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SEXUALITY AND GLOBAL FORCES - DR ALFRED KINSEY AND THE SUPREME COURT OF THE UNITED STATES

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FAULT-LINE OF CIVILISATIONS?

On September 11, 2006, the people of the United States of America paused to remember the events that had happened in New York and Washington five years earlier. Others, in many lands, joined in the reflection about "the day the world changed".

On the same day a little noticed event occurred in Houston, Texas. Tyron Garner, a homosexual man aged thirty-nine, died of complications of meningitis. Newspapers recorded how he had been one of the two accused, with John G Lawrence, who had been arrested

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in September 1998 and charged with violating the Texas homosexual conduct law. The arrest was effected by a Sheriff's Deputy who claimed that he had witnessed the two men engaging in an act of sodomy[1]. Mr Garner and Mr Lawrence had been alone in the apartment when a tip-off claimed that a black man was going crazy in the apartment and was armed with a gun. The caller later turned out to be a man who had been romantically involved with Mr Garner. When the police arrived, there was an open door, no affray and no gun. Simply two adult men in a bedroom engaged in consensual sex.

The Deputy Sheriff arrested the men and charged them with sodomy. On legal advice they pleaded no contest. The Lambda Legal Defense and Education Fund successfully challenged the convictions before a three-judge panel of the State Appeals Court. However, that decision was reversed by the State's Supreme Court. Its order led to an appeal to the Supreme Court of the United States. By a six to three majority, that Court, in *Lawrence v Texas*[2], quashed the conviction.

The opinion of the Supreme Court was written by Justice Anthony M Kennedy. At the close of his reasons, Justice Kennedy explained the evolution in the Supreme Court's consideration of the legality of homosexual criminal offences in the United States[3]:

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1 See Obituary, *New York Times*, September 14, 2006, D 8.

2 *Lawrence v Texas* 539 US 558 (2003).

3 539 US 558 at 578-579 (2003).

> "Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom".

Even more than for its decision on the specific subject of the constitutionality of sodomy offences the *Lawrence* decision was significant for the citation by the Supreme Court of legal materials from foreign jurisdictions tending to point in the direction which the Supreme Court majority eventually took. In this respect, the decision in *Lawrence* reflected other recent decisions of the Supreme Court of the United States in which a majority has examined judicial materials and other legal data from international and national courts concerned with issues similar to those presented under the United States Constitution[4]. Specifically, Justice Kennedy made reference to decisions of the European Court of Human Rights holding that homosexual offences in three countries of the Council of Europe, were in breach of the European Convention on Human Rights[5].

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[4] See eg *Atkins v Virginia* 536 US 304 at 316 n 21 (2000); *Grutter v Bollinger* 539 US 306 at 344 (2003).

[5] *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Norris v Ireland* (1988) 13 EHRR 186; *Modinos v Cyprus* (1993) 16 EHRR 485.

This mode of reasoning by the majority Justices has enlivened a fierce debate in the United States concerning the legitimacy, in domestic constitutional decision-making, for a final court to pay regard to the precedents of other courts and the opinions of jurists in other lands concerning analogous problems[6]. In my own Court, in Australia, there has been a similar clash of opinions over the legitimacy of looking, as Justice Kennedy did, to the wisdom of a "wider civilisation"[7]. Many lawyers, and not a few judges, raised in the strict confines of national and subnational jurisdictions, object to the thought, even more the practice, of using legal reasoning from other countries in any way, in the elaboration of their own national constitution and laws[8].

The basic difficulty for legal nationalists, who wish to restrict the ideas and reasons deployed in the elaboration of their own national constitutions and laws is the fact that the world has moved on. Ideas are now constantly circulating across national boundaries with an inevitable impact on the minds of human beings and the way in which they perceive the world, its people and its legal, political and social problems.

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6 "The relevance of foreign legal material in US constitutional cases: a conversation between Justice Antonin Scalia and Justice Stephen Breyer" 3 *International Journal of Constitutional Law* 519 (2005); H Koh, "International Law as Part of Our Law", 98 *American Journal of International Law* 43 at 50 (2004); M D Kirby, "International Law - The Impact on National Constitutions" (7th Annual Grotius Lecture) 21 *American University International Law Review* 327 (2006).

7 *Lawrence* 539 US 538 at 576 (2003) per Kennedy J.

8 In Australia the debate appears in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589ff per McHugh J [62]-[73] and in my own reasons at 615ff [145]-[193].

In the age of globalism, it is virtually impossible to escape the power of global ideas when their time has come. Those ideas inform the "wider civilisation" in which all people connected to them now live. In a time of satellite television, jumbo jets, the internet, cell phones and global media it is virtually impossible, at least in most civilised places, to stem the incoming tide of global discussion about science, truth, values and perceptions of our planet, its inhabitants, the biosphere and the universe that surrounds us.

Some writers contend that the events of September 11, 2001 evidenced a clash of civilisations. Writing eight years earlier, in 1993, Professor Samuel Huntington[9] predicted a growing cultural division between "Western Christianity" and "Orthodox Christianity and Islam". He suggested that this clash represented a new fault line that replaced the old fault line between liberal Western democracies and the command economies propounded by Soviet-style communism. That competition of ideas ultimately collapsed as ideas about the comparative wealth, efficiency and freedom of Western societies jumped the Berlin Wall and embraced the captive peoples of the Eastern Block who had lived too long hostage to the unworkable ideals of Soviet communism. When September 11, 2001 occurred, the notion of a new fault line, evidencing a different clash of civilisations gained much attention.

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9 S Huntington, "The Clash of Civilizations?", 72 *Foreign Affairs* 22 (1993); S Huntington, *The Clash of Civilizations and the Remaking of World Order*, (Simon & Schuster, NY, 1996).

Echoing Professor Huntington, Polly Toynbee, a columnist in the British *Guardian* newspaper, in November 2002 declared that[10]:

> "What binds together a globalized force of some extremists from many continents is a united hatred of Western values that seems to them to spring from Judeo-Christianity".

Adhering to this thesis of the clash of civilisations, Toynbee suggested that the Muslim world lacked the core political values that gave birth to representative democracy in Western civilisation, namely separation of religious and secular authority; the rule of law; social pluralism; the parliamentary institutions of representative government; and the protection of individual rights and civil liberties as a buffer between citizens and the power of the State[11].

However, more recent research by Professor Ronald Inglehart of the Center for Political Studies at the University of Michigan's Institute of Social Research and Pippa Norris of the John F Kennedy School of Government within Harvard University suggests that the "true clash of civilisations" is not that between Islam and the rest[12]. It is between the values of modern, secular, democratic societies and the values of other societies, often influenced by fundamentalist or theocratic religious beliefs about the world and its people.

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10 P Toynbee, *The Guardian*, cited by R Inglehart and P Norris, "the True Clash of Civilizations" in *Foreign Policy* March/April 2003, 63.

11 Explained in Inglehart and Norris, above n 10, "The Truth Clash of Civilisations" in *Foreign Policy* March/April 2003, 63.

12 *Ibid*.

According to this view, the cultural divide of contemporary societies is between values that are held concerning what Inglehart and Norris call the "sexual clash of civilisations"[13]. By reference to a world values survey, conducted by these scholars, they accept that culture matters, indeed matters greatly. Historical and religious traditions have left an enduring imprint on contemporary values. But the core clash is not over political values as such. Upon such questions as the desirability of democratic performance; democratic ideals; and strong democratically elected leaders, the values expressed in the responses to the world survey in Western and Islamic countries are very similar. Instead, the fault line seems to be closely linked with modernisation. It is connected with attitudes to such issues as gender equality; the right to divorce; contraception rights and abortion; and most especially the issue of homosexuality. Upon these issues there remain strongly divergent views as between the majority of Western democracies and other countries of the world.

Specifically addressing homosexuality, Inglehart and Norris conclude[14]:

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[13] *Id,* 65. Given Kinsey's own insistence on the need for great care and prudence in applying taxonomies to human behaviour and social phenomena, he would surely caution against an over-ready willingness to apply a grant theory to any so-called 'clash of civilizations' without a great deal of data to support the propounded classifications.

[14] *Id*, 68.

> "The way a society views homosexuality constitutes another good litmus test of its commitment to equality. Tolerance of well-liked groups is never a problem. But if someone wants to gauge how tolerant a nation really is, find out which group is the most disliked, and then ask whether members of that group should be allowed to hold public meetings, teach in schools, and work in government. Today, relatively few people express overt hostility towards other classes, races, or religions, but rejection of homosexuals is widespread. In response to a [world values survey] question about whether homosexuality is justifiable, about half of the world's population say 'never'. But, as is the case with gender equality, this attitude is directly proportionate to a country's level of democracy. Among authoritarian and quasi-democratic States, rejection of homosexuality is deeply entrenched: 99% in both Egypt and Bangladesh, 94% in Iran, 92% in China, and 71% in India. By contrast, these figures are much lower among respondents in stable democracies: 32% in the United States, 26% in Canada, 25% in Britain, and 19% in Germany".

The authors point out that Muslim societies are neither uniquely nor monolithically low on tolerance towards minority sexual orientation and gender equality. Many of the Soviet successor States rank as low on these issues as most Muslim societies. Nevertheless, on the whole, on these issues, Muslim countries not only lag behind the West but behind almost all other societies as well. Most significant of all, the figures reveal that the gap between the West and Islam is even wider amongst younger-aged groups. Inglehart and Norris observe[15]:

> "This pattern suggests that the younger generations in Western societies have become progressively more egalitarian than their elders, but the younger generations in

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[15] *Id*, 68.

> Muslim societies have remained almost as traditional as their parents and grandparents, producing an expanding cultural gap".

How, then, did the notions of a "wider civilisation" to which Justice Kennedy referred in *Lawrence* spread on these issues in Western societies, specifically on homosexuality? How did they take hold in such a relatively short time (half a century more or less)? Why do we witness the change and the secular acceptance of diversity which it generally brought in its wake?

It is when scholars begin to talk of the "sexual clash of civilisations"[16], as an explanation of the divide that now exists in the world, that thoughts naturally turn to the work of Dr Alfred Kinsey at Indiana University - a work that is continuing today in the Kinsey Institute with its research at the cutting edge of the study of sexuality, gender and reproduction.

For the past five years, I have been privileged to serve on the Board of Governors of the Kinsey Institute. I have been surprised to find how modestly the Institute is funded and how modestly it is often appreciated for its enormous impact on our world in one of the pivotal ideas of our time.

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16 *Id,* 65.

In the remainder of these remarks, I will say something about Dr Kinsey and his research. I will then contrast some of the early decisions of the Supreme Court of the United States on issues relating to homosexuality with the approach embraced more recently by the majority in *Lawrence*. My central thesis is not that Dr Kinsey, or his Institute of Sex Research at Indiana University, single-handedly revolutionised the values of contemporary Western societies towards homosexuality or other sexual issues. But it is that Kinsey's research profoundly shifted the debate in the United States and in other Western countries. Moreover, research within the area that Kinsey and his colleagues undertook at Indiana University should be seen as very important to the true fault line that exists in the world today. If progress is to be made in human civilisation, it must come on issues such as gender equality, rights to divorce and contraception and attitudes to homosexuality. If the world is to become a more tolerant and safer place, this is where progress must be achieved. This is why Kinsey is not only important to America and its law. The subject matters of the research into human sexuality address an important fault line in our world and are therefore very important for the future of the planet and of our species.

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DR KINSEY AND HIS RESEARCH

Dr Alfred Kinsey died fifty years ago in August 1956. He was born in Hoboken in June 1894. His father was an instructor in the Stevens Institute of Technology. Both of his parents were deeply religious and

during his youth the family were members of the Methodist Church[17]. He was described by a teacher as a "youth of utmost gentleness and principle. Biblical and ethical concepts were part of the general atmosphere of that period … At that time such a word as 'sex' was totally unmentionable"[18]. He was gifted in poetry and music. He joined the Boy Scouts of America soon after their founding in 1910. He chose to study biology and soon excelled in zoology, as that branch of biology was then known. In 1916 he graduated with a Bachelor of Science degree *magna cum laude* from Bowdoin College, Brunswick. He proceeded to Harvard Graduate School, and chose gallwasps as the insect that he would study intensively.

In 1920, Dr Carl H Eigenmann, Chairman of the Zoology Department of Indiana University, invited Kinsey to Bloomington for a teaching job[19]. The University was celebrating its centenary year. It had an enrolment of 2,296 students, only 37 of whom came from out of the State and only 50 of whom were enrolled in graduate studies. Despite an initially unfavourable impression about Bloomington, Kinsey cast his lot in with Dr Eigenmann. He began work as an Assistant Professor. He rose to Associate Professor in 1923. In 1929 was appointed a full Professor.

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17 C V Christenson, *Kinsey - A Biography*, (Indiana University Press, 1971) 17.

18 *Id*, 19 citing Mrs Sophie Schindler, Kinsey's school teacher.

19 *Ibid*, 40.

In 1920, Kinsey met Clara McMillen at a zoology picnic. He courted and married her in June 1921. Their children, Donald, Anne, Joan and Bruce were born between 1922 and 1928. Kinsey taught undergraduate general biology. But he continued his research on gallwasps and effectively became a world expert on that subject.

Kinsey's obscure but worthy scholarly life might have continued in Bloomington in this way but for one of those shifts of the mind that mark out the greatest of scientists. By the mid-1930s, Kinsey became very interested in the life views of great men of science[20]. Perhaps it was reflecting upon such scientists, and their break-throughs, that led Kinsey's mind into a new field of biology concerning what he sometimes called "the human animal". He later claimed that published research of Dr Robert Dickinson, an American leader in sex education, maternal health and birth control, led him to become interested in sex research into humans. In 1938 he began a marriage course for undergraduates and others at Indiana University. Predictably enough, this attracted opposition from conservative circles; but it was supported by the University Trustees. By the late 1930s, Kinsey was working on a "Biometric Treatment of Data", transferring the same meticulous scientific methodologies he had developed in studying gallwasps, so far as that was possible, into the study of human sexual behaviour[21].

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[20] *Id*, 64.

[21] *Id,* 104.

Books have been written, plays have been staged, documentaries and films have been screened, concerning the way Kinsey began his program of research in prisons and elsewhere involving human sexual experience. One of the early ideas that evolved from his thousands of interviews was that the previous assumption of a strict binary division between "homosexuals" and "heterosexuals" was factually inaccurate. Kinsey was beginning to postulate a rating scale by which individuals could be ranked at different points in relation to their sexual behaviour, inclinations and interests[22]. His was not an enterprise to collect erotic stories for the titillation of particular audiences. It was a case of a "taxonomist working with a taxonomic problem. The methods remain the same; only the material is changed"[23].

Kinsey's questionnaire format was refined over the 1940s. From the beginning it covered questions on the major sexual outlets of the human subjects: masturbation, sex dreams, petting and coitus. The last was subdivided into categories based on the identity of the sexual partner. This allowed for sub-classifications including pre-marital, marital, extra-marital and post-marital coitus and intercourse with prostitutes. Kinsey added two almost unexplored areas of sexual

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[22] *Id,* 107 quoting T W Torrey, "Zoology and Its Makers at Indiana University" *Bios*, 1949, xx, 67-99 at 96.

[23] W B Pomeroy, *Dr Kinsey and the Institute for Sex Research*, (Harper & Row, NY, 1972) 286 at 302-304.

activity, namely homosexual relations and sexual contacts with animals. His research was quite unique. No one, with such methodological precision, had ever before attempted such a systematic study of human sexual experience.

Those who came to mature consciousness in the 1950s, can remember the mood and attitudes of those times. In Australia as in America they were years fiercely resistant to research of the kind that Kinsey embarked upon. That research challenged not only religious precepts but also notions of civic morality, public modesty, marital privacy and basic decency. In Australia, in the 1950s of my youth, a leading Police Commissioner, Colin Delaney, later named Australian Father of the Year for 1960, declared that homosexuality was "Australia's greatest menace and fastest growing crime". Rounding up these criminals; entrapping them; putting them on the front pages of the newspapers; shaming them and punishing them was one of Police Commissioner Delaney's obsessions. He had his counterparts in America, Britain and elsewhere[24]. They still exist in many parts of the world. Only an obsessive scientist, with a background in gallwasps, would have led his colleagues, his University and the world into such a taxonomic minefield.

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[24] See eg "The Post-World War II Anti-Homosexual Campaign" in W N Eskridge and N D Hunter *Sexuality, Gender and the Law*, (Foundation Press, NY, 1997) 174. See also D Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government*, (University of Chicago Press, Chicago, 2004).

I will not recount again the fierce opposition to Kinsey's research from churches; politicians; fellow academics; civic groups and others[25]. His work on human sexuality only survived because of the strength of his personality, the support of his wife and of his immediate colleagues and the unwavering insistence of the President of Indiana University, Dr Herman Wells, that the University existed both for teaching and for the search for truth. When the history of academic independence, its enemies and noble protectors is told, the stand taken by Dr Wells, who for the most part kept the support of the University Board of Trustees, represents one of the finest moments. It would have been easy, and even predictable, for Indiana University and Kinsey to have buckled under, especially when, in an earlier moment of paranoia, Kinsey was accused of aiding communism. But buckling did not happen - largely because of the powerful personalities of Kinsey and Wells. It says a lot about the basic integrity of the American university tradition by the 1950s, and of Indiana University in particular, that Kinsey's work went forward.

Kinsey's first major report, published in 1948, was titled *Sexual Behaviour in the Human Male*[26]. The second report, published in 1953,

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25 Christianson, above n 17, 166.

26 A C Kinsey, W E Pommeroy and C E Martin, *Sexual Behaviour in the Human Male*, (W B Saunders & Co, Philadelphia, 1948).

was *Sexual Behaviour in the Human Female*[27]. Each report, but especially the first, burst upon the world as an intellectual bombshell of new ideas. Each report challenged assumptions that were generally accepted throughout the world concerning human sexual experience. Each undermined the strict binary notions of sexual orientation. Each demonstrated widespread human inclination to sexual variety, experimentation and sexual experience of various kinds throughout life. According to Yale Professor William N Eskridge and his co-author, Professor Nan D Hunter, the 1948 Report "remains the most comprehensive empirical study of male sexuality in America[28]".

The research of Kinsey and his colleagues help revolutionise thinking about sexual behaviour both in the United States and far beyond. The Kinsey approach had eschewed fixed or pre-ordained categories and hypotheses. Instead, it focussed on comprehensive fact-gathering from a large but non-random sample of college students, prisoners and Indianans swept into the "giant study" at Kinsey's Institute for Sex Research.

The study of male respondents concluded[29]:

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27 A Kinsey, W B Pommeroy, C E Martin and P H Gephard, *Sexual Behaviour in the Human Female*, (W B Saunders & Co, Philadelphia, 1953).

28 Eskridge and Hunter, *Sexuality, Gender and the Law*, above n 24.

29 Male Report, above n 26, 639.

> "Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats … It is a fundamental of taxonomy that nature rarely deals with discrete categories. Only the human mind invents categories and tries to force facts into separate pigeon-holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behaviour the sooner we will a sound understanding of the realities of sex".

Amongst the most surprising findings recorded in the 1948 Kinsey Report concerned homosexuality. Until that time American psychologists, Freudian and otherwise, and their counterparts world-wide had depicted homosexuality as biologically abnormal and psychologically poisonous. The Kinsey findings cast doubt at least on the rarity and abnormality of homosexual orientation.

- 37% of the male population had at least one overt homosexual experience to orgasm between the ages of 16 and 45, whilst another 13% had reacted erotically to other males without having an experience to orgasm. This means that 50% of the male population had experienced significant homosexual erotic attraction during adulthood;

- 30% of the male population had had at least incidental homosexual experience or reactions (rating 1 or above on the Kinsey scale) over at least a three year period between ages 16 and 55;

- 25% of the male population had had more than incidental experience (rating 2 or above);

- 18% of the male population had had at least as much homosexual as heterosexual experience (rating 3 or above) over at least a three year period;

- 10% of the male population had been more or less exclusively homosexual (rating 5 or 6) for at least a three year period, with 8% being completely homosexual (rating 6) for at least that period; and

- 4% of the white male population was exclusively homosexual (rating 6) for their entire lives[30].

The findings in the 1948 Kinsey Report concerning heterosexual activity were almost as surprising. Contrary to the then accepted mores, Kinsey and his colleagues found that virtually all men masturbated, even after they were married; that many husbands had sexual affairs during their marriage, many of them without guilt (or discovery); and that married couples engaged in a range of sexual activities, including oral and anal sex as well as vaginal sex.

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[30] Male Report, n 26, 650-651, tables 141-150, figures 162-170.

The 1953 study on *Sexual Behaviour in the Human Female* reported significant, but much lower, homosexual attraction and activity among women. It found that 28% of women sampled had experienced significant erotic attraction to other women (compared with 50% of the male sample), and 13% had homosexual experiences to orgasm (compared with 37% of the male sample). But Kinsey's great contribution to the study of women's sexuality was to establish beyond reasonable doubt that women are sexually active rather than passive "by nature":

- Nearly 50% of the sample had engaged in premarital intercourse, a considerable portion with their fiancé in the year or two before marriage. This discovery, unremarkable in today's society, came as a great shock to many in 1953;

- Among married couples, women tended to be more interested in intercourse later in marriage, whereas men tended to be most interested early in the marriage;

- 26% of women (in contrast to 50% of the male sample) had engaged in extramarital coitus by the age of 40. The incidence of extramarital intercourse in women was affected by religious background more than any other factor; and

- By age 20, only 33% of women had masturbated compared with 92% of their male contemporaries.

Kinsey's research findings confronted social assumptions that were the foundation of much religious and other moral instruction. They challenged the beliefs about fellow citizens and human beings held by most people and the laws which gave effect to the social postulates about sexual experience. Those laws concerned matters such as the woman's role in marriage and her subordination to the rights of her husband with very limited entitlements to divorce; the woman's access to forms of contraception to control reproduction and to prevent unwanted pregnancies; and the operation of anti-sodomy laws and laws against the so-called "unnatural offences" designed to stamp out such "abominable crimes" which one judge in Georgia, in 1904, had declared to be "an abominable crime not fit to be named amongst Christians"[31].

Growing up in a world that for centuries had perpetuated notions about the abnormality, unnaturalness, rarity, offensiveness and abomination of the homosexual inclination, and of the acts to which that inclination gave rise, you can imagine the impact that the widespread reporting of Dr Kinsey's research occasioned in my life. Reaching puberty, in Australia, in about 1950, I did not have to confront a belief in the wickedness of my own homosexual inclination (which somehow seemed perfectly natural to me) in quite such a lonely state as would have been the case before Dr Kinsey's report was made public.

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[31] *Herring v State* 46 SE 876 at 882 (Ga 1904).

Confronted daily by the denunciations of Police Commissioner Delaney and reading with wide eyes the front page stories of the arrests in Sydney for sexual indiscretions of the chief conductor of the Sydney Symphony Orchestra (Sir Eugene Goossens) and a famed visiting international pianist (Claudio Arrau), it was a calming thing to learn that I was not, after all, alone. At the age of 11 I was probably not even "intrinsically evil". Even if Dr Kinsey's research were not totally accurate, down to the last percentile, and even if Australians were not as sexually active as their American cousins, the overall result seemed probably capable of extrapolation - even in my young mind. What had been taught by churches and others for centuries, even millennia, was simply not borne out by empirical research into actual human behaviour. Human beings were, it seemed, very sexual creatures. This was a vital insight. For me, and millions of others (heterosexual and homosexual) it came as an insight with a powerful impact.

In fact, the changes that then occurred in social attitudes, and the law, happened relatively quickly. In the eye of history, against the background of centuries of legal penalization and social calumny, the alteration of attitudes and the consequent reform of the law in America, Europe, Australia and elsewhere came quite quickly. In part, this was because of great debates over the very purpose of human society and its criminal laws. In England, those debates famously occurred between

Lord (Patrick) Devlin and Professor Herbert Hart[32]. They accompanied the Wolfenden Royal Commission[33] and the eventual repeal, in England and many other Commonwealth countries, of the anti-homosexual criminal offences[34].

They led to numerous proceedings in the European Court of Human Rights which gradually, and with growing insistence, moved to demand that criminal and other discriminatory laws against the homosexual minority must be repealed. Such laws were held not to be within the "margin of appreciation" accorded by the European Court to the laws of member states. Now, to be a member of the Council of Europe, and hence the European Union, it is necessary to get rid of the criminal laws at least. Whilst prejudice and discrimination are not so easily abolished, the worst sources of oppression and victimization have been swept away in Europe, from Galway to Vladivostok[35].

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32 See N Lacey, *A life of H L A Hart: the nightmare and the noble dream*, (Oxford University Press, 2004).

33 *Royal Commission Into Homosexual Offences and Prostitution*, 1961, Cmnd 247 (Sir John Wolfenden, Chairman), 1957.

34 *Sexual Offences Act* 1967 (UK). In November 2000, the *Sexual Offences (Amendment) Act* 2000 (UK) removed discrimination from the age of consent in sexual offences in the whole of the United Kingdom. Similar laws have been enacted in many, but not all, Commonwealth nations.

35 See decisions of the European Court of Human Rights cited above n 5.

In South Africa, the new post-apartheid Constitution guarantees protection against unfair discrimination on the grounds of sexual orientation[36]. In Fiji[37]; in Hong Kong[38] and in other jurisdictions, courts have overruled the criminal laws that discriminate against adult people whose sexual orientation was homosexual or bisexual.

In Australia, one State jurisdiction, Tasmania, held out against the repeal of such laws. Ultimately, those laws were challenged before the United Nations Human Rights Committee which found that the provision of such anti-homosexual laws offended the requirements of the *International Covenant on Civil and Political Rights* to which Australia is a party[39]. In response to that decision, whose significance speaks for the human rights of homosexuals throughout the world[40], a federal law was enacted in Australia, under the external affairs power, to override

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36 South African Constitution, s 9(3); cf *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1513 (CC) [107].

37 Decision of Winter J, High Court of Fiji, *Nadan v The State* [2005] FJHC1; Haa0085 & 0086.2005 (26 August 2005).

38 *Secretary of Justice v Leung* (Court of Appeal of Hong Kong, 315/2005). There are many other similar decisions.

39 *Toonen v Australia*, Communication No 488/1992: Australia, CCPR/C/50/D/488/1992; (1994) 1 *Int Hum Rts Reports* 97 (No 3).

40 Baden Offord, *Homosexual Rights as Human Rights: Activism in Indonesia, Singapore and Australia*, (P Lang, 2003); Suzanne M Marks, "Global Recognition of Human Rights for Lesbian, Gay, Bisexual and Transgender People", 9 *Health and Human Rights* 33 (2006).

the provisions of the Tasmanian Criminal Code[41]. Before the validity of that federal law could be tested in the High Court of Australia[42], the Tasmanian Parliament amended its criminal law. It replaced the discriminatory sections with a provision treating homosexuals and heterosexuals alike.

Now, in many countries new laws are coming under scrutiny. In the Netherlands[43], Belgium[44], Spain[45], Canada[46], Massachusetts in the United States[47] and likely soon in South Africa[48], the civil status of marriage has been opened up to homosexual partners as well as heterosexuals. For some, seemingly many, this is a legal step too far. A

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41 *Human Rights (Sexual Conduct) Act* 1994 (Aust); *Criminal Code (Tas),* ss 122(a) and (c), 123.

42 cf *Croome v Tasmania* (1997) 191 CLR 119.

43 Wet Openstelling Huwelijk of December 21, 2000 ("Act on the opening up of marriage"). See K Waaldijk, "Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries", 38 *New England Law Review* 569 at 572 (2004).

44 Loi Ouvrant le Mariage a des Personnes de Même Sex et Modifiant Certaines Dispositions du Code Civil de 13 February 2003 ("Law opening up marriage to persons of the same sex and amending certain provisions of the Civil Code"). See K Waaldijk, 38 *New England Law Review* 569 at 581 (2004).

45 Ley 13/2005 de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (BOE, 2005, 11, 364).

46 *Civil Marriage Act*, SC 2005 (Canada) c 33.

47 *Goodridge v Department of Public Health* 798 ME 2d 941 (2003).

48 *Minister of Home Affairs v Fourie,* CCT/04 and *Lesbian and Gay Equality Project v Minister of Home Affairs* CCT 10/05.

lot of unkind things have been said in the ensuing debate. In Australia, copying the American *Defense of Marriage Acts*, an amendment was enacted by the Federal Parliament[49] to confine marriage to opposite sex partners and to forbid recognition in Australia of same-sex marriages effected overseas. Moreover, one sub-national *Civil Union Act*[50] was disallowed by the federal government under the Constitution because it was claimed that the resulting civil union for same-sex couples was too similar to marriage to be consistent with the amendment to the federal Marriage Act.

My own partner of nearly 38 years and I get by without formalities. But the fact remains that he is not protected by my judicial pension rights, as a spouse or *de facto* (opposite sex) spouse would clearly be. In this way, laws still exist in virtually every country that treat sexual minorities unequally. It is a sad realization to discover that one is a target of legal discrimination, sadder still to find that such discrimination often has the support of large numbers of decent, educated, friendly fellow citizens.

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49 *Marriage Amendment Act* 2004 (Aust). See Australia, House of Representatives, *Parliamentary Debates* (Hansard), 27 May 2004, 29357.

50 The *Civil Union Act* 2006 (ACT) was disallowed on the advice of the Federal Government. See Commonwealth of Australia *Gazette*, s 93, 14 June 2006.

Nonetheless, big changes in the law and in society have undoubtedly been made in the fifty years since Dr Kinsey's death. He is not alone responsible for the changes. But his research encouraged other investigations casting doubt on the previously accepted generalisations about homosexuals. One of the foremost of the Kinsey followers was Evelyn Hooker, a psychologist who, like Kinsey, was drawn into sex research as a second career[51]. Eventually, this scientific work caused the American Psychological Association to move away from the earlier assumptions and in 1975 to declare that "Homosexuality *per se* implies no impairment in judgment, reliability or general social and vocational capabilities [and mental health professionals should] take the lead in removing the stigma of mental illness long associated with homosexual orientation".

It is much easier to change the statements of learned societies and the texts of statute books than to alter individual feelings of self-hate and community attitudes of denigration, discrimination, belittlement and distaste. Nevertheless, the process of change has to start somewhere. Change, if it is to come about and endure, has to be founded in the best available scientific data. This, essentially, is what Dr Alfred Kinsey of Indiana University, brought to the global debate. His work coincided with a propitious moment in human history. It profoundly influenced the

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[51] E Hooker, "The Adjustment of the Overt Male Homosexual", 21 *Journal of Projective Techniques* 18 (1957); "Male Homosexuality in the Rorschach", 22 *Journal of Projective Techniques* 33 (1958).

thinking of people who grew up, as I did, at the time of the two Kinsey reports and carried in their minds thereafter the unforgettable message about the variety of human sexual experience and the significant ordinariness of this variety. Once that message was perceived and digested, it became increasingly harder, in law and in society, to go back to the attitudes of oppression and hatred. The seeds of individual and social change were planted.

THE SUPREME COURT OF THE UNITED STATES

This brings me to the changing course of the decisions of the Supreme Court of the United States in cases involving sexuality over the past fifty years since Dr Kinsey's reports.

Time does not permit an examination of the course of decisions on the issues of gender[52]; contraception and abortion[53]; and marriage and divorce[54]. However, it is worth noting some features of the evolving

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[52] See eg *Hoyt v Florida* 368 US 57 (1961); *Reed v Reed* 404 US 71 (1971); *Craig v Boren* 429 US 190 (1976); *Rostker v Goldberg* 453 US 57 (1981) and *United States v Virginia* 518 US 1 (1996).

[53] *People v Sanger* 118 NE 637, 638 (NY, 1918); *Roe v Wade* 410 US 113 (1973); *Accron v Accron Center for Reproductive Health* 462 US 416 (1983); *Griswold v Connecticut* 381 US 479 (1985); *Webster v Reproductive Health Services* 492 US 490 (1989); *Planned Parenthood of Southeastern Pa v Casey* 505 US 833 (1992). See also *Reynolds v United States* 235 US 133 (1914); *Loving v Virginia* 388 US 1 (1967); *Zablocki v Redhail* 434 US 374 (1978).

[54] eg Joyce Murdoch and Deb Price, *Courting Justice: Gay Men and Lesbians v the Supreme Court*, (Basic Books, 2001). See also W

Footnote continues

law and reasoning on cases concerning homosexuality. Not unnaturally, they reflect, over the decades since the 1950s, the changing attitudes to this subject in the United States more generally, showing what a long way has been travelled since the attitudes expressed by the Georgia judge in 1904[55].

An early decision following the Kinsey Report was *Boutilier v Immigration and Naturalization Service*[56]. That was a case where Mr Boutilier, a Canadian national, first admitted to the United States in 1955, applied for American citizenship in 1963. He disclosed a 1959 arrest on a charge of sodomy, later reduced to simple assault and thereafter dismissed in default of the complainant. He revealed that since 1959 he had shared an apartment with a man who was his lover. An affidavit from a Professor of Psychiatry deposed that he had sexual interest in girls and that his sexual structure was still fluid and immature. However, he was refused citizenship on the basis that he was "afflicted with psychopathic personality" under the statute. He challenged that finding and its constitutionality. His challenge failed.

Eskridge, *Gaylaw Challenging the Apartheid of the Closet* (1999); cf *Reynolds v United States* 235 US 133 (1914); *Loving v Virginia* 388 US 1 (1967); *Zablocki v Redhail* 434 US 374 (1978).

55 *Herring v State* 46 SE 876 at 882 (Ga 1904).

56 387 US 118 (1967).

The opinion of the Supreme Court was delivered by Mr Justice Clark. He found that there was substantial support in the record for the finding of statutory disqualification. He also rejected the due process argument. Justices Brennan, Douglas and Fortas dissented. In his opinion, Mr Justice Douglas quoted extensively from the Kinsey report, specifically the statement in the 1948 report that:

> "Many of the socially and intellectually most significant persons in our history's, successful scientists, educators, physicians, clergymen, businessmen, and persons of high position in governmental affairs, have socially taboo items in their sexual histories, and among them they have accepted nearly the whole range of so-called sexual abnormalities".

Mr Justice Douglas cited the statistics of the American male population that had had homosexual experience and added[57], in language that was to recur in *Lawrence*:

> "The sponsors of Britain's current reform Bill on homosexuality have indicated that one male in 25 is a homosexual in Britain. To label a group so large 'excludable aliens' would be tantamount to saying that Sappho, Leonardo da Vinci, Michelangelo, Andre Gide, and perhaps even Shakespeare, were they to come to life again, would be deemed unfit to visit our shores".

The minority concluded that even if the statute were not unconstitutionally vague, it could not be applied to the appellant because he was not "afflicted" with a psychopathy. It was an important assertion

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57 Citing Judge Moore 2 Circ 363 F 2d 488 at 497-498 (1966).

by the minority in the highest court of the essential normality of homosexuality. It was based squarely on Alfred Kinsey's findings and their influence upon the Justices' knowledge and reasoning.

To illustrate the extend of the progress made, Professors Eskridge and Hunter observe[58]:

> "The irony of *Boutilier* is that the 'liberal' Warren court went out of its way to interpret the spongiest statutory term in the most broadly anti-homosexual way. Note that the liberal Chief Justice Warren and Justice Hugo Black voted with the majority, the future liberal Justice Thurgood Marshall was the Solicitor-General who defended the position taken by the liberal administration of President Lyndon Johnson. This much is apparent: liberals as well as conservatives agreed that homosexuals were mentally ill".

Doubtless hoping that things had improved with the passage of the following twenty years, in *Bowers v Hardwick*[59], the appellant challenged the constitutional validity of the Georgia sodomy statute. Mr Hardwick was charged with violating the statute in a private bedroom. The District Attorney decided not to present the matter to a grand jury. However, the accused brought suit in the Federal District Court challenging the constitutionality of the statute so far as it criminalised consensual sodomy. He asserted that the statute placed him, as a homosexual, in imminent danger of arrest and violated the federal

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58 Eskridge and Hunter, above n 24, 184.

59 478 US 186 (1986).

Constitution. The District Court rejected the claim. The 11th Circuit Court of Appeals reversed. But the Supreme Court reinstated the District Court's judgment.

Delivering the opinion of the Court, Justice White remarked:

"Precedent aside … the respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. … [The Court's authority does not] extend to a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the 14th Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious".

Chief Justice Burger was even more strident in his opinion:

"During the English Reformation when powers of the Ecclesiastical Courts were transferred to the King's Courts, the first English statute criminalising sodomy was passed. Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, an heinous act 'the very mention of which is a disgrace to human nature' and 'a crime not fit to be named'. … To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching".

Justice Blackmun, with whom Justices Brennan, Marshall and Stevens joined, dissented. They quoted from Justice Jackson's eloquent opinion for the Court in *West Virginia Board of Education v Barnette*, written in 1943[60]:

> "[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order".

The dissenters went on to say that:

> "It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority".

In 1995, a challenge was brought to the constitutionality of an anti-homosexual measure (Amendment 2) passed by a State-wide vote of electors in Colorado, winning 53.4% of the vote. The amendment read:

> "Neither the State of Colorado … nor any its agencies … shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota, preferences, protected status or claim of discrimination".

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60 319 US 624 at 642 (1943).

In *Romer v Evans*[61], the Supreme Court agreed to consider the constitutionality of this measure. In October 1995, the Justices voted 6 to 3 to strike down Amendment 2 as unconstitutional. The majority comprised Justices Stevens, O'Connor, Kennedy, Souter, Ginsberg and Breyer. Chief Justice Rehnquist and Justices Scalia and Thomas dissented. In a "majestic opening" to his ruling[62], quoting the famous opinion of the first Justice Harlan (dissenting) in *Plessy v Ferguson*[63], Justice Kennedy, for the Court, observed:

> "One century ago, the first Justice Harlan admonished the courts that the Constitution 'neither knows or tolerates classes amongst citizens'. Unheeded then, those words are now understood to state a commitment to the law's neutrality when the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado's Constitution"[64].

The majority opinion made it plain that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a legitimate government interest". It went on[65]:

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61 517 US 621 (1996).

62 Murdoch and Price, *Courting Justice*, above n 54, at 473.

63 163 US 537 at 559 (1896).

64 517 US 620 at 623 (1996).

65 517 US 620 at 631 (1996).

> "[W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the Amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the Constitution or perhaps, on the state's views, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury".

The minority castigated the majority opinion pointing to what it suggested was an inconsistency between the ruling in *Bowers v Hardwick* and the new ruling in *Romer v Evans*. Justice Scalia declared that the Court "has mistaken a *Kulturkampf* for a fit of spite"[66]. For the minority, this was an impermissible intrusion by the Supreme Court in the rights of democratic government to express the disapproval of citizens as to the homosexual "lifestyle".

In *Boy Scouts of America v Dale* in 2000[67], the balance appeared to slip backwards, against the rights of homosexuals under the American Constitution. James Dale, an Eagle Scout, lost his attempt to challenge the right of the Boy Scouts of America - which Kinsey himself had joined in 1910 - to exclude him as not "morally straight". With Justices Kennedy and O'Connor shifting to the other side, that right was held to be within the legitimate conduct of the Boy Scouts to "send a message" of non-acceptance of homosexual conduct as a legitimate form of behaviour.

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[66] 517 US 620 at 636 (1996).

[67] 530 US 640 (2000).

However, a strong dissent was filed in *Dale* by Justice Stevens, ever consistent to his view on these issues. Justice Souter joined by Justices Ginsburg and Breyer explained their awareness of the "laudable decline on stereotypical thinking on homosexuality". By 2000, the language on both sides of the judicial divide was more muted. Chief Justice Rehnquist's opinion acknowledged that "homosexuality has gained greater social acceptance". But he could not conclude that, in 2000, saying that gays are "not morally straight" was just another way of saying "No Jews allowed" or "No blacks allowed"[68]. For all that, the growing impact of changing public perceptions of homosexuality is clear in both the majority and minority reasons alike.

The radical alteration of mood, outcome and expression can be perceived most clearly in *Lawrence v Texas*[69], the case with which I began this essay. Consider, and contrast, first the following observations (written for the Court) by Justice Anthony Kennedy[70]:

> "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. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the

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[68] Murdoch and Price, *Courting Justice,* above n 54, 510.

[69] 539 US 558 (2003).

[70] 539 US 558 at 578 (2003).

> Constitution that there is a realm of personal liberty which the government may not enter' … The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual".

Yet, fighting the *Kulturkampf*, Justice Scalia was no less emphatic than he had previously been[71]:

> " Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.
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> …
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> One of the most revealing statements in today's opinion is the Court's grim warning that the criminalization of homosexual conduct is 'an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.' *Ante,* at 575. It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their businesses, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive".

Justice Thomas, who dissented, took time to observe that the Texan law was an "uncommonly silly"[72] one and that, as a legislator, he

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[71] 539 US 558 at 602 (2003).

[72] 539 US 558 at 605 citing *Griswold v Connecticut* 381 US 479 at 527 (1965) (Stewart, J, dissenting).

would vote against it. He simply felt that it should be left to the democratic processes and not disturbed by judicial imperatives.

BOUNDLESS HUMAN CAPACITIES

The interaction between final courts and the legislative process is an ongoing feature of all democratic polities. It is a healthy interaction - one that reflects debates in the nation itself. Democracy, in the modern age, does not mean majoritarian triumphantalism. It involves constant dialogue between the democratic, elected elements in the Constitution and the principled, reasoned decisions of the courts. The first values speak to the moment and to passing attitudes as they manifest themselves from time to time. The second speaks to the ages and of evolving, fundamental principles that stand guard for all people. The constitutional conversation is an unending one. Obviously, it is informed by developments in the surrounding society.

The advances that have occurred in law, policies and attitudes to issues such as sexuality derive from a confluence of powerful forces. Amongst them I would certainly place very high, the impact of scientific research. Especially the research of Dr Alfred Kinsey and his colleagues at Indiana University now continued at the University by Professor Julia Heiman and her colleagues. Kinsey's research gained world-wide popular attention when his two reports were published. They gripped the imagination and interest of millions of people, not only in the United States. They had a profound effect on the *Kulturkampf,* in part

because they were expressed by scientists, in the language of scientific taxonomy and by Dr Kinsey himself who proved to be a brilliant, because under-stated, proponent of the basic truths that he had uncovered.

In addition to this element, the equation for change includes six other factors that help to explain the relatively rapid movements in the law, in social attitudes and policies. I refer to the strong tradition of independent research in university institutions which was defended at Indiana University by President Herman Wells; the strong tradition of free expression and the free media, even where unpopular facts, people and opinions are concerned, that is such a feature of the United States of America; and the rapid advance of mass media and global communications that have spread the knowledge of Kinsey's research and of all the other like research that has followed it. Such knowledge challenges ignorance, dogma, pre-suppositions and stereotypes. It undermines hatred based on those considerations. The hatred has not yet been wholly dispelled. Nor the discrimination. As Bishop Desmond Tutu has observed people seem to need someone to look down on. Yet when it appears that many innocent people are affected by the denigration and disadvantage, rational people cannot so easily maintain their animosity in the face of scientific discoveries. This has been the ongoing story of the last fifty years.

Further considerations that combined with Kinsey's research to spread its message include the changes caused by the Second World

War and by the universal movement for human rights that followed it (itself an outgrowth of Anglo-American ideas and of the leadership in the United Nations *Universal Declaration of Human Rights* of Mrs Eleanor Roosevelt); the growing self-awareness in the homosexual community itself and the support for change that it gradually received from heterosexual relatives and friends; and the conviction of an ever-increasing number in society that past laws, attitudes and policies on this subject were often irrational and unjust and had to be reformed and changed.

Dr Alfred Kinsey is, in my view, one of the greatest scientists of the twentieth century. He is certainly one of the greatest scholars of Indiana University. His contribution to a "wider civilisation" should not be understated. He should have more honour than he does, in this University, in this State and this nation. By his research and his ideas, he was a most powerful change-agent. And the process of change that he helped to put in place has by no means yet seen its course.

At the fault line of ideas competing for human acceptance in the present age, Dr Kinsey stands, beckoning us forward to greater rationality and knowledge about ourselves. We like to think that human beings are genetically programmed to embrace and follow rational discoveries. If we fail to do so, in an age of weapons of mass destruction, the future of our species must be limited. If we listen to Kinsey and other scientists we can, like the exploring Cassini Mission that winds its way through the rings that surround the planet Saturn, take

our minds out to the furthest galaxy of the Universe and bring them back down into the microscopic world of the human genome. A creature that can map space and chart the genome must have the ability to perceive, study and understand itself. It is not asking too much to expect it to do so. This is what Alfred Kinsey demanded and helped us to do. We who follow should listen to his message and his optimism and confidence with open minds and open hearts.

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SEXUALITY AND GLOBAL FORCES - DR ALFRED KINSEY AND THE SUPREME COURT OF THE UNITED STATES

The Hon Justice Michael Kirby AC CMG