Gender Justice GU4506
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Course Reader – Volume 4

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APRIL 20TH: MARRIAGE RIGHTS VS. SEXUAL JUSTICE

James OBERGEFELL, et al., Petitioners

v.

Richard HODGES, Director, Ohio Department of Health, et al.;

Valeria Tanco, et al., Petitioners

v.

Bill Haslam, Governor of Tennessee, et al.;

April DeBoer, et al., Petitioners

v.

Rick Snyder, Governor of Michigan, et al.; and

Gregory Bourke, et al., Petitioners

v.

Steve Beshear, Governor of Kentucky.

Nos. 14–556, 14–562, 14–571, 14–574.

Argued April 28, 2015.

Decided June 26, 2015.

Background: Same-sex couple brought action alleging that voter-approved Michi-

gan Marriage Amendment (MMA), which prohibited same-sex marriage, violated Equal Protection and Due Process Clauses. The United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., 973 F.Supp.2d 757, entered judgment in couple's favor, and state appealed. Same-sex couples married in jurisdictions that provided for such marriages brought actions alleging that Ohio's ban on same-sex marriages violated Fourteenth Amendment. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 14 F.Supp.3d 1036, entered judgment in couples' favor, and state appealed. Same-sex spouses, who entered legal same-sex marriages in Maryland and Delaware, and Ohio funeral director sued Ohio officials responsible for death certificates that denied recognition of spouses' same-sex legal marriages after death of their partners, seeking declaratory judgment and permanent injunction. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 962 F.Supp.2d 968, entered judgment in plaintiffs' favor, and state appealed. Same-sex couples validly married outside Kentucky brought § 1983 actions challenging constitutionality of Kentucky's marriage-licensing law and denial of recognition for valid same-sex marriages. The United States District Court for the Western District of Kentucky, John G. Heyburn II, J., 996 F.Supp.2d 542, entered judgment in couples' favor, and state appealed. Same-sex couples who were legally married in other states before moving to Tennessee brought action challenging constitutionality of Tennessee's laws that voided and rendered unenforceable in Tennessee any marriage prohibited in state. The United States District Court for the Middle District of Tennessee, Aleta Arthur Trauger, J., 7 F.Supp.3d 759, granted couples' motion for preliminary injunction, and state appealed. The United States Court of Appeals for the Sixth Circuit, Sutton, Circuit Judge, 772 F.3d 388, reversed. Cases were consolidated and certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

(1) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty, overruling *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, and abrogating *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, *Adams v. Howerton*, 673 F.2d 1036, and other cases, and

(2) States must recognize lawful same-sex marriages performed in other States.

Reversed.

Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia and Thomas joined.

Justice Scalia filed a dissenting opinion, in which Justice Thomas joined.

Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

Justice Alito filed a dissenting opinion, in which Justices Scalia and Thomas joined.

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.,* Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev.Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra.* The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder,* 772 F.3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history

reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for

the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H.

Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers,* holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas,* 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to

strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at ——, 133 S.Ct., at 2689.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864–868 (C.A.8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State–by–State Supp. (2015).

III

[1] Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147–149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d

349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[2, 3] The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572, 123 S.Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

[4] The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

[5, 6] Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Griswold*, *supra*, at 486, 85 S.Ct. 1678; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.*,

Lawrence, 539 U.S., at 574, 123 S.Ct. 2472; *Turner, supra,* at 95, 107 S.Ct. 2254; *Zablocki, supra,* at 384, 98 S.Ct. 673; *Loving, supra,* at 12, 87 S.Ct. 1817; *Griswold, supra,* at 486, 85 S.Ct. 1678. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt, supra,* at 453–454, 92 S.Ct. 1029; *Poe, supra,* at 542–553, 81 S.Ct. 1752 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

[7] A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S.Ct. 1817; see also *Zablocki, supra,* at 384, 98 S.Ct. 673 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence, supra,* at 574, 123 S.Ct. 2472. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki, supra,* at 386, 98 S.Ct. 673.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge,* 440 Mass., at 322, 798 N.E.2d, at 955.

[8] The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2693–2695. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra,* at 12, 87 S.Ct. 1817 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

[9] A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut,* which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485, 85 S.Ct. 1678. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose

as any involved in our prior decisions." *Id.*, at 486, 85 S.Ct. 1678.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U.S., at 95–96, 107 S.Ct. 2254. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at ——, 133 S.Ct., at 2689. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

[10] As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U.S., at 567, 123 S.Ct. 2472. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

[11] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer*, 262 U.S., at 399, 43 S.Ct. 625. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U.S., at 384, 98 S.Ct. 673 (quoting *Meyer*, *supra*, at 399, 43 S.Ct. 625). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at ——, 133 S.Ct., at 2694–2695. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue

here thus harm and humiliate the children of same-sex couples. See *Windsor, supra,* at ——, 133 S.Ct., at 2694–2695.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been " 'a great public institution, giving character to our whole civil polity.' " *Id.,* at 213, 8 S.Ct. 723. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor,* 570 U.S., at ——–——, 133 S.Ct., at 2690–2691. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes

marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg,* 521 U.S., at 752–773, 117 S.Ct. 2258 (Souter, J., concurring in judgment); *id.,* at 789–792, 117 S.Ct. 2258 (BREYER, J., concurring in judgments).

[12] That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving,* 388 U.S., at 12, 87 S.Ct. 1817; *Lawrence,* 539 U.S., at 566–567, 123 S.Ct. 2472.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

[13] The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection

Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M.L.B.*, 519 U.S., at 120–121, 117 S.Ct. 555; *id.*, at 128–129, 117 S.Ct. 555 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S., at 12, 87 S.Ct. 1817. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383, 98 S.Ct. 673. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, 98 S.Ct. 673, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

[14] Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 2595, invidious sex-based classifications in marriage remained common through the mid–20th century. See App. to Brief for Appellant in *Reed v. Reed*, O.T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her

separately, either for her own protection, or for her benefit." Ga.Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g., Kirchberg v. Feenstra,* 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980); *Califano v. Westcott,* 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (plurality opinion); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Like *Loving* and *Zablocki,* these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M.L.B. v. S.L.J.,* the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U.S., at 119–124, 117 S.Ct. 555. In *Eisenstadt v. Baird,* the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U.S., at 446–454, 92 S.Ct. 1029. And in *Skinner v. Oklahoma ex rel. Williamson,* the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U.S., at 538–543, 62 S.Ct. 1110.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U.S., at 575, 123 S.Ct. 2472. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.,* at 578, 123 S.Ct. 2472.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g., Zablocki, supra,* at 383–388, 98 S.Ct. 673; *Skinner,* 316 U.S., at 541, 62 S.Ct. 1110.

[15] These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that

same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

. . .

The respondents also argue allowing same-sex couples to wed will harm mar-riage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licens-ing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regard-ing marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is un-realistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See Kitchen v. Herbert, 755 F.3d 1193, 1223 (C.A.10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foun-dation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

[21] Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

FRANKE, J., CONCURRING IN THE JUDGMENT

I join parts I through VI of Court's opinion, concurring in the judgment. I agree that the decision of the court below should be reversed, and therefore I concur in the Court's judgment, but write separately to clarify that this matter should not be decided on fundamental rights grounds. Further, I believe that the Court should provide more specific instructions to the court below with respect to the appropriate remedy that should be awarded in light of the equal protection remedy we find herein: the only remedy that would be equality-enhancing overall would be one that disestablished the institution of civil marriage altogether. It would then be left to the states to devise a more equitable means by which to secure the economic and legal interests of its citizens; one that does not rest on status hierarchies that run afoul of fundamental values of equality and democracy.

We are urged by the petitioners in this case to usher in the next step in the modernization of the institution of civil marriage. The petitioners, sixteen people making up eight couples, contend that any distinction between their partnerships and those now deemed eligible to marry in the states in which they reside, turns on the consideration of factors rendered constitutionally illegitimate for the purpose of public law-making. This argument takes two principal forms: one based in the Equal Protection Clause, and another that suggests a substantive due process right to civil marriage as a fundamental right.

I

As a preliminary matter, I note that the relief sought by the petitioners herein is neither radical nor sweeping, notwithstanding the alarm bells rung by some *amici*. The claimants merely plea that their unions should be legitimized through the grant of a civil marriage license on the same terms as that afforded to different-sex couples. They insist that the same level of commitment, decency, and stability reasonably characterizes their partnerships as do the partnerships of different-sex couples that are granted state licensure. Indeed, the facts alleged by the couples in the petitioner class suggest a greater degree of commitment and stability than the majority of different-sex couples who are not barred from a civil license for their union. In important respects, the success of the petitioners in this case will subsidize the underlying values of marriage more generally, insofar as the petitioner-couples have embraced values of monogamy, financial interdependence, loving and responsible parenthood, and dignity that make up the very fabric of traditional notions of marriage. To the ways in which dignity underwrites the celebrated status that marriage enjoys I shall return. The petitioners herein have no aspirations to upend the institution of marriage, but rather seek to prove their entitlement to the blessings, rights, and responsibilities conferred by civil marriage on its current terms.

II

The Court's and the nation's evolving sense of justice, protected in many cases through a constitutional commitment to equality, has assigned particular legal and social opprobrium to public policies or laws that manifest or perpetuate ideologies of superiority and attendant inferiority. As the CHIEF JUSTICE rightly notes, "Legislation must promote the public interest, and may not be used merely to promote or disparage the private interests of some group."[1] A mere desire to stigmatize or humiliate a

particular group cannot serve as a legitimate public justification for lawmaking or public policy. See *Windsor v. United States*, 133 S.Ct. 2675 (2013); *United States v. Virginia,* 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (concurring opinions); *Department of Agriculture v. Moreno,* 413 U. S. 528, 534 (1973).

This Court has a rich jurisprudence elaborating more than one way of framing the guarantee of equality. One approach, preferred by the CHIEF JUSTICE, analogizes the instant case to *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting) and *United States v. Carolene Products*, 304 U.S. 144, 152 & n.4 (1938), and sets out to determining whether sexual orientation-based discrimination should be granted suspect class status akin to race. Some scholars have described this as an "anticlassification" approach and have critiqued it for the way in which it distracts the equality analysis from underlying causes or effects of status hierarchies by focusing attention instead on the wrong of legislative classification as a failure of instrumental rationality. Reva Siegel, *Equality Talk: Antisubordination And Anticlassification Values In Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470, 1503 (2004).

Yet another account interprets the values underlying the Fourteenth Amendment's equality guarantee as hostile to status hierarchies. This perspective toward constitutional equality seeks to isolate and excise from the domain of legitimate public action those "laws and practices that aggravate [or perpetuate] the subordinate position of a specially disadvantaged group." Owen Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 108, 157 (1976). This approach, often described as a "group disadvantaging" principle, is vulnerable, however, to a critique that it relies too heavily on social facts of disadvantage and their aggravation, rather than the exposure of the logic underlying the regulation, a logic with a basic structure of inferiority and superiority.

A separate line of cases treats the constitutional promise of equality as something more ambitious and more substantive. In these cases the Court has accepted the invitation to identify and then dismantle the ideologies or forms of thinking that maintain status hierarchies. The Court's infelicitous evaluation of laws that single out a kind of status for negative legal treatment has roots outside the context of the Equal Protection Clause. For instance, in *Robinson v. California*, 370 U.S. 660 (1962), we held that rights secured by the Fourteenth Amendment are in jeopardy when a mere status, drug addition in that context, forms the basis of criminal punishment:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
>
> 370 U.S. at 666.

In cases raising sex discrimination claims under the Equal Protection Clause brought to this Court in the last 40 years, we have repudiated the embrace from an earlier era of the sex-based status hierarchy that lay at the core of the separate spheres doctrine endorsed by the Court in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872). See *Reed v. Reed,* 404 US 71 (1971); *Frontiero v Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976).

In the context of race-based equality the Court most unequivocally adopted the antisubordination principle, calling out forms of power that created and reinforced the formation of caste when it was mobilized through invidious classification. For instance, in *Loving v. Virginia*, 388 U.S. 1, 11 (1967), the Court invalidated laws that prohibited white persons from marrying non-white persons because, *inter alia*, such laws were "measures designed to maintain White Supremacy." Similarly, an ideology of racial supremacy underwrote the essential wrong of laws segregating people on the basis of their race in the context of public transportation, employment, housing, or access to lunch counters. See e.g. *Beckett v. School Bd. of City of Norfolk*, 308 F.Supp. 1274, 1304 (E.D. Va. 1969) *rev'd on other grounds*, 434 F.2d 408 (4th Cir. 1970)(attributing some forms of housing segregation "as measures designed to maintain White Supremacy."). This approach embodied the most effective repudiation of Chief Justice TANEY's endorsement of racial caste in *Dred Scott v. Sanford*:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.
>
> *Dred Scott v. Sandford*, 60 U.S. (19 How) 343, 407 (1857).

This approach runs far deeper than a mere condemnation of racial classifications, irrationality in the making of public policy, or violations of a formalistic commitment to color-blindness. Rather, our constitution's commitment to equality should, and does, take aim at a particular form of mischief beyond mere classification. A commitment to the equal protection of the laws entails a suspicion with regard to the *work* that classification does and the ways it *collaborates* with ideologies of supremacy through the notions of inferiority it puts into action. In this regard, the principle of inequality that animates some of the Court's modern equality jurisprudence concerns itself especially with state policies and practices that create or legitimize a badge of inferiority born by racial and other minorities. This badge operates invidiously as a kind of warrant permitting, if not inviting, exclusion of, derision toward, and second-class treatment of those subjects so insigned. Under this account, when applied to the context of racial equality, the Fourteenth Amendment embodies "a broad principle of practical equality for the Negro race, inconsistent with any device that in fact relegates the Negro race to a position of inferiority." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 429-30 (1960).

The commitment underlying the equal protection clause in the racial context, one that aims to invalidate public policies that enact or perpetuate ideologies of inferiority, is equally salient in the case before us now. The segregation of same-sex couples from the domain of civil

marriage offends fundamental principles of equality because these laws express and implement an ideology of disgust, disdain, and antipathy towards lesbian and gay people that renders same-sex partnerships categorically undeserving of the recognition conferred on different-sex couples as a class. The N.A.A.C.P. Legal Defense and Education Fund made a similar argument to this Court in their briefing of the *Loving v. Virginia* case: "Actually, the laws against interracial marriage grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation … [These laws] intrude a racist dogma into the private and personal relationship of marriage." Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc. as Amicus Curiae, *Loving v. Commonwealth of Virginia*, 1967 WL 113929 at 13, 14-15.

With particular relevance to the instant case, in a series of decisions the Court has drawn sexual orientation-based discrimination within the protective pickets of the Equal Protection Clause by framing the claimants' equality claims as status-based injuries. Starting with *Romer v. Evens*, 517 U.S. 620 (1996), the Court has developed a jurisprudence of equality for lesbian and gay people that identifies a status-based harm as the gravamen of the constitutional wrong. "[Amendment 2] is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. 620 at 635. "Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. At stake in this reading of the Equal Protection Clause is the notion that status hierarchies undermine, indeed are anathema to, the very essence of democracy. "A State cannot so deem a class of persons a stranger to its laws," clarified Justice KENNEDY. *Id.* at 635. See also Jack Balkin, *The Constitution of Status*, 106 Yale L.J. 2313 (1997).

The Court continued this line of reasoning in *United States v. Windsor*, 570 U.S. __ , 133 S.Ct. 2675 (2013), wherein we invalidated a statute that denied federal legal recognition to valid marriages between persons of the same-sex by anchoring our Equal Protection analysis in the observation that, "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." 133 S.Ct. at 2693.

Overall, this line of cases can be understood to embrace something more than an anticlassification principle of equality, preferring instead a stance that can be understood as antisubordination in nature. See Siegal, *supra*, at 1505. Given that the Court's prior lesbian and gay equality cases drew from an antisubordination account of equality I expect us to continue that line of reasoning in the case before us now.

The antisubordination approach affords the Court the opportunity, or better yet, requires that the Court unearth and expose the social meanings expressed by the prohibition, and obliges the Court to describe "the status relations enforced, and the status harms inflicted, by the prohibition" in question." Siegal, *supra*, at 1503. I prefer to approach the wrong raised by the petitioners herein by recognizing how laws that ban civil licensure to otherwise qualified same-sex

couples convey a badge of inferiority toward those couples on account of their homosexuality. In so doing, those laws reinforce the caste supremacy of heterosexuality over homosexuality.

The ban on same-sex marriage is best understood as a measure designed to maintain heterosexual supremacy and to inflict a badge of inferiority on sexual minorities generally, and lesbians and gay men particularly. This argument can be found in judicial findings and briefs as the cause of marriage equality has moved its way toward us in lower courts, likening the invidious wrong underlying the exclusion of same-sex couples from the institution of civil marriage to the kind of ideological wrong named by this Court in *Loving*. See e.g.: *Conaway v. Deane*, 401 Md. 219, 268 (Ct.App.Md. 2007); *In Re Marriage Cases*, 43 Cal.4th 757, 834 (Cal. S.Ct. 2008). The plaintiffs in the 2001 Massachusetts challenge to the state's ban on same-sex civil marriage argued in the trial court: the ban on same-sex marriage "reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy." Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *Goodridge v. Dep't of Public Health*, No. 01–1647-A, Massachusetts Superior Court, Aug. 20, 2001. Similarly, Judge Vaughn Walker, ruling in the case challenging California's ban on same-sex marriage enacted in Proposition 8, found that the marriage ban "conveys a message of inferiority." *Perry v. Schwarzenegger*, Pretrial Proceedings and Trial Evidence Credibility Determinations Findings of Fact Conclusions of Law Order, 704 F.Supp.2d 921, 974, 980 (N.D.Cal. 2010).

To be clear, the ideology of inferiority that underwrites the laws under challenge in this action is not reserved for same-sex couples that seek to marry. Rather, it enunciates a kind of hatred or disgust of lesbian and gay men generally, whether or not they are in intimate partnerships or seek to have those partnerships licensed by law. The ban on marriage for same-sex couples is simply one institutional setting in which that ideology of disdain gains the state's endorsement. As our prior jurisprudence makes clear, the embrace of this kind of subordinating dogma cannot serve as a legitimate public justification for lawmaking or public policy. See *Windsor v. United States*, 133 S.Ct. 2675 (2013); *United States v. Virginia,* 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (concurring opinions).

I concur in the CHIEF JUSTICE's conclusion that laws categorically barring otherwise qualified same-sex couples from eligibility for civil marriage licenses are invalid under the Equal Protection Clause of the Fourteenth Amendment, but I do not join his reasoning in so finding. I see no need to examine the question of whether sexual-orientation based classifications should receive the same elevated level of constitutional scrutiny as classifications based on race, sex or other suspect or quasi-suspect classes. Rather, in this case we can conclude that same-sex couples can successfully challenge on equal protection grounds laws that categorically bar them from civil marriage because such laws find their origin in and perpetuate notions of heterosexual supremacy, designs that cannot form the basis of a legitimate public purpose.

II

As the CHIEF JUSTICE notes in Part VII of his opinion, petitioners also argue that a ban on same-sex marriage violates a fundamental right to marry, secured by

the Due Process Clause. I do not join in the Court's fundamental rights analysis, first because I regard it as *dicta* given that the Court had found sufficient grounds to invalidate the challenged laws on equal protection grounds. Second, I part company with what I regard as slippage in the CHIEF JUSTICE's reasoning with respect to the fundamental nature of civil marriage. Noting first that "we need not decide whether the states have a constitutional duty to create a special legal status called marriage" [2] the CHIEF JUSTICE then goes on to treat civil marriage "as if" it were fundamental, building on stilts an argument with no foundation. The CHIEF JUSTICE begins with a premise that transforms a contingent fact, "[a]ll of the states have created such a status," into a necessary one, all states must do so because "[w]e therefore treat it as a fundamental interest." The question before us is not whether marriage is fundamental in a religious, cultural, or historical sense but only whether the state's civil licensure of marriage is fundamental in a sense that is constitutional in nature. Without denying the clear fact that many people consider marriage to be a distinctly meaningful, if not sacred, form of intimate association that may entail the blessings of clergy, family, and community, this Court has never held that the constitution's due process protections require that the state set up a civil marriage regime to license those otherwise private vows.[3]

As this Court has acknowledged, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), but this important constitutional principle imagines that liberty flourishes in the absence of, not because of, state regulation, and does not require the state's involvement in sanctioning or licensing the forms that a good, meaningful or sacred life might take. [4] Unlike political rights such as voting, many of which require the state's facilitation in order for them to be meaningful, state facilitation is in no way essential to the revered nature of private, intimate vows of love and commitment. As is the case generally with the U.S. Constitution, civil liberties and rights tend to be negative in nature, proscribing certain discriminatory or oppressive terms and conditions imposed by the state on its citizens. It might be a better constitution if it contained an array of positive in addition to negative rights but it would be a markedly different one from the one we have.[5]

To be sure, once the state gets into the marriage business it must do so on terms that conform to the requirements of the constitution, but this strong imperative does not entail a constitutional duty placed on the state to license marriages at all.[6] For this reason, I would resist using this case as an opportunity expand the substantive reach of the Due Process Clause to include a fundamental right to marry.

III

Finally, while I join the Court's finding that the Equal Protection Clause is offended by laws that limit the issuance of civil marriage licenses to different-sex couples, I write separately to clarify our instructions to lower courts on remand with respect to the remedy entailed by the constitutional violation we find today.

Given that I would ground the Court's holding in an equal protection injury that focuses on the way the law reinforces the caste-based supremacy of heterosexuality, the appropriate remedy for such a violation must pay heed to the larger rights and interests of the full class of

persons so harmed. As such, the real parties in interest in this matter include homosexuals more generally, not merely homosexuals who seek to marry, or same-sex couples who seek to marry. Reverse engineering the ban on same-sex civil marriage leads one back to a blueprint for homophobia more generally, and the marriage ban is merely one element of that originary design.

The interests of this larger class of persons should inform our consideration of the appropriate remedy in this case. Justice would not be done, nor would the spirit of the Equal Protection Clause be honored, if in dismantling one status hierarchy we inextricably fortified another. Yet we would do just that were we to simply order a remedy that same-sex couples be permitted to gain civil marriage licenses on the same terms and conditions as different-sex couples. This remedy would simultaneously dissolve one status hierarchy within the gay community while assembling another, privileging married gay people over unmarried gay people, and would reinforce the supremacy of married people as a class.[7]

As society evolves in such a way as to recognize the claims of lesbians and gay men to equality and dignity, marriage has persisted as the social, legal and moral container for legitimacy and respectability. Surely the Court is correct in finding that the statutory exclusion of same-sex couples from civil marriage creates the kind of stigmatic harm that the Equal Protection Clause was designed to prohibit. But in so finding we should be loath to reinforce the legacy of laws and public values that disparage sexual relations outside of marriage. The dignity enjoyed by same-sex couples who are now eligible to marry should not be gained by reinforcing the stigma suffered by adults who cannot or do not marry, or by children born to married parents.[8] The cause of advancing the equal protection rights of same-sex couples should not be bought at the expense of an equality norm that condemns marital status discrimination. As one commentator has rightly noted, "[i]n a world in which marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage's ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy." Serena Mayeri, *Marital Supremacy And The Constitution Of The Nonmarital Family*, 103 Cal. L. Rev. 1277, 1283 (2015).

For these reasons, the appropriate remedy for the Equal Protection injury in this case would be the disestablishment of civil marriage altogether.

This remedy may strike some as a radical cure for the ill of excluding same-sex couples from civil marriage. To be sure, the disestablishment of civil marriage could impose its own equal protection injury if doing so were motivated by a desire to deny same-sex couples a right to marry, just as closing public schools created an equal protection injury when done to avoid this Court's command to end *de jure* racial segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954): "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Griffin v. County Sch. Bd. of Educ.*, 377 U.S. 218, 231 (1964). But if the abolition of marriage were undertaken, as I urge here, in sympathy with the equal protection rights of same-sex couples no constitutional infirmity of the sort of the kind confronted by the Court in *Griffin* would occur. Rather than a subterfuge to avoid compliance with the

constitution, the abolition of marriage would assure greater fidelity to the constitution's promises of equal treatment and dignity under law for all gay men and lesbians.[9]

IV

For these reasons, I concur in the Court's conclusion that the laws at issue here violate the Equal Protection Clause, but I do so for reasons other than those marshaled by the CHIEF JUSTICE. Laws barring same-sex couples from eligibility for licensure as civil marriages find their origin in and perpetuate notions of heterosexual supremacy, and have the aim and effect of imposing a badge of inferiority on gay men and lesbians more generally. Furthermore, I seek to clarify the nature of the remedy that ought to be ordered on remand. Given that the real parties in interest in this action include all gay men and lesbians, the underlying values of equal protection can only be served if the Court were to avoid a remedy that ameliorated one form of inequality while simultaneously exacerbating yet another. For this reason, the only remedy that would be equality-enhancing overall would be one that disestablished the institution of civil marriage altogether. It would then be left to the states to devise a more equitable means by which to secure the economic and legal interests of its citizens; one that does not rest on status hierarchies that run afoul of fundamental values of equality and democracy.

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[1] Opinion for the Court at p. 2.

[2] Opinion for the Court at p. 10.

[3] Cases cited by the petitioners and amici advancing the proposition that there is a Due Process right to civil marriage are less conclusive than they claim. *Turner v. Safely*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). These cases, taken as a whole, do not establish a substantive due process right to civil licensure of marriage in the absence of the illegitimate exclusion of one class of persons therefrom.

[4] This is not to say that there aren't other contexts where state facilitation is essential to the fundamental right at issue. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court rejected the claim of indigent women that the meaningful exercise of fundamental rights secured in *Roe v. Wade*, 410 U.S. 113 (1973), entailed assess to public funding that would render those rights accessible for poor women. I believe that *Maher* was wrongly decided, yet my view in this case does not contract my position in *Maher*. In the case of poor women's access to abortion, facilitation by the state in the form of public funding is the only way to render the right secured in *Roe* meaningful. In the absence of public funding, the right secured in *Roe* would be completely meaningless for many poor or low income women. With marriage, by contrast, state facilitation or licensure is incidental to a vow of love and commitment that is essentially private in nature.

[5] See Pamela S. Karlan, *Let's Call The Whole Thing Off: Can States Abolish The Institution Of Marriage?*, 98 Cal. L. Rev. 697, 700 (2010).

[6] "The 'right to marry,' is different from rights deemed 'fundamental' for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights." *Goodridge v. Department of Public Health*, 440 Mass. 309, 325 n. 14 (Mass

SJC 2003)(citations omitted). See also: Cass Sunstein, *The Right to Marry,* 26 Cardozo L.Rev. 2081, 2083–2084, (the right to marry "comprises a right of access to the expressive and material benefits that the state affords to the institution of marriage ... [and that] states may abolish marriage without offending the Constitution.") (italics omitted).

[7] We have witnessed the amplification of this status hierarchy in several states that have extended marriage rights to same-sex couples legislatively, through state court litigation, or through popular referendum. In Massachusetts, Connecticut, Delaware, New Hampshire, Rhode Island and Vermont, extending civil marriage rights to same-sex couples was accompanied by the statutory dissolution of other forms of family recognition such as domestic partnerships or civil unions. See National Center for Lesbian Rights, *Summary of Laws Regarding Recognition of Relationships of Same-Sex Couples*, December 10, 2015, available at: http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition_State_Laws_Summary.pdf. In these states marriage is granted a monopoly on licensing largely out of concerns for distributional efficiency.

[8] See e.g. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, And Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345 (2011).

[9] Constitutional scholars have described the cynical elimination of public benefits or rights that is motivated by a larger interest in rights-avoidance as a kind of "leveling-down," whereas the remedy demanded by the petitioners herein requires a kind of "leveling up," the provision of a benefit to a previously excluded group. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2027-29 (1998). The remedy I suggest herein does not amount to a form of "leveling down" insofar as the remedy seeks to advance the equal protection rights of all members of the larger class with interests in this matter: gay men and lesbians who suffer a status injury regardless of their marital status or desire to formalize an intimate relationship.

GIRGIS AND GEORGE, JJ., DISSENTING IN THE JUDGMENT

We can dispose of the case in two sentences: The States' marriage laws closely reflect normative and policy judgments about marriage that are reasonable in themselves and cannot have had their origins in bigotry. A ruling for petitioners requires replacing those judgments with alternatives of which our Constitution and legal tradition and two centuries of cases are all wholly innocent.

These points alone block every path to the majority's destination. The laws it deems unconstitutional reflect no animus. They create no caste. They deny nothing so rooted in our legal traditions as to support even a half-baked claim under our less-than-half-baked substantive Due Process law. They flout no other Constitutional provision or principle, whether real or even merely invented by our most enterprising predecessors on this Court.

All that remain are policy judgments—those of our colleagues, and those of millions of voters across the nation. But in the majority's calculus, five lawless votes from this bench are worth more than 40 million lawful ones at the ballot box. [1] From that judicial self-aggrandizement, so heedless of our Constitutional limits, we dissent.

I. The Equal Protection Challenge

A. Appropriate Level of Scrutiny

Our colleagues would variously hold that the laws at stake today (the "States' laws") deserve heightened scrutiny for classifying by sexual orientation or by sex. Yet they make nothing hinge on sexual orientation, assumed or avowed—a point that one scholarly defender of the majority's ultimate ruling considers a "simple" and "devastat[ing]" objection to its view that the States' laws discriminate based on orientation. [2] They do have widely disparate impact, but that triggers no heightened scrutiny. [3] What does trigger it, as even opponents of the States' laws have observed,[4] is a law requiring officials to rely on suspect traits in distributing legal benefits or burdens. These laws don't require—they don't *allow*—doing that with sexual orientation.

The Court demurs: seen in their "social context," it holds, the States' laws "pretend that sexual orientation minorities do not exist," or require them to "disguise their real selves." The first thing to note about this charge is that it puts the cart before the horse, effectively ruling on the laws' constitutionality in the course of deciding which level of scrutiny to apply.

The second thing to note is that it is outlandish. The States' marriage laws cast no one into outer darkness and require no dissembling about desires. All marriage laws work precisely by privileging some close bonds over all others; they will *always* leave out romantic relationships that some citizens prize the most. If that is enough to erase those citizens' social existence, then all marriage law is *ultra vires*; then all 50 states shove into the closet polyamorists. Then all require asexuals to form sexual relationships, as the Court says that the States' laws "require[] or expect[]" all men to have desire for women. The Court purports to leave these questions for another day; its opinion answers them now—in holding that the States' laws trigger heightened scrutiny because they discriminate by sexual orientation.[5]

Though Justice Koppelman agrees on the first point, he thinks the States' laws classify by sex. But even if this justified heightened scrutiny of the States' laws, it would provide no argument for a

constitutional right *to same-sex marriage*. That requires the further premise that what traditional laws conditioned on sex, was legal recognition of a category of relationships general enough to have included same-sex partnerships in the first place (e.g., that of *intimate consensual bonds, period*). That is precisely what's in dispute.

Besides, a closer look at the *kind* of sex classification at issue here shows that it needn't and shouldn't trigger heightened scrutiny. For unlike every sex-based classification to which we have ever applied heightened scrutiny, the States' laws classify based *ultimately* by a couple's *sexual composition*. And the reasons to apply heightened scrutiny to other classifications—sex-based or otherwise—apply *not at all* to classifications by opposite-sex composition. Indeed, applying it here would undermine principles of our sex-discrimination law articulated most recently in the *VMI* case. So we needn't and shouldn't apply heightened scrutiny to the States' laws.

As the Chief Justice admits, tiers of scrutiny are not constitutional guarantees, but judicially invented tools for implementing them. In Equal Protection cases, we first ask about the law's *form or structure*. If it classifies based on traits that we have prior reason to think may be relied on invidiously, we go on to examine the law's *substance* with special scrutiny. Suspect form calls for scrutiny of a law's rationale.

But here we can see at the first stage—looking at structure —that no suspicion is warranted. With these laws alone, you can't fully *describe* their criterion of classification without mentioning a social good. Their justification seeps into their form. After all, opposite-sex composition is *conceptually* related to a legitimate public end. So its connection to that end doesn't depend on further, questionable social conventions or empirical assumptions; we needn't go on to scour its rationale.

Male and female are not just any two sexes, as black and white are just two races. They are *necessarily inter-defined*: you cannot fully explain either without reference to the other and a social good. What defines them—at a deeper level of explanation than anatomy or genes—is their biological organization (and thus, their basic physical potency) for reproducing together. And reproduction, its social value, and its link to opposite-sex composition are not mere constructs. So a relation to an important public end appears on the face of this classification, without resting on any stereotypes.

Yes, same-sex couples can adopt or use reproductive technology. But our point is that male-female pairing is inherently linked to reproduction, so that a social good appears on the face of the marriage laws' classification, fully spelled out. It makes no difference to this point to say that other couplings might *also* be related (in other ways) to childrearing.

Nor is it relevant that some opposite-sex couples lack some physiological conditions for having children. The *tightness* of the link between the States' criterion and a social good would be an issue only at the second stage, of heightened scrutiny analysis: precisely what we think the Court need not reach here.

Again, our point is about the appropriate level of scrutiny, still a question of presumptions. It is that any particular racial (or ethnic, or religious) grouping is *prima facie* arbitrary—and its political relevance, presumptively in need of justification—as the male-female sexual grouping is not. In none of the

suspect groupings (racial, ethnic, etc.)—whether individual or couple-based (as in *Loving v. Virginia*)—are the classification criteria inherently linked to a legitimate public goal. They seem to be linked to a social goal only where society has created or invented—or inferred by generalization—the goal or link or both. Those generalizations and goals have often been malign (like empirical claims about African Americans; or the socially constructed goal of racial "purity"), so it makes sense not to presume their legitimacy.[6]

The same goes for perceived links between either sex and, say, particular professions. If a policy assumed a special link between women and teaching, empirical data would be needed to establish the link, to say nothing of showing that States may shape policy around it. That's why we heighten scrutiny of run-of-the-mill sex classifications. By contrast, opposite-sex composition is necessarily linked, by the concepts involved, to a social purpose we didn't just invent and can scarcely do without: society's reproduction. Here alone, the law's criterion on its face—fully spelled out—already refers to a public end. So our framework supports keeping heightened scrutiny for classifications by sex or race or racial composition, while applying the rational-basis test to classifications by opposite-sex composition.

This standard leaves intact every sex discrimination case to date. But unlike Justice Koppelman's approach, it would make good on Justice Ginsburg's assurances in the most recent sex-discrimination case, *United States v. Virginia*, that "inherent" and "physical" sex differences—unlike alleged racial ones—are a cause for "celebration," but not for oppression or limitation.[7] What scheme could possibly hug this standard more tightly than one that heightened scrutiny for all sex classifications *except* one focused on a *necessarily* "celebrat[ed]"[8] social end, to which men and women's "physical" differences are "*inherent[ly]*" linked?[9] Rejecting the present approach, by contrast, would belie the contrasts this Court has drawn between sex and race.

Does our proposal rely on "outmoded"[10] notions about gender, like the "pervasive sex-role stereotype," repudiated by this Court, that "caring for family members is women's work"?[11] Would it subjugate women by "defin[ing] masculinity and femininity in terms of complementary traits and attraction to the opposite sex," as the Chief Justice suggests?[12]

Gender stereotypes can of course be excuses to subjugate. To be sure, some also fear the effects of rejecting *all* generalizations about sex or gender. According to some feminists,[13] ignoring even the most physically grounded sex differences would itself demean women, by holding up the "unencumbered, wombless male" body as ideal.[14] In fact, some generalizations about *behavioral* differences must also be acceptable, or else *affirmative action policies based on the value of gender diversity would be unconstitutional*—a point that devastates the majority's blithe and breezy denunciations of even the subtlest appreciation of sex differences.

But we needn't resolve these matters. The premise of our proposed deference is *not* that men are by definition those attracted to women or fatherhood, so that childless men or those attracted to other men are aberrations—nor, *mutatis mutandis*, for women. It is that the sexes are conceptually specified by their biological organization and consequent *basic physical potency* (*not* moral

obligation or proper desire)[15]—to advance together an obvious social interest. This is the sort of "undeniable difference" which Justice Ginsburg affirmed can inform our law without imposing a stereotype.[16]

And it is the difference on which respondent States rely.

B. Rational Basis

In *United States v. Windsor*, Justice Alito summarized the policy judgments and empirical conjectures behind laws enshrining the traditional view of marriage and those enshrining the "'consent-based' vision." *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). Here, too, it is worth synthesizing arguments for the States' laws as gleaned from their and some *amici*'s representations, and the common law tradition on which they rely—and juxtaposing these to policy defenses of same-sex marriage reflected in the petitioners' and other amici's arguments and desired relief:

	"States' Defense"	"Petitioners' Defense"
Normative judgment about the nature and value of marriage[17] --of the bond whose recognition is a fundamental right	The exclusively committed union of a man and woman—including the sort of conjugal union uniquely possible through sexual complementarity—has inherent value, different in kind from that of other companionate bonds (same- or opposite-sex, sexual or not, dyadic or not).[18]	The exclusively committed union of any two people—including the sort of intensity and emotional quality uniquely possible through sexual intimacy—has inherent value, different in kind from that of other forms of companionship (sexual or not, dyadic or larger).[19]
Choice of policy purposes for legally recognizing the class of bonds above	To make children likelier to grow up with their committed biological parents—something valuable in itself, as well as instrumentally. And to do so without blurring the distinctive (inherent) value of marriage as understood above.	To promote the relationship's stability and social status—for the partners' sake and that of any children they rear. And to do so without blurring the distinctive (inherent) value of marriage as understood above.
Empirical judgments about the cultural effects of marriage policies	Recognizing only opposite-sex relationships better serves these purposes. For including any	Recognizing any romantic pair bond better serves these purposes. For limiting recognition to opposite-sex relationships might promote the

	companionate pair bond might promote the ideas that marriage is defined only by partners' desires and consent, that its *distinctive* value runs out when its emotional fulfillment does, and that growing up with one's biological parents doesn't matter in itself—that it's bigotry to think so.	ideas that committed same-sex relationships matter less than opposite-sex ones, that society doesn't expect gays and lesbians to form stable relationships, and that doing so wouldn't help them as much as others.
	Yet as people (in *opposite*-sex relationships) absorbed these ideas, they might be less likely to stay together to give their children a home with both biological parents, to marry before having children in the first place, or to live out the stabilizing norms (of permanent exclusivity) eroded by a focus on desire and consent alone.	Yet as people (whether in same-sex relationships or inclined to them) absorbed these ideas, they might be less likely to appreciate the value of their own bonds, to enjoy equal social standing with others, or to maintain the stability that serves their partners and children alike.

As judges, our job is not to say which of these sets of normative ideals, policy choices, and empirical judgments is true. Neither is required by any aspect of constitutional text, structure, history, or precedent, or by any underlying constitutional value or principle, however broadly construed. Since we should apply the rational-basis test, the only question is whether the States' defense is *reasonable*. It is.

To reach today's decision, therefore, the Court has had to take sides on normative and empirical disputes, and policy choices, in the face of (a) reasonable and legitimate alternatives, on which (b) the Constitution is silent. That makes its decision a usurpation of authority vested constitutionally in the people and their representatives—and not just by originalist logic. However loosely read, constitutional law does not make the normative and policy decisions on marriage that are needed to complete the petitioners' Equal Protection argument.[20]

Today's decision therefore does what Justice Holmes accused *Lochner* of having done (rightly or wrongly—recent scholarship rehabilitating *Lochner*'s

reputation matters not here). It is "decided upon" a moral and political theory of marriage "which a large part of the country does not entertain."[21] For "the Fourteenth Amendment does not enact,"[22] we might say, Mr. Evan Wolfson's book on marriage.[23] "A constitution is not intended to embody a particular [marriage] theory, whether" traditional or consent-based.[24] "It is made for people of fundamentally differing views," and "the word liberty"—or equality—is misapplied if used "to prevent the natural outcome of a dominant opinion," unless any reasonable person "would admit" that the statute was invidious.[25] But studying the States' laws, "a reasonable man might think it a proper measure on the score of" public norms and the general welfare.[26]

In short, the Court has imposed an eminently debatable ideology—a "comprehensive doctrine"[27]—under the guise of enforcing the Fourteenth Amendment with all the blindfolded impartiality of Lady Justice. But whatever the merits of our colleagues' *Weltanschauung*, their fellow citizens are free to enact another. It is no Constitutional objection to your worldview that the Progressivism that has dominated the professional and social worlds from which five Justices are drawn happens (only lately, we might add) to reject it.

1. Reasonable and Legitimate

Petitioners cite *Loving v. Virginia*, which struck down Virginia's bans on interracial marriage. But while history provided grounds for ruling Virginia's defenses pretextual or illegitimate,[28] it *disproves* the idea that the sorts of judgments behind the States' defense originated in animus. Indeed, many of them find support among same-sex marriage supporters.

a. The States' normative vision of marriage

The nearly perfect global consensus on sexual complementarity in marriage,[29] together with certain intellectual traditions, supports two conclusions about the traditional vision of marriage (even the normative judgment that sexual complementarity makes possible a distinctly valuable form of union): It wasn't conceived in bigotry, and it isn't inherently theological.

It has prevailed in societies spanning the spectrum of attitudes toward homosexuality, including ones favorable toward same-sex intimacies, and others lacking concepts of sexual orientation and gay identity. (Whatever proves discriminatory purpose against a class, ignorance of the class as such surely disproves it.) And some philosophical and legal traditions have even excluded certain opposite-sex bonds (because of un-chosen impediments to conjugal union), belying the idea that they were targeting same-sex partners.

Thus, great ancient thinkers—including Xenophanes and Socrates, Plato[30] and Aristotle,[31] Musonius Rufus[32] and Plutarch[33]—found special public value in bonds embodied in sexual intercourse and uniquely apt for family life.[34] They were not influenced by Judaism or Christianity, or ignorant of same-sex sexual attractions or relations (common, e.g., in Greece). That is, ignorance, theology, and hostility didn't motivate their conclusions about the meaning of marriage.

b. The States' empirical judgments and choices of policy purposes

The majority and Justice Eskridge's concurrence reject the respondent States' claims that excluding same-sex bonds

might advance the child-focused purposes that the States would use marriage law to serve. How a State treats one relationship, they suggest, cannot affect the decisions or behavior of any other.

This betrays a remarkably flatfooted view of social institutions. It's a truism that the law reflects culture; it would be astonishing if it didn't also *shape* culture, which in turn shapes individual choices. Thus, legally recognizing same-sex bonds will contribute to the belief that what sets marriage apart from other forms of common life is a certain emotional intensity; and that biological parenting is not specially valuable.[35]

To begin with the former: Some scholars have argued that basing civil marriage on romance-and-consent-alone might further entrench what Johns Hopkins sociologist and same-sex marriage supporter Andrew Cherlin, among others, calls the "expressive individualist" model of marriage,[36] on which a relationship that no longer fulfills you personally is "inauthentic and hollow," so that you "will, *and must*, move on."[37] It is no surprise that another study suggests that "conflict and divorce" tend to be higher where spouses internalize this view of marriage as defined by emotional fulfillment.[38]

The spread of this view might thus diminish social pressures and incentives for husbands and wives to remain together for their children, or for men and women having children to commit to marriage first. Indeed, several scholars corroborate the social power of legal change by noting that another policy—no-fault divorce—yielded "new norms and expectations for marriage and family commitments,"[39] thus "open[ing] the door for some couples who would not have" sought divorce "without the new liberalization."[40] Though supported by a review of two dozen empirical studies,[41] this claim might of course be wrong. But it makes it *reasonable* for states to worry about undermining the stabilizing norms that they have chosen marriage laws to serve—or undercutting efforts to restore those cultural norms.

The reasonableness of such concerns is only reinforced by leading same-sex marriage supporters' own arguments. Thus, some 300 LGBT and allied activists and scholars have advocated legally recognizing multiple-partner, sexually open, and term-limited bonds.[42] Some have *expressly embraced* the goal of weakening the institution of marriage by the recognition of same-sex partnerships.[43] A prominent marriage scholar has argued—in the most prestigious academic journal of moral philosophy—that justice requires a "minimal marriage" policy allowing any number and mix of partners to determine their own rights and duties.[44] These steady trends in scholars' efforts to work out the implications of their own support for same-sex marriage make it impossible to brand as irrational the States' concern that changing marriage law would undermine, in principle and practice, other stabilizing norms of marriage. But this is a real public harm, if there is distinctive value in growing up with one's committed biological parents (even if studies showed no difference between *same- and opposite-sex adoptive parenting*—empirical debates from which this point prescinds).

And it is reasonable for the States to think so. The value of biological parenting is encoded in the presumption of our law, and that of nearly every culture, that parents are responsible for their biological children.[45] It is supported by scholarly reflection on how biological ties facilitate "identity formation"[46]; by studies confirming that reflection;[47] and by

studies suggesting other benefits of married biological parenting. [48] It's implausible to dismiss these points, right or wrong, as cover for bigotry.

Justice Eskridge suggests that this "deinstitutionalization" rationale for the States' laws fails "most fundamentally" because no-fault divorce laws show that respondents have already given up on promoting the stabilizing norms of marriage. The problem for his argument is that our Constitution contains no Ratchet Clause. Nothing forbids a State, having turned a few notches in one policy direction, from stopping to move back the other way. Nor does anything forbid it from serving certain policy goals imperfectly in the meantime; "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

Even so, Justice Eskridge asks, "are [we] supposed to draw the line with LGBT couples and their families" in particular? No, and no one does. The States' laws leave out the most prized companionate bonds not only of those identifying as LGBT, but of those most inclined to polyamorous unions, or legally-presumptively nonsexual ones (e.g., the platonically intimate bond of cohabiting sisters).

To think that there is a difference in principle between stopping at opposite-sex couples (as the States would) and stopping at pair bonds generally (as Justice Eskridge would) is tendentious. It takes as a neutral and unquestionable axiom what would be rejected by every thinker and culture before yesterday, by all but a narrow band of Western nations today, and even by many of Justice Eksridge's fellow same-sex marriage supporters: viz., that there is something special about the bond of two adults—any two, but only two—so long as they also happen to be unrelated, and romantically involved, and pledged indefinitely. The cultural Left would be forgiven for thinking this an oppressively bourgeois grab bag of norms. The States think it harmful to their policy purposes for marriage law. Both may be wrong; for that matter, both may be right. Neither side's views are illegitimate bases for policy under our Constitution.

2. Caste?

The majority notes that the Fourteenth Amendment prohibits class legislation, which "singles out a group for special burdens or benefits without adequate" justification. A policy clearly stratifies in this unjust sense if it is based on the idea (behind Jim Crow laws, for example[49]) that some people should not interact with the rest on a plane of social equality.

But we've already seen, on historical grounds, that this cannot possibly explain the genesis of traditional-marriage laws, which preceded the modern concepts of gay and lesbian identity (as Jim Crow could not have preceded awareness of race), and which have prevailed in every civilization. Indeed, while marriage law has always been with us, "[w]idespread discrimination against a class of people on the basis of their homosexual status developed only in the twentieth century . . . and peaked from the 1930s to the 1960s." Brief of Professors of History George Chauncey, Nancy F. Cott, et al., *Lawrence v. Texas*, 539 U.S. 558 (2003). Yet the only remaining way to find a caste here (as Chief Justice Balkin elsewhere concedes[50]) is to take sides between the rival visions of marriage sketched above; to hold that the States' laws thus impose *unjustified* burdens. That we cannot do. Even the view that marriage laws are unjust for perpetuating patriarchy simply assumes—incorrectly, as we have seen—

that they have no possible alternative, legitimate basis.

3. Actual Motives?

To be sure, traditional marriage laws' unobjectionable origins do not prove that benign motives actually inspired the respondents' recent constitutional amendments. On the other hand, a law cannot be struck down simply for its ratifiers' actual motives, if an identical law could have been passed on legitimate grounds. Then lawmakers could reenact the same law the next day, following only a change of heart. Constitutionality should not hinge on acts of contrition, as this Court has held.[51] Nor should the motives of millions of honorable citizens of many different faiths and shades of belief be so cavalierly impugned. But petitioners argue that the *objective* purpose of the States' laws was to demean, and that this can be gleaned from the rhetoric of campaigns to enact them. In this vein, Justice Koppelman has noted that malign purposes can be gleaned from "the text [of a traditional marriage law] itself, consistently with other aspects of its context."[52] Thus, the *Loving* Court relied on context to find illegitimate purposes in Virginia's marriage ban, without having to search the hearts of Virginia's lawmakers.

Yet it would prove too much to say that a policy is unconstitutional if its enactment disadvantaged a group then facing popular hostility. An act repealing scholarships meant to enable students from low-income backgrounds to attend private schools[53] harms poor—and disproportionately minority—students, who remain targets of prejudice and injustice. Is it unconstitutional? Of course not. There is no uniquely tight fit between the repeal and the concurrent cultural prejudice; support for public schools is a perfectly good explanation.

Likewise, to rule against the States' laws based on hostile purposes, we must find not only concurrent (or even historically pervasive) hostility toward same-sex partnerships, but a tight fit between such hostility and objective features of the States' laws—the sort of fit that the Court rightly found in Loving between Virginia's marriage ban and White Supremacy.

But as we have seen, there are legitimate alternative bases. They are not just abstract possibilities but had to be purposes of marriage laws historically. They are consistent with the cultural and legal context of the States' laws' passage and were reflected in some prefatory and campaign materials. Nothing of the sort could be said in defense of the marriage ban in Loving.

Petitioners nonetheless argue that under Windsor, a law has malign objective purposes (the "intent" to "injure") if it imposes "a disadvantage, a separate status, and so a stigma" on same-sex partnerships. See United States v. Windsor, 133 S. Ct. 2675, 2693 (2013). But if creating a separate status suffices to render a marriage regime unconstitutional, then again, none can stand. The function of marriage law is precisely to create a separate status for a narrow range of companionate bonds: marital status.

II. Due Process Clause

A final question is whether we have already rejected the States' normative and policy vision of marriage as a matter of constitutional law, in the course of enforcing the fundamental right to marry. The most frequently cited (and by far the most useful) case for this claim is *Turner v. Safley* 482 U.S. 78 (1987), where we held that "important attributes of marriage" remain available to inmates.

We said that the following features were sufficient, "taken together," to "form a constitutionally protected marital relationship": (i) expressions of commitment; (ii) exercise of religious faith; (iii) the expectation of consummation upon release; and (iv) legal and social benefits (like Social Security benefits and the legitimation of children). Could these show that same-sex bonds come within the fundamental right to marry? No.

First, (i) and (iv) show that we were taking for granted the view of marriage long enshrined at common law: consummation was satisfied only by male-female sexual intercourse, and the legitimation of children born to a relationship is relevant only to opposite-sex couples. Second, if we *did* bracket those hints that the traditional view was being assumed, and tried to infer all the contours of the right to marry from the other attributes listed in *Turner*, there would be no end of it. Any consensual adult bond—including a group sexual bond, or a non-romantic one—can involve commitment, religious significance, and (if the government chooses) legal benefits. *Turner* was not implying that all these bonds came under the fundamental right to marry.

So this case—about whether certain prison regulations were reasonably related to sound penological purposes—didn't commit our legal system to rejecting the traditional view. It took for granted that vision of the content of the right to marry. It simply added that the same right was not forfeited by convicts, and that severely restricting it didn't serve (well enough) the goals of rehabilitation and security. Likewise, *Zablocki v. Redhail*, 434 U.S. 374 (1978), held that Wisconsin's restriction of marriage for those charged with failing to pay child support was not appropriately tailored to its asserted (child-centered) goals. There again, we did not commit our legal tradition to a purely companionate vision of marriage. We simply read off our history the basic contours of the fundamental right, and then asked whether a state had curbed access to marriage *so understood*, or imposed restrictions hard to justify on the same vision of its purposes. So a Due Process ruling for petitioners today—maybe even more clearly than an Equal Protection ruling—would require us to adopt a new vision of what makes a marriage.

Finally, to dispatch the privacy argument: Our privacy cases are exclusively concerned with freedom from criminal bans.[54] From that, you cannot extrapolate to a right to legal *recognition*.

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[1] This estimate reflects the number of votes for ballots approving traditional marriage laws between 1996 and 2012, based on official state reports.

[2] Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm"*, 64 Case. W. Res. L. Rev. 1045, 1048 (2014).

[3] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that a disparate impact claim alone does not "trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)).

[4] *See* Koppelman, *supra* note 2, at 1049 .

[5] The majority might object that desire for particular contours of group sexual bonds, and the absence of sexual desire, don't constitute identities, unlike desire for same-sex relationships. But as a previous case of ours has noted, and Justice Eskridge today repeats, "the

'concept of the homosexual as a distinct category of person' emerged only at the end of the nineteenth century." (Eskridge, J., concurrence) (citing *Lawrence v. Texas,* 539 U.S. 558, 568 (2003)). So there's no "natural" divide between patterns of desire that do and don't constitute an identity.

[6] *See, e.g.*, Massachusetts Board of Retirement v Murgia, 427 U.S. 307, 313 (1976) (suggesting that strict scrutiny applies in cases involving groups with a "'history of purposeful unequal treatment'" (quoting San Antonio Sch. Dist. v. Rodriguez, 411 US 1, 28 (1973)).

[7] United States v. Virginia, 518 U.S. 515, 533 (1996).

[8] *Id.*

[9] Hence, perhaps, the Court's ambivalence about sex classifications. *See, e.g.*, Craig v Boren, 429 U.S. 190, 200 (1976) (opting for intermediate scrutiny, three years after a plurality of the Court had applied heightened scrutiny in Frontiero v. Richardson, 411 U.S. 677 (1973)).

[10] City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 441 (1985).

[11] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003).

[12] J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2361 (1997).

[13] For claims along these lines by women across the political spectrum, see, for example, Helen M. Alvaré, Gonzales v. Carhart*: Bringing Abortion Law Back into the Family Law Fold*, 69 Mont. L. Rev. 409, 444 (2008) ("Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, only results in policies reinforcing an outdated and largely male model of social life and employment—a model in which no institution need 'flex' or change to allow women and men to meet children's needs. On the other hand, recognizing that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet is both more realistic and a more likely premise for a successful argument in favor of family-friendly work and education policies." (footnote omitted)); Elizabeth Fox-Genovese, *Wrong Turn: How the Campaign to Liberate Women Has Betrayed the Culture of Life*, *in* Life and Learning XII: Proceedings of the Twelfth University Faculty for Life Conference 11, 19 (Joseph W. Koterski, ed., 2003) (lamenting the claim that "to enjoy full dignity and rights as an individual, a woman must resemble a man as closely as possible. It is difficult to imagine a more deadly assault upon a woman's dignity as a woman. For this logic denies that a woman can be both a woman and a full individual."); Robin West, *Concurring in the Judgment*, *in* What *Roe v. Wade* Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 121, 141–42 (Jack M. Balkin ed., 2005) (arguing that the equal citizenship argument for abortion rights "legitim[izes], and with a vengeance, the inconsistency of motherhood and citizenship itself").

[14] Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 941 (2011).

[15] It is basic or radical (i.e., root) in that other, contingent conditions (of health, age, timeliness, other circumstances, and certain actions) need

to be met for it to be realized fully in any particular case.

[16] Nguyen v. INS, 553 U.S. 53, 68 (2001).

[17] What motivates the States to recognize marriage at all may be mundane policy purposes and empirical claims that we could compare quite apart from these pure value judgments behind the rival policy schemes. We consider the latter anyway because they are necessary to explain *some* of the features of both the States' and petitioners' preferred policies.

First, ideas about the distinct value of a certain subset of companionate bonds seem to supply each side's view of the *content* of the fundamental right to marry. They set the baseline against which each side would judge whether a particular change would simply limit eligibility for marriage (in a potential violation of that fundamental right), or create a new legal institution altogether—as both sides would say of expanding marriage law to include presumptively nonsexual bonds (e.g., between cohabiting siblings). These normative judgments about the nature and value of marriage also limit how closely each side is willing to tailor marriage law to its more mundane policy goals. A traditionalist law will extend recognition to conjugal unions that do not obviously serve the instrumental policy goals on which the traditional view is focused (e.g., if the couple doesn't have children), and *mutatis mutandis* for the revisionist (e, g., if public recognition wouldn't affect a particular couple's stability or social standing in their community).

[18] We infer this set of principles from the fact that for hundreds of years at common law, while infertility was no ground for declaring a marriage void, only sexual intercourse was recognized as consummating a marriage (after which it could not be annulled). No other sexual act between man and woman could so complete a marriage. What could make sense of these two longstanding practices?

If marriage at common law were regarded as *merely* a legal tool for keeping parents together for their children (not as *inherently* valuable), old age and other clear evidence of infertility would have been grounds for legally voiding a marriage. And if the law were targeting same-sex relationships for exclusion, it would have counted any sexual act between a man and woman as apt to consummate a marriage. (How could animus against gay men have motivated the legal norm that fellatio between a man and a woman could not consummate a marriage, and indeed that a man's impotence was a ground for annulment?) Only one explanation will do: The law saw unions consummated by sexual intercourse as valuable in themselves, and different in kind from other bonds.

Reinforcing this interpretation is the fact that several independent traditions—secular and religious, cultural and legal; the common law as well as ecclesiastical, Greco-Roman as well as Judeo-Christian—have reflected the same idea. *See* Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (Encounter, 2012), chs. 2, 5 (tracing this insight across different traditions and offering a defense of it); John Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," American Journal of Jurisprudence 42 (1998): 97–134 (same).

[19] We infer this set of principles from the fact that petitioners, would generally (i) recognize committed same-sex sexual bonds regardless of whether any given bond served more instrumental

purposes, while (ii) rejecting policies that would distinguish such bonds from opposite-sex ones (e.g., civil unions), or lump them together with presumptively *non*-sexual ones (e.g., civil unions for any committed cohabitants).

[20] The rational-basis test, which we have argued applies here, is judges' way of applying the Equal Protection clause while deferring to lawmakers' normative and policy choices wherever these are reasonable, whether or not ultimately *sound*. It is another question whether the U.S. Congress, pursuant to its enforcement power under Section 5 of the Fourteenth Amendment, has more leeway to impose its own normative and policy judgments, including by requiring States to recognize same-sex civil marriages. *See, e.g.,* Manning HLR Foreword, fn. 18 and surrounding text (suggesting that Congress may have more discretion than the Courts in enforcing the Reconstruction Amendments).

[21] *Id.* at 75.

[22] *Id.*

[23] Evan Wolfson, Why Marriage Matters: America, Equality, and Gay People's Right to Marry (2005).

[24] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[25] *Id.* at 76.

[26] *Id.*

[27] Cite to Rawls, Political Liberalism (1993).

[28] *Loving*, 388 U.S. at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)). Nancy F. Cott provides historical support for this conclusion:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. . . . But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations. [Their laws] did not concern all mixed marriages. They aimed to keep the white race unmixed . . .and thus only addressed marriages in which one party was white.

Nancy F. Cott, Public Vows: A History of Marriage and the Nation 41 (2000) (footnote omitted).

[29] *See, e.g.*, G. Robina Quale, A History of Marriage Systems 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); *see also* Edward Westermarck. A Short History of Marriage 1 (1926) (recognizing that marriage across cultures "involves certain rights and duties both . . . of the parties entering the union and . . . of the children born of it," and "implies the right of sexual intercourse.").

[30] *See, e.g.*, Plato, The Laws of Plato 232, 840c–841a (Thomas L. Pangle trans., Univ. of Chi. Press, 1988) (1980) (writing favorably of legislating to have people

"pair off, male with female . . . and live out the rest of their lives" together).

[31] For Aristotle, the foundation of political community was "the family group," by which he "mean[t] the nuclear family." Alberto Maffi, *Family and Property Law*, *in* The Cambridge Companion to Ancient Greek Law 254, 254 (Michael Gagarin & David Cohen eds., 2005). For Aristotle, indeed, "[b]etween man and wife friendship seems to exist by nature." Aristotle, Nicomachean Ethics bk. VIII, at 1162a15–19 (W.D. Ross trans., 1925)(ca. 350 B.C.E), *reprinted in* 2 The Complete Works of Aristotle 1836 (Jonathan Barnes ed., 1984).

[32] He said that a "husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies," viewing this form of affectionate and bodily union—and not only its fulfillment in procreation—as desirable. Musonius Rufus, *Discourses* XIIIA, *reprinted in* Cora E. Lutz, *Musonius Rufus "The Roman Socrates," in* X Yale Classical Studies 3, 89 (Alfred R. Bellinger ed., 1947).

[33] According to Plutarch, Solon saw marriage as a union of life between man and woman "for the delights of love and the getting of children." Plutarch, Life of Solon ch. 20, § 4, *reprinted in* 1 Plutarch Lives 403, 459 (G.P. Goold ed., Bernadotte Perrin trans., Harv. Univ. Press. 6th prtg. 1993) [hereinafter Plutarch, Solon]. Plutarch himself wrote of marriage as a distinct form of "friendship," specially embodied in "physical union" of intercourse (which he called a "renewal" of marriage). Plutarch, The Dialogue on Love § 769, *reprinted in* IX Moralia 307, 427 (Edwin L. Minar, Jr. trans., T. E. Page et al. eds., Harv. Univ. Press. 1961).

[34] And they all denied that any sexual acts but coitus, even between a married man and a woman, could seal a truly marital relationship. *See* John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 Notre Dame L. Rev. 1049, 1062–68 (1994).

[35] Petitioners contend that this point is undermined by the States' recognition of infertile opposite-sex partnerships. But it's reasonable for the States to hold that recognizing infertile conjugal unions would have at least fewer of the costs of recognizing same-sex bonds.

First, petitioners argue, it does less to focus the public vision of marriage on romantic attachment alone—as opposed to conjugal unions conspicuously and naturally oriented to family life. So to the extent that that focusing is what undermines traditional marital norms, it's reasonable to expect it to do less harm. Second, many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy. Moreover, a policy limited to fertile opposite-sex unions might lead couples to see marriage as *merely* instrumental to childrearing, which might well destabilize their bond, thus harming the public interest in giving children a stable home with both parents.

[36] Andrew J. Cherlin, Marriage-Go-Round: The State of Marriage and the Family in America Today 29 (2009).

[37] *Id.* at 31 (emphasis added).

[38] W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of*

Marriage, 39 Soc. Sci. Res. 687, 697 (2010).

[39] Lenore J. Weitzman, *The Divorce Law Revolution and the Transformation of Legal Marriage*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 301, 305 (Kingsley Davis ed., 1985).

[40] William J. Goode, World Changes in Divorce Patterns 144 (1993).

[41] *See* Douglas W. Allen & Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995–2006*, iMAPP (July 2007), http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf.

[42] *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BeyondMarriage.org (July 26, 2006), http://beyondmarriage.org/BeyondMarriage.pdf.

[43] Ellen Willis, *Can Marriage Be Saved?*. The Nation, July 5, 2004, at 16 ("[C]onferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart.").

[44] Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 Ethics 302, 303 (2010).

[45] *See* Quale, *supra* note XYZ, at 2.

[46] *Id.* at 375.

[47] *See, e.g.*, Elizabeth Marquardt et al., Instit. for Am. Values, My Daddy's Name is Donor: A New Study of Young Adults Conceived through Sperm Donation 5, (2010) (seeking "to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation.").

[48]

[49] *Id.* at 2324.

[50] *See* Jack M. Balkin, *Windsor and the Constitutional Prohibition against Class Legislation*, BALKINIZATION (June 26, 2013), http://balkin.blogspot.com/2013/06/windsor-and-constitutional-prohibition.html ("Class legislation is legislation that picks out a group of people for special benefits or special burdens *without adequate public justification*.. . . . All laws classify and have some kind of differential impact; whether a law singles out a group for special and unjustified burdens or stigma is an interpretive question and a question of values.").

[51] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

[52] Koppelman, …, at 142–143 (footnotes omitted) (quoting Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012)). We note that while in this last sentence, Koppelman argues that DOMA's purpose was to injure and disparage gay people, in the very next he says "[t]he impact on gay people was far from Congress's mind when [DOMA] was enacted." *Id.* at 143.

[53] The Case is not far from real life. President Barack Obama and congressional Democrats sought to limit

and eventually end Congressional support for tuition vouchers to low-income families in the District of Columbia. Bill Turque and Shailagh Murray, *Obama Offers Compromise on D.C. Tuition Vouchers*, Washington Post, May 7, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050603852.html.

[54] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (the use of contraceptives by spouses); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the use of contraceptives by the unmarried); Roe v. Wade, 410 U.S. 113 (1973) (abortions); Webster v. Reprod. Health Serv., 492 U.S. 490 (1989) (same); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (same); Lawrence v. Texas, 539 U.S. 558 (2003) (consensual sex).

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Echoes of victimhood: on passionate activism and 'sex trafficking'

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Abstract

The sexually violated woman has become a salient symbol in feminist discourse, government policies, the media and transnational activism at this historical juncture. In this article, I seek to understand the conviction of anti-prostitution activists that all women in prostitution are victims (despite evidence to the contrary), and their simultaneous dismissal or condemnation of those women who identify as sex workers. The analysis identifies the centrality of victimhood to the affective logic of women activist leaders in the anti-prostitution movement, and its embeddedness in discourses of suffering and redemption in Korean nationalist historiography. Sexual victimhood thus acquires the power to incite moral outrage, compel consensus and inhibit dissent. Sex workers further come to bear the historical and political burden of righting all that is wrong with the nation, making their elimination essential for the nation's rescue. Critiques of capitalism and the state become footnotes and silences in this process. In effect, the victimhood of 'prostituted women' allows women activists to circulate effectively in the affective economy of the nation as well as in the global anti-trafficking campaign. The passionate activism of anti-prostitution women activists may say less about the state of prostitution than about the activists' subjectivity as historical and global subjects, and the symbolic world that they locate themselves in.

Keywords

Activism, human rights, sex work, sexuality, South Korea, trafficking

In March 2016, the Korean Constitutional Court upheld the constitutionality of the 2004 anti-prostitution laws, thus defeating the 2012 challenge petitioned by a sex worker who was prosecuted and fined under these laws. The majority judgment stated that commercial sex degraded sexual morality and harmed human dignity,

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and therefore maintained its criminalisation. The *New York Times* described an anonymous woman shouting outside the courthouse 'This is a victory for the nation!' (Choe, 2016). My focus in this article will be on how the continuing penalisation of sex workers came to be celebrated as a victory for the nation, and the role that women activists played in promulgating that view. This article analyses how the Korean women's movement has found common ground with the global anti-trafficking movement since the 2000s, as well as how it has reinvigorated the Prostitute as the symbol of ultimate suffering and humiliation of the Korean nation, framing their affective investment in prostitution as inherently harmful to women *and* the nation.

The focus on affect can be traced to one of my encounters with a key figure in the anti-prostitution movement in South Korea back in the summer of 2005. I met with Jo Jinkyung in her office. She was director of *Dasihamkke* in Seoul, the biggest anti-prostitution NGO in South Korea's capital, founded in 2003 with support from the Seoul metropolitan city government. Dasihamkke has been a major driving force behind the campaign to eliminate prostitution, adopting the slogan 'STOP trafficking!'. Dasihamkke uses the English terms 'prostitution' and 'sex trafficking' interchangeably. In 2005, it also began using the term *seongmaemaedwen yeoseong* ('prostituted women') to replace *seongmaemae yeoseong* ('women who sell sex'), emphasising the passivity of women in prostitution. On its (now defunct) website, Dasihamkke identified as 'a Non Government Organization (NGO) and Government (GO) collaboration agency', marking its own ambivalent autonomy (Jo, 2008).

On 29 June 2005, a week before my meeting with Jo, there was the launch of the first sex workers' organisation outside the Olympic Stadium in Seoul. While Dasihamkke supported the 2004 Special Laws on prostitution, the sex workers were demanding a suspension of the new laws, recognition of sex as work and protection of sex workers' rights.

Jo became quite emotional as she talked about the suffering of prostituted women, the challenges of her work, including threats from brothel owners and pimps and an endless flow of paperwork, cases and emergencies, as well as the opposition she has faced from the press and the public. Her eyes teared up when I asked why it was so important to eliminate prostitution. Jo responded that it was the only way to achieve women's rights, and therefore a historical responsibility: 'If we don't fight for the criminalization of prostitution, then more young women would enter prostitution'.

I then asked what she thought about the women who continued to work and who identified as sex workers being criminalised, arrested and penalised under the new laws. I was of course referring also to the sex workers' organisation newly launched, and the accompanying critique of the women's movement including Dasihamkke. Jo, now eyes widened, face red with what could only be read as anger, leaned forward and slapped her hand on the coffee table, raising her voice for the first time, 'Then it's their own fault!' (personal interview, Jo Jinkyung, 3 July 2005). I was taken aback by the intensity of Jo's response. Her tears and

frustration as well as the slap unsettled me. But it was also most illuminating. Women who refused to leave prostitution were wilful deviants who endangered *other* women by perpetuating the institution of prostitution. They earned any and all wrath.

I recount this episode for two reasons. First, I have been perplexed in the last decade by anti-prostitution activists' refrain of 'victims of prostitution/sex trafficking' as the ultimate victims of violence, and their simultaneous dismissal or condemnation of those women who identify as sex workers. How could these activists, who worked so fervently to help women in prostitution, see those who spoke up as sex workers as the enemy? How was it possible that one's humanity is hierarchised according to, if not premised entirely on, one's victimhood and not one's assertion of rights? While I have witnessed this mostly in South Korea, where I have conducted research since 1998, this is by no means a Korean monopoly, but rather commonplace in a range of international activist forums.[1] The sexually violated woman has become such a salient symbol[2] in feminist discourses, government policies, the media and transnational activism at this historical juncture. Building on analyses of anti-trafficking initiatives as constitutive of neoliberal governmentality (Bernstein, 2007; Cheng and Kim, 2014; Shah, 2014; Piscitelli, 2016; Bernstein, 2018),[3] I ask what female sexual victimhood can tell us about gender and justice in neoliberal transformations.

Second, I have finally come to see the inadequacy of rationalist critiques of anti-trafficking initiatives in grasping the vehement determination of activists like Jo. As sociologist Hyojoung Kim stated in her study of suicide protest in South Korea, 'any account that fails to examine emotional elements risks a fundamental misunderstanding of the dynamics of collective action' (2002: 160). In this article, I seek to understand the passionate conviction of anti-prostitution activists that all women in prostitution are victims (despite evidence to the contrary), how they come to see it as 'the truth' and what actions follow from that truth. I try to understand their response and their sense of obligation as historically, culturally and socially specific processes of identification, subjectivity and claims-making. I identify the centrality of victimhood to the affective logic of women activist leaders in the anti-prostitution movement, and its embeddedness in discourses of suffering and redemption in Korean nationalist historiography. I argue that sexual victimhood is key to inciting moral outrage, compelling consensus and inhibiting dissent. As Dasihamkke's slogan 'STOP trafficking!' suggests, there is an emphatic need to act promptly.

An examination of the flow and overflow of affect, such as that of Jo's, and its circulation in the wider world may open up a new space for critical engagement, specifically how activists' own identities and aspirations come to be expressed and constituted in social mobilisation, and how they shape activists' contradictory relationship to the population they try to serve. In their examination of the anti-globalisation movement, Hynes and Sharpe (2009) noted that affect relates to the collective body's 'force of existence' and capacities to act. I identify the affective logic of Korean activists' insistence on women in prostitution as victims,

and analyse the potential of this logic to increase the possibilities for action. I therefore echo with Vincanne Adams' (2012: 201) suggestion that affect is a set of ethical considerations with an emotional urgency and an injunction to action. Below, I examine how the figure of the Prostitute, serving as a symbol of ultimate suffering and humiliation for the Korean nation to ignite sympathy, inspire solidarity and provoke action, is an important part of this affective appeal. To study affect amongst anti-trafficking activists like Jo may help us understand the symbolic world they locate themselves in, and how they echo with each other and thereby shape the direction in which the movement is going, or not. I believe that professional anti-prostitution feminists (Roy, 2011) like Jo speak and act from their hearts, and are bonded in a collective fantasy (Scott, 2011) in which the fates of women and the nation are merged. For these feminists, eliminating prostitution would secure both women's rights and the future of the nation. It is this affective bond between the victims of prostitution, the activists and the nation that I seek to spell out.

The analysis draws on my reading of the echoes between nationalist narratives and anti-trafficking activists' discourses in South Korea, amidst the rise of anti-trafficking initiatives globally and nationally in South Korea since 2000. In particular, I look at how the victimhood of the nation is invoked by these women activists in warranting the need to abolish prostitution. Incited by the deaths of women in a series of brothel fires, prostitution became the cause celebre of the South Korean women's movement in 2000,[4] ushering South Korea into the global wave of anti-trafficking initiatives. I identify how Korean feminists articulated their dissent by revising the cultural idiom of the Prostitute, demanding the Korean state and society eliminate prostitution as a means to purge past wrongs, in pursuit of a new epoch of rights and modernity (Abelmann, 1995). I show how the victimhood of the prostituted woman has resonance for the women activists *and* the Korean nation as violated and dishonoured. This examination of activists' affective investment may generate insight into the dynamics of collective action, and throws light on the cultural and affective logic of victimhood, questioning whether making the prostituted woman responsible for a nation's future may promote a heteronormative gender and sexual order, while silencing the pursuit of rights and broader critique of inequalities.

My analysis is guided by the specific cultural logic of victimhood and redemption in neoliberal South Korea. While there are similarities with the trends of penalisation and feminist carceral politics, as well as the preservation of middle-class domesticity and heterosexual martial sexuality as observed by Elizabeth Bernstein (2012) in the US, there are also significant departures: the burden of guilt is on foreign aggressors rather than individual evil men; and the victim subjects are women as the 'oppressed of the oppressed' and the emasculated Korean nation rather than individual women. Neoliberalism in South Korea is characterised by its emergence in the 1980s out of the country's state-led developmentalism after the Korean War (Kim, 1999). Neoliberalism broadly refers to the rise of the free market and the concomitant withdrawal of the state from the social sector,

encouraging policies of deregulation, privatisation and labour flexibilisation. The neoliberal state further asserts its power by defining its governable subjects as self-managing, self-sufficient and self-advancing. In South Korea, the military regime that assumed power in the 1960s built a capitalist developmental state, maintaining authoritarian rule and a planned market economy. Economic liberalisation and political democratisation that began in the 1980s, however, led not only to the overthrow of the military dictatorship in 1987, but also to the erosion of state control over economic and financial policies (Kim, 1999). In 1997, Kim Dae Jung was democratically elected president just before a major financial crisis, and South Korea received a bailout of US$55 billion, the largest ever in the history of the International Monetary Fund (IMF). The president established the first National Human Rights Commission and the Ministry of Gender Equality (MGE), while supporting an emerging wave of civic organisations. At the same time, structural readjustments ensured that flexible employment relations would increase, trade unions would weaken and welfare policies conditional upon one's employability would be the norm, forcing many into more precarious lives as the underemployed or unemployed in the 'neoliberal welfare state', while optimising capitalist interests (Song, 2009). Ideals of personal freedom and responsibility became the dominant ethos in shaping consumption as well as social policies. Neoliberalism and its empirical operations that are lived by individuals are often paradoxical (Cheng and Kim, 2014).

Notes on research methods

This article draws on my observations of and engagement with the anti-prostitution movement in South Korea since 1998. Through my research on migrant sex workers in US military camp towns, I developed connections with the few key prostitution-related NGOs in South Korea. In fact, before 2000, prostitution was only the concern of a few local service providers rather than national women's NGOs. The Hansori Coalition for the Eradication of Prostitution (Hansori) was a loosely organised collective, but never actively lobbied the government. While major women's NGOs (formed only in the 1980s as part of the democratisation movement against authoritarian rule) often cited prostitution as a part of gender oppression under patriarchy, there was no national effort to lobby on behalf of women in prostitution.

It was therefore a dramatic change to see the sudden rise of the anti-prostitution movement since 2000, prompted and fuelled by the tragic brothel fires in the city of Gunsan that killed 23 people (22 women and 1 man, over half of them locked in) in 2000 and 2002. Citing these tragedies as evidence of the inherent violence in prostitution, women activists lobbied for public support (including a One Million Signatures campaign) and lawmakers responded by passing the Act for the Protection of Victims of Prostitution etc. and the Act for the Punishment of Prostitution in 2004. These new laws were launched in the name of the protection of women's human rights, and were lauded by the Korean government, women

activists and even the US State Department as a progressive step to stop 'sex trafficking'.[5] While the laws provided living allowance, vocational training, medical service and shelter etc. to those who wished to leave prostitution, they also continued to criminalise those who could not prove themselves victims of prostitution. When the new laws were launched in September 2004, a massive crackdown and multiple arrests of women in prostitution, brothel owners and clients took place. Thousands of women in prostitution rallied to demand the suspension of the laws and the crackdown. Fifteen women went on a hunger strike in November 2004 in front of the National Assembly, demanding a meeting with women activists and Ministry of Gender and Equality (MGE) officials, and the suspension of the laws. At the forefront of this anti-prostitution movement, however, were mostly women activists who had not been part of any discussion about prostitution before 2000. Two of them will be the focus of my discussion here – Cho Youngsook, executive director of the Korea Women's Associations United (KWAU),[6] who subsequently became director of the government-funded agency Center for Women's Human Rights in 2005, and Jo Jinkyung, executive director of Hansori in 2002 who then founded Dasihamkke (the NGO and GO collaborative project) in 2003.

As I followed the sex workers' hunger strike, receiving updates from friends who were visiting the strikers and from other sex workers whom I was familiar with, I mobilised efforts for a petition signed by 25 international women activists and academics in late 2004. The petition to the KWAU made a simple request: respond to the hunger strikers' demand for a meeting on humanitarian grounds. The petition was taken as an attempt by 'foreigners' to meddle in domestic affairs; I was identified as the main culprit. To be specific, being a Hong Kong Chinese woman, I was readily dismissed as a legitimate interlocutor on the subject of prostitution in South Korea, despite the fact that I had conducted research on sex work in South Korea since 1998. This therefore set the stage for my interactions with these activists in subsequent years. While some refused to engage with me, some were generous with their time and ideas: Jo agreed to be interviewed, while Cho met with me but said on one occasion that I was not to quote her. The materials I draw on here are statements from public events, publications and interviews.

Victimhood nationalism and the redemption of the Prostitute

The deployment of women's bodies and sexuality in nationalist discourses both for the articulation of modernity and development, and for the expression of fears of loss of authenticity and traditions, has been observed in different parts of the Global South (McClintock, 1991; Evans, 1997; Puri, 1999; Rao, 1999; Blanchette et al., 2013; Walker and Oliviera, 2015). In South Korea, the trope of women's sexual victimhood – embodied by the Prostitute – constitutes both a vicarious trauma for imagining the nation, but also a site for its redemption and rebirth. Foreign violation is written into the fate of the Korean nation and the collective suffering of the Korean people, as historian Henry Em (1999) concluded from an

analysis of the shift in historical narratives in Korea in the 1980s. Jiehyun Lim found unique in the South Korean context that 'heroism goes hand in hand with victimhood in nationalist discourse' (2009: 6) – exemplified in the demand for self-sacrifice during the mass mobilisation for development under dictatorship in the 1960s and 1970s. Sheila Miyoshi Jager found that the *minjung* (people's) movement in the 1980s that overthrew military authoritarianism in 1987 played an important role in rewriting the history of Korea as one of active struggles against foreign aggression, and therefore always one of 'potential victory' (Jager, 1996: 37).

The 'defiled woman' as a symbol of the nation's suffering has had a long history in South Korea. Under Japanese colonialism, a plethora of literary, political and activist efforts to rekindle an autonomous Korea and future emerged. *The Wings*, by modernist writer Yi Sang ([1936] 2001), was a critique of the emasculated nation that could only ponder its own weaknesses. The protagonist was an unemployed intellectual who laid limp and hopeless at home every day, musing on his own fate while depending on his wife who received 'guests' in her room for a living. He personified the failures of the colonised nation, which not only failed to guard its women but also had to depend on their 'guests' for survival. In the post-colonial era, the internal exile and tragic fate of women who worked in US military camp towns as 'western princesses' and 'western whores' was the focus of writer Kang Sok-kyong's story, *Days and Dreams*. The Prostitute embodies the sense of honour and dignity lost, virtues and propriety violated and therefore the emotional and historical weight of women's sexuality in the nationalist imagination.

But the Prostitute could also redeem the nation through sacrifice. Miyoshi Jager found that US military camp town prostitutes 'became the symbol of the nation's shame as well as the rallying point for national resistance' (2016: 72). This was well illustrated by the mobilisation that followed the murder of Yun Keumi, a twenty-six-year-old woman who worked in a club for the US military, by Private Kenneth Markle, on 28 October 1992. Her tragic death triggered fury across the nation and transformed her into an allegory of the masculinist nation. The protests soon developed into the National Campaign for the Eradication of US Military Crimes.

The women's movement: 'the oppressed of the oppressed'

A key aspect of the South Korean women's movement has been the struggle for national independence – first from Japanese colonialism and then western imperialism (Heo, 2008: 78). Since the 1970s, women have struggled against capitalist exploitation and military authoritarianism, first in the women's labour movement, and then in the democratisation (*minjung*) movement in the 1980s. The minjung (mass people's) movement, Nancy Abelmann (1995) found, was conceived and interpreted as descending from the lineage of the indigenous, nationalised and popularised struggle tracing back to the anti-colonial and anti-imperial movement of the late nineteenth century. The minjung movement thus set the paradigm for a Korean essence that lies in a pulsating rural past, untarnished by personal interests

or foreign elements. This imagined purity of Koreanness has implications for a 'minjung feminism'. Women labour activists' rejection of the patriarchy and misogyny of the male-dominated democratic movement gave life to a feminism that embraced the goals of both gender and class liberation (Ching and Louie, 1995). Many of the senior women activist leaders in South Korea in the early 2000s – including Cho and Jo – came of age in the 'minjung feminist movement' of the 1980s.

Prostitution was considered the ultimate degradation of women in minjung feminism because, firstly, women workers were 'the oppressed of the oppressed' under the double oppression of sexual discrimination and capitalist exploitation (Heo, 2008: 85), and secondly, because prostitution, they claimed, grew out of colonialism, militarism and later sex tourism promoted by an authoritarian developmental state. Two of the well-known slogans of the women's labour movement in the 1970s – 'Our only wish is to keep our [factory] jobs' and 'Don't force us into prostitution' (Nam, 2002: 75) – illuminate the view that prostitution was considered the worst situation a woman worker could find herself in. The demand for basic workers' rights for women came with a reassertion of the distinction between factory labour and sexual labour, the reproduction of the whore stigma and the preclusion of the notion of women's rights in sex work.

The reframing of the Prostitute as an innocent victim was made possible in the late 1980s, when knowledge about the Japanese military's forcible recruitment of women for sexual servitude between the late 1930s and 1945 (the Comfort Women) became widely publicised. Korean women activists successfully rallied around the cause and became part of an important transnational Comfort Women movement by the late 1990s (Piper, 2001). This alignment of the nation's fate with that of women in sexual servitude to foreign aggressors created a milieu in which 'fallen women' could be considered victims, albeit largely as a symbol of the nation's victimhood (Yang, 1997). As passivity and innocence became the defining essence of victimhood, a hierarchy of victims emerged. Those who came forth increasingly distinguished between 'voluntary' prostitutes and virgins who were forced into prostitution (Kimura, 2008: 16–17). Those who worked as prostitutes prior to becoming Comfort Women were silenced (Soh, 2000, 2008). The struggle for 'authentic' victimhood was further illustrated in the chasm that arose between the movements for Comfort Women and women who worked in US military camp towns (Moon, 1999). Leaders and survivors of the Comfort Women movement emphasised how they were 'kidnapped' sex slaves while women in US military camp towns were 'willing whores' since there was no comparable system of enslavement (Moon, 1999: 319).[7]

The women's movement in South Korea reiterated the victimhood nationalism in dominant nationalist historiography; it further intensified the emphasis on innocence in the competition for authentic victimhood. This propensity for women as the victim subject is magnified in the anti-prostitution movement in the new millennium as local mobilisation is vitalised by the global campaign to combat 'the traffic in women'.

Victimhood nationalised

With the rise of the global anti-trafficking campaign, the Prostitute came to the forefront of the women's movement as an emblem of women's subordination in Korea, bearing the symbolic burden of women's oppression in both nationalist history and capitalist patriarchy. I examine the narratives of two key women activists below.

In 2005, I presented a paper critical of the new laws at the World Congress of Women held at Ewha Women's University in Seoul. In the packed room of about fifty people was the leading legal scholar who supported the laws and the director of the KWAU, Cho Youngsook. Five months later, with funding from the MGE, Cho became the first director of a national centre based in Seoul which was set up to coordinate and train all service providers under the auspices of the new laws. Cho named it the Centre for Women's Human Rights (CWHR; personal interview, 20 November 2008). In this capacity, Cho became one of the most prominent anti-prostitution figures both nationally and internationally. She gave interviews and lectures, and advised the government on the implementation of the laws. She organised international forums and invited overseas abolitionists (mostly from the abolitionist Coalition Against Traffic in Women, CATW)[8] to speak in solidarity. An important aspect of her work included running the two-week Training Workshop for Counsellors Preventing Prostitution. Regardless of experience, including some who had more than a decade of experience providing service to women in prostitution, anyone working in an anti-prostitution NGO had to take the training. Most were fresh to the field. Since Cho designed the programme and recruited the instructors, the training ensured that everyone working in the field was familiar, if not in agreement, with the ideas and opinions of Cho and her colleagues.

Back at the panel at Ewha Women's University, Cho fired a range of criticisms at me, but the most illuminating comment was, for me, the following:

> When I received the petition from you, I was very shocked, because it was the first time in my life, of working in the women's movement for 25 years, to have received a petition from others. All my life I have been petitioning other people, but I have never received one. So, I was very shocked to receive the appeal – it was so antagonistic . . .

From Cho's perspective, she had always been a part of the 'powerless' petitioning to 'the powerful' ('other people') – masculinist institutions including employers, labour unions and the state. The fact that she could be at the receiving end of a petition was incompatible with her own identification with 'the oppressed' – by virtue of being a woman, activist and worker. She seemed unaware of her ascendancy to power from being a grassroots activist to an avid advocate for government policies on prostitution. Furthermore, in that room with about twenty Koreans and thirty non-Koreans, Cho presented herself as a victim to a meddlesome foreigner.[9]

What Cho neglected to mention was the petition she received from sex workers about four months before our confrontation. To mention that at the panel, however, would attribute too much agency, collective identity and visibility to the sex workers. In fact, when asked to comment on the Sex Workers' Festival organised by the first sex workers' organisation in Korea, Cho said 'The women have only been mobilized by employers – the pimps – who have been pushed into a predicament by the Special Laws on Prostitution' (*Women's News*, 2005). Cho was highlighting both the lack of agency of the prostitutes and the super-agency of 'the pimps'. She and other activist leaders had consistently referred to any organised efforts of sex workers – including public protests, sit-ins, as well as hunger strikes – as coerced by 'the pimps'. To attribute to these 'pimps' the power to mobilise thousands of women to protest, and more than a dozen of them to go on hunger strike, is to produce the 'monstrosity' and threat of the criminal in Jodi Dean's terms (2009: 71),[10] and to justify stronger law enforcement.

As secretary-general of KWAU, Cho took the lead in lobbying for the new anti-prostitution laws. Echoing with the minjung discourse of a pure Korean past corrupted by 'foreign evil', Cho was a key proponent of the idea that prostitution was a product of Japanese colonialism (1910–1945), and then of US military occupation since 1945, subsequently proliferating with the globalisation of western sexual mores and capitalism. Cho wrote that 'Prostitution was closely related with foreign invasion', with the 'first ''brothel''' established by the Japanese in the 1920s and the build-up of 'camp town prostitution' for the US military after the war (Cho, 2004, 2005). This narrative of prostitution as foreign import maintains that prostitution is not indigenous to Korean society and culture,[11] and could or should therefore be purged. Significantly, this exaltation of an authentic Korean essence against colonialism and globalisation (read 'westernisation') echoed with the cultural logic of the minjung movement that successfully brought Korea's democratisation to fruition in the 1980s.

Cho's insistence that prostitution was the worst situation a woman could end up in continued after her tenure as director of the CWHR. Cho became a board member of the CATW and an international speaker on the subject of prostitution and 'sex trafficking'. In this capacity, Cho (2011) proclaimed that 'Women try to get married as a job or a ''job-marriage.'' Women who do not get married can only go into the sex industry'. In a meeting of mainly members from the abolitionist organisation in Canada, Cho stated that '(A)gain and again, women die no matter what site the brothel is in' (Jiwa, 2011). These last two quotes were factually untrue – women who do not get married do not necessarily enter the sex trade [Cho herself was unmarried in the mid-2000s when we met], and not all women in brothels die. However, Cho was speaking to an international abolitionist audience; the (Korean) Prostitute thereby comes to embody the (universal) insidiousness of prostitution. Therefore, the global anti-trafficking campaign has created the space in which the prostituted woman could be redeemed by her sexual victimhood, and acquire the status of the authentic victim in South Korea. Furthermore, the authenticity of her sexual victimhood is extended to the activists whose testimonies as country experts

(like the quotes above) circulate in the affective economy of anti-trafficking activism in the global arena.

For Jo Jinkyung, combatting sex trafficking was a covenant with God and a patriotic duty – to rescue the nation from ruins. '(T)he themes of suffering and the healing/salvation of Korean individuals and the nation-state' in 'evangelical nationalism' (Jung, 2014: 25) found powerful intersections with anti-prostitution narratives, as individuals such as Jo made explicit. Jo went to a theological seminary, worked at the Korea Church Women United before her first job in the field of prostitution in 2002 at Hansori Coalition and became director of the Dasihamkke Center in 2004. She explained how she 'felt that supporting victims of prostitution' was 'like [Moses leading] the Exodus' (*NewsnJoy*, 2006). Invoking the image of Moses leading the Israelites out of enslavement into salvation, Jo effectively appealed to a Korean identity that is built on memories of a history marked by hardship and suffering; and to the idea of the Koreans as God's chosen people following the Jews (see: Han, 2009; Jung, 2014). Presenting herself as a saviour and a possible martyr (due to threats from brothel owners), Jo personally embodied the 'victimhood nationalism' (Lim, 2009) of a good Korean Christian woman.

Prostitution is 'made possible by our historically mistaken modernisation and undemocratic, authoritarian polity, patriarchy and various cultures', and eliminating prostitution is to 'eliminate the symbol that maintains a masculine and patriarchal society', according to Jo (*NewsnJoy*, 2006). In this context, 'Those who proclaim themselves as sex workers have to . . . take responsibility for their actions' (*Chungang University Graduate School News*, 2006). Sex workers fighting for their rights stood in the way of the activists' historical mission to save the current and future generations of Korean women. For Jo, the women's movement was offering the nation an opportunity to right past wrongs and be a respectable nation-state in the world. Through this collective quest, the nation would be put on a path to regional and global leadership of women's rights, becoming the 'unprecedented leader of women's human rights in the world' (Cho, 2005). The sufferings of the nation and Korean women could therefore be rectified through the catalyst of the prostituted woman.

Echoes, silences and footnotes

The fixation on women's sexual victimhood in the women's movement and nationalist imagination underlies activists' affective investments in the prostituted woman, giving new life to an old symbol for the nation's woes. However, to the extent that it gains political and cultural legitimacy through the echoes of victimhood, it also silences any denial of victimhood with the full weight of the imagined nation. Sex workers and their allies found no space for engagement with mainstream women's rights activists, and were often accused of being sympathisers of Japanese colonialism, or infected with foreign ideas. Within the national(ist) discursive and political space, victimhood becomes the sole legitimate basis for women

to make claims for state protection. Activists' collaboration with the state as well as the consistent demand for stronger law enforcement have made broader critiques of the state difficult.

In fact, women's human rights became both a refrain and a footnote but never the content in the anti-prostitution movement. The omnipresence of the words 'women's human rights' in the legal, advocacy and publicity material of the movement that Jo and Cho led was accompanied by a highly circumscribed understanding of rights – the right to leave prostitution, but not the right to stay. Jo further dismissed 'sexual self-determination' as a tool for those who exploit prostitution: 'There are many people who profit from the current structure of the prostitution industry. Those groups that benefit from the exploitative structure think that such a word could deceptively conceal the reality' (Dashihamkke Center, 2008).

Another footnote in the anti-prostitution movement is the critique of capitalism. While capitalism has been repeatedly cited as a culprit in victimising women, there has been little critique of the developmentalism that created a greater population of dispossessed. As urban renewal projects gathered momentum, women in red-light districts and commoners (*seomin*) alike have been evicted from their homes and businesses. Rather than opening a discussion about housing rights, anti-prostitution leaders simply saw the demolition of red-light districts as a positive development.

The neoliberal logic of flexible labour has had significant gendered effects in South Korea, which had the highest gender wage gap in OECD countries in 1985–2017 (37.18 per cent in 2015; OECD, n.d.). Korean women consistently make less than 60 per cent of male average earnings. The Korea Labor Institute showed that between November 2008 and May 2009, 98 per cent of the job cuts were women's, and a total of 877,000 women in their thirties lost their jobs during this period (Yoon, 2009). Yet 'self-sufficiency' programmes for prostituted women train them to drive, cook, cut hair etc, and to be part of the docile labour force. Employability and self-sufficiency came to define the emergent welfare policies of the South Korean state since the late 1990s, and anti-prostitution activists have not questioned the reproduction of gender and class in these policies. Furthermore, some activists imagine that curbing prostitution is a way to discourage excessive consumption. I once asked a regional activist what the effects on women in prostitution would be if the sector were really eliminated, in the hope of some insight into women's marginalisation in the labour market. Her response caught me off guard: 'then they will not have the money to buy all these brand name products. Many of them engage in prostitution in order to consume luxury products' (personal interview, 10 October 2018). Removing women from prostitution would contain, then, both their consumerist and sexual excess. This echoes the Korean government's frugality programme to counter the spread of consumerism in the 1990s, targeting women's 'excessive desires' (Nelson, 2000: 139–170). This condemnation of desire for luxury is rarely discussed alongside the rising costs of living and the growing unemployment rate (Dean, 2009: 64). The Prostitute has come to embody excess in neoliberal Korea, while the state has remained unscathed, as seen below.

In 2006, a relatively new organisation that serviced women in the district of Cheongnyangni caused a scandal, exposing the irrevocable incorporation of the women's movement into the state agenda, as well as its aversion to a critique of capitalism. Illoom was founded by a group of young women university graduates. Although they received government funding through the Ministry of Gender Equality, they were unafraid of challenging government policies: this included being the only organisation that refused to provide their clients' social security numbers to the Ministry in order to protect their privacy.[12] The incident began when they tried to openly critique state collusion with capital. On the cover of their invitation to their second-year anniversary event was a picture with Kung Fu Panda in the centre aiming his signature kick at then-President Lee Myung-bak. The President was pictured laying the foundation to a building that he owned. He had been exposed by the news media as having rented a few storeys to a prostitution business; according to the anti-prostitution laws, President Lee could be liable to criminal prosecution. The Kung Fu Panda postcard drew the wrath of MGE's new section head who dealt with NGOs, who personally rebuked the young women and warned how their action could jeopardise funding for all anti-prostitution NGOs. Leaders from the movement remained silent.

Mainstream women activists have come a long way from being dissident activists in the 1980s to allying with the state for their goals. A focus on legislative reforms, institutionalisation, stronger law enforcement and a more punitive penal system has come to define the way forward for the women's movement in South Korea.[13] Heavy penalisation of the criminal is the logical response to the protection of innocent victims, as it both individualises injustices and sufferings and renders invisible the structures and inequalities that generate suffering in the first place. The preoccupation with criminalisation further exonerates the state and capital from any responsibility for gendered injustices (Bumiller, 2009; Dean, 2009).

Conclusion

The affective power of the Prostitute to ignite indignity, inspire solidarity and silence dissent was also witnessed in 2016 in the controversy around a composite photograph by the Korean artist Lee Wan. Titled 'Korean Woman', the photograph featured an expressionless woman looking at the viewers while holding a Dior handbag. Behind her was a street with colourful neon signs on both sides. As part of the travelling exhibition 'Lady Dior as Seen By' on show at the House of Dior flagship shop in Seoul, the photo did not court any controversy before its arrival in Korea. But public outrage broke out on the internet as Koreans commented on how this image implied that this woman was 'selling herself' in one of the bars in the background to buy the luxury goods, and thus implied that all 'Korean women' were morally loose and materialistic. The fact that a Korean artist produced this for a foreign company set to profit from the Korean market further added insult to injury. Dior apologised and pulled the image from the exhibition. The artist, who has a track record of using his artwork to critique

contemporary capitalist society, said that he 'wanted to paint the tired faces of Koreans who have to suffer from the ''specs competition'' through images of the bags one carries or the cars that one rides . . .' (Moon, 2016). 'Specs competition' was a term that emerged in the 2010s to refer to the need to improve one's 'specifications' to survive in the increasingly competitive Korean society. The artist's critique of capitalism was effectively silenced when media discussion accused him, with this photograph, of a foreign-sponsored effort to sexually 'degrade' Korean women. Once again, if the 'prostituted woman' deserves saving, then the 'willing prostitute' (who sells sex for luxury handbags) needs to be purged for the sake of the nation and, more importantly, critique of women's sexual impropriety trumps any critique of capitalism.

The centrality of victimhood to the affective economy is key to understanding the passionate and unswerving commitment of abolitionist activists like Cho and Jo to eliminating prostitution: morality demands it, the nation requires it, the global anti-trafficking community urges it. The circulation of affect and its prescription for actions are not personal inventions, but are rather long-nourished by dominant nationalist themes of victimhood and redemption, with the Prostitute – a powerful symbol of the Korean nation's degradation and subjection to foreign aggressions – being a mobilising 'collective fantasy' (Scott, 2011). The prostituted woman's suffering becomes an effective refrain in the vernacularisation of the global anti-trafficking moment in South Korea (Cheng, 2011). This investment in victimhood further fosters a form of 'carceral feminism' (Bernstein, 2012) that individualises both suffering and evil, encourages fears about female sexuality and promotes a strong criminal justice system as the solution to all injustices.

The passionate activism of these anti-prostitution proponents may say less about the state of prostitution in South Korea than about the activists' subjectivities as historical and global subjects, and the symbolic world in which they locate themselves. In order to articulate their own victimhood and thereby legitimacy to power through the prostituted woman, women's rights activists reproduce the cultural and gendered essentialism of the imagined Korean nation that they have fought so hard against for decades. The victimhood of 'prostituted women', or the Prostitute, further allows these women activists to participate and circulate effectively in the affective economy of the global anti-trafficking campaign, perpetuating a global hegemony of victimhood in understanding female sexual labour and migration. The question then becomes: who actually is the one who needs saving?

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Notes

1. Since the 2000s, in both mass media and activist forums, there has been a strong presence of spokespersons who conflate prostitution with human trafficking (which according to the 2000 Palermo Protocol covers the exploitation of all forms of labour and not just prostitution), refusing to engage with the notion of sex workers' rights. I have personally been to a number of these forums, including the Commission on the Status of Women's meetings in New York in 2004 to 2007, and the World Women's Congress in 2005. But see also: Saunders (2005) and Seshu and Bandhopadhyay (2009).
2. Anthropologist Abner Cohen has defined symbols as 'objects, acts, relationships, linguistic formations that stand ambiguously for multiple meanings, evoke, and impel men [sic] to act (1974: 21–22).
3. These works demonstrated that anti-trafficking campaigns in different global locations have promoted a carceral paradigm of justice that focuses on sexual violence rather than the structural and economic violence of neoliberal developments that polarise resources and wealth, while creating vulnerable populations who engage in unsafe migration. In addition, anti-trafficking policies and advocacy promote a racialised and sexual agenda that reproduces the social, moral and global divide between Western, middle-class women advocates and 'Third World women' for whom they advocate. Elizabeth Bernstein particularly argued that the anti-trafficking movement is a key site for analysing the 'neoliberal circuits of crime, sex, and rights' (2012: 233).
4. The women's movement in South Korea took shape as part of the struggle against Japanese colonialism in the early 20th century, and developed in tandem with the anti-imperialist democratisation and unification movements in the post-war era. Consequently, national independence has been a key aspect of the South Korean women's movement, in addition to grappling with the legacy of Confucianism, colonialism, post-dictatorship marketisation and globalisation of Korea and the re-defined Korean state (see: Heo, 2008: 78, Cheng and Kim, 2019). For many women activists and academics, women are not only victims of individual acts of violence, but also victims of a patriarchal structure rooted in Confucianism. Ever since the political liberalisation process after the removal of military dictatorship in 1987, the women's movement has made concerted efforts to lobby for both criminal and civil legal reforms addressing sexual violence, domestic violence, sexual harassment and the household registration system to challenge 'Korea's strong patriarchal culture, which sees women/wives as the property of men/their husbands' (Jung, 2014: 66). By the beginning of the 2000s, women's human rights had become formal national goals, with the establishment of the Ministry of Gender Equality and the National Committee on Human Rights in 2001.
5. The conflation of prostitution with 'sex trafficking' in the South Korean laws has been critically analysed in my own work (Cheng, 2011; Cheng and Kim, 2019); outside of the Korean context, see, for example: Bernstein, 2007; Peters, 2015; Piscitelli, 2016; Mai, 2018.
6. The KWAU was formed during the height of the democratisation movement and was an umbrella organisation of women's groups of diverse populations – the middle class, workers, farmers, housewives etc. After the introduction of the civilian government in 1992, KWAU reoriented its activism from democratisation to the fight for legal rights for women through legislative reforms. After the inauguration of the Kim Dae-jung government, they further actively participated in the gender mainstreaming of government policies (Heo, 2008: 89–93).

7. Katharine Moon poignantly questioned the Korean ethnonationalist emphasis on 'innocence' as a requirement for claiming women's human rights as it forges a tenuous ground for the promotion of human rights ideology and institutional frameworks in Korea (Moon, 1999: 326).
8. Prostitution-related organisations that take the position that all forms of prostitution should be eliminated are referred to as abolitionists. They are different from the prison-abolition movement and slavery-abolition movement (Dozema, 2002).
9. In fact, an Australia-based abolitionist, Sheila Jeffreys, picked up on this dynamic and commented, '. . . an American feminist is bullying Korean feminists with the notion of sex work that has been supported and promoted by pimps and brothel-owners.' Regardless of my research credentials and anchor in Asia – having been trained as an anthropologist in Hong Kong, and conducted research on sex work in South Korea since 1998, and did not start working in the U.S. till 2013, Jeffreys labeled me as an 'American' and a 'bully' bought by the sex industry, while proving herself an ally to Cho.
10. According to Dean, 'the neoliberal criminal' is imagined as the instrument of deprivation, and therefore a 'strange attractor for displaced anxieties around the brutality of the neoliberal economy' (2009: 72).
11. Sarah Soh found in her research on prostitution in Korea, that there were at least three different versions of the origin of prostitution: 'One is that prostitutes and prostituted existed during the Three Kingdom period (57 BC–935 AD). Another view is that prostitution started in Choson period. A third suggests that prostitution as a profession began in colonized Korea' (2004: 171).
12. As there is a capped maximum amount of monetary support for anyone making claims under the Prostitution Protection Act, the Ministry requested the information to audit the amount of allowances each individual has received from different organisations.
13. A similar trend of the professionalisation of feminism has been observed by Roy (2011) and Kotiswaran (2011) in India – as the NGO Illoom attested to the 'the hybrid nature of feminist political identity' that Roy (2011) maintained possible in the professionalisation of feminism. What I take issue with here is how most women's rights activists have turned away from struggles for economic justice and liberation to carceral paradigms of justice, or what Elizabeth Bernstein (2012: 235) calls 'carceral feminism'.

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DATING THE STATE: THE MORAL HAZARDS OF WINNING GAY RIGHTS

Katherine Franke*

On August 1, 2009, a masked man dressed in black carrying an automatic weapon stormed into Beit Pazi in Tel Aviv, the home of the Aguda, the National Association of GLBT in Israel.[1] He opened fire on a group of gay and lesbian teenagers who were meeting in the basement for "Bar-Noar," or "Youth Bar," killing two people and wounding at least ten others.[2] This terrible act of violence attracted immediate national and international attention and condemnation. President Simon Peres declared the next day:

> [T]he shocking murder carried out in Tel Aviv yesterday against youths and young people is a murder which a civilized and enlightened nation cannot accept. . . . Murder and hatred are the two most serious crimes in society. The police must exert great efforts in order to catch the despicable murderer, and the entire nation must unite in condemning this abominable act.[3]

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1. *Murder in the Bar-Noar*, Aguda (Aug. 2, 2010), http://glbt.org.il/en/aguda/articles.php?articleID=1572; *Two Killed in Shooting at Tel Aviv Gay Center*, Haaretz (Aug. 1, 2009, 11:14 PM), http://www.haaretz.com/hasen/spages/1104506.html.

2. *Murder in the Bar-Noar*, *supra* note 1; *Two Killed in Shooting at Tel Aviv Gay Center*, *supra* note 1.

3. Roni Sofer, *Netanyahu: Israel a Country of Tolerance*, Ynetnews.com (Aug. 2, 2009, 10:56 AM), http://www.ynetnews.com/articles/0,7340,L-3755571,00.html (internal quotation marks omitted).

Prime Minister Benjamin Netanyahu added: "We are a democratic country, a country of tolerance, a law-abiding state, and we will honor every person regardless of his or her beliefs."[4] When the Prime Minister visited the Aguda's building several days later, he remarked, "This is not just a blow to the gay-lesbian community. This is a blow to all Israeli youth and Israeli society."[5] President Peres echoed these remarks at a rally honoring the murdered gay teens: "The gunshots that hit the gay community earlier this week hit us all. As people. As Jews. As Israelis."[6]

These remarks, while laudable for their strong condemnation of violence against gay and lesbian people, signal something quite interesting about the relationship between homosexuality, the state of Israel, the Jewish people, and the idea of a modern, democratic, and tolerant state. Israel's top political leaders did more than express concern about an act of private violence against members of the nation's sexual minority; rather the way they rendered the Aguda shooting both patriotized its victims and homosexualized Jews and Israel.[7]

This essay turns to several diverse sites of global politics—Israel, Romania, Poland, Iran, and the United States—to illuminate the centrality and manipulation of sexuality and sexual rights in struggles for and against the civilizing mission that lies at the heart of key aspects of globalization. I began this essay with the discussion of Israel not to single it out, but to illustrate a larger, more widespread phenomenon. It is worth tracing why, how, and to what

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4. *Id.* (internal quotation marks omitted).

5. *TA Gay Attack Bears Marks of Terrorism*, Jerusalem Post (Aug. 6, 2009, 10:06 AM), http://www.jpost.com/Israel/Article.aspx?id=150999 (internal quotation marks omitted).

6. Attila Somfalvi, *Peres at Gay Support Rally: Bullets Hit Us All*, Ynetnews.com (Aug. 8, 2009, 10:41 PM), http://www.ynetnews.com/articles/0,7340,L-3758881,00.html (internal quotation marks omitted).

7. Israeli politicians, lesbian, gay, bisexual, and transgender (LGBT) activists, and the media overwhelmingly framed the Tel Aviv shooting as a hate crime, not an act of terrorism, despite the fact that the shooter wore a black ski mask and sprayed a group of Israelis with an automatic weapon. Surely not every act of violence that takes place in the state of Israel, whether it is a shooting, a car accident, or a barroom brawl, is understood as an attack on Israel and the Jewish people. Some acts of violence are considered random and their meanings do not exceed their mere violence, while others are labeled acts of terror (a frequent occurrence in Israel). This one was immediately considered a hate crime—a violation of the human rights of gay, indeed all, Israelis. Unpacking the categorization of crime as hate crime or terrorism is a worthy project but one for another venue.

effect a state's posture with respect to the rights of "its" homosexuals has become an effective foreign policy tool, often when negotiating things that have little or nothing to do with homosexuality.[8]

I aim in this discussion to intervene in an ongoing conversation among scholars of international law and politics that has cleaved into two rather unfriendly camps. On the one side are human rights groups and activists who seek to secure human rights protections for subordinated, oppressed, tortured, and murdered sexual minorities around the globe. They have worked hard to bring lesbian, gay, bisexual, and transgender (LGBT) people within the protective infrastructure of the well-organized human rights communities. On the other side is a group, perhaps most provocatively represented by Joseph Massad in *Re-Orienting Desire: The Gay International and the Arab World*,[9] that derides the work of LGBT human rights actors and organizations for a kind of missionary zeal to universalize Western, sexualized identities that have little or no fit with the ways in which sexuality—or, for that matter, identity—takes form in settings outside the West. "Following in the footsteps of the white Western women's movement, which . . . sought

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8. The use of "gay rights [as] . . . a public-relations tool" has been termed "pinkwashing" by critics. Sarah Schulman, *Israel and "Pinkwashing,"* N.Y. Times, Nov. 23, 2011, at A31 (quoting Aeyal Gross, a law professor at Tel Aviv University) (internal quotation marks omitted). As I have noted elsewhere: "[T]he pinkwashing critique applies to *all* states, not just Israel. In the United States there are many of us who have expressed concern that the Obama administration is using its good gay rights record (repealing 'don't ask/don't tell,' backing away from defending the Defense of Marriage Act, and endorsing marriage equality rights for same-sex couples, for example) to deflect attention from its otherwise objectionable policies (aggressive deportation of undocumented people, use of drones to execute civilians, and failure to prosecute anyone or any entity in connection with the 2008 financial crisis for example). As some states expand their laws protecting the rights of LGBT people, pinkwashing has become an effective tool to portray a progressive reputation when their other policies relating to national security, immigration, income inequality, and militarism are anything but progressive." Katherine Franke, *The Greater Context of the Pinkwashing Debate*, Tikkun Mag. (July 3, 2012), http://www.tikkun.org/nextgen/the-greater-context-of-the-pinkwashing-debate.

9. Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 Pub. Culture 361 (2002); *see also* Jasbir K. Puar, Terrorist Assemblages: Homonationalism in Queer Times, at xxiv (2007) (discussing "forms of queer secularity that attenuate constructions of Muslim sexuality" and noting the "emergence of a global political economy of queer sexualities"); Sonia Katyal, *Exporting Identity*, 14 Yale J.L. & Feminism 97, 100–01 (2002) ("[T]he changing social meanings surrounding gay or lesbian sexual identities raise deeply complex questions that are often ignored by scholars and activists in the name of globalizing gay civil rights.").

to universalize its issues through imposing its own colonial feminism on . . . women's movements in the non-Western world—a situation that led to major schisms from the outset—the gay movement has adopted a similar missionary role," wrote Massad in Public Culture in 2002.[10] Not surprisingly, Massad received some pushback from the persons and entities he identified as imperialist missionaries who have sought to redeem their good names and good work.[11] In the middle of these two polarized perspectives lie a few activists and scholars who have charted a middle course, acknowledging the ever-present risk of imperial effects, if not aims, when undertaking rights work in an international milieu, while at the same time recognizing the important and positive work that rights-based advocacy can bring about.[12] For this last group, as for Gayatri Spivak, rights are something we "cannot *not* want,"[13] yet we proceed with them cognizant of the complex effects their use entails.

The present essay carries a brief for neither side of this debate (though I will confess sentiments that strive toward the middle course). Rather, it seeks to introduce an analysis none of the disputants have acknowledged: To focus this discussion on the relationship between LGBT human rights non-governmental organizations (NGOs) in the metropole and the potentially colonial subjects they seek to aid misses a third and vastly important actor in this theater—the state. In hugely interesting ways, states have come to see that their political power, their legitimacy, indeed their standing as global citizens, are bound up with how they recognize and then treat "their" gay citizens. A careful analysis of the role of human rights mechanisms and institutions in the expansion of human sexual freedom requires that we recognize and account for the manner in

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10. Massad, *supra* note 9, at 361.

11. *See, e.g.*, Scott Long, *The Trials of Culture: Sex and Security in Egypt*, Middle E. Rep., Winter 2004, at 12, 18 ("What must be resisted is the political presumption that all interchange is conquest.").

12. *See, e.g.*, Aeyal Gross, *Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?*, 101 Am. Soc'y Int'l L. Proc. 129, 132 (2007) (asking how human rights violations can be addressed "without imposing a Western model of sexuality" but also without ignoring the realities of globalization); Teemu Ruskola, *Legal Orientalism*, 101 Mich. L. Rev. 179, 181, 185 (2002) (analyzing "prevailing cultural prejudices that inform the interpretation of comparative scholarship on Chinese Law" and examining the "ethics of comparison"); Amr Shalakany, *On a Certain Queer Discomfort with Orientalism*, 101 Am. Soc'y Int'l L. Proc. 125, 128 (2007) ("[W]e might see in U.S. gay-identity discourse some benefits for the Egyptian bottom.").

13. Gayatri Chakravorty Spivak, Outside in the Teaching Machine 51 (2009) (emphasis added).

which NGOs working in this area, along with the populations they seek to aid, often find their work and their interests taken up and deployed by state actors for purposes that well exceed the articulated aims of something called "human rights." The Israeli example I opened with is but one of the ways in which sexuality bears a curious relationship to global citizenship, politics, and governance.

Illuminating this complex dynamic reveals some patterns: *Modern* states are expected to recognize a sexual minority within the national body and grant that minority rights-based protections. *Pre-modern* states do not. Once recognized as modern, the state's treatment of homosexuals offers cover for other sorts of human rights shortcomings. So long as a state treats its homosexuals well, the international community will look the other way when it comes to a range of other human rights abuses.

I. ISRAEL

When and how did homophobic violence acquire such important meaning in Israel, such that the president and prime minister were expected to, and did, embody the role of national victim before domestic and international audiences immediately after the shooting? Why then and not in 2005 when an ultra-Orthodox man stabbed and wounded three participants in the Jerusalem gay pride parade,[14] or the following year when right-wing activists called for violent protests against the WorldPride procession in Jerusalem?[15]

The answer lies in significant part in efforts by the Israeli government to rebrand itself in a self-conscious and well-funded campaign termed alternately "Brand Israel" and "beyond the conflict."[16] In 2006, in large measure in response to its military

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14. *See* Greg Myre, Israel: 3 Stabbed At Jerusalem Gay Parade, N.Y. Times, July 1, 2005, at A9.

15. *See* Neta Sela, *Holy War Against Pride Parade*, Ynetnews.com (Oct. 30, 2006, 2:48 AM), http://www.ynetnews.com/articles/0,7340,L-3321178,00.html; Efrat Weiss, *Baruch Marzel: Pride Parade Will Lead to Violence*, Ynetnews.com (Oct. 18, 2006, 5:48 PM), http://www.ynetnews.com/articles/0,7340,L-3316718,00.html.

16. *See* David Suissa, *Opening Israel*, Virtual Jerusalem (Sept. 8, 2011, 9:26 AM), http://www.virtualjerusalem.com/blogs.php?Itemid=4693 (describing efforts of the Israeli Foreign Ministry to improve Israel's image by focusing attention on areas "beyond the conflict'" with the Palestinians as part of an initiative titled "Brand Israel") (internal quotation marks omitted); *see also* Uriel Heilman, *The Difficult Chore of Getting Israel's Message Across*, B'nai B'rith Mag., Summer 2009, at 20, 24, *available at* http://www.urielheilman.com/0601hasbara.html (discussing Israel's rebranding efforts, including the Israeli

incursion into Lebanon, Israel found its international "brand reputation" slipping to a new low. Simon Anholt, who publishes the influential annual Anholt-GfK Roper Nation Brands Index,[17] observed that in 2006:

> Israel's brand was by a considerable margin the most negative we had ever measured in the NBI [Nation Brands Index], and came bottom of the ranking on almost every question. . . . In response to one of the questions in [the governance] section of the survey, 'how strongly do you agree with the statement that this country behaves responsibly in the areas of international peace and security?', Israel scored lowest of all the 36 countries in the NBI.[18]

When the Palestinians elected a Hamas-majority government in January of 2006, the Israelis sensed that they had a public relations opening. "After decades of battling to win foreign support for its two-fisted policies against Arab foes, Israel is trying a new approach with a campaign aimed at creating a less warlike and more welcoming national image," wrote a Reuters reporter covering the meeting of then-Foreign Minister Tzipi Livni with executives from the British public relations firm Saatchi & Saatchi.[19] Livni expressed the view that the protracted conflict with the Palestinians was sapping Israel's international legitimacy. "When the word 'Israel' is said outside its borders, we want it to invoke not fighting or soldiers, but a place that is desirable to visit and invest in, a place that preserves democratic ideals while struggling to exist," Livni told the British advertising executives who had agreed to work on the Israeli re-branding effort for free.[20]

Thus the Foreign Ministry, concerned that the international community held an unfairly negative view of Israel, launched an

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Foreign Ministry's May 2006 effort to bring a group of American entertainment reporters to Israel in order to visit trendy Tel Aviv nightclubs, Israeli rock stars, and gay and lesbian rights groups).

17. *The Anholt-GfK Roper Nation Brands Index*, GfK Custom Research North America, http://www.gfkamerica.com/practice_areas/roper_pam/nbi_index/index.en.html (last visited Oct. 30, 2012).

18. Simon Anholt, Places: Identity, Image and Reputation 58 (2010).

19. Dan Williams, *Don't Mention the War—Israel Seeks Image Makeover*, Reuters, Oct. 26, 2006, *available at* http://uk.reuters.com/article/2006/10/26/uk-mideast-israel-image-idUKL2611919120061026.

20. *Id.* (internal quotation marks omitted).

extensive public relations campaign "to make people like us."[21] "The idea here is to have a major branding campaign in America and Europe," Gidon Meir, deputy director-general for public affairs at the Foreign Ministry, told the Jewish Daily Forward in 2005 as the campaign was getting underway.[22] The government, along with branding experts from the private sector, set out to "re-brand" the country's image to appear "relevant and modern" instead of militaristic and religious.[23] According to the Jewish Daily Forward, "[d]irectors of Israel's three most powerful ministries agreed on a new plan to improve the country's image abroad—by downplaying religion and avoiding any discussion of the conflict with the Palestinians."[24]

The state of Israel is not alone in its turn to public relations experts as part of a larger "nation-branding" policy. Scholars have described the marketing of state reputation as a form of "soft power" whereby the state aims to "persuade and attract followers through the attractiveness of its culture, political ideals and policies."[25] In this regard, virtually every country has devoted considerable public funds to international branding campaigns designed to advance economic and diplomatic objectives.[26]

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21. Livni "hired a whole host of public relations firms who have conducted focus groups and used other mass marketing tools to figure out how to reinvent Israel in a manner that will make people like us." Caroline Glick, Truth in Advertising, Jerusalem Post (Nov. 3, 2006, 3:53 PM), http://www.jpost.com/Opinion/Columnists/Article.aspx?id=40071. This campaign has specifically included a pitch to make Israel appear more friendly based on its treatment of gay men and lesbians. *See id.*

22. Nathaniel Popper, *Israel Aims to Improve Its Public Image,* Jewish Daily Forward (Oct. 14, 2005), http://www.forward.com/articles/2070/ (internal quotation marks omitted).

23. *Id.*

24. *Id.*

25. Evan H. Potter, Branding Canada: Projecting Canada's Soft Power Through Public Diplomacy, at i (2009).

26. *See, e.g.*, Taken by Storm: The Media, Public Opinion, and U.S. Foreign Policy in the Gulf War 131–48 (W. Lance Bennett & David L. Paletz eds., 1994) (examining the role of the media in the development of U.S. foreign policy in the Gulf War); Jozef Bátora, *Public Diplomacy Between Home and Abroad: Norway and Canada*, 1 Hague J. Dipl. 53, 54 (2006) (observing the importance of nation-branding as a basis for arguing for a "more sophisticated understanding of public diplomacy"); James E. Grunig, *Public Relations and International Affairs: Effects, Ethics and Responsibility*, 47 J. Int'l Aff. 137 (1993) (discussing the ethical issues involved in international public relations); Alice Kendrick & Jami A. Fullerton, *Advertising as Public Diplomacy: Attitude Change Among International Audiences*, 44 J. Advertising Res. 297 (2004) (assessing the effectiveness of an advertising campaign run by the United States in the Middle East and Asia from

The re-brand Israel campaign took a decidedly "pink turn" in 2006. The Israeli Ministry of Tourism launched a beef-cakey website that promoted gay (largely gay male) tourism in Israel,[27] and enlisted the assistance of several NGOs (and GNGOs[28]). Israeli diplomats were explicit about the role for gay and lesbian rights in this strategy. "We've long recognized the economic potential of the gay community. The gay tourist is a quality tourist, who spends money and sets trends," Pini Shani, a Tourism Ministry official, told the media after Tel Aviv was elected a top gay destination in 2012.[29] "There's also no doubt that a tourist who's had a positive experience here is of PR value. If he leaves satisfied, he becomes an Israeli ambassador of good will."[30] Caroline Glick further noted in her article *A Gay Old Time*: "Ministry officials view gay culture as the entryway to the liberal culture because . . . gay culture is the culture that creates 'a buzz.'"[31] To advance the pink tourism project, the Tel Aviv-Yafo Tourism Association established the Tel Aviv Gay Vibe campaign in 2010, offering gay travelers "discounted travel and flights, plus free city

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October 2002 to January 2003); Philip Kotler & David Gertner, *Country as Brand, Product, and Beyond: A Place Marketing and Brand Management Perspective*, 9 J. Brand Mgmt. 249 (2002) (exploring whether a country can be a brand); Peter van Ham, *Branding Territory: Inside the Wonderful Worlds of PR and IR Theory*, 31 Millennium 249 (2002) (exploring how and why nation branding has become important); Peter van Ham, *The Rise of the Brand State: The Postmodern Politics of Image and Reputation*, 80 Foreign Aff. 2 (2001) (arguing that nation branding is contributing to the pacification of Europe); Beata Ociepka & Marta Ryniejska, *Public Diplomacy and EU Enlargement: The Case of Poland* (Neth. Inst. of Int'l Relations Clingendael, Discussion Paper in Diplomacy No. 99, 2005) (describing Polish public diplomacy efforts during Poland's accession to the European Union (EU)).

27. *See* Gay Israel, http://tourism.glbt.org.il (last visited Oct. 30, 2012) (noting that on the website you can find "everything you need to know about gay Israel: pictures, tourist sites, accommodation, attractions, gay night life and entertainment," among other things).

28. GNGO, or governmental NGO, is a term used to refer to a NGO created by a governmental entity to do work in support of, or in furtherance of, the state's interests and aims.

29. Aron Heller, *Tel Aviv Emerges as Top Gay Tourist Destination*, Huffington Post (Jan. 24, 2012, 08:46 AM), http://www.huffingtonpost.com/2012/01/24/tel-aviv-gay-travel-destinations_n_1227888.html (internal quotation marks omitted).

30. *Id.* (internal quotation marks omitted).

31. Caroline Glick, *A Gay Old Time*, Jewish Press (Nov. 8, 2006), http://www.jewishpressads.com/pageroute.do/19838/ (quoting David Saranga, former Consul for Media and Public Affairs at the Consulate General of Israel in New York and former Deputy Spokesman for the Israeli Foreign Ministry).

tours and restaurant vouchers,"[32] and launched a website,[33] a Twitter account,[34] and a smartphone application.[35] Additionally, Israeli consulates across the United States and Europe frequently sponsor gay-friendly activities, such as the Tel Aviv Gay Vibe Float in Chicago's Gay Pride Parade.[36]

What distinguished Israel's branding strategy was not the degree to which it was chasing gay tourist dollars by explicitly selling itself as a "gay mecca" (an ironic term to be sure).[37] Berlin is

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32. *Tel Aviv to Rebrand Itself as Gay Destination*, PinkNews (July 22, 2010, 4:18 PM), http://www.pinknews.co.uk/2010/07/22/tel-aviv-to-rebrand-itself-as-gay-destination/.

33. Tel Aviv Gay Vibe, http://telavivgayvibe.atraf.com (last visited Oct. 30, 2012).

34. *Tel Aviv Gay Vibe*, Twitter, http://twitter.com/TelAvivGayVibe (last updated Sept. 15, 2011).

35. *See Tel Aviv Gay Vibe*, iTunes App Store, http://itunes.apple.com/us/app/tel-aviv-gay-vibe/id433636568?mt=8 (last visited Oct. 30, 2012).

36. The Consulate General of Israel to the Midwest promoted the Tel Aviv Gay Vibe Float through Facebook, Israel in Chicago, *Tel Aviv Gay Vibe Float @ Chicago Gay Pride Parade 2011*, Facebook, http://www.facebook.com/events/105208666236631/ (last modified June 26, 2011), and through its Twitter account, Israel in Chicago, *Come to "Tel Aviv Gay Vibe float @ Chicago Gay Pride Parade 2010" Sunday, June 27 from 12:00 pm to 10:00 pm*, Twitter (June 16, 2011, 12:10 PM), http://twitter.com/#!/IsraelinChicago/status/16328567787. There are many other examples of national and local Israeli government entities enlisting well-known gay people in the project of public diplomacy. See, for example, the U.S. tour of Assi Azar, a famous openly-gay television star, *Events*, Out in Israel Month, http://www.outinisraelmonth.com/#!events (last visited Oct. 30, 2012) (promoting several screenings of Assi Azar's documentary film as part of the Out in Israel Month Campaign in November 2011, organized by the Consulate General of Israel to New England); Gal Uchovsky, *Left and Gay in Israel*, Jerusalem Post (Nov. 2, 2011, 10:59 PM), http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=244186 (describing Assi Azar's tour as "the first US leg of this grand scheme" organized by the Israeli Foreign Ministry, which has also included "an exhibition of gay art in London and Manchester with works from some great Israeli talents").

37. Examples of the frequent reference to Tel Aviv as a "gay mecca" include Aviv Benedix, *Tel Aviv, Israel's Gay Mecca, Invites Gay Travelers to Come and Visit*, Israel Gay News (Dec. 7, 2010), http://israelgaynews.blogspot.com/2010/12/by-aviv-benedix-israels-second-largest.html (calling Tel Aviv the "gay Mecca" of Israel and noting that Lonely Planet and Out Magazine have referred to Tel Aviv as "a kind of San Francisco of the Middle East" and "the gay capital of the Middle East," respectively) (internal quotation marks omitted); Mayaan Lubell, *Tel Aviv Reveling in Gay Tourism Boom*, Reuters, Jan. 24, 2012, *available at*http://www.reuters.com/article/2012/01/24/us-israel-tel-aviv-gay-idUSTRE80N12O20120124 ("Leon Avigad,

well known for doing so as well, to its great economic advantage. In fact, Out Now Consulting, the gay public relations firm that designed the "MyGayBerlin" campaign[38] was hired by the Israelis to assess the feasibility of branding Tel Aviv as an international gay tourist destination.[39] Rather, what differentiated the role of gays in the Israeli branding campaign was the position it played in a larger national political agenda, one that exceeded mere niche marketing to gay tourists. Israeli's public embrace of gay rights figured at the core of a project to distract attention from, if not to cancel out, the growing international condemnation of Israel's treatment of the Palestinians. To this end, the Ministry of Public Diplomacy and Diaspora Affairs has solicited applications from Israeli citizens who would like to serve as "public diplomats," traveling abroad (at the state's expense) spreading the good word about Israel. The announcement makes clear that the program "is primarily interested in receiving applications from people representing the diverse faces of Israeli society, including . . . representatives of the gay community."[40]

Israel's promotion of its pro-gay policies has, over time, operated in two registers. First, as laid out above, there was the deliberate campaign to improve Israel's international "brand perception" by highlighting Tel Aviv as a hot and hunky gay tourist destination. Over time, however, the emphasis has shifted from being a project of the Tourism Ministry to one used by the Foreign Minister as a tool of foreign relations. To great effect, Israel has sought to stake out a moral high ground in comparison with its enemies by referring to how well it treats its gays. Israeli government officials and their private sector advocates have seen a strategic advantage in comparing Israel's tolerance of gay people with intolerance toward gays in neighboring Arab countries. Naomi Klein, in an interview,

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owner of the gay-friendly Brown hotel, said Tel Aviv has become a 'gay Mecca' and is enjoying a tremendous tourist boom in recent years.").

38. Out Now Consulting's Facebook page states: "Out Now has worked with German National Tourist Office and Berlin Tourism Marketing for several years to credentialize these destinations with lesbian and gay travelers." Out Now, *Out Now Global: Gay Market Leaders—Berlin Tourism Marketing*, Facebook (Oct. 29, 2008, 12:02 PM), http://www.facebook.com/note.php?note_id=32620247091.

39. Press Release, Out Now Consulting, Think You Know All About Gay Welcoming Tourism Destinations? Think Again: The First-Ever Market Study into Middle East Gay Travel Unveiled by Out Now at WTM (Oct. 7, 2009), *available at* http://www.webwire.com/ViewPressRel.asp?aId=105143.

40. Asa Winstanley, *In New Pinkwashing Recruitment Campaign, Israel Offers Free Travel for Propaganda Services*, Electronic Intifada (Nov. 24, 2011, 10:43 PM), http://electronicintifada.net/blog/asa-winstanley/new-pinkwashing-recruitment-campaign-israel-offers-free-travel-propaganda.

laid it out plain and simple: "[T]he state of Israel has an open strategy of enlisting gay and lesbian rights and feminism into the conflict, pitting Hamas's fundamentalism against Israel's supposed enlightened liberalism as another justification for collective punishment of Palestinians."[41] Israeli Prime Minister Benjamin Netanyahu's speech to the U.S. Congress in May 2011 said it best: "In a region where women are stoned, gays are hanged, Christians are persecuted, Israel stands out. It is different."[42]

As the outcry about the Israeli Occupation of Palestine grew louder, Israeli voices responded: Look how well we treat our gays! The complex significance of this official and public use of Israeli homosexuals can only be fully appreciated when considered in light of the Israeli security agency Shin Bet's policy begun in 1967 to "turn" Palestinian homosexuals into informants through blackmail and other dirty tactics.[43] As recently as May 2012, Shin Bet officers detained a gay Palestinian man visiting East Jerusalem to see a medical specialist and told him that if he didn't inform the Shin Bet "when he 'hears about a demonstration, about people, where they're going, who's got a mind to protest, who helps kids who throw stones, who's religious, who throws stones at soldiers,'" he would "'see what kind of problems [the officers would] make for [him] with the Palestinian Authority.'"[44] Thus, the Ministry of Public Diplomacy and

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41. Cecilie Surasky, *Naomi Klein Shows You Can Boycott Israel Without Cutting Off Dialogue Over Palestine*, Alternet (Aug. 31, 2009), http://www.alternet.org/story/142341/.

42. Prime Minister Benjamin Netanyahu, Speech to U.S. Congress (May 24, 2011), *available at* http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2011/Speech_PM_Netanyahu_US_Congress_24-May-2011.htm.

43. As a result, gay men have gained a reputation in Palestinian society for being collaborators or snitches, given the widespread belief that gay people are vulnerable to blackmail by the Israelis. This reputation is not entirely unearned, given the "success" of Shin Bet's tactics. *See* Jason Ritchie, Queer Checkpoints: Sexuality, Survival, and the Paradoxes of Sovereignty in Israel-Palestine 118 (Jan. 14, 2011) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champagne), *available at* http://www.ideals.illinois.edu/handle/2142/18233 (noting that the Shin Bet identifies homosexuals as one of the most fruitful sources for its network of Palestinian collaborators). This fact is vital to understanding how homophobia in Palestine derives not only from a kind of sexual revulsion we are familiar with elsewhere, but also from particularly local political dynamics.

44. Amira Hass, *Shin Bet Inquiry: Did the Israeli Slip His Gay Palestinian Lover Into the Country Illegally?*, Haaretz (May 28, 2012, 2:04 AM), http://www.haaretz.com/news/national/shin-bet-inquiry-did-the-israeli-slip-his-gay-palestinian-lover-into-the-country-illegally.premium-1.432857.

Diaspora Affairs' use of gay public diplomats is, in important respects, the friendly flip side of that of Shin Bet.

Concerned that the international community was wavering in its hard line stance toward Iran's growing nuclear capability, in 2009, Israel allocated roughly two million dollars to a new campaign to discredit Iran by specifically highlighting its mistreatment of lesbians and gay men.[45] The Israeli Foreign Ministry confessed that the new public relations campaign "aims to appeal to people who are less concerned with Iran's nuclear aspirations and more fearful of its human rights abuses and mistreatment of minorities, including the gay and lesbian community."[46] David Saranga, former Consul for Media and Public Affairs at the Consulate General of Israel in New York and former Deputy Spokesman for the Israeli Foreign Ministry, put it clearly:

> Instead of wasting time attempting to persuade them [i.e., liberal audiences in the United States and Europe] that I am right, in contradiction of their worldview, it is better to try to speak to them through the concepts and values that they understand and appreciate. For instance, presenting the attitude towards the gay community in Israel and the equality it enjoys often cracks the blind wall of criticism which liberal audiences in the United States may present.[47]

The Israeli Supreme Court joined the issue in September of 2010. It held that the City of Jerusalem had engaged in impermissible discrimination in its ongoing refusal to fund the city's lesbian, gay, bisexual, and transgender community center, Open House.[48] Year after year, the City had refused funding requests from Open House, and Justice Isaac Amit, writing for the Court, ruled that:

> The history of the relationship between the parties reveals that the appellant's hand reaching out for support has met time and time again with the miserly

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45. Barak Ravid, *Israel Recruits Gay Community in PR Campaign Against Iran*, Haaretz (Apr. 20, 2009, 9:46 AM), http://www.haaretz.com/hasen/spages/1079589.html.

46. *Id.*

47. Uri Leventher, *The Diplomat Who Tweeted*, Globes: Israel's Business Arena (Oct. 14, 2009, 6:51 PM), http://www.globes.co.il/serveen/globes/docview.asp?did=1000505339 (internal quotation marks omitted).

48. File No. 343/09 Supreme Court (Jer), Jerusalem Open House for Pride & Tolerance v. City of Jerusalem (Sept. 14, 2010), Nevo Legal Database (by subscription) (Isr.).

> hand of the municipality . . . . We cannot but express hope that the municipality will not behave stingily again and that the sides can 'shake hands' without further involving the court.[49]

Justice Amit declared that equal and respectful treatment of the gay community was one of the criteria for a democratic state, noting that this is what separates Israel from "most of the Mideast states near and far, in which members of the gay community are persecuted by the government and society . . . ."[50] He then mentioned Iranian President Mahmoud Ahmadinejad's 2007 speech at Columbia University in which Ahmadinejad claimed that there were no homosexuals in Iran.[51] This statement by the Iranian president served as evidence, in Justice Amit's view, of Israel's comparative tolerance, modernity, and morality.[52] Whether or not this language is officially a part of the new campaign to use gay rights to whip up support both domestically and abroad for a military strike against Iran, the Israeli Supreme Court is certainly pulling an oar in this project.

Aeyal Gross, a law professor at Tel Aviv University as well as a sharp critic of Israeli politics generally and LGBT politics in Israel specifically, wrote about the role of the gay community in the Brand Israel campaign:

> LGBT rights are used as a fig leaf, and the larger the area that needs to be hidden, the larger the fig leaf must be. Although conservative and especially religious politicians remain fiercely homophobic, this is partially counterbalanced—even in years when a conservative government has been in power—by the new homonationalism and the important role gay rights plays in burnishing Israel's liberal image.[53]

Other NGOs closely allied with the Israeli re-branding effort, such as StandWithUs, a pro-Israeli advocacy organization based in Los Angeles,[54] have explicitly pursued a strategy of responding to

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49. *Id.* at ¶ 86.

50. *Id.* at ¶ 55.

51. *Id.*

52. *See id.* (describing Israel as "liberal" and "democratic").

53. Aeyal Gross, *Israeli GLBT Politics between Queerness and Homonationalism*, Bully Bloggers (July 3, 2010), http://bullybloggers.wordpress.com/2010/07/03/israeli-glbt-politics-between-queerness-and-homonationalism/.

54. StandWithUs is "an international, non-profit organization that promotes a better understanding of Israel, through examination of diverse issues."

criticism of Operation Cast Lead, a three-week military campaign Israel began in Gaza in December of 2008,[55] by emphasizing how well lesbian and gay people are treated in Israel. "We decided to improve Israel's image through the gay community in Israel . . . ." said an official with StandWithUs to the Jerusalem Post.[56]

> We're hoping to show that Israel is a liberal country, a multicultural, pluralistic country . . . . That is a side of Israel we are very proud of and that we think should be shown around the world. . . . As far as a lot of people are concerned, Israel is Gaza and the West Bank and tanks, and they don't see the beautiful culture and the liberal side.[57]

Other bloggers similarly saw an opportunity to blunt international criticism of Operation Cast Lead by pointing to Hamas's intolerance toward gay men as a justification for the Israeli military action.[58] Back in the United States, StandWithUs circulated a flyer on college campuses in which it compared Israeli, Egyptian, Jordanian, Palestinian, Iranian, Lebanese, and other Middle Eastern states' policies on "sexual freedom" and concludes that Israel is the "only country in the Middle East that supports gay rights."[59]

Stacey Maltin, *International Pride Comes to Tel Aviv*, Ynetnews.com (June 13, 2009, 9:00 AM), http://www.ynetnews.com/articles/0,7340,L-3730396,00.html.

55. Operation Cast Lead, otherwise known as "the Gaza War," was a three-week Israeli military offensive begun in late 2008 aimed at stopping rocket fire from Gaza into Israeli territory. A U.N. report issued after the end of the war charged both Israel and the Palestinians with war crimes and possible crimes against humanity. U.N. Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, Human Rights Council, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) (by Richard Goldstone et al.).

56. Mel Bezalel, *Gay Pride Being Used to Promote Israel Abroad*, Jerusalem Post (June 7, 2009, 10:13 PM), http://www.jpost.com/Israel/Article.aspx?id=144736 (internal quotation marks omitted).

57. *Id.* (internal quotation marks omitted).

58. Paula Brooks, *What About the Gaza Gays?*, Lez Get Real: A Gay Girl's View on the World (Jan. 4, 2009, 3:21 PM), http://lezgetreal.wordpress.com/2009/01/04/what-about-the-gaza-gays/.

59. *Gay Rights in the Middle East*, StandWithUs, http://www.standwithus.com/pdfs/flyers/gay_rights.pdf (last visited Oct. 30, 2012). StandWithUs was by no means the first to use this strategy. "As the second Palestinian Intifada erupted in the autumn of 2000, a curious and persistent argument began being employed by supporters of the Israeli state. . . . [M]any of them rather macho young men who never identified themselves as gay and who almost certainly never lived in an Arab or Muslim country, would stand up and decry the lack of gay rights in the Palestinian Territories compared to their view

The timing of the pink turn in Israel's management of its international reputation is noteworthy. Convincing the world that Israel is a gay haven in the otherwise homophobic Middle East began to figure centrally in the marketing of Israel in the aftermath of Operation Cast Lead. Military tactics used by both the Israelis and the Palestinians in the Gaza War were subject to international criticism; however, the Israelis received particularly harsh condemnation from the international human rights community for the targeting of civilians and the use of disproportionate force.[60]

In the spring of 2011, as the Free Gaza Flotilla was preparing to sail to the Gaza Strip with the intent of highlighting the Israeli blockade of Gaza, a slick, well-produced video began to circulate on Facebook and elsewhere on the Internet, purportedly made by "Marc", a "gay rights activist."[61] He reported the "hurtful" and "heartbreaking" experience of being told by flotilla organizers that "the participation of [his] LGBT network would not be possible since it would not be in the overall interest of the flotilla."[62] He then explained to the camera how the organizers of the flotilla had close ties to Hamas and highlighted Hamas's violent hatred of women and homosexuals.[63] He ended with a plea to those who care about human rights: "Be careful who you get in bed with. If you hook up with the wrong group you might wake up next to Hamas."[64] The video got much play, including promotion by the Israeli Government Press Office on Twitter.[65] It was later discovered that "Marc" was an Israeli

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of the enlightened policies of Israel." Blair Kuntz, *"Queer" As A Tool Of Colonial Oppression: The Case Of Israel/Palestine*, ZNet (Aug. 13, 2006), http://www.zcommunications.org/queer-as-a-tool-of-colonial-oppression-the-case-of-israel-palestine-by-blair-kuntz.

60. The U.N. Fact-Finding Mission on the Gaza Conflict issued a controversial report on the force used by both sides in Operation Cast Lead. *See* U.N. Fact-Finding Mission on the Gaza Conflict, *supra* note 55.

61. marc3pax, *Who You Get in Bed With—Human Rights, Gay Rights*, YouTube (June 23, 2011), http://www.youtube.com/watch?v=vhmBbGFJleU.

62. *Id.*

63. *Id.*

64. *Id.*

65. *See Anti-Flotilla Video Fraud Linked to PM Netanyahu's Office, Official Israeli Hasbara Agents*, Max Blumenthal (June 24, 2011), http://maxblumenthal.com/2011/06/anti-flotilla-video-fraud-has-links-to-pm-netanyahus-office-official-government-hasbara-agents/ [hereinafter Blumenthal] ("Earlier today, the Israeli Government Press Office promoted the apparent hoax video on Twitter."); Benjamin Doherty, *Israeli Actor in Anti-Gaza Flotilla Pinkwashing Video Identified*, Electronic Intifada (June 25, 2011, 6:03 PM), http://electronicintifada.net/blog/benjamin-doherty/israeli-actor-anti-gaza-flotilla-

actor hired to create the video as a way of discrediting the flotilla's aims.[66] According to journalist Max Blumenthal, the Government Press Office's tweet was a re-tweet from a Netanyahu aide who seemed to have opened a Twitter account for the sole purpose of promoting the video.[67]

The fake anti-flotilla video well illustrates why Israel's use of gays in its re-branding campaign has been termed by critics as "pinkwashing."[68] Israel has effectively used the "gay issue" to advance a larger political aim of proving that Palestinians are too backwards, uncivilized, and unmodern to have their own state. The campaign to create gay solidarity with Israel around the globe has also, often unwittingly, drawn LGBT communities outside the Middle East into collusion with the Israeli state's larger public relations project.[69]

Israel's so-called pinkwashing of its treatment of the Palestinians as a tool to gain international support for its larger

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pinkwashing-video-identified (discussing the "YouTube video condemning the Gaza Freedom Flotilla for alleged homophobia, that was tweeted by the Israeli Government Press Office"); *see also* Ethan Bronner, *Setting Sail on Gaza's Sea of Spin*, N.Y. Times, July 2, 2011, at SR3 ("Israeli officials . . . had promoted the clip on Twitter and Facebook . . . ."); Catrina Stewart, *The Hoax Video Blog and the Plot to Smear a Gaza Aid Mission*, Independent (June 29, 2011), http://www.independent.co.uk/news/world/middle-east/the-hoax-video-blog-and-the-plot-to-smear-a-gaza-aid-mission-2304030.html (describing the "heavy promotion by Israeli government bodies on Facebook and Twitter").

66. Bronner, *supra* note 65 (stating that the "video was exposed as a fake," posted by an Israeli actor, and noting that Israeli "officials had long used the talking point that Hamas and other Islamist groups were intolerant of homosexuality"); Doherty, *supra* note 65 (revealing Marc's true identity as Omer Gershon, a figure "who is relatively well-known in the Israeli gay scene"); Stewart, *supra* note 65 (noting that bloggers, after becoming suspicious of the video's "slick production and heavy promotion by Israeli government bodies," exposed Marc as an Israeli actor named Omer Gershon).

67. Blumenthal, *supra* note 65.

68. *See* Sarah Schulman, *supra* note 8 (noting that the "global gay movement against the Israeli occupation" has named Israel's tactics "'pinkwashing': a deliberate strategy to conceal the continuing violations of Palestinians' human rights behind an image of modernity"); *see also* Gross, *supra* note 53 (criticizing the Israeli pinkwashing campaign as an effort to mask other human rights abuses occurring regularly within Israel's borders).

69. Parents and Friends of Lesbians and Gays (PFLAG) is one recent example thereof. Katherine Franke, *PFLAG Holds Israeli Pinkwashing Event,* Huffington Post (Feb. 22, 2012, 3:21 PM), http://www.huffingtonpost.com/katherine-franke/pflag-israel-pinkwashing_b_1290935.html (describing an event with Anat Avissar from Aguda on February 22, 2012 held at PFLAG headquarters and co-sponsored by the Israeli Embassy).

foreign policy aims demands careful analysis. The criticism of Israel embodied in the term pinkwashing does not deny the fact that gay men and lesbians enjoy a wide range of civil and other rights in Israel. They do.[70] Nor does the term deny that sexual minorities struggle in Arab societies. They do.[71] Rather, the claim is that

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70. Though, in Israel, as in other places where LGBT rights have gained traction, those rights were hard-won and need constant defense. As Erez Aloni, an Israeli queer legal scholar, reminded me: "Israel is a highly heteronormative and patriarchal state. It is also the case that the movement toward gay rights was achieved despite the strong resistance of the government—achievements were made mainly by the courts or the attorney general. What's more, many parental rights are banned for same-sex couples; [sic] and there is not even civil marriage—not to mention same-sex marriage, or inter-religious marriage by the state." E-mail from Erez Aloni, Fellow, Ctr. for Reproduct. Rights, Columbia Law Sch., to author (Feb. 27, 2012, 3:22 PM EST) (on file with author). To be sure, homophobia and transphobia are to be found throughout Israeli and Palestinian society. *See, e.g.*, Jason Koutsoukis, *Homophobia in Israel Still High but Declining Slowly, Says Survey*, Sydney Morning Herald (Aug. 7, 2009), http://www.smh.com.au/world/homophobia-in-israel-still-high-but-declining-slowly-says-survey-20090806-ebkb.html (stating that in a 2009 poll by Haaretz, following the Aguda attack, 46% of 498 people viewed homosexuality as a "perversion," while 42% disagreed); Ilan Lior, *Civil Patrol "Army" Formed to Stamp Out Homophobic Attacks in TA Park*, Haaretz (Feb. 18, 2012, 1:07 AM), http://www.haaretz.com/print-edition/news/civil-patrol-army-formed-to-stamp-out-homophobic-attacks-in-ta-park-1.409398 (noting two attacks against gay individuals in December 2011 and January 2012 near a gay communal center in Tel Aviv). The increasingly powerful role that the ultra-Orthodox wing (the *Haredim*) of Israeli society plays in shaping official governmental policy and public opinion more generally draws into question the claim that there is widespread support for gay rights across Israeli society. *See, e.g.*, Ethan Bronner & Isabel Kershner, *Israelis Facing a Seismic Rift Over Role of Women*, N.Y. Times, Jan. 15, 2012, at A1 (describing the tension between the ultra-Orthodox *Haredim* and the views of other Israelis regarding women); *The Takeaway: Israel's Secular and Moderate Majority Struggling with Ultra-Orthodox Minority* (Pub. Radio Int'l radio broadcast Jan. 16, 2012), *available at* http://www.pri.org/stories/politics-society/religion/israel-s-secular-and-moderate-majority-struggling-with-ultra-orthodox-minority-7965.html (describing the tension between the ultra-Orthodox and more moderate sects of Judaism on women). Similarly, the rise of Hamas in Palestinian society has been accompanied by a greater intolerance of homosexuality. *See, e.g.*, Press Release, Int'l Gay & Lesbian Human Rights Comm'n, Palestinian Territories: IGLHRC Supports Free Expression for ASWAT (Mar. 26, 2007), http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/415.html (noting that ASWAT, a Palestinian lesbian organization in Israel, received threats from Islamic leaders describing the organization as a "fatal cancer").

71. In Palestine, the oppression of LGBT people takes place as a cultural, not legal, matter. Palestinian "law" does not criminalize same-sex sex. The Palestinian Legislative Council has not adopted a criminal sodomy law. Thus, in the West Bank, where the Jordanian Penal Code is still applied, there is no legal

comparisons of this sort are irrelevant. The status of gay people in Israel is beside the point insofar as fundamental human rights are understood to be universal and not subject to zero-sum calculations: Israel's illegal occupation of Palestine cannot be somehow justified or excused by its purportedly tolerant treatment of some sectors of its own population. So too, many LGBT Palestinians bristle when the Israeli government purports to speak on their behalf and look after their interests, driving a wedge between their gay-ness and their Palestinian-ness. Israel expresses an interest in their welfare only so long as their interests are framed as gay. To the extent that they identify as Palestinian, Israel's helping hand cruelly curls into a fist. Indeed, that helping hand is more symbolic than real, since gay Palestinian asylum seekers cannot seek refuge in Israel,[72] nor can most gay Palestinians enjoy the hot gay nightlife of Tel Aviv due to the severe limitations placed on their movement by the laws of occupation.[73]

II. IRAN

Iranian President Mahmoud Ahmadinejad's visit to Columbia University in September of 2007 sharpened my attention to this queer (and by this I mean odd or curious) role of gay rights in larger state projects. Iranian President Mahmoud Ahmadinejad was invited to give a speech at Columbia University against a backdrop of two parallel U.S.-led wars in Afghanistan and Iraq; charges that Iran had been covertly supplying arms to Shi'a militias in Iraq; intense criticism by the U.S. government of Iran's efforts to build nuclear

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criminal sanction for same-sex sex, as the Jordanians repealed their sodomy law in 1951, well before the United States (2003) or the Israelis (1988) did so. Ritchie, supra note 43, at 114. In Gaza, where law from the British mandate is still applied, there is a law criminalizing sex between men, thus tracing the legal sanction of homosexuality in Gaza to colonial, not native, influences. *Id.* Unfortunately, the important work done by LGBT activists in Arab settings is often ignored when Arab societies are portrayed as more homophobic than others. Al Qaws, Aswat, and Palestinian Queers for Boycott, Divestment and Sanction are doing great work in Palestine, as are Helem and Meem in Lebanon, and Kifkif in Morocco. ALWAAN, Bint el Nas, and other websites also provide important resources to LGBT people in the Arab world.

72. Michael Kagan & Anat Ben-Dor, Nowhere To Run: Gay Palestinian Asylum-Seekers in Israel 20–22 (2008), *available at* http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/Nowhere.pdf.

73. Jason Ritchie's dissertation offers a nuanced and thoughtful study of the paradoxes of belonging and disenfranchisement experienced by Palestinian queers. Ritchie, *supra* note 43.

weapons; and ongoing campaigns of highly inflammatory anti-US rhetoric by the Iranian political leadership and, simultaneously, highly inflammatory anti-Iranian rhetoric by U.S. political leadership. This invitation was highly controversial—anti-Iranian forces arguing that President Ahmadinejad should not be given a forum in the United States, and others arguing that free speech and open democracy principles instruct that we should hear from those whose ideas we find most abhorrent. Still others, though admittedly a minority in the university community, felt that President Ahmadinejad represented an articulate, though at times extreme, counterpoint to U.S. imperialism in the Middle East and Western Asia. Notably, the Dean of Columbia Law School felt moved to take sides in this debate and issued a press release the day before President Ahmadinejad arrived at Columbia expressing anticipatory condemnation of the Iranian president's remarks.[74] To my knowledge, this was the first and only time that the law school's Dean has seen it appropriate to issue a formal denouncement of any individual—head of state or otherwise—invited to speak at the university.

President Ahmadinejad's speech would surely gain national attention given his views on U.S. involvement in Southwest Asia, his insistence on the duplicity underlying the Bush Administration's nuclear proliferation policies, and, of course, his comments about Israel and the Holocaust.[75] Yet the significance of the Ahmadinejad speech and the controversy it triggered has to be understood in local context. In the last several years, a number of Columbia faculty members who study the Middle East—and have taken positions that express some sympathy for the situation of the Palestinians—have been aggressively attacked by organizations in the United States

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74. Press Release, David M. Schizer, Dean & Lucy G. Moses Professor of Law, Columbia Law Sch., Statement by David M. Schizer Re: SIPA Invitation to Mahmoud Ahmadinejad (Sept. 23, 2007), http://www.law.columbia.edu/media_inquiries/news_events/2007/september07/deans_statement.

75. *See, e.g.*, Letter from President Mahmoud Ahmadinejad to "the American People," (Nov. 29, 2006), *available at* http://edition.cnn.com/2006/WORLD/meast/11/29/ahmadinejad.letter/ (accusing the Bush Administration of foreign policy based on "coercion, force, and injustice," with reference to the invasion of Iraq and U.S. support for Israel, and stating that "legitimacy, power and influence of a government do not emanate from its arsenals of . . . nuclear weapons"); *Iranian Leader Denies Holocaust*, BBC News (Dec. 14, 2005, 1:50 PM), http://news.bbc.co.uk/2/hi/middle_east/4527142.stm (describing Ahmadinejad's denial of the Holocaust and anti-Israel rhetoric as well as denunciation of his statements by Israel, Germany, and the EU).

charging them with being anti-Semitic or anti-Israeli.[76] These activities have included efforts to intervene in the tenure cases of two faculty members.[77]

When President Ahmadinejad arrived, he was "introduced" by Columbia University's President Lee Bollinger. President Bollinger's direct address to President Ahmadinejad included statements such as, "Mr. President, you exhibit all the signs of a petty and cruel dictator."[78] Bollinger criticized the Iranian president's pursuit of nuclear weapons; highlighted the mistreatment of women and homosexuals in Iran; cited Ahmadinejad's denial of the Holocaust as evidence that the Iranian president was either "brazenly provocative or astonishingly uneducated"; and noted as fact Iran's role in supplying arms to the militias in Iraq—thereby taking sides in a highly contested war and making an unsubstantiated claim of Iran's involvement in a proxy war in Iraq floated by the U.S. government.[79] Bollinger closed with the charge: "I doubt that you will have the intellectual courage to answer these questions."[80]

President Ahmadinejad responded by voicing criticisms of U.S. policy in the Middle East and Western Asia in tones and in terms rarely heard in the United States. He pointed out the hypocrisy of the United States' efforts to limit the rights of other nations to nuclear weapons when it regularly violates the nuclear arms

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76. *See, e.g.*, Karen W. Arenson, *Fracas Erupts Over Book on Mideast by a Barnard Professor Seeking Tenure*, N.Y. Times, Sept. 10, 2007, at B1 (describing the controversial tenure bid of a Barnard anthropology professor, Nadia Abu El-Haj, whose scholarship received criticism for perceived anti-Israel remarks); Jennifer Senior, *Columbia's Own Middle East War*, N.Y. Mag. (May 21, 2005), http://nymag.com/nymetro/urban/education/features/10868/ (discussing Columbia Unbecoming, a 2004 documentary accusing Arab professors of academic intimidation).

77. Richard Byrne & Robin Wilson, *Palestinian-American Scholar at Columbia U. Gets 2nd Chance at Tenure*, The Chron. of Higher Educ. (May 27, 2008), http://chronicle.com/article/Palestinian-American-Scholar/835.

78. Helene Cooper, *At Columbia University, Ahmadinejad of Iran Parries and Puzzles*, N.Y. Times (Sept. 25, 2007), http://www.nytimes.com/2007/09/25/world/americas/25iht-ahmedinejad.1.7626558.html?pagewanted=all (internal quotation marks omitted).

79. *Id.* (internal quotation marks omitted) (describing President Bollinger's statements on Iran's role in Iraq); Annie Karni, *Bollinger Stuns Ahmadinejad With Blunt Rebuke*, N.Y. Sun (Sept. 25, 2007), http://www.nysun.com/new-york/bollinger-stuns-ahmadinejad-with-blunt-rebuke/63300/ (describing President Bollinger's statements regarding Ahmadinejad's views on nuclear weapons, women, homosexuals, and the Holocaust).

80. Cooper, *supra* note 78.

non-proliferation treaty itself,[81] and asked why the Palestinian people should be shouldered with paying for the historical atrocity of the Holocaust when this genocide was committed by Europeans. He asked: "[W]hy is it that the Palestinian people are paying the price of an event they had nothing to do with?"[82] In response to a question from a student in the audience about why women were denied human rights in Iran, which included a condemnation of the execution of young men on account of their presumed homosexuality, Ahmadinejad replied that "[w]omen in Iran enjoy the highest levels of freedom," and then asserted: "In Iran, we don't have homosexuals, like in your country. . . . In Iran, we do not have this phenomenon. I don't know who's told you that we have it."[83] He then reminded the audience that in the United States, the state frequently executes individuals, not only gay people but many others.[84]

Surprisingly enough, despite ample coverage of President Ahmadinejad's visit to Columbia, the parts of the story that got the most attention were his remarks relating to women and homosexuals in Iran. As one would expect, domestic gay rights groups issued press releases the next day denouncing Ahmadinejad's denial of homosexuality in Iran, noting that without question there are men who have sex with men in Iran and they are treated very harshly by the Iranian government.[85] What was most remarkable from my

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81. *See* President Mahmoud Ahmadinejad, Keynote Address at Columbia University World Leaders Forum (Sept. 24, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401042.html ("If you have created the fifth generation of atomic bombs and are testing them already, what position are you in to question the peaceful purposes of other people who want nuclear power?").

82. "[W]e need to still question whether the Palestinian people should be paying for it or not. After all, it happened in Europe. The Palestinian people had no role to play in it. So why is it that the Palestinian people are paying the price of an event they had nothing to do with?" *Id.*

83. *Id.*

84. *See id.* ("Don't you have capital punishment in the United States? You do, too.").

85. *See, e.g.*, Press Release, Int'l Gay & Lesbian Human Rights Comm'n, Iran: IGLHRC Deplores Denial of Iranian Homosexuals by President Ahmadinejad (Sept. 34, 2007), http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/471.html (denouncing President Ahmadinejad's denial of the presence of sexual minorities in Iran); Press Release, Columbia Law Sch. Sexuality & Gend. Law Clinic, Sexuality and Gender Law Clinic Denounces Anti-Gay Remarks by Iranian President (Sept. 26, 2007), http://www.law.columbia.edu/media_inquiries/news_

perspective, however, was how conservative U.S. politicians and commentators highlighted sexism and homophobia in Iran as a justification for the denunciation of the Iranian president and as reinforcement of the widely held view that Iranian culture was particularly intolerant and primitive compared to Western modernity and cosmopolitanism.[86] Never mind that the U.S. government, particularly the administration in place during President Ahmadinejad's visit, was vulnerable to charges of sexism and homophobia as well.[87]

That gender and sexuality emerged as the most salient aspects of President Ahmadinejad's speech at Columbia is interesting not only because of how conservative U.S. politicians showed themselves to be deeply hypocritical on these issues when it so served their interests. Perhaps more importantly, the use of the rights of women and gay people as a device by which the United States asserted its moral superiority to Iran echoed similar uses of gender and sexuality in struggles for the West to assert its dominance over less "civilized" or "modern" peoples. Conversely, resistance to human rights norms that both construct and then protect a certain type of gendered and sexualized citizenship have been deployed outside the West in post-colonial and other contexts as a way of turning back

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events/2007/september07/Iran_GLBT (condemning the remarks made by President Ahmadinejad at the World Leaders Forum at Columbia University).

86. For example, on the show *On the Record w/ Greta Van Susteren*, the following exchange took place between Van Susteren and former Republican Congressman Newt Gingrich:

> GINGRICH: Well, I mean—you and I—I think that treating an evil leader—let me give you an example. He made a comment in passing there were fewer homosexuals in Iran.
> VAN SUSTEREN: Does he kill them?
> GINGRICH: They execute them. I'm just saying nobody got up and said, [h]ow you can have somebody here who denies the Holocaust, executes homosexuals, arrests students, tortures and kills journalists . . . .

On the Record w/ Greta Van Susteren: Newt Gingrich's Take on Ahmadinejad (Fox News television broadcast Sept. 24, 2007), *available at* http://www.foxnews.com/story/0,2933,297973,00.html.

87. *See, e.g.*, Planned Parenthood Fed'n of America, Inc., George W. Bush's War On Women: A Chronology (2003) (outlining actions taken by former President Bush that indicate a steady pursuit to eliminate reproductive freedom); Barbara Morrill, *A Surgeon General Who Will "Cure" Gays?*, Daily Kos (June 1, 2007, 9:07 AM), http://www.dailykos.com/story/2007/06/01/341697/-A-Surgeon-General-Who-Will-Cure-Gays- (concerning former President Bush's decision to nominate a Surgeon General who had co-founded a church that "ministers to people who no longer wish to be gay or lesbian").

Western hegemony and drumming up forms of nationalism.[88] The nation comes to acquire both a gender and a sexual orientation along the way.

Here we see the role of human rights law—particularly rights securing equality for gay men and lesbians—in the expansion of neo-liberalism and its fellow traveler, capitalism, in less economically developed precincts of the world. Revulsion toward gay men gets articulated as the most visible trope deployed by political leadership seeking to hold on to local control and governance, while tolerance toward homosexuality is demanded of those nations that seek membership in international economic and political communities. In the following sections I aim to illustrate these points through struggles for political and economic power in Romania and Poland and then will circle back to President Ahmadinejad's visit to Columbia University and the Israeli pinkwashing campaign. I will conclude with reflections on the ethical predicament for LGBT human rights advocates posed by the complex relationship between rights, nationalism, and global citizenship.

III. ROMANIA AND POLAND

Human rights norms provide as their justification and their source a set of universal and generalizable claims about the moral worth of all persons that requires the recognition of the inherent dignity and equality of all members of the human family, thereby entitling each of us to a set of inalienable rights which any government must respect as a condition of its legitimacy.[89] In the post-World War II era an adherence to human rights has become among the most important criteria by which a nation might prove

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88. "[S]tate efforts to eradicate the traces of empire and to resurrect an authentic post-colonial nation have produced sexual subjects that serve as a . . . reminder of a demonized colonial past and absence." Katherine Franke, *Sexual Tensions of Post-Empire*, 33 Stud. L. Pol. & Soc'y 63, 64 (2004). "[A] set of homosexual social and legal subjects have been created by the . . . government, and once so formed and disciplined, 'human rights' rides into the rescue to liberate them from social and legal opprobrium. . . . [T]he assistance of the international human rights establishment has further reinforced post-colonial nationalist rhetoric that located individual rights as a Western norm that threatens to undermine authentic . . . culture." *Id.* at 65.

89. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 1, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood.").

itself to be civilized and modern.[90] Inclusion in various institutions that embody modern global citizenship, such as the United Nations, the International Monetary Fund, NATO, and regional trade organizations, have come to require from applicants that they recognize a form of "individualized humanity" in their own citizens, and that those citizens possess certain inalienable rights by virtue of that humanity.

For example, the European rules that define whether a country is eligible to join the European Union (EU), commonly called the Copenhagen Criteria, set forth the following requirements:

> Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union.[91]

Accession states—those states that seek admission to the EU—are asked to undertake two important reform efforts to qualify for admission: One having to do with human rights and the other having to do with open markets.[92] However, in order to commence negotiations with a state seeking membership, the EU insists only that the accession state have made progress on the human rights and rule of law front.[93] These norms are given relative importance over the values of open markets, privatization, and fiscal and monetary stability.[94]

Romania's effort to secure membership in the EU provides an interesting example of how admission to modern economic society turns on the differentiation between civilized, rights respecting Europe and the non-rights respecting states to its east and south. Under this differentiation, Europe is economically disciplined, global, and modern, whereas its other is more primitive, tribal or local, communitarian, and economically antiquated. Romania's campaign to join the EU started in 1993 with its membership in the Council of Europe and culminated in its full EU membership in 2007. It offers a

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90. *See, e.g.*, Peter Fitzpatrick, Modernism and the Grounds of Law 121 (2001) (noting the importance of "the standard of civilization").

91. Presidency Conclusions, Copenhagen European Council (June 21–22, 1993).

92. *Id.*

93. *Id.*

94. *Id.*

useful example of the essential, but in many ways bankrupt, role of human rights law—particularly the rights of sexual minorities—in the evolution of a state's "credentialization" as global citizen.

Romania has had a shocking modern history of human rights violations, from Nicolae Ceausescu's rule through the post-Communist era.[95] The criminal treatment of homosexuality, the invasion of women's bodies in the name of the nation, and discrimination against Roma, were among the most extreme forms of state-sponsored rights-abridging behavior.[96] In 1968, the socialist Romanian government enacted Article 200, which criminalized sexual acts between persons of the same sex in any setting—expanding into the private domain a law that had previously criminalized only such acts that created a "public scandal."[97] Article 200 greatly increased the penalties for homosexuality, mandating sentences of one to five years.[98] This new law supplemented Ceausescu's pro-natalist decrees that compelled women to undergo periodic and compulsory gynecological examinations and severely punished abortions.[99] In 1986, Ceausescu declared: "[T]he fetus is the socialist property of the whole society. Giving birth is a patriotic duty . . . . Those who refuse to have children are deserters . . . ."[100] To a regime that predicated its authority on its surveillance of every detail of existence, there was no

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95. *See* Tom Gallagher, Romania After Ceausescu: The Politics of Intolerance (1995) (examining how officials have abused nationalism in post-1989 Romania to deflect criticism for human rights violations); *see also* Human Rights Watch, Struggling for Ethnic Identity: Ethnic Hungarians in Post-Ceausescu Romania (1993) (exploring the dramatic rise in racist propaganda in Romanian press and politics after the fall of Ceausescu in 1989).

96. *See, e.g.*, U.S. Helsinki Watch Comm., Violations of the Helsinki Accords, Romania: A Report Prepared for the Helsinki Review Conference 39, 45 (1986) (reporting state discrimination and persecution against ethnic minorities in Romania as well as "deep infringements of the right to privacy," including governmental pro-natalist campaigns); Charlotte Hord et al., *Reproductive Health in Romania: Reversing the Ceausescu Legacy*, 22 Stud. Fam. Plan. 231, 231–34 (1991) (describing "the world's most rigidly enforced pronatalist population policy" under Ceausescu's regime and the "challenges . . . facing Romania in the areas of reproductive health, family planning, and sex education" in the post-Communist era).

97. Ingrid Baciu, et al., Unspoken Rules: Sexual Orientation and Women's Human Rights 156-58 (Rachel Rosenbloom ed., 1996); Aleksandar Štulhofer, Sexuality and Gender in Postcommunist Eastern Europe and Russia 61 (2005).

98. Štulhofer, *supra* note 97.

99. Ctr. for Reprod. Law & Policy, Women's Reproductive Rights in Romania: A Shadow Report 14–16 (2000); U.S. Helsinki Watch Comm., *supra* note 96, at 45.

100. Hord, *supra* note 96, at 232 (internal quotation marks omitted).

realm beyond the interest of the state.[101] Liberal rights such as privacy thus found no traction in socialist Romania for women or for sexual minorities.[102]

After the violent overthrow of the socialist government in 1989, the laws prohibiting abortion were overturned,[103] yet the laws criminalizing sodomy were not.[104] Following complaints from Council of Europe rapporteurs, the Romanian government surrendered to the fact that its economic future lay to the West and reviewed its laws outlawing homosexuality when it sought Council membership.[105] Responding to European demands that Romania modernize its criminal laws, Romanian Justice Minister Petre Ninosu shot back: "If we let homosexuals do as they please, it would mean entering Europe from behind."[106] Another Romanian politician remarked at the time: "[O]f course the EU parliament wants us to abolish Article 200—they are all gay."[107]

Just as women's bodies were seized to play a key role in Ceausescu's nationalistic project, Romanian politicians used a homosexualized European body to aid in their own nationalist project by resisting repeal of Article 200. The nation took on the form of a sexualized body that was threatened with violation from the rear when the Council of Europe insisted that it bend to European values.

We witnessed the same fears expressed by the president of Poland in the spring of 2008 when he used the specter of gay marriage to trigger national resistance to Poland's ratification of the

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101. *See* Gail Kligman, The Politics of Duplicity: Controlling Reproduction in Ceausescu's Romania 22 (1998).

102. *See id.* ("By legislating reproductive behavior, the state intruded into the most intimate realm of social relations.").

103. U.N. Dep't of Econ. & Soc. Affairs, Population Div., Abortion Policies: A Global Review, at 54, U.N. Doc. ST/ESA/SER.A/129/Add.2, U.N. Sales No. E.95.XIII.24 (2002).

104. Homosexuality was illegal under Romanian law until 2001. Shirin Wheeler, *Romania's Gays Celebrate End of Ban*, BBC News (Dec. 20, 2001), http://news.bbc.co.uk/2/hi/europe/1721661.stm; Sinziana Carstocea, *Romania*, *in* The Greenwood Encyclopedia of LGBT Issues Worldwide 347, 352 (Chuck Stewart ed., 2010).

105. *See* Eur. Parl. Ass. Deb. 27th Sess. 929–30 (Sept. 24, 1996) (discussing the changes Romania had to make to its Penal Code as a condition to be accepted as a member of the Council of Europe).

106. Human Rights Watch, *supra* note 95, at 31–32 (internal quotation marks omitted). It is worth noting that Ninosu went on to become a member of the Romanian Constitutional Court.

107. Carl F. Stychin, Governing Sexuality: The Changing Politics of Citizenship and Law Reform 122 n.7 (2003) (internal quotation marks omitted).

new EU constitution. In a nationally televised speech, President Lech Kaczynski appealed to threats to Poland's national values and morality if the new constitution were ratified,[108] since it included the terms of the European Charter of Fundamental Rights—a document that includes rights for homosexuals.[109] President Kaczynski had his staff download a video from the Internet of two men marrying and used it as a backdrop to his address to the nation, while patriotic Polish music played along.[110] The two men, who live in New York and had posted the video on the Internet for their friends and family after they married in Canada, were outraged when they heard that they were being used as a homophobic prop to fortify Polish nationalism.[111]

Ultimately Romania repealed Article 200, and in 2007 it was admitted to the EU.[112] The coupling of a "victory" for gay people in Romania with every Romanian's long term economic interests by virtue of membership in the EU teaches us something important about the power and limits of using human rights law as the lever with which to pry more "backward" nations from their pre-modern ways and induct them into modern global citizenship.

Just as the Council of Europe pressured the Romanian government to repeal its laws criminalizing homosexual conduct, the Dutch government began funding a Romanian NGO called ACCEPT that would work toward the repeal of Article 200.[113] ACCEPT defined itself explicitly as a human rights organization, not as a local gay and lesbian grassroots service provider.[114] By formally affiliating with the largest federation of lesbian and gay associations in the Netherlands, and by receiving funding from the Dutch Foreign Ministry, ACCEPT's main mission was limited exclusively to the repeal of Article 200.[115] It

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108. *Address of President Lech Kaczynski* (TVP1 television broadcast Apr. 1, 2008), *available at* http://www.youtube.com/watch?v=cqbHnh7WNpU.

109. Charter of Fundamental Rights of the European Union art. 21, Dec. 18, 2000, 2000 O.J. (C 364) 1 ("Any discrimination based on any ground such as . . . sexual orientation shall be prohibited.").

110. *Address of President Lech Kaczynski*, *supra* note 108.

111. Sewell Chan, *Political Fight in Poland Hits Home for Gay Pair*, N.Y. Times, March 20, 2008, at B5.

112. *EU Approves Bulgaria and Romania*, BBC News (Sept. 26, 2006, 1:56 PM), http://news.bbc.co.uk/2/hi/europe/5380024.stm.

113. *See For a More Gay Romania*, ACCEPT, http://accept.ong.ro/foramoregayromania.html (last visited Oct. 30, 2012).

114. *See ACCEPT Association*, ACCEPT, http://accept-romania.ro/en/despre-noi/asociatia-accept/ (last visited Oct. 30, 2012).

115. *See About Us*, ACCEPT, http://accept-romania.ro/en/stiri/campanie-de-vara/ (last visited Oct. 30, 2012).

did not partner with other human rights campaigns in Romania, such as those launched on behalf of the Roma or women, nor did it see itself as enabling or responding to a local or indigenous grassroots gay or sexual rights movement in Romania.

Instead, ACCEPT was both responding to and speaking to an international audience in Western Europe. Much of the human rights script, therefore, was already written—ACCEPT merely had to perform it in Romania in a manner that was plausible enough to satisfy audiences in Amsterdam and Brussels.

What do I mean by this script? Here as elsewhere, European rapporteurs were not ethnographers prepared to find new forms of sexual affiliation that were the unique product of a post-Communist Romanian culture. Nor were they prepared to adapt their normative tools to respond to those unique conditions. Quite the contrary, European rapporteurs went looking for something familiar—a society that had homosexuals just like their homosexuals, who were discriminated against in predictable ways by public and private actors, and who should and could seek legal protection for that discrimination from the state. For a state like Romania, serious candidacy for admission to the EU meant performing plausible modernity by having a recognizable minority of citizens who understood themselves to "have" a gay identity just as in the European metropole and who could then be recognized by the state as rights-bearing subjects. The extent of the state's obligation with respect to these subjects was the annunciation of an anti-discrimination norm and a minimal infrastructure of enforcement.

This is what the Dutch paid for when they underwrote the activities of ACCEPT, and that is what they got. ACCEPT is an organization that did not primarily grow out of Romanian society, but instead played an important role as a bridge between the well-endowed European West and the needy European East. Although the EU parliamentarians insisted, in letters to the prime minister of Romania, that they were looking forward to welcoming Romania into the EU so long as they *"share the same values*,"[116] Romania was able to satisfy the Copenhagen criteria simply by repealing Article 200. This is the legally formalistic price of admission into the economic community of the EU.

The kind of gay subject these politics call up is one whose identity would coagulate in public institutions such as gay pride parades and gay community centers, where "gayness" could be

116. Stychin, *supra* note 107, at 134-35.

isolated and privileged over other kinds of identification grounded in, for instance, class, ethnicity, or religion.

Since 2004, a gay and lesbian pride parade, known as Gay Fest, has been held in Bucharest every June.[117] The first parade was named the Diversity Festival.[118] In 2006, Romania was named by Human Rights Watch as one of five countries in the world that had made "exemplary progress in combating rights abuses based on sexual orientation or gender identity."[119] Again, Western Europe got what they asked for in Romania—a Western style gay-rights movement that demonstrated the kinds of progress that mark a society being "civilized" by adherence to regional human rights norms as the price of membership in a global community.

It is impossible to say whether a kind of "gay identity" would have emerged in Romania in the absence of the type of interpellation that Western European parliamentarians insisted upon as a condition of EU membership—calling up recognizable gay subjects who could then be protected by human rights laws. Yet the almost singular focus on sexual rights as the marker of modernity has been accompanied by the neglect of other types of security and rights-based values. The "shadow report" prepared by Romanian women's rights NGOs to supplement the report of the Romanian government to the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2000 detailed the horrendous treatment of women.[120] Marital rape remains legal, there are no laws prohibiting domestic violence, laws prohibiting sex discrimination in the workforce are not enforced, and the maternal mortality rate is among the highest in all of Europe due to the fact that unsafe abortions remain the primary method of birth control in the absence of adequate family planning information and resources.[121] More recent

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117. *See About Us*, Gay Fest, http://www.gay-fest.ro/en/despre-noi/ (last visited Oct. 30, 2012).

118. *Info*, Gay Fest, http://www.gay-fest.ro/en/despre-gayfest/gayfest-2004/info/ (last visited Oct. 30, 2012).

119. *"Hall of Shame" Shows Reach of Homophobia: On International Day Against Homophobia, Violations Mixed With Victories*, Human Rights Watch (May 17, 2006), http://www.hrw.org/news/2006/05/16/hall-shame-shows-reach-homophobia.

120. Women's Non-Governmental Orgs. of Romania, Women's Status in Romania: A Shadow Report to the CEDAW 23rd Session (Apr. 2000), *available at* http://legislationline.org/documents/action/popup/id/7703.

121. *See id.* at 8–11, 18–22; *see also* Ctr. for Reprod. Law & Policy, Women's Reproductive Rights in Romania: A Shadow Report (2000), *available at* http://www.reproductiverights.org/pdf/sr_rom_0600_eng.pdf.

reports on the rights of Romanian women, particularly Roma women, show little improvement.[122]

What is more, Romania has received severe criticism for its willingness to allow the United States' CIA to set up secret detention camps and "black sites" in Bucharest where detainees have reportedly been subjected to sleep deprivation, slapping, and stress positions.[123] Perhaps this is the lesson of Romania's entrance into modern Europe: So long as you treat your gay people well, we'll look the other way when it comes to other human rights abuses, or worse, ask that you host the export of our own human rights dirty secrets.

The entrance of Romania into the economic and political community of Europe shows us several important things. During periods of political transition, sexuality has a curious way of surfacing when external threats are homosexualized as a means of solidifying or fortifying national identity within. The body of the nation becomes sexualized, if not heterosexualized, and a virulent and revitalized national heterosexual body stands ready to battle penetration or violation from the extraterritorial sexual other. When that heterosexualized state later seeks membership in a global political and/or economic community, it must revisit its sexual identity in ways that satisfy twenty-first century braiding of neo-liberal economics and sexual politics. This amounts to what is surely a tricky undertaking that involves identity management as part of a larger project of global citizenship. The state must convince a global audience of a newly found and genuinely felt tolerance toward homosexuality, including patriating its gay nationals, while hanging on to its own heterosexual reputation. The state's new homo-tolerance, some might even call it a kind of "metro-sexuality," becomes a kind of calling-card carried by the Finance and Foreign Ministers when they visit Geneva (WTO), Washington (IMF, United Nations) and Brussels or Strasbourg (European Parliament).

The Romanian experience shows us how the drive for economic inclusion in Western Europe—a drive that was understood explicitly by the Europeans as a process of civilizing the Romanians—

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122. *See* European Roma Rights Ctr. & Romani CRISS, Shadow Report: United Nations Convention on the Elimination of All Forms of Discrimination against Women in Romania for Its Consideration at the 35th Session 15 May to 2 June 2006 (2006), *available at* http://www.iwraw-ap.org/resources/pdf/Romania(2)_SR.pdf.

123. Scott Horton, *Inside the CIA's Black Site in Bucharest*, Harper's Mag. (Dec. 8, 2011, 11:37 AM), http://harpers.org/archive/2011/12/hbc-90008343.

justified the renovation of the heterosexualized body of the nation, while conjuring up a homosexualized private citizen. The new gay citizens this process produced emerged from a form of identity politics that is familiar to late-capitalist societies, but had few roots in post-communist cultures playing catch up, as was Romania. Identity becomes individualized, indeed privatized, along with the economy. So too, sexual orientation becomes a private fact about a person that should not have public consequences, such as discrimination in employment or the ability to serve in the military. Well-written laws, adequately enforced, can take care of the problem. Little or no effort was made to strengthen the institutions of civil society that might check the distributional inequalities of capitalist culture, might balk at the conscription of the West's weaker economic players in the United States' "global war on terror," and might have sought solidarity with other oppressed groups such as the Roma and women. Here, as in other contexts, international gay rights NGOs risk being used as the front end of the plow that opens up the path for new markets for European goods, new low-wage workers, and a much weaker social welfare state.

Certainly these events echo similar European efforts to advance forms of economic and human rights-based freedoms in the states formerly behind the Soviet Iron Curtain. In these contexts, both the cultural intelligibility of a gay citizen/subject and his or her rights-bearing status stand as the metonyms of freedom. That is, the lack of freedom is most convincingly evidenced by two things: First, the absence of a certain percentage of the population who will stand up, wave a rainbow flag, and proclaim their authentic homosexual identity ("We Are Family," as the Sister Sledge gay anthem declares[124]); and second, a state that is expected to recognize them by and through the enactment of anti-discrimination legislation. An international audience is fully prepared to stand in judgment of the societies who cannot produce a particular kind of gay citizenry and who refuse to extend human rights protections to that citizenry on the basis of their identity.

This formulation of the necessary relationship between identity formation, recognition, and rights was concretized in the Yogyakarta Principles in 2006 through a set of twenty-eight precepts that seek to integrate concerns about sexual orientation and gender

124. Sister Sledge, We Are Family (Atlantic Records 1979).

identity into the main of human rights law and norms.[125] For present purposes, Principle 3 is most important, holding that "[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."[126] Just as Article 15 of the Universal Declaration of Human Rights sets out that "[e]veryone has the right to a nationality . . . [and] no one shall be arbitrarily deprived of his nationality or denied the right to change his nationality,"[127] the Yogyakarta Principles are animated by a commitment to establish a universal and fundamental right to a sexual orientation and gender identity.[128] This seemingly progressive, inclusive, and dignity-respecting addition to the inventory of fundamental rights secured by international law makes an epistemic claim that risks a kind of violence in many contexts outside of the United States, Western Europe, and their satellites. It takes as given that all persons do, or should, understand themselves to have a sexual orientation and a gender identity, and that this sexually-oriented and gendered sense of self is fundamental not only to how they *know* themselves but fundamental to who they *are*.

A member in good standing in the community of human rights-abiding states (in contrast with those that are human rights-denying) must recognize this universal "fact" of humanity—that human bodies everywhere organize and then sort themselves according to a sexualized orientation. To deny or question the universality of this *truth of the human* is prima facie evidence of bigotry and intolerance.

IV. PRESIDENT AHMADINEJAD COMES TO COLUMBIA

This brings me back to President Ahmadinejad's visit to Columbia. President Bollinger's "introduction" of the Iranian leader was nothing if not a spectacular display of masculinity. The moment seemed to demand the performance of a kind of national manhood.

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125. Int'l Comm'n of Jurists, Yogyakarta Principles, Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2007). In November of 2006, "a distinguished group of human rights experts" gathered in Yogyakarta, Indonesia to draw up "principles on the application of international human rights law in relation to sexual orientation and gender identity." *Id.* at 7.

126. *Id.* at 11.

127. Universal Declaration of Human Rights, G.A. Res 217 (III) A, *supra* note 89, art. 15.

128. Int'l Comm'n of Jurists, *supra* note 125, at 8–9.

Having called President Ahmadinejad a "petty dictator," Bollinger closed his remarks with a put down, chiding the little man who wore no tie for lacking the courage, or even the capacity, to parry the thrust of Bollinger's accusations.[129] The occasion required that Bollinger get all gender-y, as Eve Sedgwick would have put it.[130]

President Ahmadinejad's comment that "[i]n Iran, we don't have homosexuals like you do in your country," and that "women in Iran enjoy the highest levels of freedom," offered evidence of what some in the United States thought they already knew about Iran and its political leadership: It is tyrannical, pre-modern, uncivilized, and not to be trusted—not trusted about its knowledge of its own people, nor about other issues such as its nuclear ambitions, its role in supporting the insurgency in Iraq, or its threat to Israel. While there may be some debate among experts about the extent and aims of Iran's nuclear program, no thinking person could doubt the existence of homosexuals in Iran and their entitlement to the protection of human rights law.

Or could they? What does it mean that here, as elsewhere, the denial of homosexuality and the persecution of sexual deviance are used as the ideal cudgel with which international actors could attack the Iranians?

First of all, I hasten to point out that the question of homosexuality in Iran is not one obviously amenable to a yes/no answer. Of course sexual identification, desires, and identities in Iran don't line up precisely as they do in the United States or in Western Europe. Why would they? Again, Joseph Massad has done a more than ample job of unpacking this complex issue in the Arab world,

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129. Cooper, *supra* note 78 ("[President Bollinger] said, 'Mr. President [Ahmadinejad], you exhibit all the signs of a petty and cruel dictator' adding, 'You are either brazenly provocative or astonishingly uneducated. . . . I doubt,' Bollinger concluded, 'that you will have the intellectual courage to answer these questions.'").

130. *See* Eve Kosofsky Sedgwick, *Gosh, Boy George, You Must be Awfully Secure in Your Masculinity!*, *in* Constructing Masculinity 11, 16 (Maurice Berger et. al. eds., 1995). In many respects the intended audience for Bollinger's "Iranophobic" remarks was not present in the room. Many alumni had adamantly denounced the university's invitation to the Iranian president on the ground that it amounted to a condonation of his anti-Zionist views. Furthermore, President Bollinger had received substantial pressure from New York politicians to cancel the Ahmadinejad event. He needed their support for plans to proceed with the expansion of the university campus into West Harlem despite, and sometimes over, the objections of local residents.

and his insights apply with equal force in Iran.[131] Afsaneh Najmabadi's and Pardis Madhavi's works have been equally important in exploring the contours of sexual and gender identity in modern Iran.[132] While I don't imagine that President Ahmadinejad's claim that there are no homosexuals in Iran was a nuanced reference to Massad's, Najmabadi's or Mahdavi's analysis of sexuality in Islamic countries, I do think that a thoughtful response to President Ahmadinejad's statement requires sensitivity to the imperial nature of the insistence upon the universal, stable, and binary fact of hetero- and homosexualities by some of the international human rights community.

Nonetheless, what of the exact words he used in his speech? I thought it might be useful to check the translation of his comment about gays in Iran. I asked an Iranian colleague, Professor Hamid Dabashi, whether the translation we received of the speech was accurate. As translated by Professor Dabashi while listening to the recording of the event, the exact words the Iranian president used were: "[I]n Iran we do not have homosexuals as you do. In our country there is no such thing. In Iran such things—in Iran—in Iran—there is no such thing. I have no idea who has said this to you."[133] Professor Dabashi raised two points about President Ahmadinejad's word choice. First, he focused on the phrase "as you do," noting that it could be "implicitly suggesting that we have a different kind of homosexuality in Iran," or it could mean, "we don't have them at all."[134] Dabashi's second point is subtler, and muddies the issue far more greatly. He wrote to me:

> [N]ow the other issue is that when the second time he says "In Iran there is no such thing" the phrase that he uses is literally "such a thing has no external presence/*vojud e khareji nadareh*"—now this phrase "*vojud e khareji nadareh*" idiomatically means "does not exist" but literally means "has no external

131. Massad, *supra* note 9.

132. *See, e.g.*, Afsaneh Najmabadi, Women with Mustaches and Men Without Beards: Gender and Sexual Anxieties of Iranian Modernity (2005) (discussing evolving social views in Iran in the areas of gender and sexuality since the 19th century); Pardis Mahdavi, Passionate Uprisings: Iran's Sexual Revolution (2009) (describing sexual habits and social views of modern Iranian youth and their effect on Iranian society).

133. E-mail from Hamid Dabashi, Hagop Kevorkian Professor of Iranian Studies & Comparative Literature, Columbia Univ., to author (Feb. 12, 2011, 12:29 PM EST) (on file with author) (internal quotation marks omitted).

134. *Id.*

> existence"—yet another polyvalent phrasing that has embedded in it the suggestion that homosexuality is not a socially acceptable behavior in Iran, namely we do not see it in public space—adding credence to the first reading of "as you do" I suggested above—namely, again a sympathetic reading of Ahmadinejad that in Iran these are private matters.[135]

Far too many human rights groups, politicians, and media outlets outside Iran responded to President Ahmadinejad's remarks with the demand for recognition: "Yes, of course there are gay people in Iran!" Even my own colleagues at Columbia Law School's Sexuality and Gender Law Clinic issued a press release immediately after the speech expressing outrage at the Iranian president's denial of a gay Iran, at the persecution of lesbian and gay Iranians by the government.[136] They unfavorably compared that horrendous treatment to the favorable constitutional protections that homosexuals receive in the United States.[137] The press release noted that gay Iranians have sought asylum in the United States and suggested that this fact was evidence of the greater freedoms here in the United States and lesser freedoms there in Iran.[138]

LGBT rights advocates found themselves in an unintended allegiance with political conservatives in Washington who, despite long and vitriolic opposition to positive legal rights for homosexuals in the United States, opportunistically used this moment to proclaim the moral superiority of the United States compared to the hostile-to-gays Iranian government. They pointed to the intolerance of Islam toward homosexuality as evidence of Iran's backwardness, while failing to mention that all but a few of the organized Christian churches in the United States vehemently oppose the rights of gay people.

Immediately after President Ahmadinejad's speech, media outlets and blogs recirculated a horrible picture of two young Iranian men being hanged in 2005, ostensibly for being gay.[139] At the time of

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135. *Id.*

136. Press Release, Columbia Law Sch. Sexuality & Gend. Law Clinic, *supra* note 85.

137. *Id.*

138. *Id.*

139. *See, e.g.*, *Iran Continues To Execute Gays*, Joe. My. God. (Nov. 13, 2007), http://joemygod.blogspot.com/2007/11/iran-continue-to-execute-gays.html (describing the release of the photos); *see also* Steve Shives, *Ahmadinejad Denied More Than the Holocaust This Time*, Yahoo! Voices (Sept. 26, 2007),

the execution in 2005 there had been a vocal outcry from the international human rights community decrying this kind of treatment of Iranian gay men.[140] Tom Lantos, then a member of the U.S. Congress and a Holocaust survivor who had long been an adamant supporter of Israel and a critic of Arab states or states influenced by Islam, strongly condemned the action: "This sickening episode shines a bright light on the severe shortcomings of the Iranian legal system. . . . [I]n this case, authorities apparently chose to play on deep-seated feelings of bigotry toward homosexuality."[141] The Belgian Foreign Minister and a British gay rights group similarly joined the protest. Peter Tatchell, a British activist, claimed "this was just the latest barbarity by the Islamo-fascists in Iran."[142]

It turns out, however, that the young men in this picture were very likely prosecuted for sexually assaulting a thirteen-year old boy, not for consensual homosexual conduct.[143] Reports of their

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http://voices.yahoo.com/ahmadinejad-denied-more-than-holocaust-time-571138.html?cat=9 (discussing the 2005 public hangings of the two teenagers in the context of Ahmadinejad's 2007 speech at Columbia University).

140. *See, e.g.*, *Report: Gay Youths Hanged in Iran*, Towleroad, (July 20, 2005), http://www.towleroad.com/2005/07/report_gay_yout.html (decrying the hanging of the two men).

141. Press Release, Rep. Tom Lantos, Rep. Lantos Deplores Iran's Killing of Gays (July 27, 2005), *available at* mpetrelis.blogspot.com/2005/07/rep.html.

142. *Execution of Gay Teens in Iran—Ayatollahs Have Murdered 100,000 People*, Peter Tatchell (July 27, 2005) http://www.petertatchell.net/international/iran/iranexecution.htm. The term "Islamo-fascist" is not original to Peter Tatchell, but has a history traceable back to conservative commentators who sought an effective neologism to link modern states made up of predominantly Muslim populations to European fascist states in the early to mid-19th century. David Horowitz's Freedom Center has organized something dreadfully called "Islamo-Fascism Awareness Week" on college campuses in the last several years, with the purported aim of educating students about the imminent threat of radical Islam, but with a more frank design of intimidating Muslim students and women's studies departments. *A Student's Guide to Hosting Islamo-Fascism Awareness Week*, Terrorism Awareness Project, http://www.terrorismawareness.org/islamo-fascism-awareness-week/49/a-students-guide-to-hosting-islamo-fascism-awareness-week/ (last visited Oct. 30, 2012). Columbia University faculty members have been a particular target of these events. Horowitz's Freedom Center, working together with CampusWatch, has launched efforts to discredit several faculty members whose scholarship and teaching have included sympathy toward the struggle for Palestinian statehood, the plight of Palestinian people, or criticism of Israeli state policy. Larry Cohler-Esses, *The New McCarthyism*, Nation (Oct. 25, 2007), http://www.thenation.com/article/new-mccarthyism#.

143. Press Release, Amnesty Int'l, Iran Continues to Execute Minors and Juvenile Offenders (July 22, 2005),

homosexuality had originated with an opposition group in Iran—the National Council of Resistance of Iran—knowing full well that the international media and human rights community would pick up on it immediately as a justification for criticism of the Iranian government.[144] And they were right. Meanwhile, there were local groups in Iran that had galvanized support for the reform of the death penalty and criminal laws applying to children through the use of the case of the hanging of these two young men.[145] This work was severely undermined when the international community intervened and plucked these two boys out for special treatment because they were "gay."[146]

I raise this not to deny that the Iranian government has a policy of persecuting men who have sex with men, or women who have sex with women, but rather to illustrate how many of the events in Iran must be understood in light of how they are inextricably intertwined with global politics, in which rights-based claims for sexual liberty are used by states as the lever to pry other state interests loose. These images, stories, prosecutions, executions, and statements are taken up and manipulated in the service of narratives of modernity, backwardness, threats to the sovereignty of Iran, threats by Iran to the sovereignty of other nations such as Israel or Iraq, and internal politics and resistance within Iran itself, as the last example clearly illustrates. That the possibly fabricated persecution of gay men could be so easily tossed up by the domestic political opposition in Iran to an international audience—already poised to criticize the Iranian government—should itself give us pause when we consider the role of sexuality in struggles for and against global citizenship.

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http://www.amnesty.org/en/library/asset/MDE13/038/2005/en/1628dceb-d4c7-11dd-8a23-d58a49c0d652/mde130382005en.html.

144. *See* Richard Kim, *Witness to an Execution*, Nation (Aug. 7, 2005), http://www.thenation.com/article/witnesses-execution (discussing the unclear circumstances surrounding the 2005 execution and the spread of news about the incident via Iranian and Western media).

145. *See, e.g.*, *Nobel Laureate Condemns Hanging of 2 Teenage Boys*, Chicago Trib. (July 24, 2005), http://articles.chicagotribune.com/2005-07-24/news/0507240331_1_shirin-ebadi-raping-teenage-boys (noting that Nobel Peace laureate Shirin Ebadi has stated that her organization, the Center for the Protection of Human Rights, "will intensify its fight against Iran's execution of minors").

146. Interview with Afsaneh Najmabadi, Francis Lee Higginson Professor of History & of Studies of Women, Gend. & Sexuality, Harvard Univ., in Cambridge, Mass. (Sept. 20, 2008).

V. ISRAEL REDUX

In some respects, the deployment of LGBT rights by states to further other national and nationalist interests is nothing new. Woodrow Wilson "used" the enfranchisement of women in the United States in the immediate post-World War I period as a means by which to champion the moral superiority of the United States., The U.S. military was racially integrated by Harry Truman after World War II for reasons that had as much to do with efforts to distinguish the United States from the Soviet Union as with the rightness of African American civil rights.[147] Likewise, the universalist humanism that underlies the post-World War II human rights paradigm always risks a kind of biopolitics that should give us pause, whether the rights asserted are on behalf of LGBT people in Egypt or Romania, on behalf of women undergoing genital cutting in Sudan, against foot binding in Japan, or abortion rights in the United States and elsewhere.[148]

To be honest, I'm happy sitting out the internecine battle between the likes of Joseph Massad, on the one hand, and the LGBT advocates at Human Rights Watch, on the other, when it comes to the impossible goal of getting the descriptive project "right" on the question of identity and sexual practices. For present purposes, I have a different bone to pick. It has to do with who and what is actualized when the LGBT subject is given a voice through the intervention of human rights. To what degree should a state's operationalization of sexuality and sexual rights trigger a set of ethical concerns back at the home office of the NGOs working to advance sex and sexuality-based human rights? When non-state actors seek to engage the human rights apparatus in the name of the rights and freedom of certain populations and practices, what sort of duty do they have to take into account the ways in which the meaning and implications of their work may not be of their own making or design?

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147. *See* Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 524–25 (1980).

148. Is the "right" feminist ending to the film Juno (Fox Searchlight Pictures 2007), one where she has the abortion rather than carries the child to term? For a smart discussion of the biopolitics of abortion rights, see Lauren Berlant, *A Barrel of Acid and a Barrel of Water*, Supervalent Thought (Feb. 24, 2008), http://supervalentthought.com/2008/02/24/a-barrel-of-acid-and-a-barrel-of-water-or-things-happen-like-this/ (discussing Christian Mungiu's film 4 Months, 3 Weeks and 2 Days (BAC Films 2007)).

Lauren Berlant has urged that we concern ourselves with a kind of moral atrophy that sets into some rights-based social movements precisely at the moment that the state "takes up" their cause.[149] Might a kind of atrophy be at risk when the state starts doing the heavy lifting related to defending the rights of sexual minorities, as we saw in the examples I discussed above? Whether in the sodomy reform politics of post-Ceausescu Romania or in today's same sex marriage politics in the United States, there is a risk that the rights-bearing gay subject—a new "good citizen"—emerges in the foreground of a national landscape while at the same time producing at its margin others who are not so good.

We might laud Israel's political leadership when it stood up for the gays after the Tel Aviv shooting, but we ought to note the circumstances when these leaders stood down in the face of similar violence perpetrated in more trying circumstances from the perspective of the liberal state. Prime Minister Netanyahu came out as a defender of gay Israelis when attacks were made against innocent young people who had gathered privately in Tel Aviv, but not when members of the Israeli religious right attacked radical queers who marched in the streets of Jerusalem.[150] A "gay right" is not a "gay right" is not a "gay right." The LGBT kids in the basement—by no means deserving any form of attack—posed little challenge to the liberal state, whereas the queers in the streets just might have. Aeyal Gross has posed an even more difficult challenge: "Israeli politicians and the GLBT community must ask whether the massacre of children in Gaza, and in Sderot, is less shocking that [sic] that of children on Nachmani Street in Tel-Aviv [where the Aguda is located]."[151]

This is all to say that a particular kind of caution is called for when the state becomes a partner in the project of converting wrongs into rights and outlaws into rights-bearing citizens. As Nietzsche observed in the late nineteenth century, liberal or progressive causes become significantly less liberal or progressive as soon as they are

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149. *Id.* (drawing from Mladen Dolar, *At First Sight*, *in* Gaze and Voice as Love Objects: Sic 1, at 129 (Renata Salecl & Slavoj Zizek eds., 1996) and 4 Months, 3 Weeks and 2 Days).

150. Jonathan Lis & Amiram Barkat, *J'lem Gay Parade Halted After Protester Stabs 3 Marchers*, Haaretz (July 1, 2005, 12:00 AM), http://www.haaretz.com/print-edition/news/j-lem-gay-parade-halted-after-protester-stabs-3-marchers-1.162735.

151. Aeyal Gross, *Harvey Milk Was Here*, Zeek: Jewish J. Thought & Culture (Oct. 25, 2009), http://zeek.forward.com/articles/115761.

embraced by the state.[152] His conclusion that "there are no worse and no more thorough injurers of freedom than liberal institutions,"[153] may press the point further than I would like, yet the idea is one with resonance for present purposes. As John D'Emilio taught us in *Sexual Politics, Sexual Communities*,[154] the legibility of modern homosexual identity has been intimately tied to the interests and needs of the liberal state, and in the cases I have discussed here we see evidence of how modern liberal states have made good use of their rights-bearing homosexual citizens.

Noting the duplicity of the state's homo-friendliness is not enough. Rather the "patriotized" rights-bearing LGBT subject and "its" movement have a duty to actively resist being mustered into nationalist projects undertaken in its name and purportedly on its behalf.

Once we recognize that the normative homosexuality that undergirds human rights discourse is not merely a "fact" in the world, but more of a complex value, it becomes easier to see how the state's embrace of the sexual citizenship of these new human rights holders risks rendering more vulnerable a range of identities and policies that have refused to conform to state-endorsed normative homo- or hetero-sexuality. This is true both for queers whose desires refuse to orient themselves ineluctably toward marriage, as well as for Muslims with sexual norms and practices of polyamory, homosociality, and modesty.[155] Under this scenario, newly enfranchised gay citizens find themselves implicated, whether they want to or not, in the construction and identification of the "enemies of the state." Witness the ingenious strategy of StandWithUs and the Israeli Foreign Ministry to appeal to gay rights supporters in their efforts to shore up Israel's foreign policy objectives with respect to Palestine and Iran.[156]

The challenge of disentangling the state's agenda from our own is enormously difficult, in no small measure due to the degree to which the problem is set up by what Foucault called the "incitement to discourse."[157] With this he sought to capture the process by which

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152. Friedrich Nietzsche, *Twilight of the Idols*, *in* The Portable Nietzsche 541 (Walter Kaufmann ed. 1976).

153. *Id.*

154. John D'Emilio, Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940–1970 (1983).

155. This is among the arguments made by Puar, *supra* note 9.

156. *See supra* notes 55–59, 61–69 and accompanying text.

157. Michel Foucault, The History of Sexuality, Vol. 1: An Introduction 17–35 (Robert Hurley trans., 1st ed. 1978) (1976).

"taking sex 'into account'"[158] transforms it from something understood within the grasp of morality (how do we judge it along a continuum of sacred to disgusting) to that of reason (how do we make it useful). Remarkably, the way he describes the eighteenth century rational turn in conceptualizing sexuality applies with equal measure to the contemporary examples I offer in this essay:

> [O]ne had to speak of it as of a thing to be not simply condemned or tolerated but managed, inserted into systems of utility, regulated for the greater good of all, made to function according to an optimum. Sex was not something one simply judged; it was a thing one administered. It was in the nature of a public potential.[159]

The public potential of sex and sexuality in today's context has materialized in homonationalist policies when states gain political power by and through the granting of civil rights to "their" sexual minorities. Civil rights, in this regard, not only enable the expansion of state power, but also have had the felicitous effect of de-politicizing the communities in whose name those rights are mobilized.[160]

Does this discussion leave us helpless in the face of a critique that eschews both the epistemic violence of securing human rights for global gay subjects on the one hand, and state politics as cynical, manipulative, instrumental, and tragic on the other? To be sure, this is where some find themselves. But we can do better than that.

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158. *Id.* at 24.

159. *Id*.

160. "[T]he language of gay rights in the Arab world is a double bind: we must use it in order to achieve restitution from very real, and very immediate oppression, but as we use this language it mobilizes us in a struggle to transform questions of social, political, and economic justice into claims of discrimination. This discrimination, in turn, can only be addressed by nation states or by international political bodies that are actively involved in oppressing our peoples, our families and loved ones, and the parts of us that not captured by the LGBTQ paradigm. We cannot 'choose' to not be who we have become, but we must recognize how we have been formed as neoliberal rights seeking and speaking bodies, and how this formation is linked to a history of depoliticization and alienation. In other words, we must be both tactical and skeptical when this language reaches to embrace us, and when we, as activists and as academics, use it ourselves. We must find ways to critically inhabit this homonational world and try, always, to act within the uncomfortable and precarious line between rights and justice." Maya Mikdashi, *Gay Rights as Human Rights: Pinkwashing Homonationalism*, Jadaliyya (Dec. 16, 2011), http://www.jadaliyya.com/pages/index/3560/gay-rights-as-human-rights_pinkwashing-homonationa.

Critical awareness of the state's role as now-fundamental partner in the recognition and protection of a form of sexual rights should push us to regard these "victories" as necessarily ethically compromised.

The moral atrophy that has kept us from recognizing the tragedy of these strategies and outcomes is where more critical, and indeed discomfiting, work needs to be done by theorists and activists alike. This means rethinking the horizon of success. "Victory" in the sense of gaining the state as a partner, rather than an adversary, in the struggle to recognize and defend LGBT rights ought to set off a trip wire that ignites a new set of strategies and politics. This must necessarily include a deliberate effort to counteract, if not sabotage, the pull of the state to enlist rights-based movements into its larger governance projects, accompanied by an affirmative resistance to conceptions of citizenship that figure nationality by and through the creation of a constitutive other who resides in the state's and human rights' outside.

VI. CONCLUSION

I will end with Israel, just as I began this essay, to highlight a community that has resisted some of the moral atrophy that often accompanies conscription in the state's larger projects. Some queer activists in Israel have parted company with the mainstream of the LGBT community, rejecting the terms of the deal made with the Israeli government whereby their rights are recognized in exchange for being used as a public relations tool.[161] The 2010 Tel Aviv gay pride parade was held only a few days after the Gaza flotilla raid, and the more radical/queer wing of the community chose to hold an alternative parade in which they would disidentify queer people with the sort of nationalism that the state had been actively cultivating, thus reinforcing a kind of anti-nationalist identification.[162] Their banners read: "There is no Pride in the Occupation."[163] These queer/left politics were met with an even greater homonationalization of the mainstream Gay Pride Parade, resisting what they termed the "occupation" of gay pride by queers who identified with the

161. This is how Aeyal Gross has put it in his analysis of the current rift between gay and queer activists in Israel. *See* Gross, *supra* note 53 (discussing the rift between queer radical activists and supporters of homonationalism, and noting that "gay rights have essentially become a public-relations tool").

162. Aeyal Gross, *The Politics of GLBT Rights in Israel (and Beyond): Between Queer Politics and Homonationalism* 26–28 (unpublished manuscript presented at Columbia Law School, Oct. 18, 2010) (on file with author).

163. *Id.*

Palestinians not with Israel.[164] Their signs and stickers, donned for the main parade, offered a retort to the signs of the anti-nationalists: "[N]o to the occupation of the parade," and "I am a proud Zionist."[165] In the end, the resistance of some Israeli queers to their cooptation into a nationalist project provoked an invigorated re-nationalization of the Gay Pride Parade in response, resulting in the proliferation of Israeli flags held by parade-goers.[166] Nevertheless, this intervention introduced and cemented a link between the dangers of Israeli nationalism, religious fundamentalism, and homophobia in a way that shifted the frame for gay politics in Israel.

Queer activists in Israel offer an example of a new kind of politics that at once appreciates the value of rights and launches new strategies to resist the perils of partnership with the state. Having said that, it is important to note how narrow the room for this work is and how perilous it can be. In February of 2011, I received an e-mail from the Office of Cultural Affairs of the Israeli Consulate letting me know that the Embassy was sponsoring a U.S. tour of a new documentary on the early days of the Israeli gay rights movement. "We would love to try and organize a screening and talk with Yair [Qedar, the filmmaker] at Columbia University," the official wrote me. Worried that I was being invited to participate in a pinkwashing event, I e-mailed my colleague, Aeyal Gross, a law professor at Tel Aviv University, and asked whether he knew anything about the filmmaker or the film, *Gay Days*, and whether this was "the usual sort of propaganda." He wrote me back immediately,

> Yair—the director—is a friend and the film is certainly not propaganda. I'm sure some will consider any depiction of gay rights in [I]srael as such but you know that's not a view I share—we should be able to talk of gay rights in [I]srael even if [it] is also co-opted. . . . . I think that it almost impossible to distinguish Israeli government promoting culture from the political uses of that, but as I say the film is not a propaganda effort—not coming from there at all (even if government promotes it for its own purposes). The director was involved in [grassroots] activism and founded Israeli gay monthly which under his

164. *Id.*
165. *Id.*
166. *Id.*

> leadership was a voice for queer thought (I used to write there regularly) and its dissemination.[167]

In Aeyal's response lies the challenge of activism in the era of homonationalist politics. Once the state takes up your cause—for the dual purpose of embracing greater rights and of advancing the state's own larger political aims—politics becomes much more complicated in tragic ways. Jasbir Puar has termed the tethering of gay rights to nationalist projects a kind of "golden handcuffs."[168]

Working on the role of LGBT rights in relation to Israel/Palestine is particularly challenging in this regard, given that any critique of Israeli state policy (and it is important to reiterate that I am talking about *state* policy, not individual Israelis or Jews) is immediately tagged as anti-semitic. What is more, recently enacted Israeli law makes careful political engagement with these hard issues even more difficult. The "Boycott Bill" passed by the Knesset in July of 2011 allows Israeli citizens to bring civil suits against persons and organizations that call for economic, cultural, or academic boycotts against Israel, Israeli institutions, or regions under Israeli control.[169] It also prevents the government from doing business with companies that initiate or comply with such boycotts.[170]

I must confess that I have experienced aggressive, sometimes violent, reactions to the recent work I have done that expresses sympathy for the rights of Palestinians and offers criticisms of Israeli state policy. As someone who has often taken unpopular positions in the LGBT and feminist communities,[171] I thought I was prepared for the backlash that engagement with pinkwashing might generate.[172] I

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167. E-mail from Aeyal Gross, Associate Professor of Law, Tel-Aviv Univer., to author (Feb. 11, 2011, 9:40 PM EST) (on file with author).

168. Jasbir K. Puar, *The Golden Handcuffs of Gay Rights: How Pinkwashing Distorts both LGBTIQ and Anti-Occupation Activism*, The Feminist Wire (Jan. 30, 2012), http://thefeministwire.com/2012/01/the-golden-handcuffs-of-gay-rights-how-pinkwashing-distorts-both-lgbtiq-and-anti-occupation-activism/.

169. Lahav Harkov, *Anti-Boycott Bill Becomes Law After Passing Knesset*, Jerusalem Post (July 11, 2011), http://www.jpost.com/DiplomacyAndPolitics/Article.aspx?id=228896.

170. *Id.*

171. *See, e.g.*, Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 Colum. J. Gender & L. 236 (2006) (reflecting on the politics of same-sex marriage politics); Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law & Desire*, 101 Colum. L. Rev. 181 (2001) (critiquing the absence of a positive theory of female sexuality in feminist legal theory).

172. I know for a fact that the threat of backlash has chilled the speech of other academics that, in a more open intellectual and political environment,

wasn't. Both our "golden handcuffs," to borrow Puar's term, and the chilling effect of the blowback certain political critique now receives, has made very crabbed room for politics and intellectual work that questions the role sexual civil rights now play in larger nationalist projects.

Queer activists in Israel/Palestine have something to teach us about what it means to do politics that resists state occupation. In their own ways, on either side of the so-called security "fence" (*hafrada*) or "wall" (*jadir*), some queers in the region are carving a path that neither privileges a global "gay citizen" nor succumbs to raw nationalism or racism/anti-semitism. The Palestinian queers I have met have a complex analysis of the relationship of occupation to homophobia, and refuse to privilege their experience of one over the other. They are acutely aware of and their politics respond to the ways in which negative social and cultural attitudes toward homosexuality in Palestinian culture are shaped in important ways by the occupation itself. They resist a politics that elevates a particular kind of sexual identity, such as gay or lesbian, over and apart from their identity as Palestinian. In this sense, their task has been so much more complicated than merely making demands for a gay pride parade in al-Manara Square in the center of Ramallah. Rather they situate queer politics within a complex web of Israeli occupation, nationalist resistance to the occupation, the weakness of the Palestinian Authority, the rise of Islamist politics, and a Palestinian biopolitical project that figures reproduction and the hetero-normative family as vital to national survival. All of these dynamics "have had serious consequences for Palestinian queers, not because Islam is an inherently (or particularly) 'homophobic' religion, but because *Islamism* has ascribed a (negative) ideological value to 'homosexuality' that did not exist before."[173]

So too, radical queer voices in Israel have refused the appeal of the new queer nationalism that they have been offered. They insist on drawing connections between the radicalism of the settlers' homophobia/sexism and their imperial project in Palestine. The creation of social space for out LGBT people in Israel has occurred alongside the evacuation of Palestinians from that same territory. The one doesn't necessarily cause the other, but the former has been used in the service of the latter. As one Israeli human rights lawyer

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would have undertaken projects that question both pinkwashing and Israeli state policy with respect to Palestine.

173. Ritchie, *supra* note 43, at 121.

from Tel Aviv told a group of us on the first LGBTI delegation to Israel/Palestine in January 2012, "Tel Aviv may be the most gay city in the world, but it's also the least Arab you'll find in the Middle East."[174]

This is what queering our politics demands: a refusal to take up the frames, and the identities those frames call up, which "winning" our rights produces. As it also turns out, rights are something the state is particularly well-suited to provide, and, as it turns out, those very rights end up being quite easily requisitioned by the state to advance its own larger interests. It falls on us, those in whose name those rights materialize, to resist the seduction of the state that, at long last, offers us its embrace, and in return seeks collaboration in its own imperial projects.

174. Source declined identification due to the sensitivity of his work.

MAY 4TH: BLACK LIVES MATTER

A MOVEMENT FOR RACIAL AND GENDER JUSTICE

Women and Black Lives Matter: An Interview with Marcia Chatelain

Marcia Chatelain and Kaavya Asoka ▪ Summer 2015

At the Millions March in Oakland, December 13, 2014 (Daniel Arauz via Flickr)

In recent months, the deaths of Michael Brown, Eric Garner, Freddie Gray, and others have mobilized an unprecedented mass movement against police brutality and racism that we now know as Black Lives Matter.

So far, the movement's attention primarily to the experiences of black men has shaped our understanding of what constitutes police brutality, where it occurs, and how to address it. But black women—like Rekia Boyd, Michelle Cusseaux, Tanisha Anderson, Shelly Frey, Yvette Smith, Eleanor Bumpurs, and others—have also been killed, assaulted, and victimized by the police. Often, women are targeted in exactly the same ways as men—shootings, police stops, racial profiling. They also experience police violence in distinctly gendered ways, such as sexual harassment and sexual assault. Yet such cases have failed to mold our analysis of the broader picture of police violence; nor have they drawn equal public attention or outrage.

A growing number of Black Lives Matter activists—including the women behind the original hashtag—have been refocusing attention on how police brutality impacts black women and others on the margins of today's national conversation about race, such as poor, elderly, gay, and trans people. They are not only highlighting the impact of police violence on these communities, but articulating why a movement for racial justice must necessarily be inclusive. Say Her Name, for example, an initiative launched in May, documents and analyzes black women's experiences of police violence and explains what we lose when we ignore them. We not only miss half the facts, we fundamentally fail to grasp how the laws, policies, and the culture that underpin gender inequalities are reinforced by America's racial divide.

How are black women affected by police brutality? And how are they shaping the concerns, strategies, and future of Black Lives Matter? Marcia Chatelain, professor of history at Georgetown University, creator of the #FergusonSyllabus, and author of *South Side Girls: Growing Up in the Great Migration*, shares her insights on the role of black women in today's vibrant and necessary movement for racial justice.

Kaavya Asoka: In addition to your historical work, you're the creator of a valuable resource for educators—the #FergusonSyllabus—which crowdsourced reading materials from Twitter and elsewhere to help teachers discuss Ferguson and race in their classrooms. Could you begin by telling us about your own relationship to Black Lives Matter?

Marcia Chatelain: As a black woman in America, this movement is fundamentally about my life and the lives of those I love. I've participated in student-led actions—like die-ins and social media campaigns—and I consider myself a student of all these amazing activists. I am a beloved observer and a participant to the extent that I incorporate the movement in my teaching and encourage my students to get involved.

Asoka: "Black Lives Matter" was created by three black women, Alicia Garza, Patrisse Cullors, and Opal Tometi, after George Zimmerman's acquittal for Trayvon Martin's death. Women have been organizing marches, die-ins, protests, and otherwise leading various responses to police brutality. Why are women playing such a key role in today's movement?

Chatelain: Women across the generations are participating in this movement, but I think we've had a wonderful opportunity to see especially young, queer women play a central role. It's important to recognize that while they are organizing on behalf of victims of police brutality and cruelty broadly, they have to constantly remind the larger public that women are among those victims too. So, although these women are putting their bodies on the line for the movement, they also have to articulate that they are fighting for all lives, including their own.

Asoka: We know that there is currently no comprehensive national data on police killings. But the information we have shows that black women are targeted in similar ways to black men—police killings, stops, and racial profiling; targeting of poor, disabled, or trans women; deaths in custody. In some cases, they're also targeted at similar rates—research released by the African American Policy Forum and Columbia University showed that in New York in 2013, 53.4 percent of all women stopped by the police were black, while 55.7 percent of all men stopped were black. Women also face gender-specific risks from police encounters—sexual harassment, assault, strip-searching, and endangerment of children in their care. How prominently is the impact of police brutality on women featuring in today's movement?

Chatelain: I think *any* conversation about police brutality must include black women. Even if women are not the majority of the victims of homicide, the way they are profiled and targeted by police is incredibly gendered. There are now renewed conversations about how sexual violence and sexual intimidation are part of how black women experience racist policing. You don't have to dig deep to see how police brutality is a women's issue—whether it's the terrifying way that Oklahoma City police officer Daniel Holtzclaw preyed on black women in low-income sections of the city, or the murder of seven-year-old Aiyana Stanley-Jones inside her Detroit home. We know that girls and women of color are also dying. The question is: does anyone care?

We also have to consider that sexual harassment, exploitation, and assault not only

happen on the streets, they also occur in the home and in the detention center. In other words, black women are often targets of violence inside homes and in private spaces where people cannot easily see them or galvanize around them. When we consider how and where people organize, it's important to remember these victims of brutality too, even if we can't gather at their specific sites of victimization. I think the most important part of all this is that black women are fighting for their names to be known as part of this issue—there is a real desire to complicate the notion that it is only young, black men who are living in fear for their lives.

When we look at this issue historically, women activists were often targeted by police, and the sexual violence that civil rights activists experienced in places like Mississippi's Parchman Farm raised the consciousness of other activists about the need for prison reform. Women like Fannie Lou Hamer were abused behind the walls of a detention center. So for black women and black female activists, police brutality is a very real concern.

Asoka: We tend to see violence and racism against black men as a barometer of racism against the black population at large, whereas violence against black women is often invisible. We're all familiar with the names Michael Brown, Eric Garner, and Freddie Gray, but Rekia Boyd is one of the few names of black women that we've heard. Why haven't the killings of women of color received the same attention as those of men?

Chatelain: Yes, I agree with Dani McClain, Melinda Anderson, and Kali Gross, among others, who are calling out the fact that the conversation about police violence is mostly framed around the endangerment of men of color. Kimberlé Crenshaw has criticized the silence around women's victimization, as well as initiatives like My Brother's Keeper, which excludes girls and young women. Sexism is a factor, but so are market forces—an industry built on saving, rehabilitating, and disciplining men of color has emerged, which has attracted state funding and enriched some leaders of color and their organizations. Since the 1980s, private and public dollars have been devoted to solving the problems of boys and young men of color in ways that they haven't for girls. This reinforces the notion that in times of scarcity, girls and young women are a low priority. So the fact that the killings of women of color do not galvanize people—whether we are talking about state actors or progressive organizers—doesn't surprise me. But I'm heartened that there are activists and collectives that have been critical of the unchecked sexism in this fight.

Asoka: You mention Dani McClain. Last August she argued in the *Nation* that the killing of black men is a reproductive justice issue for women, who have a right to see their children live in safety. Are there others who are articulating this fight for racial justice in explicitly feminist terms?

Chatelain: Black Lives Matter is feminist in its interrogation of state power and its critique of structural inequality. It is also forcing a conversation about gender and racial politics that we need to have—women at the forefront of this movement are articulating that "black lives" does not only mean men's lives or cisgender lives or respectable lives or the lives that are legitimated by state power or privilege.

Historically, movements for racial justice have often framed the question of equality as one that could be answered by men. From the abolitionist movement to the civil rights movement, many of the key issues were framed around concerns that racial injustice harmed masculinity. I think that today's movement has this in mind when calling for the names of women and girls to be included among those who inspire the

fight. No community wants to see its daughters die, or for women to be unable to support their families because of the death of their partners or other family members. I think the reproductive justice issue inherent in all of this is that violence undermines the ability to keep families and communities strong. The stress of violence and intimidation affects child protection and child development. The anxiety of parenting a child of color in a world where they are often targets can certainly shape one's decision to have children and one's approach to parenting.

Asoka: What are the challenges of trying to address issues like domestic violence against black women (a leading cause of death) when we know that calling the police seldom spells safety for either black men or women?

Chatelain: I think the tension between demanding attention to police violence and developing strategies to ensure the safety of black women and children is very real right now. When black women weigh whether they can trust law enforcement, it's a dilemma, given the reality of mass incarceration.

The next step in this movement is to consider alternatives to the current approach to policing, which relies all too often on a labor force that does not come from a particular community or alienates communities in the name of public safety. One group that supports this is Project NIA, which encourages alternatives to calling the police on youth. Another model from Chicago is the Cure Violence project (featured in the documentary film *The Interrupters*) in which respected citizens intervene in heated situations. We're now seeing organizers developing community leadership and community-based models of accountability to ensure the safety and well-being of people, while continuing to challenge the ways in which patriarchy reinforces racism and oppression.

Asoka: Many Black Lives Matter activists are using the momentum behind this movement against police brutality to also raise other issues, like economic inequality and discrimination against black LGBT people. Why is this intersectional approach to activism important?

Chatelain: Gendered police violence against cisgender and trans women, and the criminalization of poor black women and how that affects their families and communities are both key issues, although I don't know if they've been adequately captured in the protests. Protests often have to deliver a sliver of a larger message in order to prompt a deeper conversation. But the protests have also opened up a space for discussing specific structural issues—the state of our schools, unemployment, access to public spaces—and shown how police violence is one of many issues that communities have to contend with.

I am proud of Black Lives Matter's attention to intersectionality. These women and other young organizers are consciously resisting the mistakes of previous movements, especially the classism and sexism that all too often shaped the direction of older civil rights and feminist struggles. What we see now is a result of what these organizers have learned from each other about the pitfalls of narrow focus and exclusivity. This movement's openness to other movements—like the battles against mass incarceration and mass deportation—allows us to see how deeply these issues resonate across different communities.

In the early days of Ferguson, we heard messages from a wide swath of the organizing sector lending their support. From the Dream Defenders to the undocumented youth movement to the various queer organizing communities to Amnesty International, you saw a wide array of groups—along a political spectrum

from relatively mainstream to radical—moved to speak out against police violence. "Black Lives Matter" became a rallying cry to identify the places in which black life is cut short, whether it is in highly publicized instances of police brutality or through the slow suffocation of black communities facing poverty and economic inequality.

The movement's reliance on community strength rather than dependence on a single establishment voice, and the fact that throughout we've seen shifts in protest strategies—from vigils, to die-ins, to shutting down highways—reveals its creativity and flexibility. Ferguson, Staten Island, Chicago, and Baltimore are different, and different leaders emerged to organize those communities. But Black Lives Matter was able to collectivize the will of communities in each of these places where a critique of policing was severely needed.

Black Lives Matter activists come as they are—there is no management or slick manipulation of the image of the movement by anyone. It was wonderful how young activists resisted the performance surrounding December's Justice For All march because they believed that the movement they had literally put their lives on the line for was not being respected. The confrontation between a young movement and establishment groups like the National Action Network and the Urban League is deeply necessary, and I see it as another iteration of the youth driven SNCC's struggle with Martin Luther King's more established SCLC, and other moments when seemingly like-minded constituents have challenged each other.

Asoka: Like Occupy, Black Lives Matter is a bottom-up, collaboratively organized movement. Yet people often call it "leaderless." Could you put this lack of recognition of women's leadership and political participation in a historical context for us?

Chatelain: I hate it when I hear people call Black Lives Matter leaderless. If there are no leaders, then who is getting the word out? Who is getting the young people on buses and cars to appear before state houses and to lie down in train stations? Who is sending out the calls for protests? Who is managing the social media presence? Leaders, that's who. I think women are leading without suggesting they are the only leaders or that there is only one way to lead. Some of the criticism of Black Lives Matter as "leaderless" is generational. It isn't a coincidence that a movement that brings together the talents of black women—many of them queer—for the purpose of liberation is considered leaderless, since black women have so often been rendered invisible.

Across history, any time a movement has had black women at its helm or in its leadership—from Ida B. Wells and the Niagara movement to Ella Baker in the civil rights movement—there have been sexist and racist attempts to undermine them. The most damaging impact of the sanitized and oversimplified version of the civil rights story is that it has convinced many people that single, charismatic male leaders are a prerequisite for social movements. This is simply untrue.

Asoka: Women have historically been (and continue to be) perceived as the cultural and moral anchors of their communities. This has allowed societies to police women's behavior, their reproductive choices, and their sexual autonomy, while arguing that it's for their own "protection." Can you talk about this in the context of your book, *South Side Girls*?

Chatelain: In *South Side Girls* I examine the experiences of black girls and young women during the Great Migration, a period in which black people also confronted challenges in housing discrimination, hyperpolicing, and racist violence. These girls were part of a massive movement in black life, and they were often looked to as the

models of black success or failure; they in fact shouldered many aspirations and hopes for a community that did not always treat them like their lives mattered. The rigid ways that black community leaders viewed black girls was fascinating to me because they were in an impossible position—too young, too female, and too black to be heard. Yet despite this, I found moments in which they were given—or simply took—opportunities to discuss what mattered to them. I found some interviews with pregnant teenage girls in the 1920s and 1930s—they were the most marginalized of the marginalized. But in these interviews, I argue, they make it clear that they are citizens and that the state, families, and institutions have failed them. Some of the girls I include in my book resist blaming themselves; instead, they make it clear that they, as citizens, have rights, which are not being respected.

I think about these girls often as I watch today's movement unfold—where young women, some still teenagers and others barely older, are making it known that they will not tolerate state failure, or the failure of their communities to recognize the value of their lives or their leadership. The women involved in Black Lives Matter are not concerned about representing the race in any particular light or bending to the demands of respectability politics. Rather, they are carving out the space for black women to fight for justice—from the trans woman who is dying for it, to the woman in elective office, to the attorney representing protestors, to the little girl holding up a sign for Rekia Boyd, to the sorority member holding vigil in front of a police station, to the college women wearing Black Lives Matter T-shirts on campus. I'm looking forward to seeing what influence Black Lives Matter will have on the national presidential race in 2016—front and center, I hope, will be the black women who started this movement and a legion of even more behind them.

Marcia Chatelain is assistant professor of history at Georgetown University. Her book *South Side Girls: Growing Up in the Great Migration* is just out from Duke University Press.

Kaavya Asoka is an associate editor at *Dissent*.

Black Women and Black Lives Matter: Fighting Police Misconduct in Domestic Violence and Sexual Assault Cases [1]

Author(s):

Sandra Park

In the year since Ferguson, we have been reminded that police misconduct and brutality don't discriminate, at least not based on gender. We know that Black women, like Sandra Bland and others before her, aren't spared from police violence. Several commentators, including Charles Blow [2], Lisalyn Jacobs [3], and Roxane Gay [4], have authored profound pieces about Black women's experiences and the cloak of invisibility that too often surrounds them, particularly when the discussion turns to violence, police misconduct, and holding law enforcement accountable.

Fortunately, that is changing. #SayHerName has elevated and honored Black women's experiences and the dynamic #BlackLivesMatter social justice movement has broadened the conversation to highlight the many ways in which all Black people are affected by violence, police misconduct, and injustice.

But the lens must expand even further. When we speak of the reality of Black women's lives and efforts to reform the criminal justice system, we must continue to also speak about gender bias in policing and how it results in improper, and often illegal, police responses to domestic violence and sexual assault cases.

The reality is domestic violence-related calls constitute the single largest category [5] of calls received by the police. Over one million women are sexually assaulted each year, and more than a third of women are subjected to rape, physical violence and/or stalking by an intimate partner in their lifetime. And have no doubt: Black women and other women of color are disproportionately impacted [6].

Here are just a handful of stories about police misconduct in domestic violence and sexual assault cases that acknowledge the experiences of women at the intersection of racial and gender biased policing:

- In *Detroit* [7], researchers documented how stereotyping of sexual assault victims – a significant percentage of whom were African-American – led to poor criminal investigations and failure by police to submit thousands of sexual assault kits for testing.
- In *Oklahoma* [8], 13 women reported that a police officer sexually molested them while

he was on duty; that officer now faces 36 charges including felony rape, forcible oral sodomy and sexual battery.
- In *Puerto Rico* [9], the police department systematically underreported rape crimes and rarely took action when their own officers committed domestic violence, allowing 84 officers who had been arrested two or more times for domestic violence to remain active.
- In *Norristown, PA* [10], Lakisha Briggs, an African-American woman, faced eviction because police concluded that acts of domestic violence perpetrated against her – including a stabbing that required her to be taken by helicopter to a trauma center – should be considered nuisances under a local ordinance.

There are countless [11] stories just like these and even more that are untold or forgotten. These types of discriminatory police practices – abuses committed by officers, refusal to enforce established laws, misclassification or dismissal of domestic violence or sexual assault complaints – are deeply harmful and violate victims' civil rights. They jeopardize women's lives and safety, undermine efforts to end domestic violence and sexual assault, reduce confidence in the criminal justice system, and further the perpetuation of violence by discouraging victims from coming forward and allowing abusers to continue to commit crimes with impunity.

In spite of these troubling patterns, systemic discrimination by law enforcement is receiving attention due to the critical dialogue sparked by the Black Lives Matter movement. Indeed, The U.S. Department of Justice [12] has highlighted and investigated gender-biased policing. And just last month the ACLU took lead in drafting a letter signed by 88 national organizations and 98 state and local groups asking [13] DOJ to issue guidance to law enforcement agencies about how to ensure that their policies and practices are free of gender bias. These harmful and violative practices will not disappear on their own. We hope DOJ will act soon.

Until then, we will keep fighting.

Links
[1] https://www.aclu.org/blog/speak-freely/black-women-and-black-lives-matter-fighting-police-misconduct-domestic-violence
[2] http://www.nytimes.com/2015/07/20/opinion/charles-blow-sandra-and-kindra-suicides-or-something-sinister.html?_r=0
[3] http://www.huffingtonpost.com/legal-momentum/sayhername-centering-the-_b_7852078.html
[4] http://www.nytimes.com/2015/07/25/opinion/on-the-death-of-sandra-bland-and-our-vulnerable-bodies.html
[5] https://www.ncjrs.gov/pdffiles1/nij/225722.pdf
[6] http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf
[7] https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf
[8] http://www.buzzfeed.com/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city#.xawK0WOJ4G
[9] https://www.aclu.org/failure-police-crimes-domestic-violence-and-sexual-assault-puerto-rico
[10] https://www.aclu.org/cases/briggs-v-borough-norristown-et-al
[11] http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf
[12] https://www.aclu.org/blog/justice-department-police-misconduct-responding-domestic-and-sexual-violence-can-violate

[13] https://www.aclu.org/sites/default/files/field_document/policing-coalition_letter_to_ag_lynch-doj-re_guidance_on_gender-biased_policing-final-7-6-15.pdf

Reproductive Justice, Not Just Rights

Reproductive Justice, Not Just Rights

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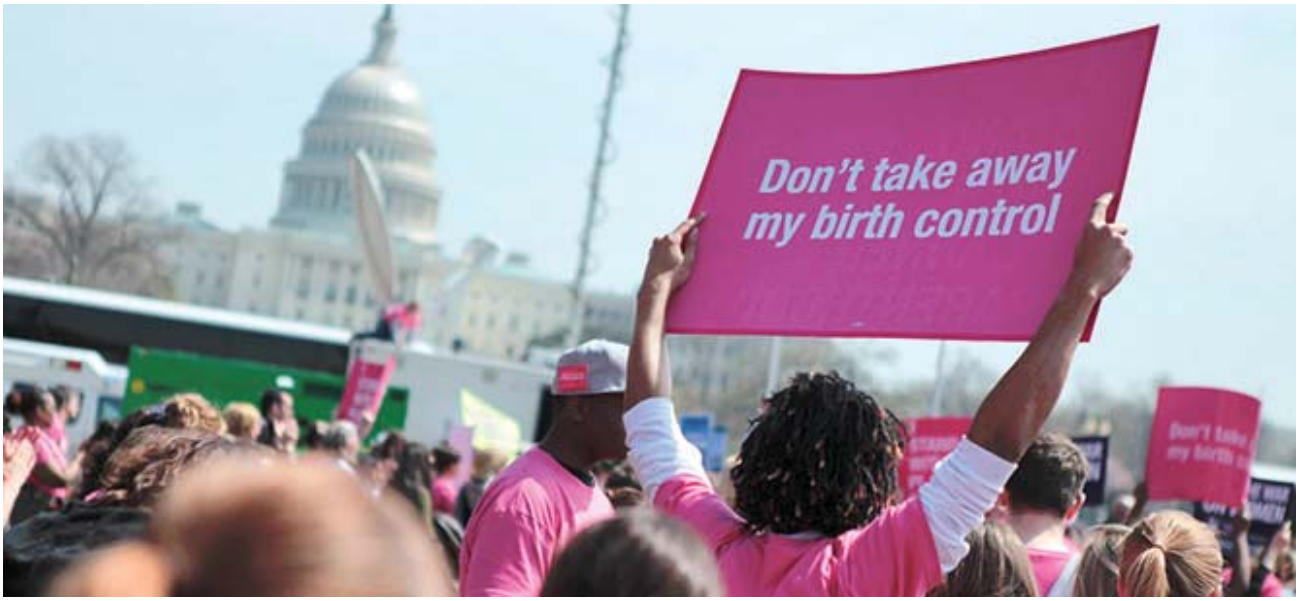
With a counter-argument from Katha Pollitt.

Dorothy Roberts ▪ Fall 2015



Planned Parenthood rally in Washington, D.C., April 7, 2011 (American Life League / Flickr)

This article is part of Dissent's *special issue of "Arguments on the Left." To read its counterpart, by Katha Pollitt, click here.*

The last time I was filled with euphoric confidence that the left would win the battle for reproductive freedom was when I linked arms with black women activists at a march in Washington, D.C. in 2004. My elation stemmed partly from a victory of one of the co-sponsors, SisterSong: it had shifted the march's focus from "choice" to "social justice." This shift was dramatically symbolized by deleting the words "freedom of choice" from

the march's original name—Save Women's Lives: March for Freedom of Choice—to rename it the March for Women's Lives.

For too long, the rhetoric of "choice" has privileged predominantly white middle-class women who have the ability to choose from reproductive options that are unavailable to poor and low-income women, especially women of color. The mainstream movement for reproductive rights has narrowed its concerns to advocate almost exclusively for the legal right to abortion, further distancing its agenda from the interests of women who have been targets of sterilization abuse because of the devaluation of their right to bear children.

A caucus of black feminists at a 1994 pro-choice conference coined the term "reproductive justice," a framework that includes not only a woman's right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments. This framework repositioned reproductive rights in a political context of intersecting race, gender, and class oppressions. The caucus recognized that their activism had to be linked to social justice organizing in order to gain the power, resources, and structural change needed for addressing the well-being of all women. Back in 2004, SisterSong brought a reproductive justice approach to the march's leadership and helped to mobilize busloads of newly energized, diverse supporters, making the march one of the largest of its kind in U.S. history. The success of the March for Women's Lives demonstrates a winning strategy; under the leadership of women of color, the left needs to ditch the dominant reproductive rights logic and replace it with a broader vision of reproductive justice.

The language of choice has proved useless for claiming public resources that most women need in order to maintain control over their bodies and their lives. Indeed, giving women "choices" has eroded the argument for state support, because women without sufficient resources are simply held responsible for making "bad" choices. The reproductive rights movement was set on this losing trajectory immediately after *Roe v. Wade*, when mainstream organizations failed to make funding for abortion and opposition to coercive birth control policies central aspects of their agenda. There was no sustained major effort to block the Hyde Amendment, which has been attached to annual appropriations bills since 1976 and excludes most abortions from Medicaid funding. Mainstream reproductive rights organizations practically ignored the explosion of government policies in the 1990s, such as welfare "family caps" and prosecution for using drugs while pregnant, principally aimed at punishing childbearing by black women who received public assistance. This myopia not only alienated women of color, but also failed to address the connection between criminalization of pregnant women and abortion rights. Today, a resurgence of prosecutions for crimes against a fetus makes crystal clear a unified right-wing campaign to regulate pregnant women—whether these women plan to carry their pregnancies to term or not. There is little to distinguish criminal charges against women for "feticide" and for abortions.

The impediment to winning is not just the current right-wing onslaught of state laws; also pernicious is a nasty, resilient strain of thinking within the left that views birth

control as a means of addressing social and environmental problems like poverty and "overpopulation." On one hand, the right has recently exploited the history of eugenics to falsely portray abortion as a form of black "genocide" and to ban abortions intended to avoid having a baby with Down syndrome. On the other hand, however, the left has yet to purge its advocacy of family planning of some of its racist and eugenicist roots, which can be traced back to the early twentieth century when progressives promoted controlling reproduction of "unfit" populations. Margaret Sanger allied with eugenicists to further her crusade for women's access to birth control, entangling the issue of reproductive rights with both liberating and oppressive aims.

Today, the mainstream reproductive rights movement has failed to confront liberals' promotion of birth control as a way to save taxpayer money spent on unintended, welfare-dependent children. For example, the *New York Times*, *Slate*, and the *American Journal of Public Health* recently published articles recommending increased use of provider-controlled long-acting contraceptives among low-income populations in order to reduce poverty, high school drop-out rates, and Medicaid costs. The troubling legacy of the U.S. biologist Paul R. Ehrlich is also perpetuated today by some environmentalists like Population Connection (formerly Zero Population Growth) and the Sierra Club's Global Population and Environment Program, which continue to see birth control as a way of addressing global "overpopulation." Framing birth control as a cost-reducing and problem-solving measure masks its potential for racial and class bias and coercion, as well as the systemic and structural reasons for social inequities.

Moreover, pro-choice groups have used the "tragedy" of fetal anomalies as an argument for supporting abortion rights without considering discrimination against people with disabilities or the potential for alliances with disability rights activists to improve the wellbeing of women and children, or the history of approved therapeutic abortions and unapproved elective abortions. The liberal notion of reproductive choice aligns with a neoliberal market logic that relies on individuals' purchase of commodities to manage their own health, instead of the state investing in health care and the other social needs of the larger public. The rhetoric of choice obscures the potential for reproductive and genetic selection technologies to intensify regulation of women's childbearing decisions in order to privatize remedies for illness and social inequities. While we should point a finger at right-wing legislators for creating wedge issues, the dominant framework for reproductive rights advocacy has created colossal political chasms within the left all by itself.

A reproductive justice framework can attract support from tens of thousands of women alienated by the mainstream agenda—poor and low-income women, women of color, queer women, women with disabilities, and women whose lives revolve around caregiving. In addition, the movement's social justice focus provides a concrete basis for building radical coalitions with organizations fighting for racial, economic, and environmental justice, for immigrant, queer, and disabled people, and for systemic change in law enforcement, health care, and education. True reproductive freedom requires a living wage, universal health care, and the abolition of prisons. Black women

see the police slaughter of unarmed people in their communities as a reproductive justice issue. They recognize that women are frequent victims of racist police violence and that cutting short the lives of black youth violates the right of mothers to raise their children in healthy, humane environments. The reproductive justice movement and Black Lives Matter are likely allies because, at their core, both insist that American society must begin to value black humanity. Black, Latina, Asian-American, and indigenous reproductive justice organizations have a history of solidarity, exemplified by SisterSong, and they have begun to forge links with other social justice movements.

The galvanizing impact of reproductive justice extends beyond these mobilization and coalition-building strategies. The movement articulates the rationale for reproductive freedom in positive moral and political terms, as a requirement for social justice, human rights, and women's well-being. Reproductive justice activists treat abortion and other reproductive health services as akin to the resources all human beings are entitled to—such as health care, education, housing, and food—in an equitable, democratic society.

In January 2015, the leaders of five black reproductive justice organizations launched a national initiative called In Our Own Voice: National Black Women's Reproductive Justice Agenda to mobilize black women, initially highlighting three key policy issues: abortion rights and access, contraceptive equity, and comprehensive sex education. The initiative plays off black women's unique strategic position: they have a long legacy of grassroots organizing for reproductive justice and they are the most progressive voting block in the nation's electorate. Reproductive justice initiatives spearheaded by women of color are important, not because they allot these women a marginalized voice within the same losing reproductive rights agenda, but because they let women of color lead a reproductive justice movement that can win.

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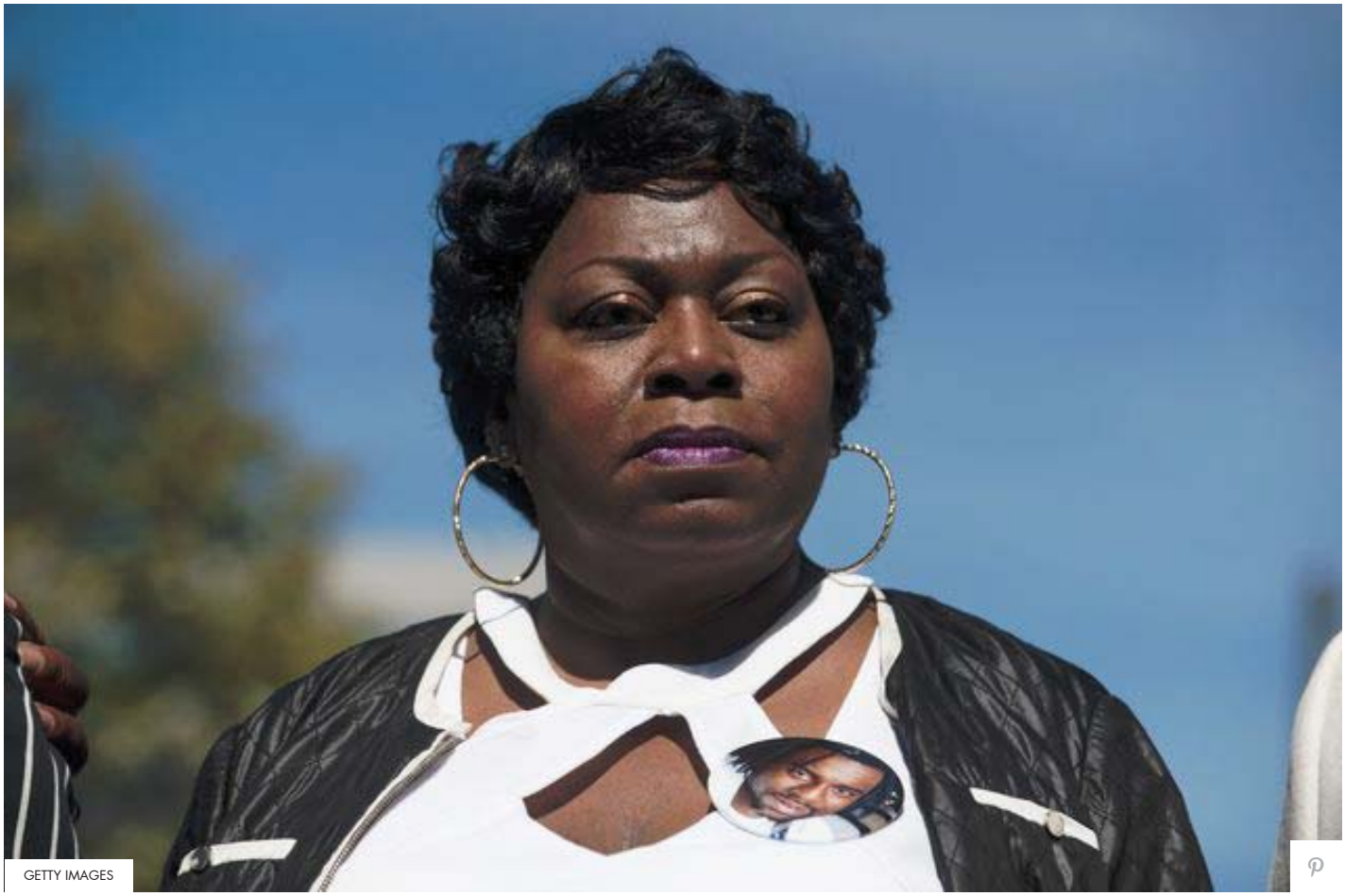
Police Violence Is a Reproductive Justice Issue

Women must have the right to choose to bring a child into this world and raise them in an environment free from violence.

by LESLIE WATSON MALACHI JUL 18, 2016



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I pulled over my car twice this week when I saw an African American man surrounded by police officers. At a time when almost daily a new mother is faced with the unthinkable news that her child was the latest victim of senseless violence, I felt the need to stop at a non-intrusive distance and make sure everyone was safe. I thought of Quinyetta McMillon, the mother of Alton Sterling's oldest child, now forced to raise their child without his father. I thought of Valerie Castile, the mother of Philando Castile, who says her son is now "a driving force in me to make sure this doesn't happen to another mother."

The wrenching police shootings this month of these two men, both just in their 30s, has been widely reported on through the lenses of excessive police force and pervasive racism. Less attention however has been given to the ways in which death at the hands of police is also a critical issue of reproductive justice. How? Women must not only have the right to choose abortion, but also the right to choose to bring a child into this world and raise them in an environment free from violence. It's a right that is demolished every time young people of color are questionably gunned down by the police.

When a child is born, the hope is always that violence in any form will not be a part of their lives, whether they are entrepreneurs, like Sterling, employees of a school system, like Castile, or police officers, like the five officers killed in Dallas while protecting a Black Lives Matter march. The hope is that their lives will not be cut short while walking to buy Skittles, like Trayvon Martin, or while preparing to start a new job, like Sandra Bland, or while playing outside a recreation center, like

Tamir Rice. Even as the African American community is under siege from so many different directions, from restrictions on voting rights, to the criminal and juvenile justice system, to the prison industrial complex, to the right-wing politicians and organizations that try to demonize our families, the hope is that it will be possible to keep our children out of harm's way.

The reproductive justice movement, which was launched by African American women more than 20 years ago, has long situated the need for reproductive rights within the larger context of the well-being of women, their families, and their communities. As someone who has been a reproductive justice advocate for many years, I know that abortion rights cannot be isolated from the other issues impacting women's lives. Prime among those issues is the ongoing police violence that disproportionately affects African Americans. Yes, reproductive justice is about the constitutionally protected right to control our own bodies, but for me, it is also about keeping safe in every area of their lives the women and girls, the boys and men, who are birthed, watched, raised, and loved.

Valerie Castile, the mother of Philando Castile, is now a part of an unfortunate and growing sisterhood of women whose children died because of police mishandling of a range of situations. It is a unique and all too large body including Samaria Rice, mother of Tamir Rice; Lezley McSpadden, the mother of Michael Brown; and Geneva Reed-Veal, the mother of Sandra Bland; whose time of grief will be a part of the historical changes to the policing systems from North to South, East to West. They stand shoulder to shoulder with Sybrina Fulton, the mother of Trayvon Martin; Lucia McBath, the mother of Jordan Davis; and so many others who join them in calling for a world where no one has to live in fear of their children's lives being cut short by those they are taught to trust because their job is to help and protect.

If we are serious about fighting for women's rights, for lives free from the fear of being targeted for being non-white, and for an end to gun violence of any kind, then the reproductive and social justice rights of women of color to safely raise a child in our country has to be front and center in that conversation.

More than 150 years after Sojourner Truth asked, "Ain't I a woman?" this week I found myself asking: Aren't we women, like other women of different racial backgrounds who decide to have children? Shouldn't we also have access not only to comprehensive health care, and job opportunities, and educational opportunities, but also to the most fundamental right of all — the right for our families to survive? Police violence is a reproductive justice issue because a mother's care for her child starts with their first breath and does not end with their last.

Minister Leslie Watson Malachi is the director of African American Religious Affairs at People For the American Way Foundation.