

# THEORIZING AND LITIGATING THE RIGHTS OF SEXUAL MINORITIES

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It is an extraordinary honor to participate in a symposium that is a tribute to the works of Martha Nussbaum. She is not only one of the country's absolute best moral philosophers, but there is also simply nobody better at doing the deep thinking about what it means to respect the dignity of human beings.<sup>1</sup>

One of the best measures of a society is how it treats its vulnerable groups. A central idea Professor Nussbaum poses in many of her writings is that all humans "are of equal dignity and worth, no matter where they are situated in society."<sup>2</sup> The strategic challenge in lesbian, gay, bisexual, and transgendered (LGBT) rights litigation is how to get courts to see sexual minorities as people worthy of equal dignity and respect. Martha Nussbaum has done tremendous theoretical work on the role of negative emotions, such as disgust and shame, in the criminalization of particular forms of sexual conduct.<sup>3</sup> This Article will focus on the roles of a positive emotion—love—and a procedural method of proof—science—in the shaping of laws

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<sup>1</sup> See, e.g., MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 343 (2004) [hereinafter *NUSSBAUM, HIDING FROM HUMANITY*] ("[T]he idea of human dignity, as a political idea, is pivotal to all known forms of political liberalism; it may reasonably be included within the core of moral ideas that form the basis for a political-liberal conception.").

<sup>2</sup> "Human beings have a dignity that deserves respect from laws and social institutions. . . . The idea of human dignity is usually taken to involve an idea of equal worth." MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 2 (1999) [hereinafter *NUSSBAUM, SEX AND SOCIAL JUSTICE*].

<sup>3</sup> *NUSSBAUM, HIDING FROM HUMANITY*, *supra* note 1, at 150, 256, 264–44, 362.

defining the rights of sexual minorities.<sup>4</sup> While Professor Nussbaum does not explicitly address the functions of science in this area, she champions reason, and an examination of the types of empirical information she presents demonstrates a place for the scientific method in the search for social justice. A discussion of the role of love in LGBT rights litigation emanates, generally speaking, from a larger discussion of liberty and autonomy, while a discussion of the role of science stems, speaking even more generally, from a larger discussion of equality. To gain greater rights for sexual minorities, advocates must paint an inclusive picture of love and relationships and must insure that science is an ally rather than an enemy in the battle.

However, a tension has emerged in litigating both the substantive arguments about love and the procedural methods of using scientific proof: some of the litigation strategies to date have been built on a heteronormative ideal. This is not to say that the tensions are between theorists and litigators, who very often are, quite literally, on the same page on amicus briefs.<sup>5</sup> (Although, sometimes the trial and political strategizing has been explicit about proceeding in stages and intentionally leaving parts of the community behind, as with the Employment Non-Discrimination Act.<sup>6</sup>) This *is* to say that the litigation strategies raise theoretical tensions.

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<sup>4</sup> Peter H. Huang and Christopher J. Anderson have also complimented Nussbaum's development of the roles of shame and disgust in law but urged attention to positive emotions. See Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, 90 MINN. L. REV. 1045, 1048 (2006).

<sup>5</sup> Brief of the National Lesbian and Gay Law Association et al. as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152348 (Chai Feldblum); Brief and Appendix for Ian Ayres, Jon Bauer, Anne Dailey, Martha F. Davis, Susan Estrich, Herma Hill Kay, Martha Minow & Susan R. Schmeiser as Amici Curiae, *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. Jan. 11, 2007) (No. 17716), 2007 WL 4725442; Brief of Professors of History & Family Law as Amici Curiae in Support of Plaintiffs-Respondents in *Hernandez v. Robles* (N.Y. Sup. Ct., July 28, 2005), reprinted in Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 252 (2006). Litigation, of course, has been accompanied by systematic pushes for gay-friendly grassroots organizations, lobbying, and public education. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 608 (1994-95).

<sup>6</sup> See Cynthia Laird, *Tense Meeting With HRC Over ENDA*, BAY AREA REPORTER, Jan. 10, 2008, available at <http://www.ebar.com/news/article.php?sec=news&article=2589>; Transgender Inclusion May Spell Trouble for ENDA, Workplace Professor Blog, [http://lawprofessors.typepad.com/laborprof\\_blog/2007/10/transgender-incl.htm](http://lawprofessors.typepad.com/laborprof_blog/2007/10/transgender-incl.htm) (Oct. 3, 2007).

Lawyers on the ground have to be concerned with pragmatic strategies, based on what works with courts. They need to consider the tactical arguments that might appeal to middle America, so they carefully cull model plaintiffs, issue planned media blitzes, and try to control the timing and geography of test cases.<sup>7</sup> What seems to be working, at least sometimes, with courts is the “homo kinship” model or “like-straight” logic to argue for parental rights or same-sex marriage.<sup>8</sup> The relational focus seems to be a necessary strategy to win, in the words of Carlos Ball, the “hearts and minds of straight Americans.”<sup>9</sup> But this strategy may only reward the “good gays”—the ones who fit the Leave It to Beaver family model of Ward, John, Wally, and the Beave.

Part II of this Article addresses the ways portrayals of love and relationships have led to some LGBT litigation successes.<sup>10</sup> It explores the tensions in building rights arguments on a foundation of heteronormativity. The suggestion that this Article makes here is to broaden the storytelling. Even if an equal protection challenge depends on substantial similarity to a benefitted group, and even if lawyers want to architect the best possible case, there may be ways to weave in compelling stories of more members of the community than simply the “white picket fence” plaintiffs.<sup>11</sup> Here the experiences of prior feminist legal theorizing and litigating can serve as models. Sex equality litigators deftly brought private lives into the public sphere and created understanding of the different circumstances of women from all walks of life as part of the human condition.<sup>12</sup>

Part III of this Article explores the role of science in litigating LGBT rights. Sexual minorities have had an awkward relationship with

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<sup>7</sup> Combined Statement of ACLU, GLAAD, Equality Federation, Lambda Legal, & NCLR, *Make Change, Not Lawsuits*, [http://www.thetaskforceactionfund.org/take\\_action/guides/change\\_not\\_lawsuits.pdf](http://www.thetaskforceactionfund.org/take_action/guides/change_not_lawsuits.pdf) (last visited Feb. 1, 2010) (urging strategic lawsuits that do not take cases up to hostile courts).

<sup>8</sup> See Katherine Franke, *The Politics of Same Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 240 (2006); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1365 (2005).

<sup>9</sup> Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1537 (2006).

<sup>10</sup> See discussion *infra* Part II.A.

<sup>11</sup> See *infra* text accompanying notes 51–60.

<sup>12</sup> See *infra* text accompanying notes 86–90.

science because of the medicalization of homosexuality and the continued conception of transsexualism as pathology.<sup>13</sup> In recent years, gay rights litigators have begun to use science and social science evidence to build their cases for equal rights. As one example, advocates have argued successfully for parental rights by drawing on a growing body of evidence that gay fathers and lesbian mothers provide equally healthy and supportive environments for their children as do straight parents.<sup>14</sup> Another more complicated example concerns arguments regarding the immutability of sexual orientation.<sup>15</sup> Some litigators have argued, and some courts have agreed, that because sexual orientation is essentially immutable, claims of gays and lesbians are deserving of heightened scrutiny. The immutability argument raises a number of theoretical difficulties, such as reinforcing perceptions of sexual minorities as abnormal or deviant, and it excludes some members of the community, such as bisexuals and the transgendered, from legal protection.

To avoid both the exclusion of certain groups and the problem of courts selectively applying scientific studies to support previously determined conclusions, this Article argues for a particular approach to the idea of scientific proof. LGBT rights litigators should push for courts to adopt a deeper and more thorough approach to scientific inquiry that insists on evaluating cumulative, comprehensive, and converging evidence. Here again gender justice advocates offer a model for the methodology of scientific proof. Feminists who litigated the early constitutional cases saw that their challenge was to depict the constructed nature of gender so that virulent forms of discrimination were understood as something other than the product of innate sex differences. They drew on evidence from science, history, literature, psychology, sociolinguistics, cultural anthropology, and sociology to offer a dynamic account of subordination that began to resonate with courts. Similarly, LGBT theorists are beginning to use a more multifaceted approach to briefing questions calling for scientific understanding. For example, recent briefs regarding the immutability of sexual orientation offer a more complex and nuanced view of sexual identity as having some biological influences but also being the product of

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<sup>13</sup> See *infra* text accompanying notes 125–34.

<sup>14</sup> See *infra* text accompanying notes 135–52.

<sup>15</sup> See *infra* text accompanying notes 153–91.

constructed differences. This view of “constructive immutability”<sup>16</sup> is beginning to be persuasive to courts.<sup>17</sup>

The arguments that have been most workable for the LGBT civil rights movement have been those premised on sameness, but those arguments do not work where courts perceive differences.<sup>18</sup> Perhaps litigators can move beyond the heteronormative ideal by emphasizing, as Martha Nussbaum’s works urge, the common features of personhood: those qualities of dignity and respect for the common humanity of all people. This emphasis would be on a different kind of sameness—shared humanity<sup>19</sup>—and more robust versions of both love and science can help with these litigation efforts.

## II. LITIGATING LOVE

### A. Constitutional Protection for Love and Relationships

Some of the most significant advances for sexual minorities have rested foundationally on love. These legal decisions over the past thirty or forty years have involved, for the most part, a recognition not of erotic love but of what Professor Nussbaum might call “*agapé*,” “a respect for relationships, for human social connections.”<sup>20</sup>

A number of decisions that are not about lesbian and gay rights have fundamentally shaped the Court’s conception of families and love. The aptly named *Loving* case, of course, is the most obvious. In striking the antimiscegenation statute, the Court in *Loving v. Virginia* observed that the statute deprived the Lovings of due process and also that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential

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<sup>16</sup> See generally Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001) (proposing the concept of “constructive immutability” and its application to challenging discrimination).

<sup>17</sup> See *infra* discussion in text at notes 185–91.

<sup>18</sup> See PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 277 (2000).

<sup>19</sup> See Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Principles in Gay Legal Theory and Constitutional Doctrine*, 61 OHIO ST. L.J. 867 (2000).

<sup>20</sup> See NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 2, at 262. Certainly, getting to love requires overcoming hate, which is so often founded on disgust and shame.

to the orderly pursuit of happiness by free men.”<sup>21</sup> We tend to forget that the pursuit of happiness is one of the three most important rights of a free people.

There is a great moment in the oral argument in that case by the Lovings’ attorney who said to the Supreme Court that Mr. Loving, a bricklayer, had managed to express the real essence of the issue better than any eloquent, expert lawyer could do in describing what the concepts of fundamental fairness and ordered liberty mean under the Due Process Clause. Richard Loving told his lawyer: “Tell the Court I love my wife . . . and it is just unfair that I can’t live with her in Virginia.”<sup>22</sup>

In *Moore v. City of East Cleveland*,<sup>23</sup> the Supreme Court struck down a housing ordinance that would have prevented grandchildren from living with their grandmother as a “single family,” thus recognizing that people get to define their own families.<sup>24</sup> The happiness literature that is emerging in positive psychology shows the central place of families in people’s happiness and that defining one’s own family is crucial to that human flourishing.<sup>25</sup>

Along the way, of course, there were some Supreme Court cases that may have gotten it flat wrong on love—*Michael H. v. Gerald D.*,<sup>26</sup> for example. In *Michael H.*, the mother conceived a child by Michael while she was married to Gerald, and Michael later established a parental relationship with the child. Michael challenged the California law that presumed that the husband of a married woman was the father of any children born during the

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<sup>21</sup> 388 U.S. 1, 12 (1967).

<sup>22</sup> *Loving v. Virginia*, The Oyez Project, [http://www.oyez.org/cases/1960-1969/1966/1966\\_395/argument/](http://www.oyez.org/cases/1960-1969/1966/1966_395/argument/) at 31:20-32:03 (last visited Feb. 1, 2010).

<sup>23</sup> 431 U.S. 494, 506 (1977).

<sup>24</sup> *Moore* is also a fascinating example of internal tensions in minority rights—since the ordinance in question was advocated by middle-class blacks who sought to exclude lower-class blacks from their neighborhood. See David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 443 (2000). I am indebted to Barbara Glesner Fines for this point.

<sup>25</sup> See, e.g., Richard Corliss, *Is There a Formula for Joy?*, TIME, Jan. 20, 2003, at 72, 74 (citing Martin Seligman for the proposition that a happy family arrangement is one of the primary factors in human happiness).

<sup>26</sup> 491 U.S. 110 (1989).

marriage. The Supreme Court held that the marital presumption of paternity trumped the biological father's claim to visitation rights.<sup>27</sup>

Even though the Supreme Court two decades ago could not see beyond the nuclear family model, at about this same time, lower courts began to recognize more inclusive definitions of family. Twenty years ago, the New York Court of Appeals in *Braschi v. Stahl Associates Co.* held that under the state's rent-control succession law, the life partner of a deceased tenant was a "family member."<sup>28</sup> The *Braschi* court concluded that the legal construction of family should not be "rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order."<sup>29</sup> Citing a number of decisions in which courts officially acknowledged nontraditional families (such as an orphan who, although not formally adopted, lived in a family home for three decades and two men who had a father-son relationship for twenty-five years), the *Braschi* court looked at the "interwoven social lives," commitments and expectations, "dedication, caring, and self-sacrifice" of the partners.<sup>30</sup> In short, the court valued the families people chose for themselves.

This more expansive understanding of family relationships began to surface in parenting rights cases. Until about fifteen years ago, almost all courts addressing parenthood claims of nonbiological, nonadoptive parents denied them.<sup>31</sup> Now about half the states, either by statute or more often by judicial decision, permit them and extend the rights to same-sex couples.<sup>32</sup>

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<sup>27</sup> Part of the explanation for the result in *Michael H.* might have been that the biological father's claim was based on "bad love"—an adulterous relationship that produced the child. *See id.* at 118–19. The outcome might also be explained by the difference between the facts at the time the case was brought, when Michael had a close relationship with Victoria, and the facts five years later at the time of the Supreme Court decision, when Victoria had moved to New York with Carole and Gerald and involvement with Michael might have disrupted an ongoing family. *See* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Uncertainty*, 11 WM. & MARY BILL RTS. J. 1011, 1045 (2003).

<sup>28</sup> 543 N.E.2d 49, 53–55 (N.Y. 1989).

<sup>29</sup> *Id.* at 53.

<sup>30</sup> *Id.* at 54–55. The court identified the functional characteristics that exemplify family relationships: "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services." *Id.* at 55.

<sup>31</sup> *See* Kimberly Richman, *Lovers, Legal Strangers, and Parents: Negotiating Parental and Sexual Identity in Family Law*, 36 LAW & SOC'Y REV. 285, 296 (2002);

What changed were a number of factors. Recognition of joint parenting was the essential precondition for the shift to recognizing more than one parental figure of any kind. Some developments regarding heterosexual parents, such as courts' recognition that two parents could share custody without causing confusion, and courts' willingness to recognize functional relationships and unmarried boyfriends as parents, carried over to gay parents. Academic work, such as Nancy Polikoff's article, *This Child Has Two Mothers*, influenced decisions in Wisconsin, which set a precedent for other states.<sup>33</sup> Paralleling these developments was the recognition of psychological parenthood in states like New Jersey.<sup>34</sup> These advances operated in tandem: as the married family broke down and courts recognized other arrangements, they also become more willing to recognize gays and lesbians as parents.<sup>35</sup>

Courts are increasingly starting to recognize same-sex second parent adoption rights and support obligations, as well as visitation rights to former same-sex partners who have become de facto parents.<sup>36</sup> That recognition of multiparent families is based on acknowledgement of the

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Elizabeth Zuckerman, Comment, *Second Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 (1986).

<sup>32</sup> See National Gay and Lesbian Task Force, Second Parent Adoption in the U.S., [http://thetaskforce.org/reports\\_and\\_research/second\\_parent\\_adoption\\_laws](http://thetaskforce.org/reports_and_research/second_parent_adoption_laws) (last visited Feb. 1, 2010); Rhonda Wasserman, *Are You Still My Mother?: Interstate Recognition of Adoption by Gays and Lesbians*, 58 AM. U. L. REV. 1, 11 (2008).

<sup>33</sup> *In re Custody of H.S.H.-K*, 533 N.W.2d 419, 437 (Wis. 1995) (quoting Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990)).

<sup>34</sup> See *In re Adoption of Child by J.M.G.*, 632 A.2d 550 (N.J. Super. Ct. Ch. Div. 1993) (approving a second parent adoption by a lesbian of her partner's biological child to whom she was a psychological co-equal parent).

<sup>35</sup> I am indebted to June Carbone for the ideas on the paradigm shift contained in this paragraph.

<sup>36</sup> See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001). See also Nat'l Gay and Lesbian Task Force, Second-Parent Adoption in the U.S., May 2007, [http://www.thetaskforce.org/downloads/reports/issue\\_maps/2nd\\_parent\\_adoption\\_5\\_07\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07_color.pdf) (last visited Feb. 1, 2010) (listing twenty-four states that have approved second parent adoptions).



nurturing and love in those families rather than biological ties.<sup>37</sup> Maybe the expression of love in this context is not so threatening. Also, particularly with cases involving children, at some point the human consequences of law are so apparent that law has to recognize relationships. What was emerging from this constellation of cases having to do with the definitions of families and parenthood, and homes where families lived, was a fuller picture of humanness, of personhood.

The real shifting of tectonic plates came in constitutional law. The transformation from *Bowers v. Hardwick*<sup>38</sup> to *Lawrence v. Texas*<sup>39</sup> rested on a variety of social influences—such as increased visibility<sup>40</sup>—and philosophical principles—such as the offensiveness of threatened criminal punishment for violation of anachronistic and underenforced sodomy laws and the idea of noninterference with nonharmful consensual sexual activity.<sup>41</sup> Also foundational was the difference between the Court’s emphasis in *Bowers* on sex and, seventeen years later in *Lawrence*, the Court’s emphasis on love, affection, and relationships. The *Bowers* Court was preoccupied with the ancient and contemporary prohibitions against sodomy, framing the question as whether there was “a fundamental right to engage in homosexual sodomy,” and tallying the number of state statutes that outlawed this kind of “homosexual conduct.”<sup>42</sup> Justice Burger’s concurrence added the incendiary exclamation point that “Blackstone described ‘the infamous *crime against nature*’ as an offense of deeper malignity than rape.”<sup>43</sup> The conclusion of the *Bowers* Court came as no surprise: “Against this background, to claim that a right to engage in *such*

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<sup>37</sup> See, e.g., *E.N.O.*, 711 N.E.2d at 892 (elaborating on the financial, economic, and emotional entanglement of the plaintiff and child to conclude that “[t]he plaintiff is the child’s de facto parent”); *In re Adoption of Child by J.M.G.*, 632 A.2d 551 (noting that the child “is definitively attached to the plaintiff. . . . [She] moves back and forth between her two mothers with relative ease.”).

<sup>38</sup> 478 U.S. 186 (1986).

<sup>39</sup> 539 U.S. 588 (2003).

<sup>40</sup> See *infra* text accompanying notes 55–60, 110–11.

<sup>41</sup> See, e.g., Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003).

<sup>42</sup> *Id.* at 191, 195.

<sup>43</sup> *Id.* at 197 (Burger, J., concurring).

conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>44</sup>

For the majority in *Lawrence*, it was not the right to engage in particular sexual acts that was fundamental, but “the relationships and self-governing commitments out of which those acts arise—the network of human connection over time that makes genuine freedom possible.”<sup>45</sup> Justice Kennedy’s opinion for the Court emphasized the “liberty of the person both in its spatial and in its more transcendent dimensions.”<sup>46</sup> It set boundaries on the state’s intrusion into “relationships” and emphasized that “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”<sup>47</sup> The *Lawrence* dissenters focused, in horror, on the forms of sexual activity that the majority opinion might countenance: “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity.”<sup>48</sup>

*Lawrence* is much more than a decision about sexual freedom.<sup>49</sup> The decision moves away from the libertarian privacy component—that there should be some realms free from government intrusion. Instead, *Lawrence* has a centrally communitarian thrust. If people are engaged in behaviors the state wants to promote, it should affirmatively promote them. The move that Justice Kennedy makes in *Lawrence* is not just that people are free to pursue certain types of sexual relationships that they want, it is a recognition that those *relationships* are important and something the state should support. *Lawrence* is monumental in its recognition that gays and lesbians have “dignity as free persons.”<sup>50</sup>

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<sup>44</sup> *Id.* at 194 (emphasis added).

<sup>45</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004).

<sup>46</sup> 539 U.S. at 562.

<sup>47</sup> *Id.* at 567.

<sup>48</sup> 539 U.S. at 590 (Scalia, J., dissenting).

<sup>49</sup> See, e.g., Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004).

<sup>50</sup> 539 U.S. at 567. Of course, in dissent, Justice Scalia accuses the majority of “sign[ing] on to the so-called homosexual agenda,” which he describes as “the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct”—in other words, a search for dignity and respect. *Id.* at 601 (Scalia, J., dissenting).

## B. Domesticated Sex

The concern that Katherine Franke and others have raised with respect to the dignity ideal in *Lawrence* is that it condones only domesticated and respectable sex, inside the home.<sup>51</sup> I think Professor Franke is quite right that an emphasis on the ideal creates negatives for those people and relationships that are outside the family values box. The worry is that people will only be able to obtain rights for the heteronormative type of “good,” relationship-based sexuality.<sup>52</sup> This has actually been the litigation strategy in most of the recent same-sex marriage cases.

The legal strategies in many of the early, and unsuccessful, same-sex marriage cases in the 1970s were “bottom-up” in structure, where the parties to the lawsuit hired their own lawyers and forged ahead to make whatever arguments they thought persuasive.<sup>53</sup> The “top-down” litigation approach, in which national civil rights groups such as Gay and Lesbian Advocates and Defenders strategically selected states and carefully chose plaintiffs, proved more effective in *Baker v. Vermont* and *Goodridge v.*

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<sup>51</sup> See, e.g., Libby Adler, Dignity and Degradation: Transnational Lessons from the Constitutional Protection of Sex 1 (Berkeley Electronic Press Legal Working Paper Series, Paper No. 1873, 2006), available at <http://law.bepress.com/expresso/eps/1873> (“[D]ignity poses unique legal hazards to reformist efforts to gain constitutional protection for a wide array of sexual practices.”); Franke, *supra* note 49, at 1409 (maintaining that pro-gay litigators have “trade[d] sexuality for domesticity” and respectability). But see Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy, and Equality*, 65 OHIO ST. L.J. 1341, 1397–98 (2004) (*Lawrence* mandates the law’s protection of Queer dignity. More remarkably and importantly, *Lawrence* does so on facts that, on the record, do not establish a “committed” or conventionally respectable relationship to have existed. Thus, despite rhetoric to the contrary in the opinion, a considered reading of the text and the facts strongly indicate that *Lawrence* does more than simply validate same-sex relationships that mimic traditional “marriages.” Instead, *Lawrence* recognizes, first, the central role that sexual desires and intimacies play in the development of individual personalities and, second, the importance of sexual experimentation and choice in individuals’ efforts to realize and secure their sense of self.”).

<sup>52</sup> See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999).

<sup>53</sup> Edward Stein, *The Story of Goodridge v. Department of Public Health: The Bumpy Road to Marriage for Same-Sex Couples*, in *FAMILY LAW STORIES* (Carol Sanger ed., 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=938531](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=938531), at 3–4 (citing *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971)).

*Department of Public Health*.<sup>54</sup> Lambda Legal engaged in a similar strategy of deftly architecting the New Jersey case of *Lewis v. Harris* by choosing “‘conservative, white-picket-fence kind of plaintiffs,’ the kind of people that average New Jerseyans could relate to.”<sup>55</sup>

The eight named plaintiff couples in *Kerrigan v. Commissioner of Public Health*<sup>56</sup> were people who had been in committed relationships for

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<sup>54</sup> Stein, *supra* note 53, at 12 (“Prospective plaintiffs were asked ‘how did they meet and commit, and how long had they been together?’ . . . GLAD wanted to select plaintiffs whose stories would make vivid the harm of not being allowed to marry.”).

<sup>55</sup> Andrew Bruck, *Equality in the Garden State: Litigation and Social Activism in the Struggle for Marriage Equality*, at 426, [http://www.hlpronline.com/Bruck\\_HLPR.pdf](http://www.hlpronline.com/Bruck_HLPR.pdf) (2008). See e.g., *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 949 (Mass. 2003):

The plaintiffs are fourteen individuals from five Massachusetts counties. As of April 11, 2001, the date they filed their complaint, the plaintiffs Gloria Bailey, sixty years old, and Linda Davies, fifty-five years old, had been in a committed relationship for thirty years; the plaintiffs Maureen Brodoff, forty-nine years old, and Ellen Wade, fifty-two years old, had been in a committed relationship for twenty years and lived with their twelve year old daughter; the plaintiffs Hillary Goodridge, forty-four years old, and Julie Goodridge, forty-three years old, had been in a committed relationship for thirteen years and lived with their five year old daughter; the plaintiffs Gary Chalmers, thirty-five years old, and Richard Linnell, thirty-seven years old, had been in a committed relationship for thirteen years and lived with their eight year old daughter and Richard’s mother; the plaintiffs Heidi Norton, thirty-six years old, and Gina Smith, thirty-six years old, had been in a committed relationship for eleven years and lived with their two sons, ages five years and one year; the plaintiffs Michael Horgan, forty-one years old, and Edward Balmelli, forty-one years old, had been in a committed relationship for seven years; and the plaintiffs David Wilson, fifty-seven years old, and Robert Compton, fifty-one years old, had been in a committed relationship for four years and had cared for David’s mother in their home after a serious illness until she died.

See also *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006), noting:

Plaintiffs are seven same-sex couples who claim that New Jersey’s laws, which restrict civil marriage to the union of a man and a woman, violate the liberty and equal protection guarantees of the New Jersey Constitution. Each plaintiff has been in a “permanent committed relationship” for more than ten years and each seeks to marry his or her partner and to enjoy the legal, financial, and social benefits that are afforded by marriage.

*Id.*

<sup>56</sup> 957 A.2d 407 (Conn. 2008).

between thirteen and thirty-one years; six of the families had children, and several of them had health issues and were concerned about access to health benefits as well as the ability to make medical decisions for each other.<sup>57</sup> Similarly, in the California *In re Marriage Cases*,<sup>58</sup> the named plaintiffs, although representing a range of racial, ethnic, and occupational backgrounds, were couples in long-term relationships. The amicus brief of the Human Rights Campaign et al., in *Lawrence v. Texas*, argued that “[g]ay men and lesbians tend to live in committed relationships.”<sup>59</sup>

In sum, the successful same-sex marriage cases were carefully orchestrated to select plaintiffs in long term, committed, marriage-like relationships, whose personal narratives appealed to middle America. As Professor Franke says, they “pos[e] model homo families—our perfect plaintiffs—before the media . . . with what feels like the deployment of children as props that attest to our normalcy, a repudiation of our perversion.”<sup>60</sup>

Is this just a theoretical dilemma, the kind of thing about which only academics worry? A number of cases indicate this is not just an academic concern. One example is custody and visitation cases in which courts disapprove of any displays of intimacy or affection between a gay or lesbian parent and a new partner.<sup>61</sup> Although a parent’s sexual orientation is

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<sup>57</sup> Gay & Lesbian Advocates & Defenders, Plaintiff Profiles, <http://www.gladtesting.org/work/cases/kerrigan-mock-v-connecticut-dept-of-public-health/> (last visited Feb. 1, 2010).

<sup>58</sup> 183 P.3d 384 (2008). The court explained:

The named same-sex couples who are parties to these actions embody a diverse group of individuals who range from 30 years of age to more than 80 years of age, who come from various racial and ethnic backgrounds, and who are employed in (or have retired from) a wide variety of occupations, including pharmacist, military serviceman, teacher, hospital administrator, and transportation manager. Many of the couples have been together for well over a decade and one couple, Phyllis Lyon and Del Martin, who are in their eighties, have resided together as a couple for more than 50 years. Many of the couples are raising children together.

*Id.* at 403.

<sup>59</sup> Brief for Human Rights Campaign et al., as Amici Curiae Supporting Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152347 at \*17.

<sup>60</sup> Franke, *supra* note 8, at 239.

<sup>61</sup> *See, e.g.,* Weigand v. Houghton, 730 So.2d 581, 584 (Miss. 1999) (“According to David, they regularly engage in homosexual activities which include both oral and anal

no longer an automatic factor in the award of custody or visitation, many courts still allow parties to try to show that a parent's homosexual behavior is somehow harmful to the child.<sup>62</sup> Another example is foster parent or adoption cases in which a single lesbian or gay man who is not in a committed, monogamous relationship wants to be a parent.<sup>63</sup> Professor Carlos Ball has shown that when states restrict adoptions by gays and lesbians, it is the children who are left without families that are harmed.<sup>64</sup> In short, heteronormativity has real world consequences. This raises the question of what litigators can do to win cases while including all members of the LGBT community.

### C. Reclaiming Sexuality Without Losing Dignity

"Equal respect for conscience means a vigilant refusal to countenance the participation of government in any creation of in-groups and out-groups, especially in the realm of religion."<sup>65</sup>

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intercourse."); *Chicoine v. Chicoine*, 479 N.W.2d 891, 892–94 (S.D. 1992) (noting that the mother had "a series of admitted lesbian affairs," the first of which was an "open and notorious affair"; that a child had walked in on the mother and her lover "in an intimate position in bed"; that the children were sometimes allowed to sleep in bed with the mother and her lover; and that the mother "and her lover were affectionate toward each other in front of the children, caressing, kissing, and saying, 'I love you'"); *Bottoms v. Bottoms*, 457 S.E.2d 102, 106–07 (Va. 1995) (awarding custody of a child to the grandmother over the mother's objections in part because the mother's lesbian relationship involved felonious and immoral conduct, including "hugging and kissing, patting 'on the bottom,' sleeping in the same bed, 'fondling,' and 'oral sex'").

<sup>62</sup> See John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 334–53 (2004).

<sup>63</sup> In Arkansas, voters in the 2008 election passed a statewide initiative banning unmarried couples from adopting or becoming foster parents—but the purpose behind the law was to prevent gay individuals or couples from adopting. NPR Morning Edition: Hot-Button Issues on State Ballots (Radio broadcast Nov. 5, 2008), available at 2008 WLNR 21176652. Curiously, Mississippi bans adoption by gay couples, but not by single people who are gay. *Fla. Gay Adoption Ban Dealt Legal Blow*, CBS NEWS, Nov. 25, 2008, <http://www.cbsnews.com/stories/2008/11/25/national/main4632388.shtml>.

<sup>64</sup> Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoptions by Lesbians and Gay Men*, 38 LOY. U. CHI. L.J. 379 (2007).

<sup>65</sup> MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 39 (2010) [hereinafter NUSSBAUM, FROM DISGUST TO HUMANITY].

In what ways can academics and litigators encourage the fight for same-sex marriage rights but also broaden courts' visions of deserving sexual minorities who do not fit the heteronormative model? Here Professor Nussbaum is superbly helpful. Her new book *From Disgust to Humanity: Sexual Orientation and Constitutional Law* begins with the premise that the founding documents of America promise equality and imply equal respect for human dignity.<sup>66</sup> She draws an analogy between respect for differences in sexual orientation and respect for different religious convictions in colonial America.

Ideas of religious liberty and tolerance in colonial America began with intermingling, which was followed by understanding—understanding that people of differing religious convictions could still reach consensus on moral values “such as fairness, honesty, and impartiality, without necessarily agreeing on theological first principles.”<sup>67</sup>

We should not delude ourselves into thinking, then, that the policies of religious respect and fairness that gradually came to dominate in the colonies, shaping our Constitution, were inspired by respect *for differing religious beliefs and practices*. Rather, they were inspired by a more basic underlying idea of respect *for persons*, for our fellow citizens as bearers of human dignity and conscience. Even when we believe others are going astray, the faculty of conscience in them deserves respect from our laws and institutions. Because human beings are of equal worth, conscience is deserving of equal respect.<sup>68</sup>

Professor Nussbaum then makes the philosophical case for the idea that sexuality, sexual satisfaction, and sexual happiness are integral parts of human dignity. She circles back to the importance of sex to individuals. This is a different argument than the libertarian vision that a state should not concern itself with what consenting adults do in the privacy of their bedroom. It is recognition that the bundle of love, desire, and erotic acts are all part of the lived experiences of humans and are deserving of state protection; it is a “re-integration” of sexual intimacy and dignity.<sup>69</sup> As she explains:

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<sup>66</sup> See generally NUSSBAUM, *FROM DISGUST TO HUMANITY*, *supra* note 65.

<sup>67</sup> *Id.* at 36–37.

<sup>68</sup> *Id.* at 38–39.

<sup>69</sup> See Paris R. Baldacci, *Lawrence and Garner: The Love (Or at Least Sexual Attraction) That Finally Dared Speak Its Name*, 10 CARDOZO WOMEN'S L.J. 289, 294 n.18

Very few Americans today think that sexual happiness is a trivial matter. For many if not most people, it is a central part of one's search for the meaning of life. . . . [S]ex is . . . intimately personal, connected to a sense of life's ultimate significance, and utterly non-trivial. . . . We understand that it goes to the heart of people's self-definition, their search for identity and self-expression.<sup>70</sup>

The recognition of equal respect for the sexuality of others is a theme that is only beginning to percolate successfully in LGBT rights cases. In *Lawrence*, the Court evinces a partial understanding that it is protecting gay and lesbian consensual sexual conduct.<sup>71</sup> The perhaps not so small irony is that the *Lawrence* Court stressed relational interests regarding a set of facts in which John Lawrence and Tyron Garner may not have had a longstanding relationship—but the Court seemed intent on describing their sexual intimacy as part of a stronger relational bond, rather than acknowledging their choice of sexual expression as a dignity-claiming activity.<sup>72</sup> The California Supreme Court, in *In re Marriage Cases*, rejected the “sophistic” argument that the statute restricting marriage to opposite sex couples did not violate the rights of gays and lesbians because they could

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(2004) (“Lawrence’s reintegration re-eroticizes gay and lesbian life and calls it good, something to be respected and to be accorded dignity.”).

<sup>70</sup> NUSSBAUM, FROM DISGUST TO HUMANITY, *supra* note 65, at 39.

<sup>71</sup> But, interestingly, only in the middle of a paragraph about what it is not protecting:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. *The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.* The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

*Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added).

<sup>72</sup> See, e.g., Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1477, 1478 (2004) (describing John Lawrence and Tyron Garner not as model or “professional civil rights people”—both had prior arrest records and they were probably “not in a long-term, committed relationship when they were arrested”).



still marry an opposite sex partner.<sup>73</sup> “[M]aking such a choice,” said the court, “would require the negation of the person’s sexual orientation.”<sup>74</sup>

The court went on to acknowledge the value of sexual orientation to personhood by quoting from amicus briefs filed by the American Psychological Association and the American Psychiatric Association:

[S]exual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. In addition to sexual behavior, these bonds encompass nonsexual physical affection between partners, shared goals and values, mutual support, and ongoing commitment. Consequently, sexual orientation is not merely a personal characteristic that can be defined in isolation. Rather, one’s sexual orientation defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.<sup>75</sup>

A few other cases have also recognized the importance of sexual identity and sexual interactions to the individual.<sup>76</sup> These decisions are promising but seem to be atypical. The lurking tension is that some of the litigation successes have been based on recognition of LGBT relational interests—while obscuring the sexuality of the parties. As Pat Cain says, “there is a certain degree of absurdity to making legal arguments in favor of gay and lesbian rights that ignore sex.”<sup>77</sup> The question, then, is whether LGBT litigators can architect winning cases while presenting a fuller

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<sup>73</sup> *In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008). *But see* *Hernandez v. Robles*, 855 N.E. 2d 1, 10 (N.Y. 2006) (holding that the marriage restriction “does not put men and women in different classes, and give one class a benefit not given to the other”); *Andersen v. King County*, 138 P.3d 963, 988 (Wash. 2006) (“Men and women are treated identically under DOMA; neither may marry a person of the same sex.”).

<sup>74</sup> *In re Marriage Cases*, 183 P.3d at 441.

<sup>75</sup> *Id.* at 939 n.59.

<sup>76</sup> *See, e.g.,* *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000) (“[s]exual orientation and sexual identity . . . are so fundamental to one’s identity that a person should not be required to abandon them”). *See also* *Egan v. Canada*, [1995] 2 S.C.R. 513, 528 (Can.) (“whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.”).

<sup>77</sup> *See, e.g.,* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1641 (1993).

picture of sexuality as deserving of dignity and while not disowning members of the community.<sup>78</sup>

#### D. Storytelling—Telling Stories of the Whole Community

“In many ways, overcoming invisibility is the first step in successfully demanding basic civil rights.”<sup>79</sup>

A number of people at this symposium have argued for the value of narratives to create empathic understanding of the human condition, especially for vulnerable minorities.<sup>80</sup> Stories can challenge traditional

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<sup>78</sup> See, e.g., Teresa M. Bruce, Note, *Doing the Nasty: An Argument for Bringing Same-Sex Erotic Conduct Back Into the Courtroom*, 81 CORNELL L. REV. 1135, 1174 (1996), explaining:

Present litigation strategies respond to stereotypes of homosexuals as oversexed sodomites by dismissing same-sex erotic conduct as insignificant to homosexual identity. This tactic, in turn, chills speech about sexuality within the gay community itself. For example, a professor of political science, who recently appeared as a witness in a challenge to an anti-gay initiative, testified that “those who organized the ‘March on Washington’ did not represent the mainstream homosexual population.” He apparently feared that including leather boys and drag queens within the larger gay community would focus unwanted attention on same-sex erotic conduct.

*Id.*

<sup>79</sup> Ball, *supra* note 9, at 1534.

<sup>80</sup> See, e.g., Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 399, 398–99 (1996) (noting that stories “are contextualized, highly particularized, and very congregate. . . . [T]hey afford a special emphasis to personal details, to nuanced characterizations, to the richness of human experience” and concluding that “storytelling embodies a unique praxis: a method both for recognizing the plural truths of lived experience, and for reimagining the possibilities of a more compassionate world”); Martha C. Nussbaum, *Loving v. Virginia and the Literary Imagination*, 17 QLR 337, 339, 353 (1997) (arguing that “judges need to pay attention to narratives of hierarchy that convey the human meaning of the situation in question, if they are to deliver judgments that are truly principled and free from bias,” and noting that “[c]ompassion connects us to shared vulnerabilities and needs”); see also Mary Ann Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643, 1647–48 (1993) (observing that at this juncture, although the narratives in LGBT litigation have focused on gay individuals and the gay community, stories of gay couples are missing from the litigation history); Tracy E. Higgins, “By Reason of Their Sex”: *Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536 (1995)

understandings; they can make visible the experiences of outsiders. They can even develop in a reader the capacity to empathize with other people whose experiences are dramatically different than the reader's own.<sup>81</sup>

Stories also speak in the way that humans understand. Research is emerging in cognitive neuroscience that stories are the ways people best learn information. Since the brain is structured to detect patterns, stories work better than simply the conveyance of facts to "encourage . . . the recognition of new patterns and relationships among objects and ideas."<sup>82</sup> Stories activate different areas of the neocortex than those stirred when the brain is just processing arguments or separate fact statements.<sup>83</sup> Stories are also stored in memory as symbols—and studies demonstrate that while people retain "only 20% of what they read, . . . they recall 80% of symbols."<sup>84</sup>

One of the things that work to decrease homophobia is increased exposure. Numerous studies in social psychology as well as public opinion data show that personally knowing people who are gay and lesbian reduces prejudice.<sup>85</sup> Hearing people's stories can provide a non-threatening, empathetic reaction akin to, although once-removed from, personal acquaintance.

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(noting that accounts of gendered experiences are inevitably partial, contested, and perspectival).

<sup>81</sup> See ROBIN WEST, *NARRATIVE AUTHORITY AND LAW* 7 (1993).

<sup>82</sup> DELORES D. LISTON, *STORY-TELLING AND NARRATIVE: A NEUROPHILOSOPHICAL PERSPECTIVE* (1994). See also Elena Plante et al., *Processing Narratives for Verbatim and Gist Information by Adults with Language Learning Disabilities: A Functional Neuroimaging Study*, 21 *LEARNING DISABILITIES RES. & PRAC.* 61 (2006).

<sup>83</sup> John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 *J. LEGAL EDUC.* 19, 25–26 (1990).

<sup>84</sup> Michael Berman, *A Few Words on Story-telling*, *HUMANIZING LANGUAGE TEACHING MAG.*, May 2003, available at <http://www.hltmag.co.uk/may03/pubs4.htm>.

<sup>85</sup> See generally Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 *BROOK. L. REV.* 61, 78–80 (2006). See also A.M. Bowne & M.J. Bourgeois, *Attitudes Toward Lesbian, Gay, and Bisexual College Students: The Contribution of Pluralistic Ignorance, Dynamic Social Impact, and Contact Theories*, 50 *J. AM. COLL. HEALTH* 91 (2001); Gregory M. Herek & John P. Capitanio, "Some of My Best Friends": *Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 *PERSONALITY & SOC. PSYCHOL. BULL.* 412 (1996); Gregory M. Herek & Erik K. Glunt, *Interpersonal Contact and Heterosexuals' Attitudes Towards Gay Men: Results from a National Survey*, 30 *J. SEX RES.* 239 (1993).

This is where some of the experiences with feminist litigation strategies can serve as a model. Consider, as an example of this point, the briefing technique of the National Abortion Rights Action League. NARAL (Pro-Choice America) submits as an amicus brief in major Supreme Court abortion cases what has come to be known as the "Voices Brief."<sup>86</sup> This brief was primarily a collection of stories of women from all walks of life who had abortions both legally and illegally. These were teenagers, women who were raped when they sought abortion services, women who were prosecuted when they had illegal abortions, those who had abortions in unsafe conditions when abortions were illegal, those who had abortions after *Roe v. Wade* in safe, clean, and supportive environments, women who had health problems that made childbirth dangerous, those who did not have financial resources to raise children, some who had cancer while pregnant, divorced professional women, married women with physically abusive spouses, some who suffered failed birth control methods, women who were pregnant as a result of rape (including a former nun raped by a priest), those afflicted with severe illnesses that necessitated abortion to save their lives, some who were addicted to drugs or alcohol, and some who carried fetuses with genetic diseases such as Tay-Sachs.<sup>87</sup> These were not paradigm plaintiffs; they were Everywoman. The brief, directed at a Court composed at the time of seven older men and two older women (none of whom, presumably, had ever had an abortion), was intended to show that abortion decisions are not made frivolously or easily and to illuminate the many circumstances in which abortion is a justifiable choice.

The storytelling technique in the Voices Brief was based on the idea that "moral convictions are changed experientially and empathically, not through argument."<sup>88</sup> Although no member of the Court has ever cited the Voices Brief, it may have encouraged some empathetic understanding. For instance, when the Court struck the spousal notification law in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality recognized some married women who were the victims of domestic violence might have good reasons not to tell their spouses about their pregnancies.<sup>89</sup>

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<sup>86</sup> Brief for Women Who Have Had Abortions & Friends, as Amici Curiae Supporting Appellees, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (No. 88-605), 1989 WL 1115239. See also Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1435-36 (1994).

<sup>87</sup> Brief for Women Who Have Had Abortions & Friends as Amici Curiae, *Webster*, 492 U.S. 490 (No. 88-605), 1989 WL 1115239.

<sup>88</sup> West, *supra* note 86, at 1436.

<sup>89</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888-93 (1992).

The Voices Brief is not the only example of telling many and varied stories. When Professor Alice Kessler-Harris testified in the *EEOC v. Sears, Roebuck & Co.* litigation, she looked at the experiences of several different generations of women in both World Wars in various different jobs, and she unpacked the idea of women “choosing” certain lines of work.<sup>90</sup> Her examination showed how choice was not a unitary concept: there are choices under pressure, choices shaped by employer practices, choices by people in subordinate positions, and choices within institutional constraints.

Telling counterstories is a way to challenge dominant narratives. Alternate narratives “destroy[] . . . the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place.”<sup>91</sup> Stories introduce the humans whose rights are being litigated, and the personal narratives tell how it feels to experience domination or discrimination.<sup>92</sup> We have seen numerous examples of this in feminist and critical race litigation strategies. In the domestic violence area, advocates learned how to overcome the stereotypes embedded in both “survivor theory” and in the battered intimate partner syndrome’s construction of “learned helplessness” to address the lived experiences of women who fight back.<sup>93</sup> In sexual harassment cases, in the face of legal rules that compel early reporting, stories may explain why women endure harassment in silence.<sup>94</sup> Stories can convey what it feels like to be the victim of racial profiling,<sup>95</sup> or an immigrant who confronts the

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<sup>90</sup> *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1314 n.62 (N.D. Ill. 1984), *aff’d*, 839 F.2d 302 (7th Cir. 1988).

<sup>91</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

<sup>92</sup> See, e.g., Margaret E. Montoya, *Celebrating Racialized Legal Narratives*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 243 (Jerome M. Culp, Angela P. Harris & Francisco Valdes eds., 2002).

<sup>93</sup> Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 129 (2008) (offering as one example the reasoning, “I hit back to keep him from beating me worse”).

<sup>94</sup> See Theresa M. Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 138–39 (2001) (explaining why sexual harassment is underreported).

<sup>95</sup> See Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 FORDHAM L. REV. 2257, 2257–63, 2290 (2002).

injustice of asylum law,<sup>96</sup> or a college student subjected to racist hate speech.<sup>97</sup>

Presenting the stories of a wider variety of sexual minorities may be a promising litigation technique. The challenge is to talk about nonparadigm cases and still find sympathetic plaintiffs. For example, when a child who had lived with both her mom and her dad and then with her grandmother who is a lesbian gave testimony before the Arkansas Legislature, saying that the best situation for her was to live with her grandmother; legislators found the child's perspective compelling.<sup>98</sup>

As another example, when Diane Schroer, a decorated Army veteran, was hired for a job with the Library of Congress as a terrorism research analyst in 2004, her name was David Schroer.<sup>99</sup> A graduate of the Army Command and General Staff College and the National War College, she had served for twenty-five years in the U.S. Armed Forces and had held the rank of Colonel. The Library of Congress revoked the job offer when Schroer told the selecting official that she would be undergoing sex-

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<sup>96</sup> See, e.g., Stanley Dale Radtke, *Defining a Core Zone of Protection in Asylum Law: Refocusing the Analysis of Membership in a Particular Social Group to Utilize Both the Social Visibility and Group Immutability Component Approaches*, 10 J.L. & SOC. CHALLENGES 22 (2008); John A. Russ IV, *The Gap Between Asylum Ideals and Domestic Reality: Evaluating Human Rights Conditions for Gay Americans by the United States' Own Progressive Asylum Standards*, 4 U.C. DAVIS J. INT'L L. & POL'Y 29 (1998).

<sup>97</sup> See Richard Delgado, *Campus Antiracism Rules, Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 349–57 (1991) (providing a description of racist incidents on college campuses, including graffiti, slave auctions, handbills that declared “open hunting season” on blacks, and a fraternity’s creation of a fifteen-foot effigy of a “black man with a bone through his nose”).

<sup>98</sup> John Lyon, *Gay Foster Parenting Ban Dies in Committee*, MORNING NEWS (Arkansas), Mar. 27, 2007, available at <http://www.nwaonline.net/articles/2007/03/28/topics/assembly07/032807lrleggayban.txt>. See also *In re Adoption of John Doe* (Fla. Cir. Ct. Aug. 29, 2008), available at <http://jurist.law.pitt.edu/pdf/flaadoption.pdf>. In the context of finding unconstitutional the Florida statute prohibiting gays and lesbians from adopting, the court tells the story of petitioner who sought to adopt the child he had foster parented for five years, the petitioner’s partner, their family life, the child’s schooling and special educational needs, and discusses the lack of effect on the child of knowledge of the petitioner’s sexual orientation. “We used a 9-minute video with various spokespeople: adoptive parents, former foster children, pediatricians, psychologists, physicians, CASA volunteers, social workers, and clergy. The video is here: <http://www.youtube.com/watch?v=iVg8Y49OmMM>. We also have DVD copies.” E-mail from Laura Bellows, Arkansasfamiliesfirst.org (Nov. 14, 2008, 3:14 p.m.) (on file with author).

<sup>99</sup> *Schroer v. Billington*, 577 F.Supp.2d 293 (D.C. 2008).

reassignment surgery. The would-be boss's first reaction was, "Why in the world would you want to do that?"<sup>100</sup>

In 2008, a federal district court held that the withdrawal of the job offer was sex discrimination in violation of Title VII. The court held that the decisionmaker's concerns—that Schroer might not be able to get a security clearance, that Schroer's military contacts might not be willing to associate with her because she is transgender, and that the upcoming sex reassignment surgery might distract her from her job—were merely a pretext for discrimination based on sex stereotypes.<sup>101</sup> Maybe it took an Army Colonel and former member of the Special Forces coupled with the hiring official's candor that her "perception of David Schroer as especially masculine made it all the more difficult for her to visualize Diane Schroer as anything other than a man in a dress" to make a compelling case for transgender discrimination.<sup>102</sup> These stories are indications of ways gay rights advocates can do more to document the human dimension, range of experiences, different family structures, and different needs.

Some of the stories in the equal protection realm seem to have succeeded in litigation by erasing sexuality. Perhaps there are ways to focus on the love, reintroduce the sexuality, and tell the stories of more disparate members of the LGBT community. Other stories that are emerging outside the context of litigation may be useful sources for a more inclusive sort of LGBT Voices Brief. For example, Jennifer Finney Boylan in two books, *She's Not There* and *I'm Looking Through You*, tells the story of how she was born a male, James Boylan, was married, fathered two children, had sex reassignment surgery, and how she and her wife, Grace, have navigated their love for each other after the surgery.<sup>103</sup> It is an amazing, complicated story of love that, of necessity, highlights issues of sexuality. Contrast her story with the Kansas Supreme Court's desiccated reading of the marriage of J'Noel and Marshall Gardiner, in which the court held that a marriage between a man and a post-operative male-to-female transsexual was void *ab initio*.<sup>104</sup> While the opinion delves into the various surgeries J'Noel had, entirely missing from the opinion (and from the underlying district court

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<sup>100</sup> *Id.* at 296.

<sup>101</sup> *Id.* at 296–97.

<sup>102</sup> *Id.* at 305.

<sup>103</sup> JENNIFER FINNEY BOYLAN, *I'M LOOKING THROUGH YOU* (2008); JENNIFER FINNEY BOYLAN, *SHE'S NOT THERE: A LIFE IN TWO GENDERS* (2004).

<sup>104</sup> *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002).

record) was any understanding of the humans, their relationship, their understanding of their marriage, or their love for each other.<sup>105</sup>

Some stories are already being told in realms outside the context of traditional rights litigation. After the attacks on the World Trade Center, the New York Times published a “Portraits of Grief” series that included stories of life partners, both gay and straight.<sup>106</sup> Since the Department of Justice did not create a specific exclusion for same-sex partners, Lambda Legal took the cases of several gay and lesbian surviving life partners to argue successfully for the eligibility for benefits from the federal September 11 Victims’ Compensation Fund.<sup>107</sup>

When we think outside the white-picket-fence plaintiffs’ box, people are afraid of the prospect of plaintiffs far removed from the norm: couples who might want an open marriage or those who met in a stereotypic bathhouse, haven’t known each other long, and want a quick Britney Spears wedding. Telling stories that go beyond the paradigm plaintiff carries risks. Telling those stories may carry even bigger risks in terms of how those presentations get translated on the political side. Any differences from the norm can become, in some people’s eyes, a reason why sexual minorities are different and why their rights should be restricted.

The types of legal claims being asserted will certainly frame the sorts of stories that can be told. (Undoubtedly, the laws in particular areas,

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<sup>105</sup> *Id.* at 137.

<sup>106</sup> Sally F. Goldfarb, *Disasters, Families, and the Law*, 28 WOMEN’S RTS. L. REP. 35, 41 (2007).

<sup>107</sup> 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 WM. & MARY J. WOMEN & L. 207, 234–35 (2003). *See also Moments of Silence Mark Fifth Anniversary of 9/11*, TUCSON WKLY. OBSERVER, Sept. 13, 2006, at 1, available at <http://www.tucsonobserver.com/archives/pdf/2006/09/Sep2013.pdf>. *But see* Goldfarb, *supra* note 106, at 41, noting:

Special Master Kenneth Feinberg was aware of the injustice of denying benefits to the partners of people killed in the attacks. He held hearings to resolve disputes between unmarried partners and others, and he worked to persuade the personal representative in such cases (who was typically a parent or other family member of the decedent) to share the award with the surviving partner. In the exercise of his discretion, he sometimes offered to increase the total award to induce the personal representative to allocate part of the sum to the partner, but these efforts did not always succeed.

*Id.*



such as the Don't Ask, Don't Tell policy, may have forced some awkward storytelling.<sup>108</sup>) As Cass Sunstein has noted:

Perhaps the rights protected by the Due Process Clause must grow out of longstanding practices. But as it has come to be understood, the Equal Protection Clause is tradition-correcting, whereas the Due Process Clause is generally tradition-protecting. The Equal Protection Clause sets out a normative ideal that operates as a critique of existing practices; the Due Process Clause safeguards rights related to those long-established in Anglo-American law.<sup>109</sup>

Pushing the envelope of deserving plaintiffs may be easier in the due process fundamental rights area and may not translate as well to equal protection theories. Due process does not demand a comparison to a similarly situated in-group; the very burdening of the right is the constitutional harm. With an equal protection challenge, it is imperative to compare the plaintiff with a member of the group already receiving benefits, so it is inherent in the equality realm that plaintiffs must base their appeals on likeness to a superordinate group. Equality arguments, of necessity, require discussions of sameness—but a more encompassing view of the qualities of rights-bearing individuals may help avoid the problem of the heteronormative ideal.

Litigating for LGBT rights is a process of organizing, becoming visible, seeking recognition, and validating gay and lesbian identity.<sup>110</sup> Visibility has increased in so many realms—arts, the media, politics, and public life—with gay-positive movies and television shows, actors, sports figures, next door neighbors coming out, parades, festivals, gay-owned

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<sup>108</sup> For example, in *Pruitt v. Cheney*, 963 F.2d 1160, 1161–62 (9th Cir. 1992), Captain Dusty Pruitt challenged her Army discharge based on her status of being a lesbian, claiming that although she had entered two ceremonial marriages with women, the Army had no evidence she had ever participated in any homosexual acts. Professor Diane Mazur comments on the ironic practical storytelling necessitated by the state of the law: “Was she trying to create the impression that she had never so much as held hands with either of her partners in life, an act which would have disqualified her from military service?” Diane H. Mazur, *The Unknown Soldier: A Critique of “Gays in the Military” Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 240 (1996).

<sup>109</sup> Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 67 (1996).

<sup>110</sup> Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1558–64, 1608–11 (1993).

businesses, gay-straight alliances in high schools, an increase in planned families, changing views of religious institutions, creation of gay advocacy groups, and elections of gay and lesbian officials. This increased visibility has worked to increase understanding and acceptance of gays, lesbians, and the transgendered and recognition of their families.<sup>111</sup> Perhaps advocates can find more ways to make visible in litigation the stories of those members of the LGBT community who have been in the shadows.

### III. SCIENCE, LITIGATION, AND LIBERATION

We are close to what Suzanne Goldberg has termed a “constitutional tipping point” regarding the rights of sexual minorities.<sup>112</sup> Professor Goldberg makes the important observation that in times when norms about social groups are destabilized, courts tend to focus on fact adjudication rather than acknowledging their roles in making normative judgments.<sup>113</sup> When courts are asked to make difficult normative judgments, Professor Goldberg warns, rightly I think, that “there is little to prevent courts from randomly selecting data to support a given conclusion and using that information out of context.”<sup>114</sup> What can prevent that selective culling of supporting data is an insistence that decisions be made based on cumulative, comprehensive, and converging evidence. This is where this Article turns to the philosophy of science.

What this Article will argue for in this section is a more robust view of the concept of scientific proof or theory-building in litigation than just reliance on selected pieces of empirical evidence. This view suggests that courts should make decisions that comport with the principles of scientific inquiry. Certainly, theories have to meet basic criteria of falsifiability,

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<sup>111</sup> See generally Mary Patricia Bym, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN’S L.J. 163, 187–95 (2007).

<sup>112</sup> Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006).

<sup>113</sup> *Id.* at 1961.

<sup>114</sup> *Id.* at 1989. Professor Goldberg calls for courts to “recognize the connections among cases involving the same social group” and to “acknowledge and defend[] . . . different treatment of the same facts in similar cases.” *Id.* at 2014–15. Her “candid fact-based adjudication” model is an excellent procedural approach that insists courts engage with conflicting norms. What this Article proposes is a theoretical approach that both litigants and courts should take toward evidence.

simplicity or elegance, and explanatory power.<sup>115</sup> Beyond that, in deciding controverted issues, courts should look for cumulative, comprehensive, and converging evidence—the three C’s of the scientific method.<sup>116</sup> Cumulative evidence is mounting evidence; comprehensive evidence is evidence that covers the waterfront; converging evidence is evidence that points in the same direction. This means evidence gathered over time, in various disciplines and contexts.<sup>117</sup>

It may not be easy for judges to know when supporting data can be considered cumulative or comprehensive, or even when it points in the same direction. This may necessitate a willingness for courts to break out of traditional doctrinal and jurisdictional molds, and search in disciplines outside of law or in geographic areas outside a particular state or federal jurisdiction for guidance. As just one example of the point, in recent decades the Supreme Court has looked to international norms for growing consensus evidence in death penalty cases and gay rights cases.<sup>118</sup> When issues are disputed and studies are introduced on both sides, courts should also interrogate the empirical methodologies used—the sophistication of studies, control of background and other independent variables, control groups, sample size, research design, and expertise of the researchers,

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<sup>115</sup> See ARTHUR N. STRAHLER, UNDERSTANDING SCIENCE: AN INTRODUCTION TO CONCEPTS AND ISSUES 58 (1992).

<sup>116</sup> See PHILIPP FRANK, PHILOSOPHY OF SCIENCE: THE LINK BETWEEN SCIENCE AND PHILOSOPHY 350 (1957) (discussing the testing of new scientific theories according to the principle of convergence—how the theories fit with what is already known); Bernard Cohen, *History and the Philosopher of Science*, in THE STRUCTURE OF SCIENTIFIC THEORIES 308, 321 (Frederick Suppe ed., 1977) (pointing out that knowledge in science is cumulative in that a scientist “is apt to borrow or use or adapt a definition or a law or an axiom or a principle, or even a whole theory, from one of his predecessors”). See generally Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 270 (1989) (“A theory must be consistent with the generally accepted body of knowledge, both within its own discipline and in other areas. . . . Theories that rely on and relate to comprehensive and converging evidence from other disciplines are more likely to be valid.”).

<sup>117</sup> See, e.g., JEROME R. RAVETZ, SCIENTIFIC KNOWLEDGE AND ITS SOCIAL PROBLEMS 209 (1973) (explaining that the “special character [of scientific knowledge] results from the complexity and interconnectedness of its materials, as they evolve through the complex and fallible social processes of their use and adaptation”).

<sup>118</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003). See also *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (“[W]ithin the world community, imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

among other factors.<sup>119</sup> I have argued elsewhere that these principles are not just useful in addressing controversial issues of fact, but are also useful for value questions.<sup>120</sup>

Advances of women have been tied to this sturdier methodology of proof—one that relies on evidence over time and across cultures from a variety of disciplines. To demonstrate systematic patterns of discrimination and subjugation of women, feminist legal theorists looked to a wide array of interdisciplinary evidence. They unearthed historical records to demonstrate the persistence of patriarchy over generations.<sup>121</sup> They drew on sociolinguists, who examined gendered patterns of dominance and subordination in discourse on different continents.<sup>122</sup> They used the tools of literary theorists to explore the portrayals of women in texts.<sup>123</sup> With this

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<sup>119</sup> See, e.g., Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDISC. L.J. 1 (2002); Jeremy A. Blumenthal, *Meta-Analysis: A Primer for Legal Scholars*, 80 TEMPLE L. REV. 201 (2007); Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537 (2004–05). The Canadian Supreme Court made this point well in its opinion in *M v. H*, [1999] 2 S.C.R. 3, at ¶ 296 (Can.), where the Court notes:

I have been greatly aided in my consideration of the existing social science evidence by the voluminous Brandeis briefs and articles submitted by the respondent. While this evidence is an important source of information for this Court, I must stress that care should be taken with social science data. When dealing with studies exploring the general characteristics of a socially disadvantaged group, a court should be cautious not to adopt conclusions that may in fact be based on, or influenced by, the very discrimination that the courts are bound to eradicate. Judges, in fact, should be diligent in examining all social science material for experimental, systemic or political bias of any kind.

*Id.*

<sup>120</sup> See Nancy Levit, *Defining Cutting Edge Scholarship: Feminism and Criteria of Rationality*, 71 CHI.-KENT L. REV. 947, 955 (1996); Levit, *supra* note 116, at 265.

<sup>121</sup> See, e.g., Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L. REV. 511, 536 (1990) (citing historian GERDA LERNER, *THE CREATION OF THE PATRIARCHY* 110–11 (1986)).

<sup>122</sup> See, e.g., Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (examining how different courts have treated ambiguous language used to invoke Miranda rights in light of gendered speech patterns).

<sup>123</sup> See, e.g., SANDRA LIPSITZ BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY* 43–49 (1993) (discussing the subordination of women in the Bible); Joan Williams, *From Difference to Dominance to Domesticity: Care as Work*,

cumulative evidence converging from a host of disciplines, feminist legal theorists built the case that socially, politically, and economically women were subjected to systematic discrimination. They convinced courts to look at this larger cultural context to find institutional responsibility.<sup>124</sup>

Central to the process of feminist theorizing was a methodology based on scientific inquiry. This more expansive view of the principles of critical inquiry, based on evidence from the sciences, religion and the social sciences—psychology, sociology, history, and cultural anthropology—can serve sexual minorities well in litigating for rights.

### A. Sexual Minorities and the Awkward Dance with Science

Sexual minorities have had an awkward relationship with science. For gay men and lesbians, sexual orientation was originally medicalized as a mental disorder; for the transgendered, it still is. Bisexuals are uncomfortably situated with respect to the science of sexuality because they call into question whether sexuality is a trait that is biologically motivated at all.<sup>125</sup>

Before 1900 sexologists created a taxonomy that classified homosexuality as a congenital inversion of “normal” sexual desire,<sup>126</sup> one which they considered an “organic aberration[.]”<sup>127</sup> But at least they argued

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*Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1468 (2001) (drawing on the works of literary theorist Judith Butler).

<sup>124</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 536–40, 542–45 (1996) (addressing the history of sex segregation in education, as well as demonstrating an understanding of the constructed nature of sex differences, as various institutions of higher education gradually admitted women for professional training).

<sup>125</sup> There is increasing evidence about the consistency of bisexuals’ self-identification over time, but the research on bisexuals lags far behind that on lesbians and gays because earlier researchers neglected bisexuality. See, e.g., MARJORIE GARBER, *VICE VERSA: BISEXUALITY AND THE EROTICISM OF EVERYDAY LIFE* (1995); CLARE HEMMINGS, *BISEXUAL SPACES: A GEOGRAPHY OF SEXUALITY AND GENDER* (2002); Lisa M. Diamond, *Female Bisexuality From Adolescence to Adulthood: Results From a 10-Year Longitudinal Study*, 44 DEVELOPMENTAL PSYCH. 5 (Jan. 2008); Paula C. Rodriguez Rust, *Bisexuality: The State of the Union*, 13 ANN. REV. SEX RES. 180 (2002); Margaret Rosario et al., *Sexual Identity Development Among Lesbian, Gay, and Bisexual Youths: Consistency and Change Over Time*, 43 J. SEX RES. 46 (Feb. 2006).

<sup>126</sup> Nancy J. Knauer, *Science, Identity, and the Constructive of the Gay Political Narrative*, 12 LAW & SEXUALITY 1, 12 (2003).

<sup>127</sup> *Id.* at 15.

that these “sexual impulses” that departed from the norm should not be legally punished.<sup>128</sup> Psychoanalysts in the 1930s viewed homosexuality as a psychiatric problem.<sup>129</sup> The first *Diagnostic and Statistical Manual of Mental Disorders (DSM-I)* catalogued homosexuality as a form of psychopathic personality disorder.<sup>130</sup> In 1973 the American Psychiatric Association removed homosexuality from the list of sociopathic mental disorders but developed a new classification of “sexual orientation disturbance,” later called “ego-dystonic homosexuality.”<sup>131</sup> It was not until 1986—little more than two decades ago—that this category was finally removed from the *DSM-III-R*.<sup>132</sup>

As for those who are transgendered, in that same revision of the *DSM-III-R*, the APA added the category of “gender identity disorder” for those who are “preoccupied with their wish to live as a member of the other sex” and who may experience “an intense desire to adopt the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation.”<sup>133</sup> Gender identity disorder is a diagnosis that persists in the latest incarnation of the *DSM*.<sup>134</sup>

Let’s examine two slices of the ways courts have considered scientific evidence in litigation regarding the rights of sexual minorities:

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<sup>128</sup> *Id.* at 16–17.

<sup>129</sup> Susan R. Schmeiser, *The Ungovernable Citizen: Psychopathy, Sexuality, and the Rise of Medico-Legal Reasoning*, 20 YALE J.L. & HUMAN. 163, 226 (2008).

<sup>130</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 796–97 n.121 (2002) (citing COMM. ON NOMENCLATURE & STATISTICS OF THE AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL: MENTAL DISORDERS 38–39 (1st ed. 1952)).

<sup>131</sup> See Knauer, *supra* note 126, at 23–24.

<sup>132</sup> See Suzanne B. Goldberg, *Intuition, Morals, and the Legal Conversation About Gay Rights*, 32 NOVA L. REV. 523, 530 n.32 (2008) (noting that a category of “Sexual Disorder Not Otherwise Specified” for those who experienced “persistent and marked distress about [their] sexual orientation” is still in the *DSM-IV*).

<sup>133</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 532–33 (4th ed. 1994). For a more complete history of the revisions, see Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL’Y & L. 177, 237–38 (2006).

<sup>134</sup> AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-TR) 576–77 (5th ed. 2000).

evidence regarding the parenting capabilities of sexual minorities and evidence regarding the immutability of sexual orientation.

## B. Social Science Evidence Regarding LGBT Parents

In *Baehr v. Lewin*,<sup>135</sup> the Hawaii Supreme Court remanded to the trial court the factual issue of the state's interest in banning same-sex marriage. On remand, the state of Hawaii tried to argue that children were better off raised in a marital household with their biological parents. However, its own expert witness testified that "gay and lesbian couples can, and do, make excellent parents and that they are capable of raising a healthy child."<sup>136</sup>

The state of Vermont raised a variation of this argument in *Baker v. State*, claiming that the state had an interest "in promoting the 'link between procreation and child rearing.'"<sup>137</sup> However, the court noted that the state permitted many couples to marry who have no intent to procreate, and observed that "a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques."<sup>138</sup> If the state's interest is in legitimizing children, the court concluded, "the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against."<sup>139</sup>

The argument that different-sex parents "further[] the well-being of children" was persuasive to the Washington Supreme Court in *Andersen v. King County*,<sup>140</sup> when it upheld the state ban on same-sex marriage. The court accepted the state's argument that "rearing children in a home headed by their opposite-sex parents is a legitimate state interest furthered by limiting marriage to opposite-sex couples because children tend to thrive in

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<sup>135</sup> 852 P.2d 44 (Haw. 1993).

<sup>136</sup> *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*7 (Haw. Cir. Ct. Dec. 3, 1996).

<sup>137</sup> 744 A.2d 864, 870 (Vt. 1999).

<sup>138</sup> *Id.* at 881.

<sup>139</sup> *Id.* at 882.

<sup>140</sup> 138 P.3d 963, 969 (Wash. 2006) (*en banc*). See generally Carlos A. Ball, *Blurring the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORDHAM L. REV.* 2733, 2754-55 (2008).

families consisting of a father, mother, and their biological children.”<sup>141</sup> The Arizona Court of Appeals reached a similar result in *Standhardt v. Superior Court of Arizona*.<sup>142</sup> The court held:

The State could reasonably decide that by encouraging opposite-sex couples to marry, thereby assuming legal and financial obligations, the children born from such relationships will have better opportunities to be nurtured and raised by two parents within long-term, committed relationships, which society has traditionally viewed as advantageous for children.<sup>143</sup>

Both the American Psychological Association and the American Psychiatric Association have weighed in with statements summarizing the scientific evidence and resolutions endorsing policies of nondiscrimination regarding the parenting rights of sexual minorities.<sup>144</sup> LGBT rights advocates have moved from the defensive use of social science evidence as a shield to using it as a sword.

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<sup>141</sup> *Andersen*, 138 P.3d at 983.

<sup>142</sup> 77 P.3d 451 (Ariz. 2003).

<sup>143</sup> *Id.* at 462–63.

<sup>144</sup> American Psychological Association (APA), Policy Statement on Sexual Orientation, Parents, and Children, July 28–30, 2004, *available at* <http://www.apa.org/pi/lgbc/policy/parents.html> (stating that “there is no scientific evidence that parenting effectiveness is related to parental sexual orientation: lesbian and gay parents are as likely as heterosexual parents to provide supportive and healthy environments for their children” and that “research has shown that the adjustment, development, and psychological well-being of children is unrelated to parental sexual orientation and that the children of lesbian and gay parents are as likely as those of heterosexual parents to flourish,” and concluding that “the APA opposes any discrimination based on sexual orientation in matters of adoption, child custody and visitation, foster care, and reproductive health services”). The American Psychiatric Association has also stated that:

[n]umerous studies have shown that the children of gay parents are as likely to be healthy and well adjusted as children raised in heterosexual households. Children raised in gay or lesbian households do not show any greater incidence of homosexuality or gender identity issues than other children. Children raised in nontraditional homes with gay/lesbian parents can encounter some special challenges related to the ongoing stigma against homosexuality, but most children surmount these problems.

American Psychiatric Association, Gay, Lesbian and Bisexual Issues, <http://www.healthyminds.org/glbissues.cfm> (last visited Feb. 1, 2010).



Intriguingly, in *Kerrigan*, the defendants “expressly have disavowed any claim that the legislative decision to create a separate legal framework for committed same sex couples was motivated by the belief that the preservation of marriage as a heterosexual institution is in the best interests of children.”<sup>145</sup> However, arguing that same-sex marriage for parents was in the best interests of their children was part of the litigation strategy for amici who filed briefs in support of the plaintiffs in *Kerrigan*. An amicus brief from the American Psychological Association, American Psychiatric Association, the National Association of Social Workers, and other organizations argued that the children of the approximately 66,000 gay fathers and 96,000 lesbian mothers<sup>146</sup> in the country would benefit from the security, stability, legal clarity and reduced stigma if their parents were granted the right to marry.<sup>147</sup>

In the California same-sex marriage case, the Northern California Chapter of the American Academy of Matrimonial Lawyers and the California District of the American Academy of Pediatrics joined in an amicus brief to argue that children are harmed financially, emotionally, and psychologically if their parents are not allowed to marry—that “they recognize they and their parents are treated as second-class citizens.”<sup>148</sup> Picking up on this argument, amici the American Psychoanalytic Association, the American Anthropological Association, and the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area emphasized the stigmatization of children of same-sex parents “if the State itself labels their parents’ relationship as ‘different’ and implicitly of lesser standing.”<sup>149</sup> These themes resonated with the California Supreme Court, which recognized that state sanctioning of same-sex marriage provides children

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<sup>145</sup> 957 A.2d at 477–78.

<sup>146</sup> Brief of American Psychological Association et al. at 9, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2007) (No. S.C. 17716), available at <http://www.glad.org/uploads/docs/cases/2006-01-31-kerrigan-amicus-brief-child-welfare.pdf>.

<sup>147</sup> *Id.* at 14–15.

<sup>148</sup> Amicus Curiae Brief in Support of Parties Challenging the Marriage Exclusion, *In re Marriage Cases*, 183 P.3d 384 (Cal. Oct. 4, 2007) (No. S147999), 2007 WL 3167051 at \*1.

<sup>149</sup> Amicus Curiae Brief of the American Psychoanalytic Association, the American Anthropological Association, and the Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, Urging Reversal of the Decision of the Court of Appeal, *In re Marriage Cases*, 183 P.3d 384 (Cal. Oct. 4, 2007) (No. S147999), 2007 WL 4632420 at \*33.

with a secure legal basis for their parents' union.<sup>150</sup> The court ultimately held that adhering to "the traditional definition of marriage . . . will, as a realistic matter, impose appreciable harm on same-sex couples and their children."<sup>151</sup>

In *Sex and Social Justice*, Martha Nussbaum remarks on the use of social science evidence regarding the rights of lesbian and gay parents to adopt children or retain custody of them. She summarizes that "children raised in homosexual households showed no differences from other groups, either in sexual orientation or in general mental health or social adjustment."<sup>152</sup> This seems to be part of a broader project and implicit scientific methodology of Professor Nussbaum's—to look at evidence from a variety of disciplines, eras, and cultures to build the philosophical and moral case for social justice for sexual minorities. The litigation strategies of LGBT groups align with this approach as they move toward greater inclusion of supporting social science evidence in their briefs.

### C. Scientific Evidence Regarding the Immutability of Sexual Orientation

Early gay rights advocates argued that because sexual orientation was immutable (and because homosexuals are a politically powerless minority and have been subjected to virulent antigay discrimination), homosexuality deserved heightened scrutiny under the equal protection clause.<sup>153</sup> The cumulative and converging evidence—studies in genetics, anatomy, and neurobiology,<sup>154</sup> bolstered by anecdotal first person accounts,

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<sup>150</sup> 183 P.3d at 425, 433.

<sup>151</sup> *Id.* at 401.

<sup>152</sup> NUSSBAUM, *SEX AND SOCIAL JUSTICE*, *supra* note 2, at 204.

<sup>153</sup> See, e.g., Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U. DAYTON L. REV. 575, 583–85 (1985); Harris M. Miller, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 817–21 (1984).

<sup>154</sup> See generally EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 305 (1999); Laura S. Allen & Roger A. Gorski, *Sexual Orientation and the Size of the Anterior Commissure in the Human Brain*, 89 PROC. NAT'L. ACAD. SCI. USA 7199 (1992); J. Michael Bailey & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 38 ARCHIVES GEN. PSYCHIATRY 1089 (1991); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993); Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCIENCE 1034 (1991); Brian S. Mustanski, *A Genomewide Scan of Male Sexual Orientation*, 116 HUM. GENETICS 272

as well as overwhelming evidence of the failure of conversion or “reparative” therapy<sup>155</sup>—seems to indicate a strong biological location for sexual orientation for gay men. While the evidence is more incomplete and inconclusive regarding lesbians,<sup>156</sup> sexual orientation seems highly resistant to change.

The scientific evidence that sexual orientation is essentially immutable was influential to some federal courts, particularly in cases in the early 1990s challenging the military’s policy of excluding gays and lesbians from service, but most of those opinions have been vacated.<sup>157</sup> That evidence was unpersuasive to other courts in the same era.<sup>158</sup>

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(2005); Qazi Rahman, *The Neurodevelopment of Human Sexual Orientation*, 29 NEUROSCIENCE & BIOBEHAVIORAL REV. 1057 (Nov. 2005); Ivanka Savic & Per Linström, *PET and MRI Show Differences in Cerebral Asymmetry and Functional Connectivity Between Homo- and Heterosexual Subjects*, PROC. NAT’L. ACAD. SCI., Apr. 30, 2008, <http://www.pnas.org/content/early/2008/06/13/0801566105.full.pdf+html>; D.F. Swaab et al., *Brain Research, Gender and Sexual Orientation*, 28(3/4) J. HOMOSEXUALITY 283, 283 (1995).

<sup>155</sup> See American Psychiatric Association, *Therapies Focused on Attempts to Change Sexual Orientation (Reparative or Conversion Therapies)* (May 2000), <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200001.aspx> (“The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient.”); Katrina C. Rose, *Sign of a Wave? The Kansas Court of Appeals Rejects Texas Simplicity in Favor of Transsexual Reality*, 70 UMKC L. REV. 257, 263 n.27 (2001) (“The failure rate of the homosexuality ‘cure’ touted by the so-called ‘ex-gay’ movement—based on one group’s own numbers—is as high as 92 1/2%.”). See also Carolyn Ann Hicks, Comment, *“Reparative” Therapy: Whether Parental Attempts To Change a Child’s Sexual Orientation Can Legally Constitute Child Abuse*, 49 AM. U. L. REV. 505 (1999); Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumers’ Report*, 33 PROF. PSYCHOL.: RES. & PRAC. 249 (2002).

<sup>156</sup> See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 526, 542 (1994); Robert Kunzig, *Finding the Switch*, PSYCHOL. TODAY, May–June 1998, at 88, 93, available at <http://www.psychologytoday.com/articles/200804/finding-the-switch>.

<sup>157</sup> See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1339, 1348 (9th Cir. 1988), *vacated and aff’d on other grounds*, *Watkins v. U.S. Army*, 875 F.2d 699, 704–11 (9th Cir. 1989); *Able v. United States*, 968 F. Supp. 850, 862–64 (E.D.N.Y. 1997), *rev’d*, 155 F.3d 628 (2d Cir. 1998); *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991), *rev’d*, 976 F.2d 623 (10th Cir. 1992). Other courts simply relied on the status-conduct distinction and held that classifications based on conduct were constitutionally permissible. See, e.g., *Thomasson v. Perry*, 80 F.3d 915, 948 (4th Cir. 1996).

<sup>158</sup> See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (holding, without citation to any scientific authority, that

Theorists identified a number of difficulties with using a litigation strategy that rests on the immutability of sexual orientation to claim suspect class status.<sup>159</sup> The tactic of focusing on innate differences can reinforce the perception of sexual minorities as Other, which may undercut the strategy of shared humanity.<sup>160</sup> At the extreme, commentators raised the specter that discovery of a “gay gene” could lead to eugenics.<sup>161</sup> As a political strategy, the tactic is uncertain, because beliefs in immutability do not ineluctably lead to support of civil rights for sexual minorities.<sup>162</sup> It omits from protection bisexuals, transsexuals, those whose orientation is ambiguous or in flux—as well as all voluntary conduct.<sup>163</sup> The larger moral problem is that origins of sexual desire should really be beside the point.<sup>164</sup> The problems with the immutability argument seem to be more than just theoretical risks. For example, some people who have sought refugee status fearing persecution based on bisexuality have had difficulty obtaining relief

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“[h]omosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender or alienage”); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics whereas homosexuality is primarily behavioral in character.”).

<sup>159</sup> For a contrary set of concerns, see Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629, 631 (2002) (cautioning that arguments heavily emphasizing the social construction of sexuality could prompt courts to find “the category of ‘gays and lesbians’ too diffuse to amount to a cognizable class”).

<sup>160</sup> Knauer, *supra* note 126, at 39–40 (criticizing strict classifications of sexual orientation).

<sup>161</sup> See, e.g., Susan J. Becker, *Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL’Y & L. 177, 248 (2006) (“The worst case scenario is that a biological or genetic marker for homosexuality will serve as a socially and medically approved basis for altering or aborting such ‘defective’ fetuses or for implementing social policy based on the ‘natural distinctions’ between sexual minorities and other individuals.”) (internal citations omitted).

<sup>162</sup> Knauer, *supra* note 126, at 33, 37.

<sup>163</sup> See generally Halley, *supra* note 156, at 520; Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 405–06 (2000).

<sup>164</sup> See Halley, *supra* note 156, at 567–68.

because of the dominant understanding of sexual orientation as immutable.<sup>165</sup>

Uses of the immutability argument in the past decade or so, primarily in same-sex marriage cases, have been both more nuanced and somewhat more successful. Regarding the factors in immutability analysis, courts do not dispute that sexual minorities have been victims of virulent discrimination and stigmatized. Some courts have rejected the idea that gays and lesbians are politically powerless.<sup>166</sup> A key location of dispute is the question of the alterability of sexual orientation.

Litigators are not making the absolutist argument that they were in the early years that sexual orientation is inborn, innate, and unchangeable.<sup>167</sup> They are developing a less essentialist claim that sexual orientation is not fixed, but deeply rooted.<sup>168</sup> This argument adds a layer, drawn from social psychology, that cultural perception and treatment of an identity characteristic can make that characteristic constructively immutable.<sup>169</sup> The movement is from an argument of strict biological causation to a focus on identity as a status that is in part socially constructed, but nonetheless real—with political and legal consequences that are both outside the control of individuals and not a legitimate ground for government action. It is a category that, in the words of Professor Sam Marcossion, is both “experienced as immutable by many individuals”<sup>170</sup> and “constitutive of part of their identity.”<sup>171</sup> The parallels to race, sex, and religion are that they are all about the socially constructed meaning of the categories that end up, from an individual point of view, as essentially immutable for the person whose lived experiences are dictated. The importance of race, for example, is not the biological category but the social

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<sup>165</sup> See Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, 53 MCGILL L.J. 59 (2008).

<sup>166</sup> See, e.g., *Dahl v. Secretary of the United States Navy*, 830 F. Supp. 1319, 1324 (E.D. Cal. 1993) (finding a triable issue of fact regarding whether homosexuality is immutable, but holding the point was moot because gays and lesbians were not politically powerless).

<sup>167</sup> See *supra* cases cited in note 157.

<sup>168</sup> See *infra* discussion in text at notes 184–90.

<sup>169</sup> See Marcossion, *supra* note 16, at 700–10.

<sup>170</sup> *Id.* at 700.

<sup>171</sup> *Id.* at 701.

features that make people unable to move from imposed caste systems that are truly immutable. The benefit of the constructive immutability argument is that it encompasses a diverse community, since the subordinating harms of the category as constructed “are shared by lesbians and gay men who do not experience their classification as immutable.”<sup>172</sup>

Martha Nussbaum commented on the immutability debate in an essay several years ago. She pointed out that the constructed category has become essentialized in ways that are unchosen.<sup>173</sup> She also noted that the aspect of the immutability argument that appeals to the public is innateness as a lack of choice—and therefore an inappropriate source for stigma or blame.<sup>174</sup> Professor Nussbaum also makes clear that the power of the immutability argument derives from coupling it with a moral argument about the substance of what is being denied to people because of the unchosen characteristic: “denying people a form of sexual fulfillment that cannot be substituted for because of deep factors about the organization of their personalities is indeed cruel and unreasonable.”<sup>175</sup>

Consider the ways recent court decisions addressing same-sex marriage cases have treated the immutability argument. Two of the courts finding marriage or marriage-like rights for same sex couples did not address the immutability idea.<sup>176</sup> Most of the recent decisions denying those rights also omitted immutability analysis.<sup>177</sup> Yet in *Conaway v. Deane*,<sup>178</sup> where the Maryland Court of Appeals found a rational basis for prohibiting same-sex marriage, the court commented on the absence of briefs on the immutability issue—although given the steep standard the court implies it would have invoked, the lack of briefing was probably not determinative of the outcome. In a footnote, the court briefly sketched three of the studies from the early 1990s, considered critiques of them, and then stated that “the

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<sup>172</sup> *Id.* at 710.

<sup>173</sup> Martha C. Nussbaum, *Millean Liberty and Sexual Orientation: A Discussion of Edward Stein's "The Mismeasure of Desire,"* 21 L. & PHIL. 317, 320 (2002).

<sup>174</sup> *Id.* at 321 n.4.

<sup>175</sup> *Id.* at 332.

<sup>176</sup> See Goodridge, 798 N.E.2d 941; Lewis v. Harris, 908 A.2d 196 (N.J. 2006).

<sup>177</sup> See Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002); Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Li v. State, 110 P.3d 91 (Or. 2005).

<sup>178</sup> 932 A.2d 571, 615 n.57 (Md. 2007).

biological studies do not establish that biology is the primary indicator of sexual orientation.”<sup>179</sup> The court concluded that “there does not appear to be a consensus yet among ‘experts’ as to the origin of an individual’s sexual orientation.”<sup>180</sup>

The absence of briefing the issue may have mattered in *Andersen v. King County*.<sup>181</sup> The parties did dispute whether sexual orientation was immutable, yet the court rejected the argument, which had been based on legal precedents but, according to the court, not supported by empirical studies. The court held:

The plaintiffs do not cite other authority or any secondary authority or studies in support of the conclusion that homosexuality is an immutable characteristic. They focus instead on the lack of any relation between homosexuality and ability to perform or contribute to society. But plaintiffs must make a showing of immutability, and they have not done so in this case.<sup>182</sup>

Of course this same plurality simply ignored the amicus brief of the American Psychological Association, which provided a wealth of psycho-social evidence that homosexuality was a normal expression of human sexuality and that children of same-sex couples would benefit psychologically if their parents were allowed to marry.<sup>183</sup> So perhaps the court was not really open to persuasion with scientific evidence.

In several of the most prominent decisions finding a right to same-sex marriage, the immutability idea was one of the struts of the decisions. In

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

<sup>180</sup> *Id.*

<sup>181</sup> 138 P.3d 963 (Wash. 2006).

<sup>182</sup> *Id.* at 974. In a footnote, the court left open the question for future research: “We recognize that this question is being researched and debated across the country, and we offer no opinion as to whether such a showing may be made at some later time.” *Id.* at 974 n.6. Brief of Respondents Castle et al., *Andersen*, 138 P. 3d 963 (No. 75934-1) 2004 WL 3155215 at \*55–56 (Nov. 29, 2004), did refer to prior legal authorities regarding immutability, as well as the American Psychological Association’s condemnation of reparative therapy, to conclude that sexual orientation is a characteristic that is not only irrelevant to the issue but also one that is exceedingly difficult to change.

<sup>183</sup> Amicus Curiae Brief of American Psychological Association, *Anderson*, 138 P. 3d 963 (No. 75934-1), 2005 WL 901986.

1995 in *Egan v. Canada*,<sup>184</sup> the Supreme Court of Canada held unanimously that sexual orientation was sufficiently analogous to the enumerated bases for prohibited discrimination in the Canadian Charter of Rights and Freedoms that the equality provisions also banned discrimination based on sexual orientation. Ruling that it was illegal to deny homosexual couples the spousal social security allowance to which married couples were entitled, the Court stated, “whether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.”<sup>185</sup>

The Connecticut Supreme Court in *Kerrigan v. Commissioner of Public Health*<sup>186</sup> ruled that sexual orientation is a quasi-suspect classification, finding that immutability, although not a requirement, was a factor in invoking heightened scrutiny. The court described sexual orientation in constructivist terms as a “distinguishing characteristic that defines them as a discrete group,” and a “central, defining [trait] of personhood”—as well as a characteristic that has been the source of virulent discrimination—and asking “whether the characteristic at issue is one governments have any business requiring a person to change.”<sup>187</sup>

Similarly, in *In re Marriage Cases*,<sup>188</sup> the California Supreme Court found that immutability was not an absolute requirement for suspect class status. The court expressed appreciation for the amicus briefs filed and specifically cited to the American Psychological Association and the American Psychiatric Association brief that sexual orientation is an important “characteristic of the *individual*, like biological sex, gender identity, or age.”<sup>189</sup> Comparing sexual orientation to religion, the court evinced an understanding of the constructive immutability idea: “Because a person’s sexual orientation is so integral an aspect of one’s identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.”<sup>190</sup>

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<sup>184</sup> [1995] 2 S.C.R. 513 (Can.).

<sup>185</sup> *Id.* at ¶ 5.

<sup>186</sup> 957 A.2d 407.

<sup>187</sup> *Id.* at 438–39 (internal citations omitted) (emphasis in original).

<sup>188</sup> 183 P.3d 384 (Cal. 2008).

<sup>189</sup> *Id.* at 407 n.10; *id.* at 441 n.59 (emphasis in original).

<sup>190</sup> *Id.* at 442.



In sum, the immutability argument has been persuasive recently to some courts in same-sex marriage cases. These courts are beginning to accept the view articulated so well by Martha Nussbaum that sexuality is fundamental to identity. They also recognize that while change of one's sexual orientation is not impossible, it is often substantially difficult, and, whether alteration is difficult or not, that change is not something that should be compelled by government. To these sympathetic courts, sexual orientation is not a fixed biological location but one in which personhood is also constructed as a matter of group identity. And they acknowledge that the current construction of sexual identity is encumbered with virulent stereotypes that are completely unchosen by the individuals affected. The idea that attaching any consequences of blame or stigma to a status that is largely unchosen produces fundamental unfairness seems to resonate with these courts.

The example of constructive immutability offers a much more robust view of science and social science evidence. This is not a situation of waiting to see if the empirical evidence of biological causation becomes more undeniable. It is a more nuanced, deeper, richer theory of evidence that looks at the social science evidence regarding categories as the product of social construction.

Similarly, a number of briefs in same-sex marriage cases looked more broadly for evidence across disciplines showing the acceptance of same-sex unions. For instance, in the New Jersey *Lewis v. Harris* case, Lambda arranged for amicus briefs from more than one hundred clergy members to argue that allowing civil same-sex marriage would not undercut religious views of marriage, from historians who argued that same-sex couples have existed throughout history, and from the American Psychological Association, which maintained that "children of same-sex couples would benefit if their parents were allowed to marry."<sup>191</sup> A similar brief was filed in New York to "demythologiz[e] the history of marriage in New York," noting that numerous features of marriage, such as husbands' absolute control over their wives, have long been alterable.<sup>192</sup>

Plaintiffs in *Kerrigan v. Commissioner of Public Health* obtained an amicus brief from history and family law professors who emphasized the

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<sup>191</sup> Bruck, *supra* note 55, at 426.

<sup>192</sup> See Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 252 (2006) (including Brief of Professors of History & Family Law as Amici Curiae in Support of Plaintiffs-Respondents, *Hernandez v. Robles*, 26 A.D.3d 98 (N.Y. App. Div. July 28, 2005)).

fluidity of the institution of marriage throughout time and over history.<sup>193</sup> They were joined by a group of comparative constitutional law and international human rights scholars, who attested to the trend in foreign jurisdictions toward expanding civil marriage rights to same-sex couples.<sup>194</sup> A group of religious bodies from different faith traditions filed an amicus brief supporting the idea that civil marriage should be kept distinct from religious ideals of marriage.<sup>195</sup>

In a fairly dramatic shift in the past twenty years, science is becoming an ally to rather than an oppressor of gays and lesbians. LGBT litigators are moving toward more extensive uses of scientific evidence in support of equal rights. The uses of social scientific evidence in cases raising issues of parenting abilities, the immutability of sexual orientation, and the acceptance of same-sex marriage across cultures are emblematic of the idea that science can be used to promote gay rights. The science that they are using is a richer conception than simply biological imperatives; it draws on cumulative, comprehensive, and converging evidence from a wide variety of disciplines in support of arguments. These litigators see the persuasive value of scientific evidence and scientific methods in making arguments to courts and the public about moral questions.

#### IV. CONCLUSION

This Article has focused on an unlikely pairing—love and science. Both play a role in Martha Nussbaum's scholarship and both have been used in LGBT litigation. One of the tensions in litigating the rights of sexual minorities has been the attachment to the heteronormative ideal. Martha Nussbaum's central idea—that we need to act in ways that affirm human dignity—may offer a path that helps avoid the heteronormativity

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<sup>193</sup> Brief of Amicus Curiae the Professors of History and Family Law in Support of Plaintiffs-Appellants, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2007) (No. S.C. 17716), *available at* <http://www.glad.org/uploads/docs/cases/2006-12-12-kerrigan-history-amicus-brief.pdf>.

<sup>194</sup> Amicus Brief on Comparative and International Law in Support of Plaintiffs-Appellants, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2007) (No. S.C. 17716), *available at* <http://www.glad.org/uploads/docs/cases/2006-12-12-kerrigan-amicus-international-brief.pdf>.

<sup>195</sup> Brief and Appendix of the Amici Curiae Religious Organizations and Clergy, *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. S.C. 17716), *available at* <http://www.glad.org/uploads/docs/cases/2006-12-12-kerrigan-amicus-brief-religion.pdf>.

problem. As the implicit methodology of her works emphasizes, a deeper approach to scientific inquiry will support this project.

In urging more love and more science, is there a conflict in either the metamessages or the methodology? First, on the level of metanarrative, science is not about the outliers, it is about the norm. Second, methodologically, stories bring in the anecdotal—narratives that are not themselves impartial, objective, or empirical.

Stories, though, *are* real: “they are populated by real people; they afford a special emphasis to personal details, to nuanced characterizations, to the richness of human experience.”<sup>196</sup> But we need to tell stories about all of the members of our community. As Sam Marcossion says, “We’re not going to win an ultimate stable victory if it is based on a false picture of the community.”<sup>197</sup>

Stories acknowledge that knowledge is incomplete, partial, and uncertain. Stories alone may not be rights-claiming, but they are a central tool of persuasion when used in litigation, particularly if supported by broader evidence from the sciences and social sciences. Law has limits; it cannot grant or require societal acceptance. These litigation strategies are part of the broader project about changing the ways straight people think about gays, lesbians, bisexuals, and the transgendered. It is difficult to fight against power and entrenched ignorance, but Martha Nussbaum offers hope that reason will ultimately triumph over injustice: “[I]f we face the issue with good moral arguments, appropriately illuminated by historical and cross-cultural understanding, there is reason to believe that we can prevail over prejudice, both in the courts and in the larger society of which they are a part.”<sup>198</sup>

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<sup>196</sup> Hayman & Levit, *supra* note 80, at 399.

<sup>197</sup> Telephone interview with Sam Marcossion, Professor of Law, University of Louisville, Louis D. Brandeis School of Law (Nov. 10, 2008).

<sup>198</sup> NUSSBAUM, HIDING FROM HUMANITY, *supra* note 2, at 331.

