Rights, Religion, Regard, Contact: The Common School Ideal, a Nurturing, Safe and Effective Educational Environment for All Students

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Oliver Wendell Holmes stated:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed.¹

The gravitas of law is both as a normative mandatory force limiting citizen freedom of action within appropriate bounds, and as a body of codification tied to the high aspirations and moral and ethical desires of Americans. Obviously, there have been numerous commentaries and schools of thought regarding the moral force of law, and the relevance or irrelevance of a critical examination of moral issues in U.S. legal philosophy and jurisprudence. However, we inevitably confront individual and group conceptions of the moral, of the desired, and of the role of normative prescriptive law in American life, when dealing with compulsory education and laws affecting it. In fact, the confrontation between values, purposes and ultimate aims has been with us since the development of the common schools, and what used to be a general agreement that common

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public schooling was a powerful American good, or at least ideal protecting American democracy.

The purposes of the old vision of common schools, and the viability of public schools in general require currently that we confront legal and pedagogical values and proscriptions regarding same sex marriage laws and debates that impact the public schools. This policy arena is replete with values in tension, such as the protection of minorities and other populations, versus desires of local or national majorities to affect or establish educational policy expressing localized majoritarian values.

Public schools have become a space where Constitutional values and maxims confront legal duties and rights in a nexus that regularly includes contention over the appropriate sphere of influence of religion in education, modulated by parents' high hopes and aspirations for their children, including the perceived right propounded by some religious parents to use education to prepare their children for ultimate, or "higher duties." Compulsory education, established in the United States long before other international declarations of human rights included it as a child's right, is rooted in both the ideal and utilitarian visions of the role of education in shaping and defining what democracy in a constitutional republic should be.

Rationales for public education and the common schools have included preparing children for high duties that sound in religious values, and include the need for a process for inculcating skills, dispositions and values that prepare citizens to operate with appropriate vigor and virtue in the demands of a democracy, including acting as informed voters, engaged citizens, and even in such focused civil duties dear to the hearts of law faculty, as wise and judicious jury members. In the early nineteenth century Governor Everett of Massachusetts, as reported by Horace Mann in the Common School Journal, stated that the greatest hope for effective and virtuous jury panels in America resided in the training received in the common public schools:

There are other civil duties to be performed, for which education furnishes a still more direct and appropriate preparation. The law of the land calls the citizen to take a part in the administration of justice. Twelve men are placed

in the jury-box to decide on the numberless questions which arise in the community,—questions of character,—questions of life. The jury passes on your fortune, your reputation; pronounces whether you live or die. Go into the courts; are they light matters which those twelve men are to decide. Look in the anxious faces of those whose estates,—whose good name,—whose all is at stake, hanging on the intelligence of those twelve men, or any one of them. What assurance is there, but that which comes from our schools, that these men will understand and do their duty? Yes, these little boys now sporting in the streets, or conning their tasks in our town schools, in a few short years will be summoned in their turns, to discharge this important trust. Can we deem it a matter of indifference, whether or not their minds have been early accustomed to follow a train of thoughts, or a statement of facts?³

Obviously, jury service and other duties of an informed and educated citizenry, motivated by a republican virtue that takes for granted an element of altruism, have been central arguments for a common system of public schools.

However, beyond these somewhat utilitarian arguments, and beyond focused civic duties such as jury duties and acting as informed voters, discussions of the role of common schools at their inception also included terms like piety, virtue, and moral attributes—even terms like brother and sister, referring to students and their duties to others. These are also at the center of the conceptions of the roles and definition of law itself—which always struggles with the issue of physical force versus moral force or legitimacy. When dealing with education and the development of the human intellect in a common public school system, Horace Mann stated:

Each individual must think of the welfare of the state as well as the welfare of his own family...[for] however skilfully it [the intellect of a man] may have been trained, if it not be guided by sense of justice, a love of mankind and a devotion to duty, its possessor is only a more splendid...barbarian.⁴

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³ Horace Mann, Taunton County Common School Convention, 1 COMMON SCH. J. 219, 221 (1839) (Mann's report of remarks by Edward Everett, Governor of Massachusetts).

This subordination of individual desires in a sought for general altruism is what, arguably, Mann, Cicero, Montesquieu, and others would term piety, or a pious individual. Although piety as a term has received a modern unflattering gloss, this usage seems apt when investigating compulsory attendance in schooling. It seems that ability to seek higher goals, and to subordinate one's own desires in confrontation with a conception of a common good is the basis of piety as understood by classical moralists. Virtue is similarly embedded in conceptions of democracy tempered by republican virtue, and moderated by enlightened attention to ethical constraints. These were, and I argue still should be, the very stuff of the American common compulsory education movement.

Mann, and other proponents of the common schools made such virtue and piety the central ethical foundation and argument for common schools in America. Later, John Dewey would contextualize this central ethos in duties towards the common school process and institution by stating his famous and oft-quoted: "What the best and wisest parent wants for his own child, that must the community want for all its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy." This conception marries an exalted aesthetic standard of caritas towards children with the pressing needs of a democracy.

Dewey’s standard includes an ability to empathetically conceptualize the good that others would want, and should receive, even beyond a priori experience. The virtue of the public common schools is that the institution invites Americans to engage in a moral and ethical interchange and conception of what others should receive in a moral society, and a conception and discursive interaction on how others’ needs and desires should be met. Obviously, such a concept has been developed in religions as some corollary to the Golden Rule. In the Common School Journal of 1839 the following is cited regarding the common schools:

There is nothing that tends to throw so much interest and sanctity around the place of instruction as the moral and

spiritual influences that there may be imparted . . . . Teach
the children to be affectionate with each other; to have kind
feelings without envy or jealousy; that difference in dress
makes no distinctions; that they should be as a band of
brothers, bound by the tenderest ties of love . . . . [T]he older
scholars should be taught to feel a deep interest in the
younger; to watch over them as sisters, and to feel a
responsibility for their happiness and improvement. I know
from experience that this can be done . . . .

It appears that the hopes and high aims of the common
school movement had foundational aspirations that included
ideals such as brotherhood and sisterhood, and ties of love.
These seem nearly religious, and certainly are hortatory
towards an exalted purpose of such schools. This caritas seems
to be intended to extend to individuals and is intended to
ensure the continued viability of the republic and democratic
processes.

But how are such high aims, and an appeal to republican
virtue and altruism to operate if Americans, both the deeply
religious and those alienated by some organized religions—
including some advocates for gay, bisexual, lesbian and
transgendered students are not in contact within a similar or
common school system? If the public educational environment
becomes increasingly hostile to the deeply religious, or
alternatively to the profoundly progressive and those seeking
to establish rights for LGBT students, where and how will the
American conversation and exchange of ideas take place that
public education at its best can foster? How will love for the
individual, and in extension for the democracy occur if we're
isolated from individuals who do not think like us, or accept
our own deeply held orthodoxies?

Levinas avers, according to John wild, that only by being
involved with others can we fully confront concepts like justice
or responsibility to others. He believes the beginning of the
ethical plane comes:

when we pay attention to the other and take account of him
and the strange world he inhabits. It is only by responding to
him that I become aware of the arbitrary views and attitudes
into which my uncriticized freedom always leads me . . . . It is

6. Horace Mann, The Best Means of Exerting a Moral and Spiritual Influence in
Schools, 1 COMMON SCH. J. 209, 212 (1839) (Mann's report of remarks by Robert C.
Waterston, Esq., at a meeting in Boston in 1839 directed to female teachers).
only then that I see the need of justifying my egocentric attitudes, and of doing justice to the other in my thought and in my action.7

Levinas also declares ethics, even religion, reside in the individual or the I's response to the “Other”:

There can be no “knowledge” of God separated from the relationship with men. The Other is the very locus of metaphysical truth, and is indispensable for my relation with God . . . . It is our relations with men, which describe a field of research hardly glimpsed at (where more often than not we confine ourselves to a few formal categories whose content would be but “psychology”), that give to theological concepts the sole signification they admit of.8

Levinas' focus was on establishing that the relationship of “man to man” is the arena and schoolhouse of the ethical plane. However, for this salutary confrontation with the “Other,” or for the acting out of the ethical primacy resulting from human relationships to operate successfully, there is an a priori assumption that individuals will have access to other individuals who are not closely identified with their own predispositions. There is the danger that the divide between deeply religious individuals and other individuals, religious or not, seeking to establish rights to same-sex marriage and other rights will become so wide institutionally in public school settings, because of legal, regulatory, and policy decisions, that they will flee from each other, and not be accessible to be influenced by each other in America's common schools.

In addition, and further exacerbating this potential dysfunction or danger, there is a tension inherent in seeking to enhance understanding of diversity and individual rights that currently may tend to ignore the deeply religious citizens in our public settings, especially deeply religious minors in public schools, as a type of diversity to protect. Religious conservatives and those motivated by progressive spiritual duties can be stereotyped as irrational, hateful, prone to subjectivity of the individual, and unexamined intellectually. In the tension of entrenched positions between some of those motivated by religious and spiritual duties, and those seeking

8. Id. at 79.
to mediate the conflict to enhance outcomes for gay, lesbian, bisexual and transgendered individuals, the stereotypical can easily wash out the clarity of the face of the “Other.” In public education it is difficult to speak across the divide between individuals focused on civil rights and constitutional rights and individuals focused on deeply held convictions—convictions that are often reified and shaped in organized religious settings.

Obviously, religious groups and individuals recoil in surprise when they are told by a federal trial judge, as in *Perry v. Schwarzenegger*, that the basis for their vote on a referendum, as on Proposition 8 in California, makes that vote constitutionally infirm because they are expressions of private public policy preferences that are privately moral in basis, and not rational in basis and thus subject to being overturned as violative of the Constitution; while other conceptions of human rights that also seem motivated by moral or spiritual values, broadly defined, seem to be appropriate bases for voting behavior and decision making in the public arena. What about when such a dialectic becomes toxically one sided in a school setting? How do we reconcile the deeply religious citizens’ and students’ sense of higher duties, including viewpoints that seem apocalyptic in some ways, with those who fear tyranny over a minority by a majority rooted in a subjective sense of morality that impinges on individual rights?

This paper discusses these questions within the framework of the quest for what makes a nurturing, safe, and effective educational environment for all students. It argues that an environment that silences deeply religious students and their parents, either through policy, or because they will feel impelled to leave public education for private and other choice options, does not create an educational environment that is optimal for gay, lesbian, bisexual, transgendered and other students with other diverse backgrounds and core characteristics. In fact, deeply religious students may have more in common with LGBT students in many ways than students not motivated by such deep core identifying characteristics or beliefs. In addition, attention must be paid to statutes and regulations in states that codify opt-out provisions from portions of curricula based on moral or conscientious

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grounds. Such provisions, potentially acting as relief valves, will be used to frame the larger issues above. Qualitative research that tends to highlight the attitudes of deeply religious individuals towards those with gender and sexual preferences that differ from the deeply religious individual are also discussed to explore the difficulty of defining religious adherents into world views of prejudiced or not prejudiced. Some research will be referenced to help identify what will be lost if students and parents on both sides of the divide over same-sex marriage are isolated from each other. Finally, a plea to examine the early ideals of common schooling is made, as a way to mediate understanding between deeply religious students and parents and LGBT students, faculty and their parents and supporters.

II. WITHDRAWING TO COMFORT ZONES

I have read assiduously, but not exhaustively, in the social science research regarding interactions of religiosity, and interactions of types of religiosity, including Intrinsic, Extrinsic and Quest and other categories such as “fundamentalist,” with measures of prejudice, supported by survey research and test instruments. Many of the measures seem questionable in their ability to predict the construct of “prejudice” but seem to merely reify whether one is a certain type of “religious” individual. In much of this research social scientists have attempted to deal with gross findings that tend to show, on the measures used anyway, that religion, or some types of religious views, can have a tendency to produce prejudice towards minorities and others, including LGBT students and individuals. Follow up studies have tended to break survey respondents into different categories, and have found that a certain type of religious individual performs better than others on the “prejudice” scales they have developed, these include categories such as Intrinsics, Extrinsics, and Quest individuals. So, according to these types of research, some types of religion, or religious views, may have the potential, according to some survey data, to develop pro-social or anti-prejudicial behavior, and some types of religious world views might have the potential to develop anti-social or prejudicial behavior when compared against an entire construct of humans that believe in or practice religion.
In many of these studies, often conducted with cohorts of university students as subjects, but also conducted with cohorts of individuals who are already in psychological counseling, or in psychology programs in universities, groups that may or may not necessarily be representative of the larger body of religious believers, those who actually attend religious observances regularly tend to measure high on prejudice scales and low on altruism scales. Certainly there are challenges with the methodology of many of these studies. These can include the lack of a sensitive understanding of religion, and the frustrating methodology of trying to study all religious believers as one construct compared to all non-religious individuals as one construct, and the less than scalpel-like precision provided by research questions used. If one uses, for example a question, used in some of the instruments such as: "It would be beneficial to society to recognize that homosexuality and bisexuality is as natural as heterosexuality." it is a possibility that instead of encountering the construct of "prejudice" the research is merely reifying the original categories of religious individuals, and their doctrinal bases. A low score on a Likert scale to the above question may merely define the theological position of the religious adherent's faith tradition, not necessarily find "prejudice."

One might suspect there might also be confounding interactions in the question over the term natural for many individuals, religious or not, and religions do not all treat "natural" in the same positive way. My own faith tradition has an ancient, well known classic pronouncement regarding human nature:

For the natural man is an enemy to God, and has been from the fall of Adam, and will be, forever and ever, unless he yields to the enticings of the Holy Spirit, and putteth off the natural man and becometh a saint through the atonement of Christ the Lord, and becometh as a child, submissive, meek, humble, patient, full of love, willing to submit to all things which the Lord seeth fit to inflict upon him, even as a child doth submit to his father.10

While this has little to do with theological issues related directly to LGBT issues, it might, in my tradition, and through other pronouncements in other faith traditions' doctrines,

easily provide confounding data as a response on a survey purporting to measure prejudice that includes a reference to how positive it would be to have same-sex marriage be considered natural in society.

When researchers have tried to measure altruism instead of prejudice, in order to look for the predicted, or hoped for positive behavior changes of religion towards individuals unlike each other, it is also possible that the instruments utilized are a bit too coarse to understand the universe of religious observers. Obviously, in Christianity, and researchers have tested for just this proposition, Christians are taught by various precepts and religious dogma and traditions in most Christian sects that they are to love the sinner without loving the sin. Research has been designed to investigate whether, even when religious fundamental teachings of a group teach of homosexual behavior as a sin, adherents also are more likely than the non-religious individual to act with compassion or altruism toward LGBT individuals—in other words do they show by their actions that they love the sinner but not the sin.

On the tests of many social science researchers on the component of altruism of religious individuals, religious believers do not display more altruistic behavior towards LGBT individuals. However, the test for such altruism used regularly may or may not be helpful. In fact, to me as a less than expert consumer of the research, I find problems with such research designs as measures of altruism or lack of prejudice towards individuals, although researchers have made good faith attempts to control for confounding variables. In part, they have attempted to divide the world of the religious research subjects into types of religious world views that seem to have explanatory correlation (if not causation) to survey research data—again most commonly, Intrinsics, (those who report that religion affects everything in their life); Extrinsic, those who see religion as a plus to add to their life, and Quest individuals, those who report that they value their religious doubts and questions.

For example, classic research conducted by Batson, Floyd, Meyer, and Winner, and replicated and adapted by other researchers, investigated the Christian distinction between

valuing the person, versus valuing the behavior. Their research tested the proposition for different types of religious individuals (e.g., Intrinsic, Extrinsic, or Quest on faith scales) that religion would lead to universal compassion. In their research design they gave university students the opportunity to help another same-sex student apply for and conduct activity aimed at winning a prize that would provide funds. Some subjects were told that the student they were given the opportunity to help was homosexual and intended to use the prize if received, to attend a gay pride rally. Other subjects were told the student they could choose to help was homosexual and hoped to use the prize money to visit his or her grandparents. The other subjects were merely told, without any comment on sexual orientation, that the student was intending to use the prize money to visit his or her grandparents. This research, and other like research tended to find that highly committed, religiously observant, or practicing university students (scoring high on the “Intrinsic” scale of views of religion) were statistically less willing to help homosexual students. This correlation was not significantly affected by the anticipated use of the funds. The conclusion of the researchers is generally that devout Christian students are prejudiced towards, or do not apply the “love the person, not the behavior” doctrine towards gay and lesbian persons regardless of their behavior.

Such research findings, have apparently found a statistically significant correlation, based on the limitations of their research design. The lexicon of social science research seems to be relatively full of such studies that tend to deny the ability of deeply religious individuals to apply the hate the sin but love the sinner doctrine. I would caution, that before such findings are given great weight in policy considerations, we should consider that there may be many reasons for the correlations found, including the potential for confirmatory bias by researchers or ignorance of religious individuals, if not in the analysis, then in the design of such research methodologies.

Based on such research findings, some social scientists and researchers have called for programs and interventions intended to create a meaningful distinction for religiously motivated students and others between the value of a LGBT person and the value of their behavior—a distinction underscored by conservative Christian theology itself which
declares that all persons qua persons are valued and created by God. This may be useful if done appropriately, but at the same time, it is unlikely that any intervention, accommodation or program requiring that deeply religious conservative individuals surrender closely held moral frames of reference regarding homosexuality as expressed in sexual behavior will be welcomed or effective. Such interventions, although they can often appear condescending and cloying to religious people if not undertaken with respect and sensitivity, are preferable to the apparent unwarranted pathologizing and labeling under the term homophobia of some religious rejections of homosexual behavior. The research appears to be replete with religious worldviews and orientations being described as antigay or even homophobic and the direct or inferred conclusion is a call for requiring intervention on the near clinical level as a psychopathology and/or personality disorder. This tendency conflates attitudinal differences, or doctrinal theological matters as clinical mental health disorders and concerns, and over-reaches the term homophobia destroying any utility of the term as a useful label of anti-social behavior.12

However, there is another body of research that seems to somewhat contradict these claims and trends.13 Such anti-confirmatory research tends to begin with the position that devout Christians are not as uni-dimensional and flat as previous research has assumed. For example, Bassett, Baldwin, Tammaro, Mackmer, Mundig, Wareling and Tschorke did similar research, but utilizing a sample of individuals who all rated high on the Intrinsic faith scale (93% rating themselves above the midpoint on the scale) and were attending a Christian liberal arts college.14 They found their research subjects very likely to help a gay or lesbian individual


in a task for which they sought assistance.\textsuperscript{15} When the task for which the object of the study was seeking assistance included a student who was gay but who was not sexually active, but was practicing celibacy, the students were found very likely to assist the student, at almost the same level as the other option of assisting a student who was not gay and was visiting grandparents.\textsuperscript{16} It appears that the conception of loving the sinner not the sin was influenced by the determination of acceptability of the action, or sin, as perceived by the religious subject in ways earlier researchers, less adept at understanding deeply religious subjects, did not consider.

Another surprising finding from this research was that students tested in the second semester of their attendance at the Christian college reported a higher level of acceptance of gay and lesbian individuals on the test's scales.\textsuperscript{17} The researchers posited this was a result or effect of students' increased interaction with the Christian college's faculty, but this may have been an effect of increased exposure to the entire religious college's environment. Such a finding, or set of findings, seems to hint that there is more to know in regards to religion's influence on universal compassion, and the impact of deeply held "Intrinsic" faith compared to other types of faith. It also may point out shortcomings in the methodology and tasks utilized to predict universal compassion, or pro-social behavior. Significantly, this study may tend to show that contact with other individuals who challenge or enrich a deeply religious student's views can tend to result in more universal altruism or compassion towards gay and lesbian individuals.

For the purposes of this paper, and this conference, such research, although interesting, tends to ignore other questions related to the presence or absence of deeply religious students in school settings. The discussion and focus of most of the research in this area has seemed to be geared towards understanding the effects of different types of religious views held by religious peoples towards gay and lesbian individuals (transgendered or bisexual individuals not being included in such research generally). Discussion tends to focus on whether

\textsuperscript{15} Id. at 137.
\textsuperscript{16} Id.
\textsuperscript{17} Id. at 140.
fundamentalism, however measured, or "Intrinsic" faith values, cause or are associated with prejudice.

When dealing with the question of the impact on public education of a potential exodus from public education of such religious individuals if the curriculum and the structures of speech and interaction become perceived as hostile, there are other significant questions to include. Are deeply religious individuals more or less likely to contribute to general violence, hostility, bullying, and cyber-bullying, and general crime than those who do not perceive themselves as deeply religious? Will the retreat, or exodus of deeply religious individuals make public schools more welcoming or safer generally for LGBT students and their families? It seems probable that the presence or absence of deeply religious students may be powerful determinants or components in creating a culture, climate and safe space for LGBT students and their families.

There is research that tends to show that religious individuals are engaged in crime at a lesser rate than a general sample, but most such research has not focused on the impact towards LGBT students, or school climate, and most has not tried to divide the universe of religious individuals into Intrinsic, Extrinsic, Quest and other categories to determine the strength of the effect of religion on criminal activity. Baier and Wright conducted a meta-analysis that included sixty previous studies on the effect of religion on criminal behavior and found that even given their meta-analytic limits, they still found at least a moderate effect of religion in deterring criminal activity by religious individuals.\textsuperscript{18} It would, however, be overstating the case to say that the majority of research has shown a clear and powerful pro-social effect of religiosity among adolescents in inhibiting criminal behavior. It is not beyond theoretical impossibility to wonder if appropriately nuanced research might find less criminal behavior among those that self-represent on research surveys as Intrinsic in their faith, meaning that their faith influences all their life and activities.

Also, in studies of college students and the general public, religiously committed individuals have (compared to those

religiously uncommitted) reported volunteering more hours for example, as relief workers, tutors, and campaigners for social justice. Among the 12% of Americans whom Gallup (1984) labeled “highly spiritually committed,” 46% reported presently working among the infirm, the poor, or the elderly—double the 22% among those “highly uncommitted.” In a follow-up Gallup survey, charitable and social service volunteering was reported by 28% of those who rated religion “not very important” in their lives and by 50% of those who rated it “very important.”

Wuthnow has analyzed Gallup data in general looking for the effects of involvement in religious small groups and noted that:

regular participants in religious small groups [local church groups] also were more likely to have done volunteer work than were nonparticipants in these groups. This pattern was true for volunteer work donated to educational organizations, social service and welfare organizations, arts and cultural organizations, work-related organizations, political organizations, and multipurpose human welfare organizations ... regular participants were also more likely to be involved in volunteer work than occasional participants.

Does this implicate that the school community will be different with a lower percentage of deeply religious and religiously involved students who may be used to participating in altruistic human service organizations? What about the findings regarding likelihood to tutor, for example? Will there be a difference in school climate with a lower percentage of deeply religious individuals?

Certainly some individuals are motivated by religious values towards great acts of altruism and self-sacrifice. The well-known instance of the four chaplains of the SS Dorchester in World War II comes to mind. After their ship was torpedoed in frigid waters, these four Protestant, Catholic and Jewish Chaplains gave away their life jackets to other soldiers and


were last seen standing together on deck with linked arms, praying together as the ship sank. Obviously, they are not evidence alone of a generalizable self-sacrificing altruism of deeply religious individuals, but such behavior does not amount to no behavior, and does appear to be religiously motivated. The question remains what specifically does the potential for such religiously motivated altruism in the specific mean about deeply religious voters and students in general?

There are other studies regarding a connection between students' religion and resiliency, religiosity and educational attainment and other myriad behaviors. Suffice it to say, that there is the likelihood that an accelerated absence of deeply religious individuals might have other effects on public schools' cultures and climate beyond the measures of "prejudice" or universal compassion. Not the least of our questions in this conference should be how active politically are deeply religious individuals, and what impact would an increased exodus of deeply religious individuals from public schools have on support of public education? Experience tends to show that such individuals are politically organized and powerful through religious affiliation and through personal individual motivation and affiliation, and if they are not involved in public education they are likely to actively withdraw political support.

Given such research, and given the opinion pieces that are published regularly, although not always based in direct research, regarding the antisocial and purported prejudicial attitudes engendered by some types of religious views, the question then for school settings should properly be whether LGBT students and individuals will receive better treatment, and a better educational environment in American public education if the individuals who test highly for religious adherence and practice leave the public schools for private or home schools? The sub-textual implications, and often the clear findings, of many researchers as reported in articles seem to indicate that LGBT students will fare better in educational settings which lack deeply religious individuals.

At least as important as a question would be will American democracy as a whole be better off, and will the LGBT individual in the political construct of this country's polity be better off if the two camps, if it is possible to divide the world neatly into two camps along this divide, do not have any common nexus of shared experience in the public schools?
Research conducted by Phi Delta Kappa and Gallup seems to highlight the importance of this question even if it does not answer the question perfectly. It is possible that properly understood it is an endorsement for “contact theory,” meaning the theory that having access to the “Other” in familiar intimate recurring settings creates knowledge and positive attitudes towards others in “outgroups” unlike the “self.” Further dividing or isolating deeply religious individuals from LGBT individuals in education may not enhance understanding and policy that serve either group well.

Perhaps activating and drawing upon the deeply held religious values of religious students might be another option that should be considered. This may be the effect noted by Basset et al. in their 2001 research referenced supra finding more sympathetic responses from devout research subjects towards gay or lesbian research subjects among those who had been involved in a Christian college’s curriculum longer than others. This was posited as an effect of greater and longer student contact with the attitudes and teaching of the religious faculty, although it might have been the entire culture and community of believers together having an impact. Dovidio, Glick and Rudman in their book, On the Nature of Prejudice: Fifty Years After Allport seem to argue for utilizing religion itself as a further tool to impact or “unmake” prejudice, as they cite Allport’s theories and research:

Allport . . . was committed to combating prejudice not simply to understanding it. If he was right in his belief that internalizing religious teachings of universal acceptance and compassion can unmake prejudice, then more attention needs to be given to religious institutions not as causes of intergroup antipathy and ethnocentrism but as possible contributors to solutions—at least in those areas of the world where religion remains an important part of people’s lives. Allport would likely encourage us to develop programs in religious settings to reduce prejudice.

Of course, to do so we must solve some serious problems. First, as suggested above, we need to know which religious teachings encourage rather than discourage tolerance and compassion. Second, we need to get religious institutions to focus on these teachings. Third, we need to get people to take their religions seriously as a challenge and guide rather than to use it as a crutch and buffer.
[We cannot forget] Allport's key observations, frequently voiced by others since. This observation is that direct, purposeful, positive interaction with and action on behalf of the targets of prejudice are more effective in reducing prejudice than is learning about prejudice. (Allport, 1954/1979, p. 485) or hearing sermons about tolerance (p. 495). Even if one's religion talks the talk of universal acceptance and compassion, this talk needs to be combined with opportunities to walk the walk. Only through such a combination of action and personal transformation is religion likely to unmake prejudice.

The divide between Christian conservatives with deeply held religious values, or Intrinsics, in the parlance of social science, and those engaged in the gay rights movement is unlikely to be resolved entirely in the near term. However, the inappropriate application, or even imposition of worldviews seems to apply across the divide in both directions. There are researchers who identify themselves with Christian conservatives who are beginning to call for sensitive and nuanced utilization of religious values themselves to reduce homophobic attitudes and behavior among the religious. In Rosik et al.'s research, they found a significant minority of deeply religious students who made a meaningful distinction between the individual's intrinsic worth and the individual's gender or sexual behavior.

Rather than attempt to require such students to surrender their deeply held moral framework and religious values, appropriate interventions could utilize the deeply religious individual's moral framework to internalize the coherent values of that framework towards all others. I side with Allport in positing that the prescriptive antidote to prejudice may not be less religion, but more. Rosik et al. suggests:

Biblical passages that call for such attributes as kindness, patience, love and self-control can be applied to relations with gay men and lesbian women to lessen homophobia without invalidating the normative assumptions of conservative Christian groups. We anticipate that such an approach could, for example, be successful in decreasing disrespectful


discourse, verbal hostility, and other behavioral displays of antisocial sentiment among religious communities.\textsuperscript{24}

Basset et al. notes some success in such a religious and scripturally based intervention in improving attitudes toward homosexual men among Christian students who rejected both celibate and sexually active gay men.\textsuperscript{25} There was, however an abatement of the effect over time. This may be an argument for long-term contact with deeply religious interventions and with LGBT individuals to continue and enhance such an effect.

The effects of contact, or lack of contact may be evidenced in the following tables. Phi Betta Kappa and Gallup together polled parents who by 1996 had already enrolled their children in non-public education. Note that in response to the question in Table 1 below: “Would you favor or oppose teaching about the gay and lesbian lifestyle as part of the curriculum in the public school in your community?” 75\% of parents involved in non-public education opposed the question, while only 64\% of those in public schools opposed the proposition. Those with no children in schools answered at nearly identical percentages as those with children in public schools. How important is it that those who had chosen to leave the public schools had significantly different views regarding the curriculum and the gay and lesbian lifestyle?

\textsuperscript{24} Id. at 16.

\textsuperscript{25} Rodney L. Bassett et al., \textit{Being a Good Neighbor: Can Students Come to Value Homosexual Persons?}, 33 \textit{J. PSYCHOL. & THEOLOGY} 17, 23 (2005).
Phi Delta Kappa Poll 1996 Poll
Would you favor or oppose teaching about the gay and lesbian lifestyle as part of the curriculum in the public school in your community?

<table>
<thead>
<tr>
<th></th>
<th>National Totals %</th>
<th>No Children in Schools Total %</th>
<th>Public School Parents %</th>
<th>Nonpublic School Parents %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor</td>
<td>34</td>
<td>35</td>
<td>33</td>
<td>23</td>
</tr>
<tr>
<td>Oppose</td>
<td>63</td>
<td>62</td>
<td>64</td>
<td>75</td>
</tr>
<tr>
<td>Don’t Know</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

In Table 2 below note a similar differential in response to the question: “If teaching about the gay and lesbian lifestyle were included in the curriculum of the local public schools, in what way do you believe it should be presented in class—as an acceptable alternative lifestyle, as an unacceptable lifestyle, or as one alternative lifestyle with no moral judgment made?” Thirty percent of public school parents favored presentation in class as an unacceptable lifestyle, while 42% of non-public school parents favored presentation as an unacceptable lifestyle. For the choice of “One alternative—no moral judgment” 56% of public school parents favored such presentation compared to 46% of non-public school parents.
If teaching about the gay and lesbian lifestyle were included in the curriculum of the local public schools, in what way do you believe it should be presented in class—as an acceptable alternative lifestyle, as an unacceptable lifestyle, or as one alternative lifestyle with no moral judgment made?

<table>
<thead>
<tr>
<th></th>
<th>National Totals %</th>
<th>No Children in Schools Total %</th>
<th>Public School Parents %</th>
<th>Nonpublic School Parents %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptable</td>
<td>9</td>
<td>10</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Unacceptable</td>
<td>27</td>
<td>25</td>
<td>30</td>
<td>42</td>
</tr>
<tr>
<td>One alternative no moral judgment</td>
<td>57</td>
<td>58</td>
<td>56</td>
<td>46</td>
</tr>
<tr>
<td>Don’t know</td>
<td>7</td>
<td>7</td>
<td>6</td>
<td>6</td>
</tr>
</tbody>
</table>

Admittedly, such responses, and such surveying, do not allow for precise conclusions. Non-public schools range from the non-religious to the pervasively religious and represent a constellation of other differences of mission and student body and parental motivations for participation. However, the inescapable conclusion is that on the dimension of perceptions of, or attitudes towards LGBT students and curricular offerings or interventions regarding them, parents within public schools as a whole, and I would assume their students, differ from parents and students in non-public schools. Those in non-public schools tend to have less favorable viewpoints towards LGBT students and their issues of interest, than those involved in public schools.

If appropriate opt-out or opt-in provisions and institutionalized respect for religious diversity of students do not accompany interventions and programs intended to enhance circumstances and attainment of LGBT students, it is likely that there will be a widening perceptual divide between those involved in one type of school and those left in the public schools. I maintain, as I began this paper, that the tradition of common public schools has the potential to be beneficial in
muting a human tendency towards the caricaturizing, or de-humanizing of others with whom there is no common regular contact. Such contact is one of the most beneficial outcomes of public education in the United States, and has the potential for improving perceptions of LGBT students by deeply religious individuals and vice a versa over time.

III. CONTACT THEORY

Remaining together in a common school has potential to enhance the pro-social anti-prejudicial effects of contact, but it also requires ongoing negotiation and rights and respect regarding sharing the common space for speech and other activity. In Hansen v. Ann Arbor Public Schools,26 a public school as part of diversity week held several panels of speakers, one of which was a panel styled: Homosexuality and Religion. Although the norm in the school was for the student council to plan and develop all panels, this panel was headed up by individuals in the Gay/Straight Alliance who recruited six religious leaders who demonstrated respect to gay and lesbian issues from the community, to speak about how to reconcile the Bible with a homosexual lifestyle.27 The plaintiff, Hansen was part of a religious club, and asked to take part in the panel or at least have the opportunity to choose a religious leader that could give a different point of view about homosexuality.28 Her requests were repeatedly rebuffed.29 In the end diversity week took place and the Homosexuality and Religion panel took place without Ms. Hansen’s involvement or representative.30 It was claimed that she was denied the opportunity to participate because she missed a “mandatory” meeting even though others who missed mandatory meetings were able to participate and she attended the second mandatory meeting.31 Later, Ms. Hansen, although not allowed to participate in the panel, was allowed to give a two minute speech to kick off diversity week.32 Her remarks were reviewed and “edited” by three

27. Id. at 790–91.
28. Id. at 790.
29. Id.
30. Id.
31. Id.
32. Id. at 791.
school employees although other students only had to pass by one school employee editor.\textsuperscript{33} 

Based on these facts the district court found a First Amendment violation of the student’s speech rights and an unconstitutional establishment of religion and violation of the Due Process Clause of the Fourteenth Amendment, but did not find a violation of the student’s free exercise rights.\textsuperscript{34} The court noted:

This case presents the ironic, and unfortunate, paradox of a public high school celebrating “diversity” by refusing to permit the presentation to students of an “unwelcomed” viewpoint on the topic of homosexuality and religion, while actively promoting the competing view. This practice of “one-way diversity,” unsettling in itself, was rendered still more troubling—both constitutionally and ethically—by the fact that the approved viewpoint was, in one manifestation, presented to students as religious doctrine by six clerics (some in full garb) quoting from religious scripture. In its other manifestation, it resulted in the censorship by school administrators of a student’s speech about “what diversity means to me,” removing that portion of the speech in which the student described the unapproved viewpoint.\textsuperscript{35}

While the case and the occurrence were unsettling, and probably resulted in strident and unloving interactions, it is possible that this interaction across the values that divided the contending camps, had a salutary effect and provided for a better framework for inclusion in future interactions. If Ms. Hansen and her parents had already left for a non-public school would the issue, and its possibly salutary outcome have been raised? It is understandably subject to debate whether anything good came from this conflict, but I believe the absence of a plaintiff like Hansen would make it more likely that potential constitutional violations in the future would go unnoticed, uncommented and unchallenged.

Contact theory has been the basis for many interventions, including desegregative efforts within the public schools. In 1954, Allport in his seminal theory hypothesized that the greater contact between a person with members of stigmatized outgroups, the lower the exhibited prejudice will be, provided

\begin{itemize}
  \item \textsuperscript{33} Id. at 791–92.
  \item \textsuperscript{34} Id. at 815.
  \item \textsuperscript{35} Id. at 782–83.
\end{itemize}
that those in contact are reasonably similar in formal status during the contact. Recognizing this and testing this in regard to contact and religious individuals and attitudes towards LGBT persons Finley and Walther reported from their research, incorporating measures of contact that: "Other than religion, the strongest predictor of attitude toward homosexuality and GLB persons were the measures of number and types of interpersonal contact. This still is a powerful explanation of variation in diverse types of prejudice. Those who have more contact with GLB persons, and contact of a closer nature, are forced to question their assumptions about the "immorality" of GLB persons, for example.36

IV. OPT OUT/OPT IN PROVISIONS AND CURRICULAR WAIVERS

In part, to help facilitate contact between individuals and families with contending viewpoints regarding gay straight alliances and civil rights advocacy for LGBT students and because of the concern of religious parents regarding curricular elements that teach health issues in ways inconsistent with religious beliefs, or parental conscientious beliefs, some states have developed codifications of rights and standards regarding opting out of such curricula, and other curricula within the schools. Such provisions may have the potential to provide ways to slow the exodus from public schools of deeply religious individuals and maintain contact. These provisions may be a response to assemblies or other celebrations of diversity that might not coincide with parents' or students' religious or conscientious beliefs. Utah's regulations regarding education include some key limited rights for parents and others seeking opt out rights from activities and for those seeking alternative readings or provisions in educational requirements that run counter to conscientious or religious beliefs. The Utah administrative code specifically does not limit itself to religious beliefs, but includes "expressions of conscience." Conscience is defined as: "a standard based upon learned experiences, a personal philosophy or system of belief, religious teachings or doctrine, an absolute or external sense of right and wrong.

which is felt on an individual basis, a belief in an external Absolute, or any combination of the foregoing.”

The rights protected seem somewhat limited, but this depends on their application and interpretation by administrators. Regulation 277-105-5 provides waivers for participation in school activities:

A. A parent, a legal guardian of a student, or a secondary student may request a waiver of participation in any portion of the curriculum or school activity which the requesting party believes to be an infringement upon a right of conscience or the exercise of religious freedom in any of the following ways:

1. it would require an affirmance or denial of a religious belief or right of conscience;

2. it would require participation in a practice forbidden by a religious belief or practice, or right of conscience; or

3. it would bar participation in a practice required by a religious belief or practice, or right of conscience.

B. A claimed infringement under Subsection A must rise to a level of belief that the requested conduct violates a superior duty which is more than personal preference.

These rights are generally held by parents. The code requires that when a student seeks to exercise such opt out rights, parents must be notified and provide consent. It is possible, that the above provision would cover the situation where a student or his or her parents wish to opt out of an assembly that might celebrate LGBT individuals in ways that seem to require an “affirmation or denial of a religious belief or right of conscience,” although this is not perfectly obvious, and there is no robust line of cases interpreting the statute in Utah. To harbor under this protection, a parent would have to seek to equate being exposed to ideas to affirmation or denial, but this seems possible. There also may be better codified protection for religious parents seeking to opt out of certain health education activities or instruction in Utah schools. In Utah’s statute 53A-13-101, it requires that when teaching regarding health and sexuality the materials adopted by any local school board must


38. Id. r. 277-105-5.
emphasize “abstinence before marriage and fidelity after marriage,” and specifically prohibits instruction in “If the advocacy of homosexuality.” The statute provides for parental review of curricula in health education, with concomitant parental consent or opt out rights. This might be more appropriately called an “opt in” provision. No health or sex education curriculum is to be provided to minors in Utah schools without parental permission. In addition, Utah’s statute appears to prohibit answering any spontaneous questions by students in health education courses. Only the prescribed curriculum, available to parental review in advance, is allowed, without any significant student teacher interaction in terms of questions and answers that might stray from the prescribed curriculum. Of interest to some religious parents is the statutes’ total prohibition of “the advocacy or encouragement of the use of contraceptive methods or devices” which is understood to include any instruction on contraception in Utah schools. Other sections of the Utah Code also provide for very liberal opportunities for parents and students to seek waivers from book readings and other portions of the curriculum. The standards established for granting or denying such waivers or opt out rights give substantial rights to religious parents and students and to other parents and students with conscientious objections.

Kevin Rogers and Richard Fossey’s work, to be presented at this conference, will analyze opt out provisions and their availability in most states in depth. I have included a discussion of Utah’s here because of its unusually extensive or liberal rights to parents for opting out or opting in, and because it is representative of a number of states, and parental wishes expressed in the political marketplace, that will either be accommodated appropriately by legislators, or it is likely that more students from deeply religious backgrounds will exercise choice options and leave public education. Obviously, this will change public education over time. Will it be a positive change for the purposes of common schooling as envisioned by its early proponents? Will it result in a positive outcome for LGBT students if such students are self-winnowed out of the public schools?

Research regarding attitudes is somewhat amenable to instrumentation problems and subtle nuances. Note my own modest research findings with a group of conservative
Christian students below. The measures and outcomes seem to shift with the question asked. Certainly these students seem to display a significant desire to protect the civil rights of LGBT students, while not necessarily wishing to protect all portions of the civil rights agenda of advocates for LGBT students and others. It seems to me that this represents a bridge across the divide between deeply religious, or Intrinsic students and other LGBT students and individuals.

How do you feel about the statement: Gay, Straight and Lesbian Alliances help all students feel safe in Utah public schools?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don’t like or have no affinity for
6. Don’t like or have no affinity for
7. Strong dislike or lack of affinity for
How do you feel about the statement: Gay, Straight and Lesbian Alliances help gay and lesbian students feel safe in Utah public schools?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don't like or have no affinity for
6. Don't like or have no affinity for
7. Strong dislike or lack of affinity for
How do you feel about the statement: Gay, Straight and Lesbian Alliances build support for Utah public schools?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don't like or have no affinity for
6. Don't like or have no affinity for
7. Strong dislike or lack of affinity for

53% 26%

How do you feel about the statement: Same sex marriages should be given legal recognition in Utah?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don't like or have no affinity for
6. Don't like or have no affinity for
7. Strong dislike or lack of affinity for

80% 10% 10% 10% 0% 0% 0%
How do you feel about the statement: Multicultural diversity should include gay and lesbian students?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don’t like or have no affinity for
6. Don’t like or have no affinity for
7. Strong dislike or lack of affinity for

How do you feel about the statement: Utah public schools should celebrate gay and lesbians students as part of celebrating multicultural diversity?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don’t like or have no affinity for
6. Don’t like or have no affinity for
7. Strong dislike or lack of affinity for
How do you feel about the statement: The civil rights of gay and lesbian students should be protected in Utah public schools?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don't like or have no affinity for
6. Don't like or have no affinity for
7. Strong dislike or lack of affinity for

How do you feel about the statement: Racial minorities and gay and lesbian individual fights for civil rights are equal in importance?

1. Strong affinity, or liking
2. Affinity or liking
3. Somewhat like or an affinity
4. Neutral
5. Somewhat don't like or have no affinity for
6. Don't like or have no affinity for
7. Strong dislike or lack of affinity for
V. CONCLUSION

It is easy to demonize, disregard, and disrespect those we are not in contact with. At the heart of my answer to the question, what may be the impact of same-sex marriage on education in America, is my concern that it will divide religious parents and students from American public schools if we are not vigilant about structures and policies that provide for respectful contact and dialogue. I tend to believe that the most effective way to impact deeply religious individuals and to build upon their religion’s most positive values is through their own interaction with their religion. At the very least, it is my thesis and prediction that the schools will be very different if deeply religious parents flee the public schools, not only at the school level, but at the macro level as the support of such parents is removed from public schools.

Our answer to how we deal with same-sex marriage, and curricula and celebrations in public education regarding these issues will also answer how long we will continue to have healthy common public schools. Contact between deeply religious individuals and those seeking to minimize prejudice towards, and harassment of, LGBT individuals, and enhanced civil protections of their status, is the most promising way to develop a common American understanding of rights and regard across deeply held religious and normative divisions regarding LGBT issues and protections. I agree with Purpel and Shapiro. What is needed is contact that can initiate a “discourse of an education that can speak to a healing and repair of our world [which] must “touch people's spiritual and emotional lives to what have been called the feminine moral images of wholeness, compassion, care, and responsibility.”39 The prescription cited in 1839 by Waterston at the outset of the common school movement still seems apposite in this policy arena today, and religion does not need to be an outsider to this intervention: “Teach the children to be affectionate with each other; to have kind feelings without envy or jealousy; that difference in dress makes no distinctions; that they should be as a band of brothers, bound by the tenderest ties of love . . . .”40

40. Mann, supra note 6, at 212.