Regulating Sexuality: On Liberty versus Equality

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Governmental regulation of sexuality has been a fertile field in the United States for protective judicial interventions since the mid-1960s. Beginning with *Griswold v. Connecticut* in 1965[1] – when the U.S. Supreme Court struck down a decidedly "silly" and also unique state law forbidding married couples from using contraceptives – the range of judicially protected sexual activities has broadened vastly from interracial marriage (1967)[2] to freely available contraceptives for unmarried people (1972)[3] to freely available abortions (1973)[4] to same-gender sexual relationships freed from criminal prohibitions (2003).[5]

The constitutional principles underlying these decisions varied from one case to the next. The "right to privacy" was the proclaimed basis in *Griswold* – the first application of this right as such in U.S. constitutional jurisprudence. The interracial marriage case rested on two grounds – "equality" derived readily from the Court's 1954 ruling against segregated schools in *Brown v. Board of Education* [6]; but also an independent and, at the time, quite novel ground, the "fundamental right to marry." The unrestricted access of unmarried people to contraceptives was grounded on "equality" (with the Court engaging in a novel exercise of minimal "rationality" review to overturn the state restriction) while the abortion right was based on "privacy" (though

[1] 381 U.S. 479 (1965).

[2] Loving v. Virginia, 388 U.S. 1 (1967).

[3] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[4] Roe v. Wade, 410 U.S. 113 (1973).

[5] Lawrence v. Texas, 539 U.S. 558 (2003).

[6] 347 U.S. 483 (1954).

some commentators have subsequently argued that the Court would have been on firmer ground if it had relied on "equality"[7]). The Court's most recent effort, in striking down the same-sex sodomy laws, was a pastiche of "privacy" and "equality" grounds.

The goal of this essay is to evaluate the comparative merits of these two grounds, "privacy" and "equality," for guiding protective judicial interventions regarding state regulation of sexual expression. One might say that there is no need to choose between these two grounds – that both are implicated, albeit in different ways, in sexuality regulation; and, accordingly, that sometimes one value, sometimes the other and sometimes both should be invoked by courts in their interventions. I disagree with this position. I believe that different substantive and process consequences follow from the internal logic of the two grounds and that, on both scores, the equality norm is a preferable guide. I hope to illustrate this by focusing on two currently disputed issues about state regulation of sexuality: the claims of so-called "intersex" people – that is people born with anomalous indications of gender identity[8] – to choose their identity, and the claims of same-sex couples to state-recognized marriage.

I. Intersex people

The conventional way for establishing the gender identity of such intersex people has been parental choice guided or directed by physicians. This choice often involve surgical interventions in early infancy to reshape anomalous genitals toward the standard appearance of

[7] See Guido Calabresi, Ideals, Beliefs, Attitudes, and the Law: Private Law Perspectives on a Public Law Problem 101-14 (1985), Robert A. Burt, The Constitution in Conflict 350-51 (1992).

[8] "Intersexuality" can refer to a wide range of biological features including genitalia, chromosomes, hormones, or secondary sex characteristics. The Intersex Society of North America estimates that one in one hundred individuals have "bodies that differ from standard male or female." <http://www.isna.org/faq/frequency>.

"male" or "female." (In relatively rare instances, surgical interventions are required to correct functional deformations; but cosmetic surgery is the most common basis for medical interventions in infancy.[9]) The law has played a central role in these interventions by recognizing the right of parents to make medical choices for their children. Contemporary advocates among and on behalf of intersex people maintain that these social practices should be changed, and the law altered accordingly, so that choice of gender identity is not made at infancy but only at maturity by the individual intersex person.

On the face of it, the privacy norm appears to be the most apt vehicle for comprehending this claim of intersex people to control their own gender identity. But there is an underlying implication of this norm that doesn't fit the social or psychological context in which individual decisions about gender identity are necessarily made. The privacy norm posits that individuals must be free from social or legal compulsion in making choices about matters in which their welfare is exclusively or principally at stake (that is, where others' welfare is not at all, or very little, affected by the choice). Gender identity is, however, a social construct. It masquerades as a biological given; but the very existence of human beings whose biology does not fit the conventional mold of "male" or "female" itself demonstrates that gender is a social construct imposed on a spectrum of definitional possibilities. The freedom of intersex individuals to choose their own gender identity is necessarily constrained by the socially constructed possibilities that are available to them.

At the moment, the dominant social construction of gender provides room only for a

[9] The Intersex Society of North America estimates the frequency of surgery "to 'normalize' genital appearance" at one or two births per thousand. Id.

binary choice between "male" and "female." It is possible to imagine, and many voices are currently being raised to support the imagined possibility, that this binary restriction be broadened to admit a new category of "intersex" or even more radically to eliminate gender categorizations in order to underscore their social as opposed to biological basis. These new possibilities have been aimed, among other targets, at the social designations of public restrooms – some advocates demanding a third door labeled "intersex" or "none" to supplement the ubiquitous facilities limited to "men" and "women"; other demanding the replacement of all gender designations with undifferentiated "unisex" as the only possibility.

These disputes about the designation of public restrooms first came into public attention during the 1970s in the congressional debate about passage of the Equal Rights Amendment, providing a constitutional guarantee against discrimination on grounds of sex. Opponents of the ERA seized on the possibility that the amendment would forbid gender-specific public restrooms and ERA proponents dismissed this charge as a *reductio ad absurdum*, as a "potty issue" invoked only to distract attention from the real injuries inflicted on women by discriminatory treatment.[10] Though the "potty issue" may have been understood as a joke or as tactical mockery in the 1970s, it is not implausible today to see seriously-drawn parallels between racially segregated and gender segregated bathrooms, in both cases resting on false biological categorizations (of "race" or "gender") in order to support the social subordination of some people to others.

These parallels between race and gender discrimination in the social usages of these categorizations speak to an equality norm, not a privacy norm, as the issue at stake in both cases.

[10] See Janet K. Boles, The Politics of the Equal Rights Amendment: Conflict and the Decision Process (1979).

One might claim that freedom of choice is still an important dimension in both cases – that the goal for racial justice was to give blacks a "free choice" between attending all-black or mixed-race schools and to argue similarly that intersex individuals should have the same freedom to choose their gender affiliation, whether "male," "female," "intersex" or "none of the above." But we need only consult the historical inadequacy of "free choice" among schools as a remedy for race segregation to see the comparable limits of this norm in responding to the indignities experienced by people who don't fit the dominant social categorizations of gender. As the Supreme Court observed in its rejection of Southern school district "freedom of choice" plans, the proper goal was "a system without a 'white' school and a 'Negro' school, but just schools."[11] The visible persistence of the stigmatizing social category – even with the sting of legal enforcement apparently removed – was at the core of the harm, of the inequality, inflicted by the segregation regime. So too for the intersex individual who is forced to choose between socially valued (binary) and devalued (heterodox) gender conceptions.

There is a further connection between *Brown* and the social status of intersex people that points to the centrality of the equality norm – that is, the fact that the stigmatized social category had especially harmful impact on young children. In justifying the selection of public school segregation as its first and most symbolically salient target for undertaking wholesale repudiation of the segregation regime, the Supreme Court in *Brown* observed, "[E]ducation is perhaps the most important function of state and local governments. . . . [I]t is a principal instrument in awakening the child to cultural values . . . and in helping him to adjust normally to his environment. . . . To separate [children in grade and high schools] from others of similar age and

[11] Green v. County School Board, 391 U.S. 430, 442 (1968).

qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[12]

For intersex people, childhood experiences about their "status in the community"

is, if anything, even more crucial than the reception of African-American children in public schools. Unlike African-American children, the parents of intersex people are not likely to be intersex themselves and, indeed, are most likely to share the stigmatizing attitudes of the broader society. The rush to cosmetic surgery which is typical for parents of intersex newborn testifies powerfully to this proposition. Imagine how deeply etched the "feeling of inferiority" would be for a dark-skinned infant if the initial parental response to his birth would be cosmetic surgery to whiten his skin. African-American parents identify with their children and therefore are able to provide whole-hearted emotional support in the face of social prejudice in ways that are not so readily available to the "gender-normal" parents of intersex children.

Many contemporary advocates for intersex children insist that the best course of action is to withhold any cosmetic surgery or even any clear designation of gender until the intersex child becomes mature enough to make this choice on its own. This prescription follows most readily from conceptualizing the child's interest as a "privacy" claim – the right, that is, to make crucial decisions about sexual identity for oneself, free from the legal or social compulsion of others. This is, however, a shallow and misleading way to comprehend what is truly at stake for the intersex child or adult. The "privacy" conceptualization overlooks the burden of social shame that the child's parents most likely have felt and conveyed to the child because of his

[12] 347 U.S. at 493-94.

stigmatized "anomalous" status. It overlooks, that is, the way that social badge of inferiority inevitably shapes parental attitudes to their scorned child and in turn the child's attitude toward itself. By the time the intersex child reaches maturity – and therefore capable of choosing gender identity within the understanding of the "privacy" conceptualization – the "heart and mind" of this child will have already been "affected .. . . in a way unlikely ever to be undone."

It does not follow from this consideration that parental choice of cosmetic surgery for their intersexed child should be encouraged or permitted by the legal system. What follows is that, even if discouraging or forbidding this surgery is desirable, this policy in itself does not address the core of the problem from the perspective of the intersex child. The core of the problem is the socially stigmatizing attitudes toward any apparent deviance from the bimodal norm of gender identity – a stigma that is all the more deeply ingrained because the bimodal norm is generally understood as the "biological reality" that all human beings are either "male" or "female," so that any variance from this norm is somehow outside the bounds of humanity.

To see the problem through the lens of the "privacy" norm is to oversimplify it to the point of distortion – to promise an apparently clear-cut, readily attainable remedy to social oppression in the same way that anti-slavery advocates in the mid-nineteenth century viewed their task as entirely accomplished when the formal abolition of slavery was enacted in the Thirteenth Amendment. The "equality" norm, properly understood, identifies the core problem and acknowledges the remedial difficulties and, most importantly, establishes a criterion against which all strategies for social amelioration must be measured. The criterion is, "how likely is any particular measure – such as postponing cosmetic surgery until adulthood or even permanently (as medical malpractice per se), and/or eliminating gendered public facilities, and/or

changing official certificates (birth, death, drivers licenses, etc.) in order to withhold gender identity until adulthood or even permanently – to undo the social stigmatization of and enhance social respect toward intersex people"? The question, put this way, is not easy to answer with any assurance. But this is the proper question – as a question of equality, not privacy – for thinking about the problem.

II. Same-sex Marriage

State regulation of same-sex relations provides another context where the issue may be characterized as "privacy" or "equality"– and this context has special salience because the claims for state validation of same-sex marriage, the most contentious contemporary legal dispute regarding same-sex relations, will vary depending on whether the "privacy" or "equality" norm is given precedence. Overturning criminal penalties against same-sex sexual relations can readily be understood as an application of either the "privacy" or "equality" norms or as some mutually reinforcing combination of both. But the claim for state validation of same-sex marriages is most coherent only as an application of the equality norm.

To be sure, the conduct involved in same-sex marriage can be understood as a quintessential act of privacy – the commitment to a life partner for shared sexual, emotional and financial support. But there is a clear difference between state action forbidding choice of commitment and state action acknowledging and thereby celebrating that choice. One might plausibly say that state action bestowing copious advantages on one set of choices (for example, mixed-sex commitments) while withholding them from others (such as same-sex commitments) is such a substantial intrusion into the choice of private relationships that it should be viewed as a

violation of the privacy norm. I think this is stretching the privacy norm out of shape; but for the sake of argument, I'll concede the point because this claim can, as I see it, be fully recognized by state-recognized civil unions which provide to same-sex partners all of the financial and practical benefits available to mixed-sex partners. State-recognized marriage, by contrast, has no comparable practical advantage; it is entirely honorific and celebratory as such. Perhaps it provides an incentive for commitment among those eligible for the status; but it is hard to see how state refusal to celebrate the choice of an intimate partner is a significant inhibition if there are no practical state-imposed disadvantages on that choice.

If, however, we state the claim to same-sex marriage as an application of the equality norm, we are more readily led to an understanding of the true issues at stake in that claim. The equality norm has obvious application to this claim in a way that the privacy norm does not. That is, same-sex couples are treated differently from mixed-sex couples rather than being treated as equals; whereas same-sex couples are in effect abandoning their claim to privacy by the very fact that they are demanding public acknowledgment and legitimation of their relationship. Stating the demand as an equality claim does not, however, settle the issue. It is still open to an opponent of same-sex marriage to assert that the differential recognition of mixed-sex marriage is not a violation of the equality norm because there is a real and adequately substantial difference between mixed-sex and same-sex marriage that justifies the variant treatment.

In this sense, the equality norm is more demanding than the privacy norm. For those who claim that withholding marital status from same-sex couples is a violation of their privacy right, the very fact that the state refuses to recognize a choice of marital partner by two mentally competent adults is *ipso facto* a violation of the privacy right. The right, that is, implies that the

state is obliged to acknowledge any act of choice simply because it is a choice. Differential treatment is not, however, an *ipso facto* violation of the equality norm. It is only a violation if there is some impermissible motive or effect involved in the differentiation – some impermissible devaluation or stigmatization. Understanding the claim for same-sex marriage as an application of the privacy norm implies that the state is not entitled to express a moral judgment on any choice of marital partner because the choice itself is the protected activity. Understanding the claim as an application of the equality norm implies that the state is entitled to make moral judgments about marital partners – but not *this* moral judgment that devalues same-sex as compared to mixed-sex affiliations.

By focusing attention on the special characteristics of *this* moral judgment condemning same-sex marriage, application of the equality norm provides a much more extensive and richer account of the indignity inflicted on same-sex individuals than application of the privacy norm which purposefully restricts attention to choice as such without regard to the substantive content of that choice. Understanding the same-sex marriage ban as a violation of the equality norm reveals similarities to the indignity inflicted by the institution of slavery – the paradigmatic instance of wrongful imposition of inequality in our culture. By drawing out this parallel, we can see how application of the equality norm yields a deeper social and psychological account of the impact of the same-sex marriage ban – and, even more than this, we can see how the equality norm itself rests on a more profound and normatively appropriate conception of democracy than the privacy norm.

A. Same-sex Marriage and Slavery

The linkage between slave status and the same-sex marriage ban does not arise from the conventional account that forced, uncompensated labor was the core evil of slavery. Forced labor and the consequent denial of free choice in making employment decisions was an evil – no matter how often Southern plantation owners insisted that slaves were in fact compensated for their labor by the provision of food, housing, clothes. (Indeed, Southern slaveholders drew a favorable comparison with their provision of lifetime support for their slaves even when they were no longer productive, in contrast with the Northern industrial practices of so-called "wage slavery," where the capitalist owners would simply fire any unproductive worker no matter how long he had served his capitalist master.) But more demeaning than the deprivation of choice involved in forced labor, there is one attribute of slave status that is even more radically and undeniably different from freedom. That attribute is the absence of any legal recognition of family relationships.

Slaves were not simply forbidden by law to marry. Because they were the property of their masters, slaves had no legally recognized relationship with anyone else. They had biological connections with their children, they had loving connections with one another; but none of these connections were approved or permitted by law.[13] So far as the law was concerned, nothing impeded masters from selling their slaves to far-away purchasers, breaking their bonds of love and biology with their mates and their children. And the law affirmed the morality of such heart-breaking actions. As the anthropologist Orlando Patterson has described it, slavery was a

[13] See Elizabeth Fox-Genovese, Within the Plantation Household: Black and White Women of the Old South 296-97 (1988).

status of "social death"; and slaves were, he said, "natally alienated" – that is, even worse than dead, they were alive but not part of the human species.[14] Their forced labor was not the hallmark of this dehumanized status; the law's disregard for their bonds with other beings, its refusal to recognize their family relationships, their inability to marry in the eyes of the law, was much more at the core of the social degradation inflicted on them.

Free blacks – the small number who had been released from slavery by their masters or the even smaller number who had never been enslaved – were legally authorized to marry before the Civil War. But a special disability was imposed on them in a few states that prohibited marriages between blacks and whites and, even more, imposed criminal penalties on violators – not just the interracial couples themselves but anyone who performed the marriage ceremony itself. In the *Dred Scott* decision, Chief Justice Taney cited the existence of these miscegenation statutes to demonstrate that interracial intermarriages "were regarded as unnatural and immoral" and accordingly "this stigma, of the deepest degradation, was fixed upon the whole [negro] race." Taney relied on these marriage restrictions to establish the central premise for his ruling that all blacks, whether enslaved or free, could not be "citizens of the United States" entitled to invoke the protective jurisdiction of federal courts. The central premise, as Taney enunciated it, was that blacks were "beings of an inferior order ... altogether unfit to associate with the white race ... and so far inferior that they had no rights which the white man was bound to respect."[15] From this premise, Taney explicitly concluded that blacks were outside the grand proclamation in our Declaration of Independence, that "all men are created equal."

[14] Orlando Patterson, Slavery and Social Death: A Comparative Study (1982)

These, then, are the three steps in Taney's reasoning: Blacks are not permitted to marry white people; this restriction demonstrates that blacks are "beings of an inferior order [possessing] no rights which the white man was bound to respect"; therefore, blacks were excluded from the guarantee in our founding document that "all men were created equal." In a tight logical syllogism, Taney proceeded from the marriage restriction to the proposition that blacks (whether slave or free) were not human beings – that, so far as our law was concerned, they were excluded from, they were inherently alien to, the human race.

After the Civil War, the liberated slaves were permitted to marry one another. But now miscegenation laws prohibiting interracial marriage were enacted in every Southern state.[16] It was not until 1967 that the U.S. Supreme Court ruled that Virginia's miscegenation law violated the Constitution. In an opinion by Chief Justice Warren, the Court relied on two grounds for invalidating the law. First, the Court ruled that the law wrongly relied on a racial classification that was demeaning to blacks as an expression of white supremacy. This ground was not at all surprising in light of the Court's 1954 ruling in *Brown v. Board of Education* that racial classification of schoolchildren was unconstitutional. But more surprisingly, the Court set out a second, independent ground for invalidating Virginia's miscegenation law. The Court proclaimed that the law violated the fundamental right to marry. "The freedom to marry," the Court said, "has long been recognized as one of the vital personal rights essential to the orderly

[15] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

[16] Joel Williamson, A Rage for Order: Black-White Relations in the American South Since Emancipation 186-91 (1986).

pursuit of happiness by free men."[17]

This second ground was not necessary to the Court's holding; the first ground regarding the wrongfulness of racial categorizations, was quite sufficient to dispose of the case. Moreover, this second ground was essentially unprecedented. Though prior cases had mentioned marriage as a "basic civil right," no Supreme Court decision had ever struck down restrictions imposed by state marriage laws regarding who was entitled to marry whom. The Court thus reached out in this 1967 Virginia case for a novel legal formulation for identifying the constitutional evil in state miscegenation laws. The Court did not explain why it had done this. Indeed, this second ground in its ruling came at the very end of the Court's opinion and was stated in only two short paragraphs. But I believe this novel second ground was enunciated because the Court understood – perhaps consciously, perhaps only intuitively – that there was a crucial linkage between slavery and legal barriers to marriage.

It was not enough for the Court to rule that the racial miscegenation law violated the equality norm because it drew invidious distinctions between same-race and mixed-race marriages. The Court had a deeper sense of inequality in mind than this somewhat formalistic notion; the Court understood that degradation of blacks found clearest expression in the denial to black people of their right to marry. That, I would say, is the reason that the Court reached out to formulate an added reason for invalidating the miscegenation laws based on their violation of the "fundamental right to marry."

State refusal to recognize same-sex marriages should be understood in this light. The

[17] Loving v. Virginia, 388 U.S. 1, 11 (1967).

basic question in evaluating this refusal is not – as the conventional equal protection analysis suggests – whether separate classifications for heterosexual and same-sex relationships are rationally plausible or based on long-standing moral or social traditions. The basic question is whether state prohibition of same-sex marriage reflects the same underlying attitude toward gays and lesbians that legal prohibition of interracial marriages signified toward blacks – that is, refusal to acknowledge shared membership in the human race.

B. Same-sex Marriage and Democracy

Application of the equality norm has led us to this basic question, to the true issue at stake in the marriage bans with a directness and clarity that the privacy norm could not provide. But even more than this, its revelation of this basic question indicates why the equality norm is a richer, more normatively appropriate conception of democratic values than the privacy norm. Application of the equality norm leads us to consider the nature of the communal relationship – and in particular, whether that relationship is characterized by mutual respect. The privacy norm, by contrast, rests essentially on the premise of the absence of communal relationship.

Justice Brandeis put this proposition with special clarity in his dissenting opinion in *Olmstead v. United States* which laid the groundwork for the Court's formulation of the "right to privacy" in *Griswold*, almost forty years later. In *Olmstead*, Brandeis asserted that the Constitution "conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."[18] There may be good reason for embracing "the right to be let alone" when an individual is faced by implacably hostile

[18] Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

opponents who disrespect and devalue him. But this social isolation is not "the most comprehensive of rights." The very concept of rights depends on a communal relationship – of a shared communal recognition of the limits of one person's authority over another. Nor, for this reason, is "the right to be left alone . . . the right most valued by civilized men." This right is most valued when appeals for mutual understanding, forbearance and respect have failed – when the very existence of a continuing communal relationship is in doubt. The "right to be left alone" is, one might say, a last-ditch effort among hostile people to avert open warfare and to break off communal relationships rather to remain yoked to people who seeks to subordinate your welfare to theirs.

The claim for state recognition of same-sex marriage is aimed at upholding rather than walking away from a communal relationship – not at upholding a committed relationship with a same-sex partner but more fundamentally in seeking general public recognition and celebration of that partnership rather than defining the partnership as a "private matter" with no public signification. Turning away from public recognition is, implicitly at least, based on a claim that others have no business in judging the moral or social worth of an individual's choice of sexual partner. Insisting on public recognition expresses, implicitly at least, a willingness to justify one's choice to others – an effort to obtain moral respect for one's choice, even if others apply a different moral calculus for themselves.[19] The appeal for equal respect is based on a hopeful understanding of the social foundation of democratic principle. The invocation of privacy with

[19] A different attitude about the moral value of justifying one's conduct to others was at the core of the classic debate in the 1960s between H.L.A. Hart and Patrick Lord Devlin about social enforcement of morality. For a sympathetic account of Lord Devlin's position, see Robert A. Burt, "Moral Offenses and Same Sex Relations: Revisiting The Hart-Devlin Debate," 1 Journal of Law (Australia) 70-88 (2004).

its underlying assumption that others' moral approbation is irrelevant to one's own conduct is not incoherent as a matter of principle; but it rests on a thin, even an impoverished, conception of mutual respect and is thus at odds with the strongest and best account of democratic practice.

The right to privacy, the "right to be left alone," attempts to preserve a relationship characterized by hostility rather than mutual respect by carving out some specific category of entitlements which are exempt from others' claims to impose judgment, from others' coercive jurisdiction. In past times, this category was described as "property rights" which trumped others' claims; in our time, this category has been reformulated as "intimate conduct" involving sexual or family relationships. We now can clearly see that the concept of protected "property" which held sway in U.S. constitutional culture from the late nineteenth century to the New Deal of the 1930s obscured the stake that the "non-propertied" had in the bundle of social resources which were reserved to the "propertied" interests. The "property label" was itself a cultural construct rather than a self-evident marker of a "true owner" as compared to an illegitimate claimant.

The "privacy" concept today is not applied to economic resources but rather to what are now viewed as distinctively different personal concerns. But as we have seen regarding the claims of intersex people to recognition as such, the social constructs of gender are not "private" concerns which affect individuals in their "personal" rather than their "communal" capacity. Gender identity is a communally constructed resource; it has no meaning or value outside of its communally expressive character.

This is equally true of "marriage," of the social designation of marital status. If

"privacy" is understood to be a claim for an individuals to define their own status, entirely independent of the social constructions (and accompanying moral approval or disapproval) of others, then the very idea of "marriage" – like the idea of "gender" – becomes incoherent. We can, however, coherently characterize the dispute over marital status or gender identity, in the same way that the old dispute about "property" was recast after the New Deal, by formulating it in the vocabulary of "equality." In this formulation, the dispute is a claim by those excluded from socially approved categories of "married" or "gendered" or "property-holder" that their exclusion subjects them to wrongful subordination. Their categorical exclusion withholds valuable assets – whether measured in quantitative monetary terms or in qualitative terms of social respect. This differential withholding of assets does not necessarily connote a wrongful imposition of inequality. The wrong begins to arise when the social meaning of this privileging of some as compared to other classes of people connotes a "less-than-human" status in the less privileged – when, in the words of *Dred Scott*, the less privileged were understood as "beings of an inferior order ... altogether unfit to associate with [others]... and so far inferior that they had no rights which [others were] bound to respect."

III. How to make "the constitutional ideal of equality . . . a living truth"?[20]

The differential connotation of "human" and "non-human status" is not necessarily a violation of the equality norm because the very structure of human culture – its intellectual constitution – involves such a process of differentiation. This internal logic has been compellingly described by the anthropologist Mary Douglas in her classic book, *Purity and*

[20] Cooper v. Aaron, 358 U.S. 1, 20 (1958).

Danger.[21] In the very title of her book, Douglas indicates that in cultural terms the opposite of purity is not just "impurity" but something more powerful and ominous. That is, the opposite of "purity" is "danger." The very structure of human culture, of civilization – our intellectual and emotional capacity to construct intelligible meaning in a world of sensory flux, our capacity to feel safe in a world filled with threats – is built upon categorical distinctions between what is permissible and what is prohibited, between the sacred and the profane, between what is pure and what is dangerous.

As Mary Douglas demonstrates, the specific content of these categorizations varies from generation to generation; but though the content changes, the impulse, the human imperative, remains the same to distinguish between these categories of purity and danger and to cling to them as life rafts in a turbulent sea. Douglas also demonstrates that in moments of great historical upheaval, the contents of these categories suddenly appear inadequate precisely because their observance had failed to avert the upheaval. So the old contents fade but the imperative to differentiate opposed categories of purity and danger persists and these categories are filled in with new content.

If this process of categorization is a basic characteristic of human civilization, if it is in effect "hard-wired" into our cultural self-understanding, then two questions follow. The first question: If the categorizations of "purity" and "danger" persist, is it nonetheless important to try to change the content of these categories through rational human choice? The second question: How can this change be brought about?

[21] Mary Douglas, Purity and Danger: An Analysis of Concepts of Pollution and Taboo (1966).

It is, I think, easier to answer the first question. This is a question of normative principle, whether there are some extrinsic standards for judging the goodness of these categories; whether, one might say, some kinds of "purity" are intrinsically more "pure" than others, and whether some kinds of "danger" categorizations are more dangerous than others. Many different kinds of content can fill in these opposed categories (contents, for example, about what and what not to eat or to wear or to pray for). Of these many different kinds of contents, I would say that the most dangerous – the most difficult to justify in normative terms – is the categorization of some human beings as "pure" and others as "contaminated." The traditional caste system in India exemplifies this kind of content categorization. The treatment of Jews in Europe, culminating in the Nazi Holocaust, is another example. The status of African-Americans in our own culture is a third example. In the U.S. Constitution, in the document that constitutes our national identity, our own culture has condemned this kind of categorization of human beings through the abolition of slavery in the Thirteenth Amendment and the extension of that ideal in the guarantee of equality to all persons in the Fourteenth Amendment.

This first question is "easier" for us to answer than the second question, which is, how do we proceed to change the content of the categorizations when some people are wrongfully defined as "contaminated" as compared to others who are "pure"? Here is where I see a special role for the judiciary, and where I see the judicial actions in addressing the status of African-Americans during the half-century between the late 1930s and the mid-1980s as the model for implementing this moral imperative of attempting to remove the stigma of "contamination" imposed on a scorned, vulnerable group of people.

There are three essential steps in this process. The first step is for the judiciary to take

the initiative in identifying, in publicly acknowledging, the factual existence of this stigmatization of some specific group and moral wrongfulness. By taking this first step, the judiciary offers its moral recognition to the stigmatized group. The judges' actions in themselves tell the members of this group that they are no longer excluded and alone, that there is now a new witness, a morally salient public witness, who sees and condemns the indignities and humiliations that the oppressed people had previously endured in enforced silence.

The second step in this remedial process is that the members of the oppressed group are encouraged by, emboldened by, the unprecedented visibility and moral recognition that the judges have offered to the group. The members of the oppressed group step away from their accustomed acquiescent posture of social silence and openly, publicly, proclaim the reality of their suffering and the injustice of it. This is the step that Rosa Parks took when she refused to give up her seat to a white man on a public bus in Montgomery, Alabama. Rosa Parks' uprising by remaining seated was a revolutionary act. And it was not coincidental that this brave act took place in 1955, just one year after the Supreme Court's ruling in *Brown v. Board of Education*. Rosa Parks' action precipitated an economic boycott of the public bus system and of white businesses generally by virtually the entire black population of Montgomery, and this boycott marked the beginning of the modern civil rights movement.[22]

This second step – the coming forward, the public coming out of the oppressed group –

[22] The Supreme Court's role in precipitating this public "coming out" of an oppressed and previously silenced people was made clear in the first speech that Martin Luther King, Jr. gave in a Montgomery church, the speech that marked the beginning of King's leadership of the civil rights movement. King said in that Montgomery church in 1955, "We're going to work with grim and bold determination – to gain justice on the buses in this city. And we are not wrong . . . in what we are doing. If we are wrong – the Supreme Court of this nation is wrong. If we are wrong – God Almighty is wrong." Quoted in Taylor Branch, Parting the Waters: America in the King Years 1954-63 at 140 (1988).

cannot be commanded by any court. It can only be encouraged. The group must find its own voice; it must take courage from the new recognition given to them. And if this second step does indeed occur, then a third step becomes possible. The third step is that the oppressors – the socially favored group, the "pure" and "normal" human beings – are led to see the suffering imposed on the disfavored group in a way that potentially inspires a sense of empathy, of fellow-feeling, of acknowledged bonds of humanity.

This third step does not come easily. The oppression of the disfavored group has been so humiliating, so totalizing, precisely because rigid maintenance of the rock-solid status of the status differentiations has been so powerfully important to the dominant group, to the "pure" human beings, for their own sense of psychological safety and well-being. A total and frontal assault on these status differentiations is likely to be met by dominant group not simply with stubborn resistance but even more fatally for the success of the corrective enterprise, the assault will be met with simple incomprehension – as if some outsider from the planet Mars were raising questions about the very nature of reality. But until the dominant group, the oppressors, have been led to redefine their relationship to the oppressed group, the genuine experience of equality on the part of both the oppressed and the oppressors will remain out of reach.

This is the basic reason that, even if it is relatively easy to identify the wrongfulness of categorical subjugation of some humans compared to others, it is not so easy to remedy this subordination in a way that vindicates the equality norm. The challenge in this moral process, this social experience of "consciousness" and "conscience" raising, is not simply for some dictator – some nine or five elderly lawyers in Washington, D.C. – to announce the true dictionary meaning of "equality" as that word appears in the dusty historical document of the

Constitution. The deeper, truer challenge is for those elderly lawyers, those judges, to translate that dusty word into a living communal reality. To accomplish this transformation, these judges cannot act alone. They lack this truly transformative power, either in practical or in moral terms. For both practical and moral reasons, the judges must actively appeal to others for assistance.

There is no all-purpose formula for judicial conduct to enlisting others in this enterprise. Judges must be alert to the particularities of their cultural situation and adroit in setting up "teachable moments" that both encourage the oppressed to speak for themselves and induce the oppressors to redefine themselves (in particular, to see themselves as oppressors when their prior treatment of the "impure group" seemed to them simply to be an expression of the "natural order of things"). Regarding the status of gays and lesbians, the most visible expression of oppression was the criminalization of same-sex sodomy; the U.S. Supreme Court should have understood its obligation to launch the first step in the remedial process I have outlined by invalidating these laws when they were first challenged in *Bowers v. Hardwick*.[23] The Court belatedly, though explicitly and expansively, recognized its error seventeen years later in *Lawrence v. Texas*, and this action in turn has precipitated the legal claims for recognition of same-sex marriage.

These claims have not been pursued, however, in federal courts; virtually all of the advocates have gone to state courts and relied on state constitutions. This litigation strategy was pragmatic; the advocates clearly anticipated an unsympathetic reception in the federal courts and especially in the Supreme Court. But whatever the motives of the litigants or of federal judges, I believe that the proper judicial response is to leave this issue to the state courts and state

[23] 478 U.S. 186 (1986).

constitutional adjudication. The state courts themselves have come to different results: thus far, three have ruled in favor of a state constitutional entitlement to same-sex marriage (Connecticut, California and Massachusetts)[24], several others have ruled that same-sex couples must be provided all of the practical state-bestowed advantages of mixed-sex marriages through so-called "civil unions" without necessarily carrying the honorific designation of "marriage," (New Jersey, Vermont)[25], some have ruled that neither marriage nor civil union status is guaranteed by their state statutes (New York, Arizona, District of Columbia)[26] and twenty-seven states have adopted constitutional amendments forbidding same-sex marriage (thirteen of which were passed after the Massachusetts Supreme Judicial Court ruling in 2003)[27]. The multiplicity of tribunals (and the variations in their results) is not a regrettable lack of uniformity but an advantage for the unfolding of the remedial process.

State recognition of same-sex marriage will truly amount to a remedy for the long history of oppression directed against gays and lesbians only if that recognition is voluntarily offered by the former oppressors. Processes of re-examination and repentance can be precipitated by judicial interventions; but social space must be preserved within which communal acts of voluntary symbolic contrition can take place. This social space can be vividly provided by the very process of serial consideration of the claims for same-sex marriage by different state courts

[24] Kerrigan v. Commissioner of Public Health, 957 A.2d 407 (CT 2008); In re Marriage Cases, 43 Cal.4th 757 (CA 2008); Goodridge v. Dep't of Public Health, 798 N.E.2d 941 (MA 2003).

[25] Lewis v. Harris, 908 A.2d 196 (NJ 2006); Baker v. State, 744 A.2d 864 (VT 1999).

[26] Hernandez v. Robles, 855 N.E.2d 1 (NY 2006); Standhart v. Superior Court, 77 P.3d 451 (AZ 2003); Dean v. District of Columbia, 653 A.2d 307 (DC 1995).

[27] Nat'l Conference of State Legislatures, *Same-Sex Marriage*, <http://www.ncsl.org/programs/cyf/samesex.htm>.

at different times in rulings that are only persuasive but not binding on sister jurisdictions. State constitutions are, moreover, relatively easy to amend by popular means whereas the federal constitution is virtually impossible to amend. Thus state court constitutional rulings favoring same-sex marriage that are not overturned at the polls convey clear, if indirectly stated, popular acquiescence and effective approval. (Sensitive judicial supervision of this process is necessary and appropriate; thus the California Supreme Court should rule, as it is currently considering,[28] that the popular majority reversal by referendum of their constitutional ruling was not the proper way to revise the state constitution, but that more rigorous procedures of legislative approval by super-majorities must precede any popular consideration. The California court should extend its protection to the oppressed group by bestowing legislative advantages on them but not by conclusively imposing favored status on them.)

Different judicial strategies are needed in other countries without the serendipitous advantages provided by the U.S. federal system. For example, claims for judicially-enforced recognition of same-sex marriage are now pending in Argentina where the issue is governed by a uniform national rule. I would say that the courts there should build on the example of the Buenos Aires provincial government's recognition of civil unions by extending the right to this status throughout the Argentine provinces, but that the courts should hold back in ordering the entire country to accept the symbolic endorsement of same-sex "marriage." In this way, the Argentine court could bestow heightened attention and convey respect to the equality-based claims of gays and lesbians but still preserve social space for popular acts of atonement.

[28] Strauss v. Horton, Case No. S168047 (CA Sup. Ct. 2009).

The equality claims by intersex people are currently at a different place in the cultures of both North and South America. Re-examination of the seemingly "natural" character of bipolar gender identity has scarcely begun, and intersex people themselves remain almost invisible as such. I would say that the best judicial strategy for initiating the three-step remedial process I have outlined would be for courts to strike down statutes that empower parents to consent to cosmetic surgery for their children, and to generously construe petitions from intersex adults to change their gender designations on official state documents, such as birth certificates and drivers licenses, as they themselves see fit.[29]

These various judicial strategies do not fit the conventional idea of the "neutrality" of constitutional adjudication, of the self-evident positivist force of the law's majestic abstractions. All of the strategies I've suggested can be depicted in conventional legalist terms; for example, federal courts could justify their refusal to entertain constitutional claims for same-sex marriage by citing precedents in favor of "abstention" to state courts on matters reserved to them by principles of federalism.[30] I maintain, however, that courts can and should see these doctrinal

[29] In the U.S., processes to "correct" erroneous designations of gender on birth certificates are already available; I am suggesting that judges should rule that these corrective processes do not depend on "scientific" proof of chromosomal status or genital appearance but only on the individual's self-depiction. One possible ironic consequence of such ruling would be that an intersex adult would be free to change gender designation to accommodate his/her wish to bypass the strictures of state law forbidding same-sex marriage. The anomaly of an individual changing gender identity so that same-sex marriage becomes mixed-sex by an act of will would in turn exert some social pressure against the plausibility of the restrictions themselves.

[30] In Morrison v. United States, 529 U.S. 598, 616-18 (2000), the Supreme Court struck down the federal Violence against Women act on the ground that it impermissibly dealt with matters that were "truly local" rather than "truly national" in character, and cited as prime example of the "truly local" category "marriage, divorce and childrearing." This could be a doctrinal basis for federal deference to state constitutional adjudication regarding same-sex marriage. (Moreover, the designation in *Morrison* of "marriage" as "truly local" should mean that when a state specifies that "marriage" is available to same-sex couples, the federal government cannot intrude on this state preserve but must defer to the local rule. On this ground, regarding same-sex couples validly married (as in Massachusetts, Connecticut or California), federal courts should immediately overturn the congressional Defense of Marriage Act (DOMA), which limits marital benefits such as provided by federal tax laws or Social Security to "legal union between one man and one woman." 1 U.S.C. sec. 7.)

moves not as abstract self-enforcing commands but as opportunities to advance the underlying goals of the equality norm.

The conception of the judiciary as a participant in an on-going dialogue with national and state legislatures, with the oppressed and the oppressors, is possible whether the judges see themselves as enforcing norms of equality or of privacy. But the social isolation implicit in the privacy norm carries its own impetus toward judicial solipsism. The U.S. Supreme Court's adventure with *Roe v. Wade* is Exhibit A both of this tendency implicit in the privacy norm and, as I see it, the harmfulness of this tendency. If the right to an abortion had been based on the equality norm, as a remedy for the subordination of women, a different set of remedies based on more modestly conceived judicial interventions might have presented themselves.[31]

If I had space and time enough in this presentation to extend this thesis in this and other contexts, I believe I could show advantages in all cases of reliance on the equality rather than the privacy norm in evaluating legal regulations of sexuality. The advantages are all context-specific, but together they support the general thesis that I am putting forward: Equality,

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Federal abstention to state tribunals could also be derived from the proposition that in interpreting the federal Constitution, the Supreme Court frequently draws on a multiplicity of state court rulings and that federal courts should therefore abstain in favor of state court adjudication to provide time for this extended deliberative process before definitively deciding the constitutional status of same-sex marriage. See, e.g., Lawrence v. Texas, 539 U.S. 558, 577 (2003) (state court decisions supporting constitutional invalidation of same-sex sodomy laws); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277 n. 6 (1990) (state courts decisions supporting right to refuse life-prolonging medical treatment). Compare Atkins v. Virginia, 536 U.S. 304, 315 (2002) with Penry v. Lynaugh, 492 U.S. 302, 333-34 (1989) (evolving national consensus regarding constitutionality of executing mentally retarded people); and compare Roper v. Simmons, 543 U.S. 551 (2005) with Stanford v. Kentucky, 492 U.S. 361 (1989) (evolving national consensus regarding execution of juveniles). See Smelt v. County of Orange, 447 F.3d 673 (9th Cir.), *cert. denied*, 127 S.Ct. 396 (2006) (approving federal court abstention to state courts in constitutional challenge to gender-restrictive state marriage law).

[31] For development of these propositions about *Roe*, see Robert A. Burt, The Constitution in Conflict 344-352 (1992).

si; Privacy, *non*.