briggs, *In Whose Image? Brave New World of Genetic Mapping*, PLAIN DEALER, Aug. 26, 2000, at E1 (bracketed word supplied).

humanity, and likely provide solid evidence for the argument that diversity in human sexual behavior and identity are naturally occurring and harmless (and perhaps even beneficial) to society. As previously noted, this type of factual information, generated by credible sources, helps trigger transformative learning about sexual minorities – both within scientific communities and among the general public - and further undermines the utility of behavior-identity compression as a tool for rationalizing discrimination against sexual minorities.

V. Conclusion: Enlightenment Redux

*The promise of democracy is fulfilled by minority rights, and equal justice under the rule of law, and an inclusive society in which every person belongs.*⁴⁴⁹

Enlightenment occurs when people move from an emotional and mystical view of the world to one grounded in science and fact. That exactly describes the ongoing transformative learning about sexual minorities in this country. As long-time activist Evan Wolfson observed, “Ultimately, hearts and minds open. But it’s not pretty and it’s not quick.”⁴⁵⁰

While voices condemning sexual minorities remain shrill, the sheer volume of countervailing, accurate information about sexual minorities being broadcast throughout this country - and indeed around the world - bodes well for transformative learning that leads to equality. In this respect I cannot help but contrast my year-long journey that produced this article with Professor Rivera’s four year struggle to complete her groundbreaking tome on the legal position of homosexual persons in the mid-to-late 1970s.⁴⁵¹

Professor Rivera faced major challenges in her (mostly manual) efforts to locate legal and other primary research materials involving sexual minorities; she also encountered uncooperative if not hostile attitudes from those who possessed such materials.⁴⁵² My (mostly electronic) research yielded a deluge of material covering every aspect of sexual minority’s struggle for equality and the movements within law, religion, science and society that seek to advance and those which seek to repress this emancipating effort. Every organization and individual contacted cooperated fully without questioning my need for, or ultimate use of, such materials. Our radically disparate experiences demonstrate how sexual minorities have moved from the closet to center stage in less than three decades.

⁴⁴⁹ President George W. Bush, quoted in White House Press Release, *President Discusses Freedom and Democracy in Latvia*, at <http://www.whitehouse.gov/news/releases/2005/05/print/20050507-8.html> (May 7, 2005). Commenting on the U.S. experience during his speech commemorating the 60th anniversary of the end of World War II, Bush opined that “the only ways we found to rise above the injustices of history was to reject segregation, to move beyond mere tolerance, and to affirm the brotherhood of everyone in our land.” *Id.* One could validly argue that the president’s use of past tense in this sentence is a bit premature.

⁴⁵⁰ Evan Wolfson, leader of the advocacy group Freedom to Marry, *quoted in* Stevenson Swanson, *In Other States, Opposition Solidifies*, CHICAGO TRIBUNE, May 17, 2005, at C1.

⁴⁵¹ Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1978-1979).

⁴⁵² *Id.* at 804-805; Rhonda R. Rivera, *Our Straight Laced Judges: Twenty Years Later*, 50 HASTINGS L. J. 1179, 1180-1181(1999).

Social movements are powerful facilitators of the CSRA that produces broad-based transformation of perspectives.⁴⁵³ It would be foolhardy, of course, to predict that the CSRA spurred by increased visibility of sexual minorities will continue on a steady course until equality is achieved. Many obstacles remain, as the prejudice that transformative learning seeks to eradicate has been hammered into the public psyche through decades of behavior-identity compression.⁴⁵⁴ Fueled by myths and misinformation, this prejudice anchors the power and economic success of conservative religious and political leaders who have no incentive to concede or compromise on the civil rights involved.⁴⁵⁵ But in a country where presidential and other important elections are decided by a percentage point or two, one not need convince the entire populace that equality for sexual minorities is appropriate: 51% will often suffice.

Dealing with the emotional and political fall out from the current conservative crusade proves tiresome, as it requires repeatedly confronting the many myths and stereotypes that have fueled behavior-identity compression for years. The battle is exhausting, yet at times exhilarating, because the conflict (and the news media's apparent fascination with it) provides a tremendous opportunity to inspire transformative learning in individuals, communities, and institutions. When one considers the small number of sexual minorities in this country⁴⁵⁶ and democracy's tendency to inflict the tyranny of the majority on the minority, the visibility, power and voice accompanying the anti-gay crusade must be appreciated and fully utilized.

In the end, personal relationships may prove the strongest instigators of positive transformative learning about sexual minorities. A few years ago, I predicted that "the more aware the public becomes aware about the realities of lives lived by their homosexual neighbors, the more likely the general populace is to perceive this segment of the population not as a threat, but simply as a minor variation of mainstream humanity."⁴⁵⁷ I further suggested that "as enlightened familiarity replaces fear born of ignorance, the evolutionary process will continue towards a truly tolerant, and thus truly free, society."⁴⁵⁸

For the reasons articulated in this article, these words still ring true, even in today's neo-conservative atmosphere. Despite efforts to repress it, CSRA and the transformative learning

⁴⁵³ MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note XX, at 188.

⁴⁵⁴ The prejudice also appears entrenched in our legal system. See Symposium: *Homophobia in the Halls of Justice*, 11 AM.U.J. GENDER SOC. POL'Y & L. 13 (2004).

⁴⁵⁵ See, e.g., Ralph Blumenthal, *Texas Governor Draws Criticism for a Bill-Signing Event at an Evangelical School*, N.Y. TIMES, June 6, 2005, at A12 (reporting on Republican Rick Perry's signing at a Christian academy of a ballot measure containing a proposed state constitutional amendment banning same-sex marriage; the signing occurred "on a dais before a cheering crowd of close to 1,000 churchgoers and leaders of evangelical ministries" even though Perry's signature was not needed to submit the matter to voters).

⁴⁵⁶ Measuring the number of sexual minorities in a given population has proven difficult due to the inconsistency in the terminology used to define various categories of sexual minorities and in wording questions in a manner that evoke accurate responses. LEVAY, *supra* note XX, at 60 – 65 (reporting that the ten percent figure originally issued by Kinsey has been widely criticized, and that the most studies report an incidence of homosexuality of about one to three percent). See also Milton Diamond, *Homosexuality and Bisexuality in Different Populations*, ARCHIVES OF SEX. BEHAVIOR, August 1993, at 291 (analyzing population data from U.S., Asia, the Pacific, Great Britain and Europe).

⁴⁵⁷ Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 207, 252-53 (2003).

⁴⁵⁸ *Id.* at 253.

such reflection inspires will undermine the utility of behavior-identity compression, inevitably leading to the end of legally sanctioned discrimination against sexual minorities in this country.