SOCIAL ORDER & DISORDERED MINDS

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Social Order & Disordered Minds

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I. Fear Itself

Nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance.

Franklin D. Roosevelt, First Inaugural Address, March 4, 1933

How can we understand why some groups of people become culturally devalued – scorned, condemned, even obliterated; why these apparently rock-solid denigrations suddenly seem arbitrary and unjust and even seem to vanish; and always after some emancipatory interlude, why new social degradations appear, aimed at the old targets or new ones. This is the central question of this work. Its underlying goal is to explore the possibilities for purposeful abandonment of these degrading social impositions and, in particular, to identify the role that courts can play in our constitutional culture to secure this end.

Much more is needed to promote the dissolution of these social degradations than simply inveighing against them. These degradations come into being because they satisfy deep-rooted social and individual psychological needs, and we must understand this dynamic if we hope to make some inroads against them. Recognizing the depth of the social and psychological forces that produce and sustain these degradations need not lead to endorsement or passive acceptance of them. There is in fact a hopeful social history of emancipatory moments when these degradations were abandoned; at the same time, this social history has a darker side considering that the moments of emancipation were only intervals between recurrent episodes of new or resumed degradations. Perhaps the emancipatory moments can be extended indefinitely, can become the norm. But attaining this goal depends on understanding the psychological impetus for the apparently recurrent social cycle of victimization, emancipation and re-victimization.

To this end, we will begin by examining the times in American social history when newly degrading categorizations were established and compare those times to the moments when the old categorizations suddenly seemed pointless and were abandoned, at least for some time interval. This historical account smooths out many bumps and, in particular, ignores the dissenting voices that stood against the dominant mood at any time. There always were dissenting voices, whether advocating egalitarian emancipations when the dominant mood of the country favored hierarchical subordinations or advocating repressive subordinations when the dominant mood was emancipatory. But even so at any given moment there was a dominant narrative and that is the focus of my attention. After sketching this historical account, we will consider the psychological impetus for these recurrent cycles.

In broad strokes, here is the chronology of the progression of this cycle in American social history: from the stable hierarchical social order in colonial times; to the disruption of that order in the violent break with Great Britain; to the egalitarian emancipations that followed the Revolutionary War and intensified after Thomas Jefferson's election in 1800; to the imposition of more rigid hierarchies after Andrew Jackson's election in 1828; to the cataclysmic eruption of the Civil War followed by the brief emancipatory moment of the Reconstruction era and enactment of the three post-War liberating constitutional amendments; to the reimposition of even more rigid hierarchies between 1876 and 1930; to the accumulation of disruptive events beginning with the Great Depression, events that undermined the post-Reconstruction hierarchies (of whites over blacks, capitalists over labor, men over women, straights over gays, mentally "normal" over mentally ill or retarded); to the egalitarian emancipations that gradually unfolded after 1930 and virtually exploded during the decade of the 1960s.

The Revolutionary War disrupted prior social orderings but nonetheless had a stabilizing connection with the prior order because the post-independence domestic elite moved from the previous shadow of British colonial rule into full daylight in the exercise of their social authority. By contrast, the Civil War effected a radical, almost total breach of prior assumptions about the structure of social authority. The rigid re-imposition of social subordinations after the Civil War was gradually undermined between the Great Depression and the cultural disruptions of the decade of the 1960s; and unlike the cataclysm of the Civil War, this dissolution of the prior social order took place over an extended time period and the emancipatory interval that followed has been much more prolonged than the post-Civil War Reconstruction era. The vast destructiveness of the Civil War – not simply in lives lost but in the almost total uprooting of prior social orderings – brings into higher visibility the social and psychological forces at work in the other episodes in this cyclic process of oppression, emancipation and new or renewed oppression.

We can begin to appreciate these forces by seeing the deep connection between the post-Civil War hierarchical subordination of blacks and the virtually contemporaneous degradation of new categories of sexual miscreants. Before the Civil War, the possibility of rebellion had been the dominant fear regarding black slaves in the South. After the War, sexual aggression by black men against white women ("the black beast rapist") became the dominant fear.[1] White lynching mobs were propelled into an especially murderous rage against blacks accused of raping (or simply having sexual intercourse) with white women.[2] This new fear of black male sexuality found comparable expression in the changed social signification of sexual deviance generally and homosexuality in particular after the Civil War and Reconstruction.

Condemnation of same-sex sexual relations has a long history in Western culture, stretching back to biblical times. But in the United States, this condemnation became transformed in the late nineteenth century. Forbidden sexual acts that anyone might indulge were no longer simply condemned as such. The condemnation took on a new format. The status of homosexual was proclaimed to be a firm category of people distinct from heterosexual people. This was not simply a repudiation of the acts of same-sex intercourse; the entire social category of The Homosexual was at once invented and condemned.[3]

This reconceptualization occurred at virtually the same moment when American culture explicitly took on the task of controlling sexual conduct in new ways based on new social categorizations. Thus also in the late nineteenth century, laws were enacted that for the first time required a man and a woman who wished to be married to obtain a prior license from the state.[4] Before this time, state recognition of marriage took place only on a post hoc basis when there was some controversy about whether a couple should be considered married – that is, when one alleged spouse had died intestate or when a merchant who had advanced credit to one alleged spouse sought to recover the debt from the other alleged spouse. If the couple's relationship had been formalized as "marriage" by some church ceremony, this was sufficient for the state's purpose; but even without this ceremonial celebration, states were prepared to recognize these on-going relationships as so-called "common law marriages." In the early twentieth century, most states abolished the status of common law marriage on the ground that this status in effect allowed couples to marry themselves rather than requesting prior permission from (and, in effect, subordinating themselves to) the state.

The new marriage permission laws, moreover, did not accept every applicant. Marriage

status was now categorically withheld from people who were considered "mental defectives" – not simply or even primarily because mentally defective people lacked capacity to enter any contractual arrangements but because these people allegedly would reproduce children who themselves would be mentally defective.[5] This state policy against reproduction by so-called mental defectives was not restricted to withholding permission to marry. Coerced sterilization of people found to be mentally defective became legally recognized and widely practiced in most states during the late nineteenth and early twentieth centuries.

At this same time, states enacted new restrictions on a wide range of sexual behaviors. Sale of contraceptives (and in some states even use of contraceptives) was prohibited by state and federal laws.[6] Before the Civil War, abortions had been available without legal restriction during the first trimester (or before "quickening," the perceptible movement of the fetus in the womb). By the end of the nineteenth century and the beginning of the twentieth, every state had adopted new abortion restrictions, limiting availability only to pregnancies that threatened the "life" (or sometimes also the "health") of the woman.[7] These new laws assigned the regulatory task exclusively to licensed physicians, just as the implementation of the new sterilization laws was assigned to licensed physicians. (And it was only in the late nineteenth century that the state undertook the licensing of physicians as a prior requirement to engage in the practice of medicine.)

Perhaps the most vivid expression of the post-Civil War hysteria about "out-of-control" sexuality was the open warfare waged by the federal government against polygamy in the Utah Territory. In his 1871 State of the Union address, President Ulysses S. Grant referred to the Mormon practice as "a remnant of barbarism, repugnant to civilization, to decency, and to the

laws of the United States."[8] During the latter half of the nineteenth century, the federal government escalated its attempt to suppress polygamy by seizing the assets of the Mormon Church and even dispatching federal troops.[9]

From this quick sketch, we can see that invention of the new category of "homosexual person" was accompanied by a wide range of previously non-existent public regulation of sexual conduct during the late nineteenth century.[10] One other instance of new categorical conceptualizations in late nineteenth century America casts special light on understanding the demonization of homosexuality as such. That is the emergence of race segregation in the former slaveholding states of the Confederacy.[11]

The Jim Crow regime threw a pervasive regulatory net over all aspects of social relations between blacks and whites in the South. The establishment of rigid social separation of the races was, in one sense, meant to reassert the subordination of blacks to whites that had been at the core of the slavery institution. But the new format of that subordination had an underlying connection with the new status of homosexuals after the Civil War. Racial segregation did not invent but solidified the conceptual categorization of black people – that is, *all* black people as such – as intrinsically inferior to whites. Before the Civil War, all slaves were black, but not all black people were slaves. Some black people were free, that is; although free status was increasingly restricted in the South and Blackness viewed as categorically different from Whiteness from the beginning of the nineteenth century until the eve of the Civil War, this categorical distinction was reified and made explicit in public policy during the generation after the War by the emergence of racial segregation. For the Jim Crow regime, all blacks were the same and categorically distinct from all whites as such. This is the new conceptualization that

had taken hold at the same time between all homosexuals as distinguished from all heterosexuals.

I draw this comparison because it takes me directly to the basic theme I will pursue throughout this work – that degrading social categorizations are deployed to impose a reassuringly ordered structure in the face of a threatening sense of social and individual incoherence. All of the novel categorical restrictions in sexual conduct and race relations were imposed by the generation that came to maturity after the Civil War. This generation was deeply unsettled by the War, perhaps even more so than the prior generation which had directly presided over it but had entered into that traumatic conflagration as adults with the prior experience of having lived in a world that seemed reassuringly ordered. To be sure, that world exploded for everyone; but unlike their forefathers, the young footsoldiers in the war could not pass onto their children and their children's children the sense of having lived in an ordered world with an organic connection to the social life that preceded them.

Thus it is not surprising that some time should elapse between the disruptive event of the Civil War and the imposition of rigid compensatory hierarchical subordinations. The greater confidence of the older generation in the existence of an underlying strata of social order provided a psychological space in which emancipation – that is, the very idea of doing without the old social hierarchies – could take hold. For the subsequent generations, however, the Civil War in retrospect rendered the world unintelligible. The old social categorizations had failed to provide reassurance about the coherence of the world. New categorizations were needed – and ultimately were devised – for this purpose. As with blacks, the new reified and condemned status of homosexuals was an instrument toward this goal.

Enormous social dislocation was inflicted by the Civil War. First of all, the war changed

the character of the American Union. President Lincoln had initially insisted that the goal of the war was to preserve the Union. He failed to achieve that goal; the Union that emerged after the War and as a result of the War was fundamentally different from the Union that Lincoln wanted to save. Before the Civil War, the Union had been a voluntary association among states; as a result of the War, the Union was transformed into a forced alliance between dominant and subjugated states, North and South.

But the War destroyed much more than the previous conception of American political relationships; it destroyed human lives in a magnitude that exceeded all past recorded experience of warfare not just in the United States but perhaps in the entire history of the Western world.[12] The total number of Civil War deaths is now reliably estimated at 750,000. In the Second World War, there were 405,000 American deaths. If the total U. S. population had been the same in 1865 as in 1945, there would have been 7.5 million American Civil War deaths. Moreover, there were more American combatant deaths in the Civil War than the combined total of deaths in all the other was this country has fought, from its beginnings in 1776 until today.[13] The Civil War thus plunged everyone into a state of grief. Historians of the period concur in ascribing "the central roles occupied by loss and trauma in postbellum America."[14] This dislocating sense of loss and trauma vividly persisted for almost a century – especially in the South where approximately one-quarter of the white males aged 20 to 24 died in the War.[15]

After the Civil War, Americans – both North and South, white and black – could not simply resume social life as if the old antebellum presuppositions about the forces of order still were intact. And so, as we have seen, they devised new forms of social order, which were given expression in novel and newly rigid terms of dominance and submission of whites over blacks,

heterosexuals over homosexuals, men over women, so-called "mentally normal" people over mentally disabled people. The rigidly hierarchical terms of these social relations were in the service of appeasing the sense of disorder, of social chaos, that had emerged from the cataclysm of the Civil War.

These new terms had their desired effect for almost one hundred years. This effect can be measured not simply by the self-serving proclamations of dominance among the top dogs – the white, male heterosexuals – but also by the widespread silent submission of the bottom dogs, the women, blacks and gays who acquiesced in their own subordination and devaluation (albeit in the face of the pervasive threats of violent reprisals) .

What then happened to these seemingly rock-solid degradations of vulnerable groups so that today we have a black President, the currently leading contender from his political party to succeed him is a woman, same-sex marriage is now available in thirteen states and the District of Columbia? These data points do not demonstrate that the old degradations of blacks, women and gays have disappeared. But the categorizations no longer have the wide-spread force of seemingly unchangeable elements in the "natural order of things." The categorizations are publicly contestable and fiercely contested.

There are many possible explanations for these dramatic changes. It can be plausibly argued, for example, that the Second World War brought women out of the home and into the workplace for the first time in substantial numbers and that this changed their own and others' sense of their re-categorization as no different from, as equal to, men in economic endeavors. It can be plausibly argued that the war brought large numbers of Southern blacks to northern cities with greater fluidity in racial practices and that service in the armed forces by blacks gave them a

new sense of possibilities and self-evaluation. The list of possible causal factors is immense. I want to focus attention, however, on one common explanation for social change – that is, the new expressions of open resistance by the previously degraded groups – not in order to dismiss this explanation but to suggest its incompleteness.

What explains the newly vocal protest of the formerly oppressed but silent groups? Why did large numbers of African-Americans rise up in the 1960s to challenge the segregationist regimes after almost a century of public silence? Why did large numbers of women suddenly characterize themselves as oppressed and embrace a feminist agenda in the 1970s? Why did gays rise up beginning with the Stonewall uprising in 1969 and gathering in numbers, force and openness throughout the rest of the twentieth century?

These groups always knew that they were suffering from oppression. But I believe these groups were led to open protest because they suddenly sensed an audience among the oppressors who had previously been blind to their suffering. They suddenly sensed that considerable numbers of their former oppressors were now prepared to extend a new sense of fellow-feeling toward them, of empathic identification with them.

This new openness among many (though certainly not all) of the former oppressors did not occur because of the open protests. It is more accurate, I believe, to say that the protests from the previously subjugated groups initially occurred because these groups sensed (however indistinctly, however unconsciously) that large numbers of their oppressors already themselves felt vulnerable and oppressed by the emotional and cognitive disruptions that they were experiencing. The newly open protests in effect built on and reinforced the sudden emergence of fellow-feeling among large numbers of the oppressors. The protests brought these empathic

identifications into high visibility and conscious awareness. But these identifications arose from a deeper source. While multiple factors gave impetus to the destabilization of degrading categorizations, the initial spark for this social process came from a series of external shocks comparable to the impact of the Civil War in the nineteenth century.

There was no single event that had the impact of the Civil War but there were a long succession of events from the late nineteenth century to the mid- twentieth century that radically unsettled the previous social ordering: the open warfare between capitalists and labor in response to the transformation of the American industrial workplace, a series of depressions culminating in the Great Depression of the 1930s, the two World Wars, the subsequent Cold War, the threat of nuclear holocaust, the Vietnam War. The accumulation of these events led to a pervasive undermining of the old order by the decade of the 1960s. Taken all together, by this time American society experienced a full-blown loss of confidence in the beneficence and coherence of the existing social order. The old order had lost its apparent solidity and its capacity to comfort and reassure.

One social experience in the 1960s had special impact in contributing to this sense of loss. Just as widespread, deeply unsettling grief was engendered by the Civil War, the assassination of President John F. Kennedy precipitated a state of grief that was amplified by the subsequent killings of Martin Luther King and the President's brother Robert, when he himself seemed on the verge of succeeding to – and in effect resurrecting – his brother's presidency. This grief may not be as personal as the losses experienced by the Civil War survivors, though Lincoln's assassination points to the existence of links between the personal and societal experiences of loss. The trauma of the Civil War may have been more intense than the social

response to the assassinations of our leaders in the 1960s. But grief over the irreparable loss of these national leaders was a chronic undercurrent that markedly contributed to a loss of confidence in the prior belief that we could rely on customary caretakers to protect us from harm.

The social turmoil surrounding the Vietnam War and the explosions of racially motivated riots in black urban ghettos and the widespread violent assaults on blacks by segregationist white Southerners were also chaotic social disruptions. These eruptions brought into high visibility and intensified the loss of faith in the beneficence and effectiveness of traditional caretakers.

This loss of faith in caretakers as such points to a special link to the reevaluation of the status of gays and lesbians from the chaos of the late 1960s. We can see this link by examining the terms of debate about the most polarizing public dispute that emerged in the 1970s – the conflict between pro-choice and pro-life advocates regarding state restrictions on the availability of abortion. Beneath their clamorous antagonism, there is one proposition – one critique of American culture in the 1970s – that was shared ground between the two warring camps. The pro-choice and pro-life forces actually agreed on the same fundamental premise that traditional caretakers could no longer be trusted to faithfully discharge their socially protective roles.

From the post-Civil War era until the late 1960s, there was widespread social agreement that physicians should decide if and when abortions would be available to pregnant women. Starting in the mid-1950s, reform efforts arose to liberalize the standards that physicians should apply in making their decisions. But these efforts were led by physicians and were still confined by the premise first articulated immediately after the Civil War – the premise that doctors should be in control of the abortion decision. It was not until the late 1960s that a new premise rose into public visibility – the premise that doctors could not be trusted as the decision-makers and

that women were entitled to decide for themselves.

The pro-choice critique rested on a broader rejection of trust in men generally to act in women's interests and a reevaluation of the relative social status of men and women, transforming the status differences from separate spheres (women dominant in the home, men dominant in the public world) into acts of oppression directed by men against women. At the same time that this re-evaluation of the beneficence of social ordering of men and women was taking place among pro-choice forces, the pro-life forces emerged into high public visibility driven by the same basic premise – that traditional caretakers could no longer be trusted.

For the pro-life forces, the traditional caretakers who had betrayed their trust were not physicians but the Supreme Court Justices who reversed the old rules and gave complete decision-making authority to women as such. Underlying this pro-life rejection of the beneficence of judges was an even more fundamental loss of confidence in traditional caretakers. The old faith that mothers would protect their children from harm was replaced by a new image among pro-life forces, that is, mothers as socially approved killers of their babies.

This loss of faith in traditional caretakers was not restricted to the abortion debate. This loss of faith can also be seen as a driving force in another dramatic and surprising cultural development in America since the 1970s – that is, the virtual disappearance of the elite status in American culture of White Anglo-Saxon Protestant men. From the very beginning of the American Republic in the eighteenth century, one fact of social status and ordering had seemed unchanging and unassailable. That fact was the unquestioned dominance of the so-called WASPS – White Anglo-Saxon Protestant men – in America. The exalted status of this group was apparent in every institutional aerie of social respect and power.

We can observe in microcosm the diminution of that status by considering the membership of the United States Supreme Court over the course of American history. For the first two hundred years of our republic, only six Catholics and five Jews served on the Court; all the rest were Protestants. Moreover, there were never more than two Catholic or Jewish Justices on the Court at the same time. Thus even though Protestants were not the exclusive members of the Court, they always were numerically predominant in its membership. Today, however, there are no Protestants – *zero* Protestants – on the Court. The entire Court is comprised of six Catholics and three Jews (including three women, two of whom are Jews and the third Catholic).

This is an amazing social transformation. It speaks not only to changes in our legal culture but to a radical transformation of the American social order. Just fifty years ago, when I graduated from Yale Law School, it was a seemingly settled fact that the WASPs owned American society. The rest of us – Jews, Catholics, women, blacks – were here on sufferance, with the social status of resident aliens. During the past half-century, the WASP dominance – as exemplified by our High Court – has simply disappeared. What had appeared as solid in our social hierarchy has suddenly melted into air.

If the old corps of caretakers – Supreme Court Justices, physicians, pregnant women – no longer inspired confidence, it is not surprising that the culture generally would engage in a search for a new group willing to take on this role. One new group – I would say, the most salient new group – that has stepped into this breach is gays and lesbians. The speedy evolution of the reform agenda among this group from the decriminalization of same-sex sodomy to advocacy for same-sex marriage makes the point. Their agenda has shifted from a privacy claim – that no one should interfere with their consensual sexual practices – to a claimed access to marital status in

order to respect their wishes and their capacity to care for one another and for children in loving long-term relationships.

This new claim is framed in the terms of equality or dignity – that gays and lesbians should be treated the same as heterosexuals who wish to marry. In the background of this claim is a much-lamented social fact, that heterosexual couples are increasingly inclined not to want marriage and some half of those who do marry are ultimately divorced. In other words, heterosexuals are now more reluctant than ever to make long-term, legally enforceable caretaking commitments between themselves and with their children. The campaign by gays and lesbians for access to married status is not simply a claim for equal status; it is a claim that revalorizes the frayed institution of marriage, of state-recognized long-term commitments to discharge the fundamental caretaking promises of the marital state. At the moment, this assertion seems to be striking a resonant chord, especially among young heterosexuals; overall, a majority in public opinion polls now supports same-sex marriage, a rapid increase from just a few years ago.

The changed status of gays and lesbians, of African-Americans, of women, of people with physical or mental disabilities, of the WASP elite all reflect a wide-spread social conviction dating from the mid-1960s that social order no longer securely rested on the old categorical rankings that favored white male heterosexual able-bodied Protestants. This radical dissolution of the old order has not yet been followed by a new, stable social ordering. The deeply contentious polarization of contemporary American political life is a reflection of this persistent instability. But the instability is, in itself, deeply disturbing. It is as if the rules governing the social relations among strangers have been uprooted and everyone is suddenly vulnerable not only to our fears of one another but to the unruly forces in our own individual psyches.

And yet, paradoxically, the initially dominant social response to the dissolution of the old heirarchy did not lead immediately to the impositions of new patterns of dominance and subordination. The dominant social response to the dissolution that erupted in the 1960s decade was an egalitarian emancipation of the previously oppressed groups. The impetus for this emancipation was not simply or not even primarily the newly vocal protests of the oppressed; the underlying impetus was a new sympathy for the oppressed groups by the former oppressors. The appearance of this new sympathy, moreover, followed the same historical pattern of the immediate sequels to prior dissolutions of the seemingly stable social orders, immediately after the Civil War and the American Revolution.

The genealogical connection between the emancipatory impulses of the mid-1860s and the mid-1960s is revealed by the popular designation of these two moments as the First and Second Reconstructions, as if the latter was returning to the egalitarian promises of the former and turning away from long hierarchic impositions during the interval. The First Reconstruction had the same familial connection to the emancipatory promises in the period between 1776 and 1830. In colonial America, the most visible and forcible subordinating degradations had been directed against black slaves (located mostly in the South but an important part of the commerce in the Northern colonies) and Native Americans (against whom the white colonists in all sections of the country engaged in brutal, land-grabbing aggression).[16] The Revolutionary War was accompanied by considerably softened white attitudes in the Northern and Upper Southern states toward black slaves and Native Americans. A new empathy appeared as the revolutionary colonists compared themselves to slaves in their relations with Great Britain and were explicitly and openly troubled about the inconsistency of this claim with their own treatment of black

slaves.[17]

Thus most Northern legislatures abolished slavery during the generation after independence[18] and legislatures in the Upper South made it easier for slaves to buy their freedom or otherwise be emancipated by their masters.[19] Regarding Native Americans, a new policy was embraced that accentuated treaty-making rather than warfare; these treaties, moreover, were ostensibly beneficent toward the Native Americans. This post-Independence era was, broadly speaking, an emancipatory moment.

To be sure, egalitarianism was not uniformly embraced in this moment. The impetus for the replacement of the Articles of Confederation with the Constitution was in effect a reactionary re-assertion of hierarchic social authority by the old colonial ruling elite who saw their status threatened by the democratic grasping of the masses (that is, the white, male artisans and small-scale agriculturists).[20] The new Constitution was hardly an emancipatory document, especially in its entrenchment of slavery in the South. But even here, some new empathic connection is revealed by the fact that, for all its deference to Southern plantation slaveholders, the word "slave" never appears in the constitutional text. James Madison, perhaps the richest man in Virginia and the largest slaveholder, was explicit in his insistence that the word would stain the document and that its absence would implicitly convey the hope that the slave institution would someday be abolished.[21]

By 1832 the post-Revolution emancipatory impulse had run its course in the Upper South and the North and a new and even more rigid social hierarchy was imposed. The last gasp of this impulse was the extended debate of the Virginia legislature in 1831-32 regarding the possible abolition of slavery, a measure which was defeated by the narrow margin of 65 to 58.[22]

For some time before then, however, conditions for freed blacks became more harshly repressive in the Southern states. For example, many Southern states forced free blacks to leave their territory and these states concurrently made it almost impossible for slaves to buy their freedom even if their owners agreed.[23]

Regarding Native Americans, the previous national goal of conciliation was essentially abandoned in favor of an openly avowed policy of literal extermination, of genocide. The marker for this shift was the election of Andrew Jackson as president.[24] All the preceding presidents had been charter members of the American founding elite (and all but two, Adams father and son, had been Virginia plantation owners of vast wealth). Jackson represented the "new man" (as the common account had it, tracking mud into the White House and stomping on old manners). The Age of Jackson may have been an egalitarian embrace of middling white men, but it was unmistakably a return to and intensification of the subordination of blacks and the slaughter of Native Americans.

The puzzle of the recurrent emancipatory intervals between these repressive regimes remains, however, to be explored. If we can understand the social dynamic that produces these intervals, can we self-consciously act to prolong them and even ensure their permanent dominance over the forces of hierarchical repression? Simply preaching the virtues of egalitarianism is not enough. We must try to understand and purposefully grab hold of the psychological levers of social change that recurrently have produced emancipatory intervals.

The key to this understanding is to contrast one differentiating element in the repressive and emancipatory regimes. That element is the conceptual (and often actual physical) distance in social relations generally. The repressive regimes are characterized by firm, clearly

identifiable boundaries among individuals and groups. The existence of clearly demarcated boundaries is a crucial step toward the erection of an hierarchic social structure of dominance and submission. By contrast, the emancipatory intervals are characterized by the absence of firm boundaries marking social distance among individuals and groups. This relative absence of boundaries, this fluidity, is the crucial building-block for an empathic identification that cuts across hierarchic social boundaries.

The presence or absence of boundaries does not explain the difference between repressive and emancipatory eras. Focusing on social boundaries that enact or counteract differentiating distance is, however, like using a dowser to locate the place where a well should be dug. Narrowing our attention to the psychological dynamic underlying the existence or dissolution of social boundaries will lead to understanding the well-spring for enforced distance and differentiation as compared to diminished distance and empathic identifications among individuals and social groups.

We can see a vivid illustration of the social deployment of empathic identification in Franklin Roosevelt's first inaugural address, which provided the epigraph for this chapter. Early in this address, Roosevelt proclaimed, "first of all, let me assert my first belief that the only thing we have to fear is fear itself." The customary quotation of this aphorism stops here. But the remainder of the sentence gives its full context and reveals the offer of empathic identification that the new president held out to a nation in the grip of the Great Depression.

After identifying "fear" as his adversary, FDR defined it in a distinctive way: "nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." His specific invocation of paralysis and his use of mobility "to convert retreat into advance" as

his goal for the nation conveyed the history of his own struggle with infantile paralysis and his apparent success in overcoming this personal crisis. It's hard to believe that FDR's reference was unintentional, though perhaps this was his unconscious speaking to override his conscious intention of publicly ignoring his disability. It's equally hard to believe that most of his audience didn't consciously connect his prescription with his personal struggle; but in any event, the emotional resonance of his statement inevitably conveyed an unconscious communication: "I am at one with you and together we can overcome this crisis that would cripple us if we were isolated individuals." Roosevelt offered an all-inclusive shared identification, a self without boundaries, and millions of Americans embraced the offer.

As heart-warming as this offer might seem, there is also a deeply disturbing element in the dissolution of separate boundaries, an instability of social ordering, that the boundlessness implies. The Great Depression in some measure dissolved the prior social order and this dissolution inspired the formless, pervasive fear that Roosevelt identified: "nameless, unreasoning, unjustified terror." Fear of personal and social disorder is the crucial motive for impositions of degrading subordination of vulnerable groups. The very force that holds promise for new alliances of empathic identification and acknowledged interdependence also impels vulnerable people toward "retreat" from one another, toward enforced degrading submission by some toward others. But why should this primitive terror find relief, as has repeatedly happened, through the degradation of some by others rather than through joining in common enterprise based on empathic recognition that all are equally afflicted?

That is the question to which we now directly turn.

II

II. The Insanity Offense

If thine eye offend thee, pluck it out and cast it from thee.

Matthew 18:9

The social construction of rigid differentiation between some people who are viewed as "naturally superior" and others who are "inherently inferior" is deployed to justify the conceptual and often the physical confinement and degradation of the subordinate group. This social categorization is at its root a psychological enactment, a projection outward, of the dichotomous split, the threateningly self-contradictory image of the "self" in everyone's mind.

The conceptual subordination of one person by another depends on the premise that the two are not just physically but psychologically separate from one another. This might seem like an intuitively obvious and entirely unproblematic proposition. But in fact it is not true that any of us is clearly separate from one another as a psychological proposition. "Separateness" is a wish more than a psychological reality.

The starting point for understanding this proposition is to acknowledge that newborn humans lack the capacity to see themselves as separate from others or from the physical world. This is hardly a surprising supposition. We currently have no way to directly observe newborns' brain structure to detect this capacity – or for that matter, to directly observe the brain structure essential in adults for the possession of this self-conception. But careful observation of newborn and child behavior supports the inference that the conception of the separate self is not inborn but is a learned phenomenon.

II

Sigmund Freud viewed the infant's inability to imagine a self separate from the world as an essential feature of what he called "primary process thinking" in which there is no distinction between fantasy and reality or between dreams and waking observations. The absence of these distinctions means that the mental conjuring of a fantasy in itself transforms the fantasy into a reality; accordingly, imagining voices in one's mind is experienced as no different from hearing the voices of real people in the external world. In an adult, the dominance of these premises is the hallmark of psychosis. A typical infant is exclusively committed to these premises, which constitute what Freud saw as the magical omnipotence of infantile thinking.

The building block for primary process thinking is the absence of boundaries between self and other. By contrast, the essential foundation for rational thinking – what Freud called "secondary process thinking" – is the presence of clear-cut boundaries between self and other. Reasoning from this premise, fantasy can be distinguished from reality and dream life can be experienced as different from waking observations. No one with normal brain function reasons exclusively within one mode or the other, but different individuals differ in their psychological commitment along the spectrum from near-exclusive reliance on secondary process as compared to primary process thinking.

There is firm empirical confirmation of the absence of boundaries between self and other in typical infantile thinking. Thus, for example, one revelatory marker of the capacity to conceive a separate self is understanding that knowledge I possess is not necessarily and automatically possessed by others. This understanding necessarily implies that my mind is separate and different from others' minds and that to obtain knowledge they must either learn it as

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I have done or I must communicate it to them. This seemingly common-sense proposition is not grasped by virtually any child until around three years of age.

In a classic psychological experiment carried out by the developmental psychologist Jean Piaget, this has been demonstrated by hiding a ball in the presence of the child and another person, then with the child alone present moving the ball to a different hiding place and asking the child to predict where the other person would look for the ball when he reenters the room. Children younger than three typically respond that the other person would immediately look in the new hiding place, ignoring the fact that the child alone knew that location. Only after age three does the typical child immediately grasp that the absent person would look in the original hiding place.

Another observable marker of the newborn infant's incapacity to see himself as separate from others is his inability to recognize himself in a mirror. Until around eighteen months, the typical infant fails to respond to his own mirror image with any special recognition or differentiation. Notwithstanding that the infant smiled or grimaced or cried at the precise instant that his mirror image made the same move, the typical infant makes no connection between himself and the reflected image of himself. After eighteen months, the typical infant recognizes himself in the mirror by intentionally playful exchanges between himself and his mirrored image. The infant thus demonstrates a newfound capacity to see himself as separate from the rest of the world. Whereas previously the mirror image had been for the infant a perceived object no different from all others, now the infant sees the mirror image as a unique expression of an "I" or a "Me."[25] (Though the concept of a distinct "I" is thus revealed in rudimentary form, the infant still has not fully absorbed this idea until much later than eighteen months. Accordingly, the

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typical verbal infant remains confused about the use of personal pronouns until well into his third year, finding it difficult to understand that he is a "me" to himself but an objectively observed "you" to others.)

I made a further personal observation recently when I spent some time with my seven-month old great-nephew, Beckett. As he sat on a blanket covering the floor, he tugged repeatedly at the blanket's edge apparently intending to lift it off the floor and over his head. He couldn't succeed in lifting the blanket because he was sitting on it – a problem evident to me but not to him as he kept pulling. It seemed to me that Beckett had no sense of himself as an object in the world; he was, that is, unable to conceive himself as a separate object weighting down the blanket. So he tugged and tugged to no avail. (I tried to explain the problem to him, but he had nothing to say about it.)

These examples might suggest that, although the concept of a separate self-aware self is not inborn and, indeed, some considerable period of time elapses while the concept takes hold in a child's mind, nonetheless the separate self does ultimately prevail and by adulthood has displaced the earlier erroneous view for all with normal brain structures. After all, so the argument goes, the existence of a self separate from others is an objectively observable reality, just as we have physical bodies separate from one another. The notion of dissolved selves, of inextricably intertwined connection with others, is a fantasy – persistent in some people, less so or not at all in others, but a fantasy nonetheless.

The clincher for this argument is that the very possibility of rational thought, of objectivity, depends on the premise that each of us is a separate integer, capable not only of

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viewing other people as distinct but also of seeing the external world generally as separate from oneself. This objectifying capacity marks the difference between us moderns and primitive tribesmen who believe in magic animism – as if cultural anthropology demonstrates that humans have traversed the same developmental path that each infant today follows when it matures into (modern, rational) adulthood.

If this belief were not enough to demonstrate that the mature modern adult has a firm grasp on separate selfhood, and has cleansed his mind of the childish fantasy of an unbounded self, the heavy artillery of the concept of moral responsibility brings up the rear for this argument. Unless – so the argument goes – each of us has a self separate from others, no one of us can be considered responsible for our conduct. We would indeed lack the psychological capacity to conform our conduct to moral norms. The existence of a conscience – a psychologically internalized regulator of conduct – depends not only on the concept of a personal self separate from others; it depends on the capacity to view oneself objectively, as if the individual could stand outside himself and evaluate himself as a person self-consciously separate from himself.

This argument stands at some distance from our starting point. To claim that the concept of a separate self must exist or else the very idea of individual moral responsibility collapses provides no proof for the actual existence of separateness as a psychological construct. This claim does show the psychological depth and even urgency of the modern commitment to this concept. The existence of this psychological compulsion, however, does not itself demonstrate that the concept of separate selves is erroneous. We may also feel urgently committed to the idea that the earth is round but this doesn't suggest that this idea is incorrect.

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Even so, as much as the idea of psychologically dissolved selves throughout adulthood is counterintuitive, I want to insist on it as a foundational proposition. What if we did believe that no adults ever abandon their childhood conviction that they are inextricably intertwined with the entire universe of people and of things? What if children do not supercede this view but instead suppress it, deposit it for safekeeping in some more or less accessible region of their minds while they learn to engage in public discourse based on the diametrically opposed belief in separate selves? What if most adults regularly, if unconsciously, think about the world in ways that combined both perspectives – that they were "bounded selves" and at the same time "unbounded selves," even though these two perspectives are diametrically contradictory of one another.[*]

[*] My inquiry is akin to the questions posed by the recently developed discipline of behavioral economics. Practitioners of this discipline build from observations of common cognitive illusions that derail rational calculations; and they use these observations to design social policy that counteracts irrational influence on behavior. Thus, for example, the common cognitive error of giving excessive weight to current satisfactions as compared to anticipated later payoffs leads many people to neglect saving for retirement. To compensate for this inclination toward irrationally short-sighted and self-harmful conduct, behavioral economists prescribe retirement savings account that automatically enroll participants and require an affirmative step of "opting out" for a participant to withdraw from the account. This prescription in turn builds on another irrational cognitive bias, that people are inclined to "go along" with the status quo even though they would not have endorsed the current arrangements if presented as an original proposition and even though they were now free to reverse those arrangements. (See R. H. Thaler & C. R. Sunstein, Nudge: Improving Decisions about Health, Wealth and Happiness (New Haven: Yale Univ. Press, 2008).)

The behavioral economists are by and large content with identifying these cognitive biases (often through ingenious laboratory experiments involving college undergraduates participating in various game calculations) without trying to identify their conceptual roots. Some of the practitioners do try to dig deeper but their speculations about the mental structures at work (for example, dividing the mind into "hot" and "cold" (J. Metcalfe & W. Mischel, "A hot/cool system analysis of delay of gratification: Dynamics of willpower," 106 *Psychological Review* 3-19 (1999*)* or "fast" and "slow" capabilities (Daniel Kahneman, Thinking, Fast and Slow (2012)) often seem more question-begging than independently illuminating.

My aspiration is the same as the behavioral economists generally – to identify psychological forces that lead to irrational, self-injurious calculations and to identify social

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This is not idle speculation. There are, I believe, firm reasons for believing that these propositions are a more accurate portrayal of human psychological functioning than the conventional idea that normal infants like primitive mankind begin without a concept of separate selves and ultimately come to believe exclusively in the existence of self separate from others. This alternative portrayal rests on the foundation laid by Sigmund Freud.

For many people today, this provenance is itself sufficient basis for dismissal. It is true that many of Freud's ideas have not weathered well. His attitudes toward women as wannabe men, toward heterosexual genital intercourse as the touchstone for normal psychosexual maturity, toward the necessary dominance of rational thinking over irrational fantasy – all of this and more have revealed Freud's limited attitudes as a man of his times in a middle-class Viennese cultural milieu.

Moreover, Freud's methodology does not satisfy contemporary norms of scientific inquiry. None of his hypotheses about the workings of human psychology were empirically demonstrated by scientifically accepted techniques such as use of control groups and double-blind experimental protocols. These scientific techniques are intended rigorously to exclude the possibility that observers see what they want to see rather than seeing past their preconceptions to an objective reality. It might seem especially suspect and ironic to cite Freud's work for the proposition that

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interventions that take account of these forces rather than assuming or rationally arguing for the prevalence of rationality over irrationality. I focus specifically on the competing conceptions of the "self" – the contradiction, that is, between a "bounded" versus a "boundless" self – because, as I will develop, these contradictory conceptions are well-recognized features of human cognition that emerge from developmental differences in infantile and adult modes of reasoning and, in particular, these contradictions provide an understanding of the psychological roots of harmful inflictions on vulnerable groups.

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most people confuse themselves with the world around them since his methodology doesn't satisfy the basic scientific criterion for assuring that he has not confused himself with what he thinks he is observing about the world.

If, however, we apply Occam's Razor to Freud's work so as to pare it down to its essentials, to the few propositions which are basic and necessary for his view of human psychology, we will see reasons why his perspective cannot be easily dismissed. I propose to do this by identifying the specific building blocks that Freud required to explain the infant's development of a separate sense of self so that we can explore how well these elements still stand up. There are two building blocks which are all that Freud needed for this explanatory purpose. The first is the existence of human capacity for memory, the second is the existence of unconscious thinking.

Inborn human capacity for memory is easy to demonstrate empirically. If we posit that at some moment in human development, the infant or child was unable to distinguish between self and other, this moment would be subject to its memory. Freud explicitly claimed that the infant was aware of his surrounding world but that

> "the infant at the breast does not as yet distinguish his ego [sense of self] from the external world as the source of the sensations flowing in upon him. He gradually learns to do so [so that] the ego detaches itself from the external world. Or, to put it more correctly, originally the ego includes everything, later it separates off an external world from itself. Our present ego-feeling is, therefore, only a shrunken residue of a much more inclusive – indeed, an all-embracing – feeling which corresponded to a more intimate bond between

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the ego and the world about it."[26]

The existence of this intimate bond in early childhood is empirically confirmed by the data I've just mentioned. But notwithstanding the young child's capacity for memory, it is on its face plausible that the experiential memory of an indistinguishable bond between self and the external world, a memory literally of "selflessness," would not be retained but would be obliterated. Unless this memory were expunged, it might seem that it would engender considerable confusion as the maturing child "separates off an external world from itself." But Freud insisted that this memory was never erased. Indeed, he was bold enough to suggest that "in mental life nothing which has once been formed can perish – that everything is somehow preserved and that in suitable circumstances . . . it can once more be brought to light."[27]

This is a radical proposition. It may indeed be too extravagant to be sustained. But even if Freud was wrong in appearing to assert that every memory "is somehow preserved," no matter how fleeting or insignificant at the time, it is surely plausible that a persistent thought reiterated many times every day for several years would become embedded in long-term memory pathways. It is enough for our purposes to limit Freud's claim to all adults who "somehow preserve" the memory that throughout their infancy, none had understood themselves to be separate from the surrounding universe of animate and inanimate objects.

To make clear how much this proposition defied common sense understandings of the mental workings of memory, Freud moved (as he often did) to a poetic invocation. He asked the reader to visualize the archeological history of the city of Rome, noting how new structures were successively built on top of the old so that the former history of the city was effectively preserved

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though buried. He then continued,

> Now let us, by a flight of imagination, suppose that Rome is not a human habitation but a psychical entity with a similarly long and copious past – an entity, that is to say, in which nothing that has once come into existence will have passed away and all the earlier phases of development continue to exist alongside the latest one. This would mean that in Rome the palaces of the Caesars and the Septizonium of Septimius Severis would still be rising to their old height on the Palatine and that the castle of S. Angelo would still be carrying on its battlements the beautiful statues which graced it until the siege by the Goths, and so on. . . . And the observer would perhaps only have to change the direction of his glance or his position in order to call up the one view or the other.[28]

This evocation requires one amendment to set out the full sense of Freud's meaning. As an abstract proposition, one can grasp the idea that all past developmental stages persist in memory but that these stages cannot be concurrently experienced. A further flight of imagination as an addendum to Freud's might illustrate this proposition. Picture an ambiguous line drawing that looks like a portrait of a duck from one perspective but from another perspective looks like a rabbit. To see the duck or the rabbit, as Freud says of ancient and modern Rome, one must merely "change the direction of his glance or his position." But even though the observer knows that both the rabbit and duck co-exist in the same image, there is no way that she can see both at the same time. It is as if the duck and the rabbit exist in the same space but occupy different conceptual universes constructed from diametrically opposed premises. So too we can understand but not concurrently experience the psychic phenomenon that has been our focus of

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attention – that is, the successive conceptions of a boundless self living in an indistinguishably unified universe and a bounded self separate from others in the universe.

What is the mechanism for this extraordinary mental gymnastic? Freud posited the existence of an unconscious mind as a structured entity co-existing alongside a conscious mind. The distinction between conscious and unconscious does not appear full-blown in early infancy; it is a developmental achievement. One might say that the unconscious serves as a repository for early ideas (such as the boundless self) that are diametrically opposed to later-acquired ideas (such as the bounded self) – ideas that if experienced at the same moment would generate only anxious confusion.

Freud never was able convincingly to articulate the precise relationship between conscious and unconscious thought processes. But the question whether unconscious and conscious thought processes are rigidly differentiated or whether they do or should exist in a hierarchical relationship is less important than Freud's basic insight that unconscious thinking exists, that it rests on premises different from and logically inconsistent with conscious thinking and that unconscious thinking influences behavior even though it is not directly accessible to awareness. Freud was not able to observe the neurological operation or even the existence of unconscious thinking; he inferred that there must be some such phenomenon from his observations of his patients and his self-analysis. But the limitation of his observational capacities should not be a reason for dismissing his basic insights any more than Darwin's failure to understand the mechanism for genetically transmitted inheritance undermines his claim that evolution through reproduction is a basic characteristic of all life forms.

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The empirical lacunae in Darwin's conception has now been filled by our modern understanding of genetic transmission. Modern observational capacities regarding brain function have not yet advanced as far as our new knowledge of genetics. But regarding the existence of unconscious thinking, we no longer need to rely solely on inference as Freud did. We now have direct empirically verifiable observation of unconscious thinking based on brain monitoring capacity that has been developed only within the past forty years.

The first empirical demonstrations of unconscious thinking were accomplished in the 1970s by Benjamin Libet at the University of California, San Francisco. Libet asked subjects to lift their right index finger whenever they felt an urge to do so. Based on readings from electrodes attached to the subjects' scalps, Libet observed that electrical activity regularly occurred in the brain 300 milliseconds before the subject was aware of the urge to move his or her finger. "Merely by observing the electrical activity of the brain, Libet could predict what a person would do before the person was actually aware of having decided to do it."[29] Libet thus saw directly what Freud was capable only of inferring – that brain activities indistinguishable from consciously perceived thoughts take place outside of conscious awareness. We can now see unconscious thinking in operation.

What are these thoughts? What meaning do they contain? We know from Libet's experiments and others who have succeeded him that this observable, unconscious brain activity is not random electrical noise. The scalp readings that preceded his subjects' awareness of an impulse to lift their index fingers repeatedly revealed the same patterns. They have meaning of some sort, though to decipher this meaning we are still dependent on a reconstructive process

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carried out by the subjects themselves – a process that retrospectively teases these impulses into some form of conscious awareness. The reconstructive process is in its essence identical to the waking recall of dreams.

The relationship between conscious and unconscious thought is not, however, one-to-one correspondence. Far from it. There is an immense reservoir of unconscious thinking that never becomes conscious, located in what the neurologist Eric Kandel describes as a "vast array of unconscious, autonomous, specialized brain networks that contribute to the small amount of conscious information that is the spotlight of attention."[30] The content of this reservoir is "the momentary, active, subjective experience of working memory." The spotlight of conscious attention in effect "corresponds to our working memory for a single event, a memory lasting only sixteen to thirty seconds."

Behind this consciously experienced memory, however, there is an immense network of memories that is selectively scanned, as it were, backstage. As Libet's experiments showed, this unconscious scanning occurs with incredible speed; the interval he identified between the unconscious prelude to and the conscious awareness of the urge to lift one's finger occupied only 300 milliseconds. But during this tiny interval, it is as if the urge to lift one's index finger is processed through an interwoven chain of associative memories – memories, perhaps, of past uses of the index finger, of body activity, of following instructions, of independent choice-making, of this and that and cabbages and kings.

This scanning of past memories inevitably leaves some residual tracings in the final conscious idea. To use a theatrical metaphor, only a limited number of memories step forward to

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center stage to be incorporated into the spoken script, the consciously acknowledged idea. The vast number of other memories which remain unconscious are not entirely effaced, however, but retreat offstage where they remain ready to be recalled. This theatrical metaphor was notably used by the cognitive psychologist Bernard Baars to describe the way unconscious ideas come into conscious awareness from a widespread network which he called the "global workspace" of the brain. He analogized this workspace to a theater with three parts: "(1) a bright spotlight of attention focused on the action of the moment; (2) an unseen cast and crew who are not part of the immediate action; and (3) the audience. . . . Mind is not simply the actors, crew members, or audience, but the network of interactions among them."[31]

The relationship between the conscious idea at center stage and the off-stage memory may be harmonious – that is, the unconscious memory may be comfortably enfolded into the conscious thought, though it remains outside conscious attention. Or the relationship may be adversarial – with the off-stage memory banished from the center of conscious attention but unreconciled to its exile, shouting angrily from the wings and even disrupting the action on-stage. Whether harmonious or conflictual, this portrait of cognitive processing between unconscious and conscious memories is captured by William Faulkner's dictum, "The past is not dead. It is not even past."[32]

The newly developed modes for observing living brain activity almost certainly will continue to advance in sophistication and detail; but for the moment, I believe we can comfortably assert the following propositions: (1) that the newborn infant lacks the conceptual capacity to imagine himself as separate from other people or the external world; and (2) that the conceptual

capacity to imagine a "separate self" is achieved developmentally over some extended period of time. We have not yet identified an empirically observable structure in the brain that directly corresponds to the concepts of boundless and bounded self, but direct observations of developing children confirm the successive presence of these two modes of cognition.

More speculatively, we can advance the added propositions: (3) that human memory of infantile belief in a boundless self is not effaced as the infant comes to develop a belief in a bounded self, but the contradictory infantile belief is stored in unconscious memory; and (4) this memory (along with a multitude of others) is regularly scanned on the way toward consciously aware selective attention. In this rapid scanning process, the contradiction between memories of a boundless self and a bounded self is not resolved but one mode or the other takes precedence.

Like the rabbit/duck portrait, these modes cannot occupy the same psychic space since they are directly contradictory; but unlike the rabbit/duck example, these contradictory modes of thought may be experienced so rapidly that the individual is not aware of the alternation. To use yet another theatrical metaphor, the individual's shift back and forth between the contradictory modes is like her perception in a movie theater that she is watching continuous action on the screen whereas in fact she is observing a multitude of still pictures arrayed so rapidly that they appear as continuous motion.

The precise relationship between the two modes differs among individuals, and differs from one historical era to the next. Thus the belief in ghosts actively involved in human affairs or assignment of animistic qualities to inert objects such as trees or rocks speaks to cultural norms giving greater weight to boundlessness among individuals than modern Enlightenment ideas of rigid separateness between human beings and the external natural world. Moreover, the

relationship between these two modes of thought can be more or less harmonious, more easily experienced as continuously coordinated rather than disturbingly disruptive, in any given individual (as in any cultural era).

Propositions 3 and 4 cannot be directly observed nor can they be as closely inferred from observed data as propositions 1 and 2. For purposes of our inquiry, however, I will assume the validity of all four propositions as the groundwork for asking what would follow for legal regulation of human conduct if these propositions were true. I do believe that propositions 3 and 4 are highly plausible and that they are regularly confirmed in the consultation rooms of psychoanalysts and psychodynamically informed therapists – most clearly through the interpretation of dreams, "the royal road to the unconscious," as Freud saw it.[33]

People who suffer from psychoses characteristically are impaired in their capacity to see themselves as separate from others and the external world generally. They hear voices and imagine them to be external events rather than interior fantasies; they cannot readily distinguish between fantasy and objectively observed reality. Some people are afflicted by physical abnormalities in their brains that produce psychotic delusions and contemporary advances in neuroscience promise to give us more detailed and accurate accounts of these abnormalities. My central concern, however, is not with people whose brain structure is demonstrably abnormal. My concern is with those people who have essentially normal brain structure but nonetheless experience some difficulty in distinguishing between fantasy and reality, between waking life and dreams.

This group is not simply a large number of people. This group constitutes everyone who has a normal brain architecture in which the diametrically opposed conceptions of a bounded and

a boundless self are embedded. Through our elaborate networks of social interactions, normal people solve, or at least cover over, this contradiction and consequent difficulty in differentiating fantasy from reality and wakefulness from dreams. The cognitive functioning of every normal person thus has fundamental similarities with the mental processes of insane people.

This is a disconcerting proposition for many people, perhaps even for most; and this discomfort leads many people to deploy their rational capacities, their bounded mind, to exert control over, to disown the unruly boundless portion – to "pluck it out and cast it [away]"

A multitude of social arrangements have been created in the service of this wish. One clear expression is in the formulation of the insanity defense in the criminal law. Much ink has been spilled during the past century and a half in the effort to identify a proper definition of legal insanity. The fundamental goal in this enterprise has been to erect clearly demarcated distance between the mentally normal "us" and "them" who really *are* mentally ill.

Public attitudes toward the insanity defense are a tangle of contradictory propositions. We call it a "defense" because we want to deny culpability, moral blameworthiness, for actions that we might imagine in the realm of possibility for all of us. And yet we fear insane people precisely because we can't avoid thinking that they are not simply similar to us, but that they are intertwined in a relationship with us – that their inability to demarcate selves separate from us stimulates our vulnerability in conclusively demarcating our boundaries from them. In this sense, insanity is not a defense for them but an offense from them against us.

Accordingly, after confidently offering empathy to them by excusing them from moral culpability we confine them to facilities labeled mental hospitals but mock this very terminology by providing the barest semblance at most of treatment opportunities; and we typically impose

longer terms of confinement than would have obtained if they had been found morally guilty and placed in facilities labeled as prisons.

Our mixture of empathy and revulsion toward insane people is a reflection of our own struggles between boundless interconnection with them and bounded differentiation from them. Our initial impulse of exculpatory empathy is a pale version of our boundless interconnection. Our virtually immediate retraction of empathic identification as expressed in the imposition of harsh and often endless confinement without treatment reflects our need to reassert our bounded selves as a defense against our own boundless selves. This struggle with our own thought processes engenders not only frustration but defensive anger – which in turn explains the cruel contradiction embedded in our social response.

A successful insanity defense does shield a defendant from the death penalty. But though we refrain from killing the criminally insane, we confine them to a living death. We extrude them – in most cases, permanently extrude them – from the human community. This kind of quarantine is not only physical but, more importantly, is a conceptual quarantine intended to draw firm lines between "them" and "us" so as to appease the fear that their disordered minds are fundamentally similar to the disorder in our minds. This fear inevitably arises because of the juxtaposition of directly contradictory modes of thought in our cognitive functioning.

The threat to everyone's cognitive coherence represented by people suffering from mental disorders is at base the same threat pervasively experienced by people caught in social turmoil severe enough to call into question the logical order of their world – turmoil such as the Revolutionary War, the Civil War and the disruptions culminating in the 1960s decade. The social response to mentally ill people is directly parallel to the subjugations imposed at various

times and with varying ferocity on blacks, Native Americans, gays and women in the wake of the disruptions of the Revolutionary War, the Civil War, and the decade of the 1960s.

It is not surprising therefore that almost immediately after the Civil War, a newly rigid regime of degradation accompanied by conceptual and physical segregation was inflicted on mentally disabled people – just as we have seen for other vulnerable groups. Beginning around 1875, increasingly large-scale, geographically isolated residential institutions were created to isolate mentally ill and retarded people from "mentally normal" society. These institutions were initially founded with protestations of beneficence – a claim with some plausibility because of the past injuries inflicted on disabled people living in community settings. Quickly, however – by around the turn of the century – these "beneficent treatment" institutions had universally been transformed into unimaginable hell-holes where the inmates received nothing resembling treatment, nothing but brutal inflictions, and where most of the brutalized inmates found release from institutional confinement only by dying. By around 1905, many promoters of institutionalization discarded the fig leaf of therapeutic promises and openly acknowledged their fear of social dangers supposedly posed by mentally disabled people and the exclusive role of this fear in justifying life-long institutional confinement for all of them.[34]

The emancipatory movement for mentally disabled people first emerged into high social visibility in the early 1960s, at virtually the same time as the civil rights revolution for blacks, then women, and then gays took flight. This new reform activity for mentally disabled people was fundamentally (if not explicitly) also impelled by eruptions of social disorder and resultant disbelief in the beneficence of caretakers in the 1960s. Because of the close correspondence of the emergence of emancipatory movements among these various groups, we can also infer a social

connection between the prior degradations inflicted on them.

A rational case could readily be made that mentally abnormal people needed special treatment for their own benefit and for the protection of others. But the blatant hypocrisy and the vastly cruel oppressions imposed on people viewed as mentally abnormal had a deeper and much darker source. The abusive subjugations were a projection onto these people of fears that the dominant majority had about the coherence, the rationality, of their own cognitive functioning The war against the mentally disabled people was an unconscious expression (coupled with a conscious denial) of the oppressors' warfare against their own minds. So too we can understand the oppressions imposed on other vulnerable groups after the three eruptions of intense social turmoil in American social history. The dominant majority were gripped by fears about their own cognitive coherence in response to the turmoil. They projected those fears onto others, portrayed themselves as superior to these vulnerable others and imposed brutally degrading controls on them. This was a disguised effort to control the unruly portions of their own minds – a disguise that fooled themselves more effectively than they fooled the victims of their oppressions.

Can this view of the underlying psychological dynamic of oppression be used as a springboard toward emancipating the oppressed by liberating the oppressors from warfare against themselves? We turn now to explore this possibility.

III. Self Divided

"*What is meant by this word* **reason**?"

Thomas Hobbes

We have relied upon a psychoanalytically based dynamic for understanding relations between oppressors and oppressed, but there are other roads to Rome, other ways that address the same issue and lead to similar conclusions.

In *Sources of the Self: The Making of the Modern Identity* (1989), the philosopher Charles Taylor identified what he called "the continuing philosophic discomfort" with the post-Enlightenment conception of the self, and he located the source of this discomfort in the confusing shift between "radical objectivity" and "radical subjectivity" within the self's conceptual structure.[35] Human beings can observe themselves from a third-person perspective and experience themselves from a first-person perspective. But Taylor said that the two perspectives are incommensurate; they start from different premises and these premises lead to radically different mental representations of the individual and collective worlds. Though Taylor did not stress the distinction between the two perspectives that I emphasize, his account is consistent with the proposition that "radical subjectivity" reflects the premise that the self is boundless and "radical objectivity" rests on the separateness of a bounded self from the external world.

Taylor characterized the defining difference between the pre-modern and post-modern Enlightenment views of the self in a vivid way. He said that the self-objectifying modern self "stands in a place already hollowed out for God; he takes a stance to the world which befits an image of the Deity."[36]

When God is firmly in his place, the incommensurate distinction between the third-person and first-person perspective in human thought is stabilized. That is, God embodies the third person perspective; he observes and controls us. We in turn embody the first person perspective, observed and controlled by him. The conceptual instability occurs when God disappears from the equation and when these two perspectives of radical objectivity and radical subjectivity are thought to exist in a single entity that is the modern self.

If the modern self combines the two perspectives, it is easy to understand the pre-modern embodiment of the third-person perspective in God as a psychological projection – that is, as a psychological defense mechanism by which an individual projects his own attributes onto someone or something in the external world (in this case, a projection of the individual's capacity for seeing himself as a third-person) because acknowledgment of the attribute as his own would be too uncomfortable. Though the individual psychologically separates himself from ownership of or personal responsibility for the attribute, this conceptual maneuver in fact rests on the premise that the individual and the object of his projection are seamlessly intertwined. The psychological defense mechanism of projection rests on the unacknowledged, unconscious premise that the self is not separate from the external world.

Just as Taylor in effect ascribed a central place to the distinction between the boundless and bounded self in his account of the conceptual development of the modern self, so too Thomas Hobbes implicitly gave a defining role to the development of this distinction. Hobbes's great work, *Leviathan*, is best known as a treatise on social organization, but Hobbes's political account does not begin until Part II, "Of Commonwealth." In Part I, entitled "Of Man," Hobbes considered mankind as individuals, not as socially interacting with one another. In this Part he

explored various sensory capacities of mankind – taste, touch, hearing, sight – which establish the grounding capacity for social relations. The most interesting discussion for our purposes appears in the second chapter of Part I where Hobbes identified a surprising human difficulty as he saw it: "[I]t is a hard matter, and by many thought impossible, to distinguish exactly between sense and dreaming. For my part . . . being awake I know I dream not, though when I dream, I think myself awake."[37]

Hobbes offered a solution to this cognitive uncertainty when he considered "what is meant by this word *reason,* when we reckon it amongst the faculties of the mind." He observed that "the ablest, most attentive, and most practised men may deceive themselves and infer false conclusions" and that "no one man's reason, nor the reason of any one number of men . . . [suffices, even when] a great many men have unanimously approved it. And therefore, the parties must by their own accord set up for right reason the reason of some arbitrator or judge to whose sentence they will both stand, or their controversy must either come to blows or be undecided, for want of a right reason constituted by nature, so it is also in all debates of what kind soever."[38]

The striking characteristic of this solution is not its obvious shortcoming as a way of determining "right reason"; who, after all, might qualify for this task of definitive "arbitrator or judge" when, by Hobbes's own concession, the best and the brightest "may deceive themselves and infer false conclusions." The striking thing is how closely this solution tracks Hobbes's conception of political authority – that men in a state of nature will come to blows, will engage in an endless war of all against all, unless by their own accord they surrender themselves to a Sovereign who will rule over them and conclusively settle disputes among them. Hobbes in Part I of his treatise, "Of Man," identified a cognitive difficulty that he said afflicts most, if not all, men

– that is, the ability to distinguish between dreams and wakefulness or, put another way, the self-deceptive inclination of all individual reasoning; and Hobbes purported to solve this difficulty through formal social ordering. He offered his solution in capsule form in Part I, and expanded it in copious detail in Part II, "Of Commonwealth." He thus seamlessly linked the solution for individual cognitive difficulty to a communal arrangement.

As Hobbes intuited, there is a direct connection between the cognitive functioning of individual human beings and the collective construction of the social order. Our individual brains are constantly bombarded by sensory perceptions that have no intrinsic structure or meaning. We construct meaning, we give order to disordered perceptions; and one of the ways we use for bestowing meaningful order is through our mutual depiction of our social relationships with one another. We may be prone to endless warfare with one another, as Hobbes claimed. But more fundamentally, our individual cognitive capacities are internally divided between boundless and bounded selves. Even though we strive for psychological harmony, our thinking is organized on the basis of inconsistent premises and in this sense we are endlessly at war with our selves. What respite can be found, what sense of cognitive coherence can be achieved by individuals, depends upon the collective construction of a network of social relations.

This construction does not necessarily lead to Hobbes's specific solution of an unaccountable Sovereign. Even so, in the next chapter we will explore the attractions of Hobbes's solution in the closely equivalent role assigned to life-tenured judges in the American constitutional scheme; but we will also see the psychological impoverishment of this solution and the greater promise offered by more participatory social orderings.

We can see both the depth of this contradiction and the persistently urgent need to resolve

it by exploring a further implication of Charles Taylor's observation that the modern post-Enlightenment concept of Self occupies a "space hollowed out for God." When God is the first-person creator and we are the third-person objects of his creation, it becomes easy to identify the uncaused cause in a hierarchical structure of the universe. God is the originator who causes everything to happen but nothing or no one has caused him to come into being. God is the uncaused cause. But if God disappears (or is in hiding and unavailable), who or what takes his place as the uncaused cause? Taylor observed that we moderns have taken God's place. But if that is so, how can we cause us?

The search for this uncaused cause is at the core of the law's secular struggle to define the insanity defense since the mid-nineteenth century. In the terms of the insanity defense, no matter what the variations in its formulation have been, sane conduct is viewed as freely willed by the individual; he is, in effect, the uncaused cause of his conduct. Insane conduct is not "free," but is caused by some superior force, by "mental disease or defect." When we see the contemporary image of the self through Taylor's eyes – as a secular response to the apparent emptiness of the "place already hollowed out for God," we can see how the idea of "free will" became a centrally prized element of human conduct.

Hence the passion that attends the debate about the existence and definition of the self-controlling self in the criminal law. Much more than a practical question about the proper disposition of socially threatening people is at stake; the very existence of the category of freely willed actions, of voluntary actors, must be vindicated. The meaningfulness of the world depends on it. Unfortunately, the search for the uncaused cause is a snark hunt – in Lewis Carroll's imagery, "the impossible voyage of an improbable crew to find an inconceivable creature."[39] But

this counsel of despair has not been widely accepted. Indeed, precisely because the perceived stakes of the search are so high, its persistent failure has only increased the urgency of the pursuit.

In the service of this goal, we are constantly engaged in conceptually constructing a world together in order to assure one another that our minds are themselves coherently organized entities. Through this mutual assurance, we impose order on a threatening sense of cognitive chaos. This is the goal of our social practices in categorically and physically confining insane people as such – our insistence that insanity is a discrete, definable condition different in kind from "normal thinking" rather than a spectrum of different intensities among all people.

The law's treatment of insanity is only one example of a pervasive social endeavor in matters apparently both large and small. We can see this phenomenon in more prosaic matters than the definition and treatment of insanity – matters that have been illuminated by the American sociologist, Erving Goffman. Writing in the 1960s, Goffman minutely observed the social etiquette regulating public encounters among strangers. In these apparently simple observations, he discerned underlying forces of aggression and threatening psychic incoherence, which the social etiquette – the social regulatory ordering – was in effect implicitly intended to appease. Goffman's two most salient examples were, first, the mutually choreographed conduct of strangers who enter an elevator on successive floor stops and, second, the mutual regulation of eye contact between strangers who pass one another on public streets.

Goffman's methodology was quite simple by modern standards, but quite effective nonetheless. He positioned cameras on the ceilings of elevators to watch people entering and he stood on public streets to watch people approaching one another. For the choreographic regularities in elevator conduct, he observed that when a second passenger joins the first, the two

almost invariably take up the furthest distanced positions diagonally across from one another; when a third and fourth passenger enter, all of the occupants take up positions at the four corners of the elevator, as far as possible from one another; and when a fifth enters, he or she almost invariably stands dead center. This patterned spatial separation breaks down when a sixth enters; there simply is too little space for all of the passengers to take fixed, equidistant stands – but the impulse for demarked territoriality still persists in the effort among this crowd to avoid touching one another.

Goffman's second example of eye contact on public streets was equally striking in his identification of regular rules regarding spatial distance. Goffman found that as strangers approach on a public street, they initially look at one another from a distance, often somewhat furtively. But when they reach approximately eight feet apart, they almost invariably cast their eyes downward to demonstrably break eye contact and look away from one another. Goffman calls this implicitly regularized street conduct a "dimming of the lights." And he speculates – convincingly to my eyes – that this regularly observed conduct in public streets and elevators is in the service of the same goal: to reassure people who have never previously met that they have nothing to fear from one another.

The fact is, as Goffman noted, that our everyday encounters among strangers continuously offers the possibility of mayhem of some sort. All of us do have reason to fear one another. Statistically speaking, people are more at risk in their dealings with intimates or acquaintances; perhaps this is, at least in part, because we let our guards down among familiar faces. But Goffman showed that we are not relaxed, we are continually on alert for danger in public encounters among strangers; and the intricate etiquette he identified for these encounters are in the

service of providing mutual reassurance that we have nothing to fear from one another – and more fundamentally that order rather than chaos will prevail in chance street encounters.

If you want to test this proposition for street encounters, you can refuse to "dim your lights," as Goffman put it, and instead remained locked in eye contact until you are directly alongside the other person. You can try this, but I don't recommend it because this breach of etiquette will invariably be viewed by the object of your sustained gaze as an intrusive, hostile act. "Who you staring at, buster?" is the most likely response before you get busted.

The possibility of physical assault may be the conscious account of the disturbing encounter. The basic fear in this seemingly small breach of street etiquette, however, is not physical assault but cognitive assault against the fragile coherence of the universe as perceived by our self-contradictory minds. Goffman's prosaic examples of elevator and public street conduct reveal more than lessons for routine public encounters. These examples suggest a deep social purpose for these seemingly small details of public etiquette – that is, the existence of a tacit understanding that each of us needs to reassure ourselves that imagined danger and chaos will not materialize. We appease one another's fears so that we can carry on with the mundane tasks of everyday life. But the fears nonetheless lie just beneath the surface of awareness – which is why the simple act of refusing to break eye contact on a public street, the refusal to "dim the lights," is likely to engender a defensive response, and maybe even an explosively hostile response.

Several lessons emerge from these examples. The first lesson is that encounters on public streets or elevators may in a shallow sense be viewed as consensual relationships but this view obscures the more profound observation that it is effectively impossible for any individual to live an entire life without any public – that is, social – exposure. And in this inevitable exposure,

however limited, no one can exempt themselves from the demands of public etiquette. Consent is thus not relevant to the formation of relationships in vast areas of our social lives. The idea that consent is the touchstone for all legitimate social relations is an Enlightenment philosophers dream, an expression of the modernist fear of the cognitive disruption implied by the boundless self.

Goffman's specific examples reflect this fear. The public etiquette he observed in street passings or elevator placements is at its core an act of reassurance that all participants saw themselves as separate selves; or, in other words, that all had effectively tamed the idea that there were no boundaries between self and other where each imagined the entire world as his or her personal domain. In fact, this idea can be tamed only with persistent difficulty and never permanently transcended, however "unreasonable" this idea may be in the "real" world of separate selves competing for limited resources.

Freud observed that human appetite is insatiable, as if none of us had suckled long enough at our mother's breast.[40] Insatiability is one key attribute of the boundless self. As an urgent primal neediness, each of us knows this imperative intimately; and thus each knows both the difficulty of controlling this boundless demand and the consequent threat to safety from others' assertion of an unbounded claim to every imaginable resource. Irrational belief in a boundless self does more than undermine rational thought based on separation between self and other. This belief also undermines personal safety. No wonder that mutual participation in ritual affirmation of the belief in individual separateness is so urgently and pervasively demanded in our social life.

Participation in this ritual is not optional; it is not a condition of voluntary entry into a social relationship. The existence of a relationship is presumed as a consequence of everyone's

belief, albeit an unconscious belief, in a boundless self. The very strength of this belief is the impetus for the social demand that this belief be strenuously disavowed.

A second lesson follows from this. As a corollary to the modernist belief in the normative centrality of consent as a basis for entry into all social relationships, liberal Enlightenment thinkers have posited the so-called "harm principle" as the limiting condition for social regulation. John Stuart Mill has given classic expression to this principle. In his treatise *On Liberty,* Mills famously wrote, "The only purpose for which power may be exercised over any member of a civilized community, against his will, is to prevent harm to others."[41] This principle depends for its coherence on a radical separation of self and other; but this psychological premise gives no acknowledgment to the force of the competing belief that each of us is boundless so that any harm you inflict on yourself inevitably harms me because you and I are indistinguishable. The radical separation of self and other does exist in normal adults' minds; but so does the opposite boundlessly interconnected view. Mills simply suppresses this latter view by fiat.

Mills' harm principle has become a cornerstone in liberal arguments opposed to the social constriction of individual choice in such matters as same-sex marriage, freely available abortion, legalization of physician-assisted suicide.[42] The psychological thinness of the premises for the harm principle does not resolve the normative question in favor of state restriction on these matters. Rather, this thinness means that the harm principle has no resolving force and that coherent normative arguments against state restrictions must be found elsewhere.

Another social scientist, the cultural anthropologist Mary Douglas, amplified the lesson that Goffman drew, and took us more directly to see the dread of conceptual chaos accompanying the fear of physical mayhem that Goffman identified. In her classic book, *Purity and Danger*,[43]

Douglas pointed to a pervasive cultural practice, not only for encounters among strangers but for all manner of social relations, of drawing bipolar oppositions between permitted and forbidden practices. She spent considerable time identifying cultural standards for distinguishing between categorizations of "clean" and "dirty' and asserted that the core definition of "dirt" is "matter out of place." In other words, everything (or at least everything that has any social salience) must have an assigned place, whether that position is demarcated as "clean" or "dirty."

Douglas analyzed dietary laws from this perspective and, using the particular example of Jewish rules regarding permitted and forbidden foods or combination of foods (for example, mixing meat and milk at the same meal), she demonstrated that these rules have no physical health justification but instead are instead based on analogical reasoning about separating matter into apparently coherent organizing categories (for example, all creatures with cloven hooves should be treated one way, all creatures with hooves but without cleavages in them should be treated differently; all that chew their cud should be treated differently from those that don't chew). The important feature of these categorizing rules is not in their content as such, but in the simple fact that there are categories which establish a conceptual ordering and thereby express a reassuring socially observed ritual that extracts meaning from disorder. This is the ultimate message of her book: that the opposite of "purity" is not "impurity" but danger.

Thus the danger that Erving Goffman saw in quotidian street encounters among strangers, Mary Douglas saw not just in all social interactions but in all cognitive functioning. What to eat and how, what to wear and when, whom to have sexual contact with and how and when – a multitude of designated categories of pure and impure, of cleanliness and dirt are all in the service of conceptually differentiating safety from danger. Goffman's observation about maintenance of

spatial distance as a way of reassurance might seem to suggest that there is something universal about this social marker because spatial distance invariably protects against physical assault and is thus a universal survival technique among all sentient creatures. But Douglas refused to identify universal rules for giving content to categories of purity and dirt. Content shifts from generation to generation; the only thing that universally persists is the imperative to draw conceptual categories that differentiate purity and dirt and that accordingly convey safety or danger.

Douglas's account is descriptive. She did not directly explore the psychological impetus for this universal categorizing imperative and she rigorously eschewed any normative judgment about this imperative. I propose, however, to rush in where she held back.

I believe we can see the psychological impetus for socially constructed categorical distinctions between "cleanliness" and "dirt," between purity and danger, in the contradiction in our cognitive functioning between reasoning based on bounded and boundless selves. This contradiction is inevitably disturbing to everyone because it undermines the apparent stability both of our individual cognition (the belief that, as individuals, we are capable of rational self-control) and our social interactions (the belief that, as a collectivity, we can rationally appeal to one another to avert a war of all against all).

One way – historically, the most prevalent way that this disturbing sense of cognitive disorder has been appeased is by the psychological defense mechanism of projection. That is, as individuals or as a group we project one polarity of our internal psychic conflict onto our portrayal of forbidden foods or socially prohibited behavior or the degraded status of some people or groups in order to imagine them as the embodiment of disease, dirt and dangerous disorder. Specifically regarding the social degradation of some people or groups, we impose social subordinations

avowedly because they are diseased and so forth, but really so that we, the oppressors, can see ourselves as radically distinct from them. We are in control of them and therefore we are pure, clean, orderly and safe – and ostentatiously in control of our (psychically divided) selves.

For most of American social history, subordinated status has been imposed on one or another group – blacks, women, gays, Native Americans, Jews, Catholics, immigrants, poor people, disabled people – to accomplish this defensive projection. But what exactly is normatively wrong about this psychic maneuver? If in fact the majority of Americans find appeasement of their urgent anxieties about cognitive coherence from their degradation of minority groups, why can't this be justified by a utilitarian calculus of sacrificing some for the benefit of the greater number?

The conventional answer is this status violates the guarantee of equality and that this norm has binding force because it was proclaimed in our founding document for "all men" and subsequently universalized by implication from its expanded application to black men in the post-Civil War constitutional amendments and to women in the Nineteenth Amendment. A hierarchical claim appears implicitly embedded in this account – that the equality principle has priority not so much because of its intrinsic merit but because it was embraced by the People in their capacity as the hierarchically dominant source of legitimate authority.

I want to go deeper than this, however. I believe that the equality principle has intrinsic merit irrespective of the hierarchic authority of its endorsers. In my view, the cognitive psychology that I have sketched – the equal though contradictory status of the two modes of cognition based on the boundless and the bounded self – demonstrates the intrinsic wrongfulness of assigning rigidly subordinate status to any human being. This is not to say that status

differences can never be justified. But in just the ways that the competing modes of cognition alternate in their dominance in individual cognitive processes, so too only alternating relations of dominance and subordination, fluidity rather than rigidity of social status, can be justified as a proper social ordering.

The rigid, avowedly unchanging and essentially total subordination of one person to another or one group to another is a deeply destructive social construct – deeply destructive for both the oppressors and the oppressed. This hierarchical relationship is at its core an admixture of the two modes of cognition premised on the boundless and bounded self. On the one side, the hierarchy expresses a boundless connection between the oppressor and the oppressed in which the former treats the latter as parts of the same self while paradoxically denying any connection. That is, the oppressor consciously insists on his rigid separation from and domination of the oppressed. At the same time, the oppressor unconsciously ascribes aspects of himself to the oppressed, aspects that the oppressor finds disturbing, fearful, intolerable. In the mind of the oppressor, he and the oppressed are a single psychological construct (boundless selves) but divided against itself (bounded selves).

Endless and even escalating psychological effort is required to maintain rigid separation between oppressor and oppressed, to keep this projected construct pure by refusing to recognize that negative ascriptions to the oppressed subordinate are nothing more than the repository of the disowned and dangerous elements in the oppressor's own mind. The effort requires escalating energy because it is built on a falsehood – that the oppressor and oppressed are truly separate entities and have no attributes in common with one another. Both the oppressor and the oppressed know this to be false but the oppressor suppresses conscious awareness of the falsity. In

this sense, the oppressor oppresses himself by continuously imposing rigid control over the parts of his own mind which he has ascribed to the oppressed.

However much this conscious effort at self-suppression might appear to succeed (consciously expressed by the arrogant self-righteousness and self-satisfaction of the oppressor), the victory over the unruly forces of the oppressors' own mind can never be completely achieved, precisely because that mind is divided against itself. This dog can never catch his tail, though he tries endlessly to do so. Accordingly the oppressor constantly views the oppressed as almost out of control. Even the smallest challenge by the oppressed – a seemingly hostile stare, a failure to observe minutely detailed elements of public or private deference – thus becomes magnified and an occasion for demanding heightened subordination and degradation.

This account focuses on the oppressor's perspective. The oppressed have a different experience: they struggle against yielding to the oppressors' false view of them; or they try to exert countervailing force by conforming themselves to the oppressor's fearful depiction of them and thereby playing on his unacknowledged but unconsciously communicated fear; or they hold fast, often secretly, to a view of their own goodness in the face of the oppressor's contrary projection. And they suffer greatly from the insults heaped on them. They are truly enslaved.

There is also an enormous burden imposed by this effort on the oppressors because they are driven by fear of their incapacity to control the unruly forces in their own minds. They are at war with themselves – a war which they act out on others in an attempt to defeat a part of their own minds. I don't mean by this to assert an equivalence of suffering or to solicit equal sympathy for the victims and the victimizers. But I do want to insist on the burdens imposed by this struggle on the victimizers, on the dominant groups, because I believe that conscious acknowledgment of

these burdens promises a path away from these recurrent social enactments of projective degradations by some onto others. The impetus for individuals to protect their own cognitive coherence by degrading others, by extruding them from a shared community, is in itself a form of un-freedom, of oppressors' enslavement to the conflicting psychological forces in the divided kingdom of their minds.

According to the psychoanalyst Hans Loewald, the consequence of this insistence on rigid objectification of and distance from others is to "lose our moorings in the unconscious and its forms of experiencing which bespeak unity and identity [with others and the external world] rather than multiplicity and difference. [This is] madness that is the madness of unbridled rationality."[44] By contrast, psychic freedom is to be found in flexibility, the capacity to move back and forth between the boundless and bounded self, "to regress, to play, to make loose associations – ironically to give up structure. [But] when one does give up structure, one has not thereby lost it. One retains the capacity to come back."[45]

This alternation expresses itself not only within an individual's psyche but in his relationship with others. The hallmark of an integrated psyche, as Loewald portrayed it, is the capacity to move freely between its structured and unstructured aspects – what I have been referring to as the bounded and unbounded self. This expresses itself not only in the individual's attitude to himself but in his relationships with other people; social relationships are in effect a stage on which psychic conflicts are acted out. The subjugation of others, attempts to exercise total control over them, denotes an unintegrated psyche "split into parts that are themselves at war with each other."[46]

The effort to enslave others in order to protect a fragile sense of psychic coherence is an

implicit admission of weakness. Though the oppressor is typically not willing or even able to admit this consciously, he knows this unconsciously – in his secret heart. This is the underlying meaning of Abraham Lincoln's observation,"In giving freedom to the slave, we assure freedom to the free."[47] In the constant and constantly escalating effort required to maintain others' enslavement, we enslave ourselves. Thus even by a utilitarian calculus, "the greatest good for the greatest number" is not achieved by majority oppression of minority groups. No one – neither oppressor nor oppressed – benefits from this social relationship.

This lesson has a long history. It was at the core of Socrates' apparently paradoxical claim in the *Gorgias* that it is better to be the victim than the perpetrator of injustice. Callicles mocked Socrates for his embrace of victimhood, but Socrates vividly portrayed the countervailing cost to the perpetrator of his tyrannical behavior. He analogized the perpetrator to a man with a persistent itch who is driven to endless scratching, to a man who persistently tries to fill a sieve with water, and finally to a man without friends who can trust no one and must endlessly fear that others will follow his example by degrading him. Socrates chose to be a victim rather than a perpetrator because, he insisted, the victim can attain "the healthiest possible soul" – a harmonious state that is unavailable to the perpetrator.[48]

Callicles was not convinced. He refused to persist in conversation and turned away from Socrates's poignant plea at the very end of the dialogue, "Let us follow this, I say, inviting others to join us, not that which you believe in and commend to me, for it is worthless, dear Callicles."

In American social history, Callicles's voice has been heard more often and more forcefully than Socrates, his unheeded benefactor. But is there a way for us today to follow Socrates' path – a way in particular that might show oppressors what Socrates tried to demonstrate

to Callicles, that he was injuring himself by subjugating others?

IV. Hierarchy and Interdependence

There is no such thing as an infant.

D. W. Winnicott

Courts are the obvious institutional candidates for the promotion of emancipatory reform in the United States. In historical practice, the judiciary generally and the Supreme Court in particular have more often acted to underwrite rather than unsettle established social ordering of dominance and submission. But even when courts have resolved to ally themselves with emancipatory efforts, there are more and less coherent or desirable ways to do so.

There are two styles of social authority which the judiciary could invoke. One is a hierarchical style relying essentially on a command modality. This hierarchy can run either from "the top down" (when courts invoke their own superior and exclusive status in interpreting constitutional guarantees) or from the "bottom up" (when courts defer to popularly elected institutions). The conventional view is that these alternatives are radically distinct and that constitutional invalidation is disfavored because it is anti-democratic ("counter-majoritarian" is the catch phrase coined by Alexander Bickel). I, however, want to stress the similarity between these two exercises of authority, whether courts invalidate or defer to actions of elected institutions. In both cases, the courts are relying on a hierarchical conception of social authority, identifying a final adjudicator in social disputes (regardless of whether the last word belongs to courts, legislatures, the executive or the people speaking directly through referenda).

The opposite to the hierarchical style is what I'll call relational interdependence. This is a participatory style in which it is impossible to draw a hierarchically arrayed straight line of authority. In a relational interdependence, so far as the disputants see it, there is no identifiable

locus of final authority. The lines on an organizational chart either shift continuously among the disputants or are so intertwined that there never is a moment during the dispute when a single locus of superior authority can be identified. Unlike the hierarchical style, the interdependence style of authority is continuously interactive.

The two styles of authority can be understood in the psychological terms I have set out. The hierarchical style corresponds to the bounded self, exerting (or attempting to exert) control over the opposed, irrational (and therefore unruly) impulses of the boundless self. The interdependent style does not reverse this hierarchy to give automatic deference to the boundless self. The interdependent style instead refuses to choose between the two conceptions of self, accepting and even encouraging an equal and alternating relationship between them.

The distinctive characteristic of the hierarchical style is its preference for definitive resolution of conflict – not just conflict among various combatants but conflict within an individual's psyche that fundamentally arises from the two dichotomous modes of thought based on a bounded or boundless self. The recurrent impetus to impute to others uncomfortable elements of one's own psyche – the so-called defense mechanisms of "splitting" and projective identification – is itself an expression of both modes of thought. The projection relies on a boundless conception of self – that is, the capacity to project undesirable parts of one's own psyche onto another person and thereby to deny responsibility for those parts. This mental gymnastic depends on a dissolution of boundaries between the projector and the object of his projection. At the same time, the projection involves a rigid separation of self between the projector and the object – "I am pure and you are dangerous," as Mary Douglas would put it, "and we are distinctly separate from one another."

If disputes between the projector and the object of his projection can appear to be definitively resolved in favor of the projector – in favor, for example, of whites over blacks or men over women or straights over gays – this confirms the projector's wish to exert control over the undesirable elements in his own psyche that he has projected onto the object. The object must, moreover, be visibly subordinate so as to provide an adequately blank slate to receive the negative inscription imposed by the projector.

By what psychological means might the oppressive subordination of the object be undone? The conventional view is that the oppression must be definitively overturned – in legal terms, that the object's right to equality or dignity must be enforced. But this conclusive resolution of the conflict looks suspiciously like a reenactment and endorsement of the original projective endeavor – this time, perhaps, with the roles reversed ("bottom rail on top now, Massa" as a freed slave reportedly boasted to his former master immediately following the Civil War[49]); and in any event, this reversal is likely to provoke intensified resistence by the targeted oppressor to the detriment of the previously oppressed and supposed beneficiary of the intervention (as occurred following the brief emancipatory foray after the Civil War).

Is it possible to take a different path toward interrupting the cycle of forced oppression driven by these intra-psychic conflicts? Is it possible to design social interventions that would patiently unravel these psychological mechanisms rather than directly assault them? What would follow if we understand the impulse for rigid separation and subordination as an individual's intolerance for, his revulsion against, his own conflicting impulses and as an effort to suppress his ambivalence? Is it possible, in particular, to develop an alternative to the hierarchical mode of dispute resolution that does not involve an effort to conclusively resolve internal psychological

conflict but instead promotes tolerance for this ambivalence, based on a recognition that this conflict is inevitable among all individuals? Are there institutional mechanisms available to coax into the oppressors' conscious awareness what they unconsciously know but refuse to acknowledge – that they are injuring themselves by oppressing others? These are the goals of what I've called the relational interdependence mode of social authority.

The hierarchical mode is easily grasped because it is already so familiar. There may be considerable dispute about who should have the final word in social conflicts; but the idea is clearly comprehensible that ultimately there must be a final word and that there are discoverable operational standards for deciding the institutional identity of that final decision-maker. The interdependence mode, by contrast, is much less familiar as a way of describing social authority.

D. W. Winnicott, the English psychoanalyst, has given an apt account of the individual psychology of the interdependence style with his famous dictum, "There is no such thing as an infant."[50] He meant by this that the infant does not view itself and cannot accurately be viewed by others as a separate integer, as psychologically distinct from his interaction with caretakers. This is another way of seeing the infant as a "boundless self" but it is more illuminating because it acknowledges the absence of a "self" at all. The infant and its mother are literally one. This implication of this dictum is that, although the infant has a separate body, he does not possess a separate psychological existence. According to Winnicott, there is no infant but only the mother/infant relationship, a kind of blending or indistinguishable intermixing of the two.

The further implication of this dictum is that although the mother is an adult fully capable of thinking of herself as separate from her infant, she typically participates in this interdependent dissolved selfhood as much as the infant does. The infant cannot conceive

otherwise; but such is the seductive force of boundlessness for adults that we have considerable difficulty in resisting it, especially in the emotionally charged context of relations with our children.

Winnicott's dictum can be extended. Not only is there no such thing as an infant but there is nothing more than half an adult. In part of our minds, we adults can understand ourselves as free-standing, separately bounded individuals. But in another, unerasable though contradictory part, we adults understand ourselves like infants as existing only in relationships with others, boundlessly intertwined with them.

As Winnicott conceives the mother/infant interdependence, it makes no sense to see it as resting on the dominance of the mother over the child or the child over the mother – though the endless pursuit into adulthood of this unattainable goal of permanent dominance on one side or the other is, sadly enough, quite plausible as a psychological proposition. Nonetheless, however much it may be desired, the idea is psychologically unintelligible that one part of an adult's mind can exert permanent dominance over the other ineradicable though contradictory part. (Recall my characterization of the search for "free will," for the individual self as the uncaused cause of his conduct, as a snark hunt.)

The issue of the social status of same-sex sexual relations is an especially apt context for exploring the two modes of authority. Freud in particular was inconsistent in his treatment of the normative status of homosexuality, an inconsistency which reflects conflicting bounded and boundless self-identities. In his classic early work "Three Essays on the Theory of Sexuality," Freud posited heterosexual genital intercourse as the *summum bonum* of adult psychological development; and yet, at the same time, in a lengthy footnote, Freud identifies bisexuality as an

inborn characteristic of all humans.[51] There was in effect a conflict between Freud's text (one might say, the dominant public face of the essays) and his footnotes (buried but easily available for excavation). This inbred ambivalence linked to conscious efforts at denial of ambivalence – of clear victory for heterosexual over homosexual relations – reflects the psychological dynamic of all rigid subordinating separations based on projective splitting off of undesired elements.

We readily know how the hierarchical mode would approach this conflict. An aggrieved person – who had been, say, convicted under a state criminal statute for engaging in same-sex sexual relations or had been refused a state license to marry a same-sex partner – would complain in a court proceeding and the judge (or hierarchically organized series of judges) would decide whether the Constitution prohibited or permitted the challenged state action. But what would this dispute look like if conducted under the interdependent conception of authority? What are the distinctive process elements of this conception? Are there substantive norms which might be appropriate in the hierarchical mode but which are inadmissible in the interdependence mode?

In process terms, the interdependence mode would look exactly like the actual course of litigation during the past decade regarding same-sex relations. This is not to say that judges, legislators or litigators self-consciously rejected the hierarchical conception in favor of the interdependent. The various participants most likely backed in to the latter mode, for tactical reasons or for technical doctrinal reasons, while preferring (or preferring to think of themselves) as acting within the hierarchical mode. In retrospect, however, we can see a coherent underlying conception of social authority beneath the opportunistic, seemingly random choices among the participants in the dispute.

The story of judicial interventions regarding same-sex relations began in 1986, in a

clearly hierarchical mode. In *Bowers v. Hardwick*, the Supreme Court (by a five-to-four vote) upheld against a constitutional challenge a Georgia statute criminalizing sexual relations between two adult men in the privacy of their own home.[52] The Court's opinion by Justice Byron White was dismissive, even to the point of mockery, of the petitioner's claim, citing the long-standing condemnatory public attitudes toward homosexuality and labeling as "facetious, at best" the proposition that homosexual relations had any resemblance to family ties and deserved respect rather than revulsion.[53] Hierarchy was embraced both in process terms (the Court was proclaiming the last word and awarding complete victory to the legislature in its condemnation of homosexuals) and in substantive terms (the Court's opinion was virtually explicit in characterizing sodomy as illicit and repellant, no matter how much or why the same-sex lovers were drawn to one another). So far as the Court was concerned, there was nothing more to be said by or on behalf of the same-sex lovers that anyone (judges, legislators, citizens) was obliged or even invited to consider.

Though the *Bowers* Court did not cite an nineteenth century Supreme Court decision that supported its disposition, it could readily have done so. That case is *Dred Scott v. Sandford*, which held that blacks as such – whether free or slave – could not be recognized as citizens of the United States entitled to seek protection in federal courts.[54] *Dred Scott* is, of course, overwhelmingly viewed today as among the worst, if not the worst, decisions ever rendered by the Supreme Court and the *Bowers* Court would not have dared to acknowledge any kinship with their ruling. But the relationship was there nonetheless.

In working its way toward the exclusion of blacks from recognized citizenship, the Court's opinion by Chief Justice Taney asserted that from the founding of the nation, black people were

considered "beings of an inferior order ... altogether unfit to associate with the white race ... and so far inferior that they had no rights which the white man was bound to respect." In substantive terms, *Dred Scott* relied on a hierarchical vision of social life, with blacks occupying the lowest rung. In process terms, the Court invoked the hierarchical conception of its own authority not only in asserting superiority over Congress by constitutionally foreclosing congressional authority to exclude slavery from the territories but also by closing off other institutional forums – territorial legislatures, and federal or territorial courts – where disputes about the status of slavery might have been pursued.

Similarly, in *Bowers*, homosexuals did not simply lose their case; their loss was so totalizing that it effectively obliterated them from any recognized status as a potential rights claimants. This was apparent in the Court's mocking characterization of the petitioners' "claimed constitutional right to engage in sodomy." Chief Justice Warren Burger's concurring opinion was even more explicit in denying the claimants' status as human beings worthy of any respect as such. "The proscriptions against sodomy have very 'ancient roots.' . . . Condemnation of these practices is firmly rooted in Judaeo-Christian moral and ethical standards. . . . Blackstone described 'the infamous crime against nature' as an offense of 'deeper malignity' than rape, an heinous act 'the very mention of which is a disgrace to human nature' and 'a crime not fit to be named.'"[55] To regard a person or practice as "nameless" is effectively to deny its connection to humanity. This denial was the underlying, unacknowledged connection between *Bowers* and *Dred Scott.*

In 2003, seventeen years after the *Bowers* decision, the Supreme Court revisited the issue and this time held unconstitutional a Texas statute criminalizing same-sex sexual relations between consenting adults in the privacy of their home (and explicitly overruling *Bowers* as "not

correct when it was decided and not correct today"). This new ruling, in *Lawrence v. Texas*, might look on its face as coming to a different substantive conclusion but nonetheless relying on a standard hierarchical conception of social relations and of its own authority.[56] That is, the Court appeared to assert its own superior authority over state legislatures and elevated homosexuals to a specially protected status. It is, however, equally plausible and more illuminating to understand the Court in *Lawrence* as moving away from a hierarchical conception to a relational interdependence conception of judicial authority and social relations generally.

The *Lawrence* Court's opinion was written by Justice Anthony Kennedy, and its embrace of the relational interdependence was at most only implicit and was most likely unintended as such. The best evidence for this shift from hierarchy to interdependence was visible paradoxically in the apparent analytic disorder of the Court's opinion. In his dissent, Justice Antonin Scalia concluded that the majority opinion revealed that "principle and logic have nothing to do with the decisions of this Court."[57] Scalia leveled this charge specifically at the Court's dictum that *Lawrence* "does not involve" the issue of same-sex marriage.[58] Beyond his complaint that the Court's ruling was an unacknowledged stalking horse for same-sex marriage, Scalia criticized the Court generally for lack of clarity and clearly argued connection with past precedent that, in his view, overwhelmingly supported state criminalization of same-sex sexual relations.

It is indeed difficult to see the specific justification for overturning the Texas statute from the Court's opinion. Was the Texas statute invalid because it invaded the same-sex lovers' privacy rights as consenting adults acting in the privacy of their home? Kennedy in his opinion invoked the privacy ideal, but he didn't clearly rely on it alone. He also characterized same-sex couples as seeking autonomy regarding "matters involving the most intimate and personal choices

a person may make in a lifetime . . . just as heterosexual persons do"[59] (thus an equality principle) and he asserted that criminalizing persons for engaging in same-sex sexual relations "demean[s] their existence [and] control[s] their destiny"[60] (thus a dignity principle). Do these expressions mean that "invasion of privacy" or "denial of equality" or "derogation of dignity" were independent, alternative grounds for invalidating the Texas law? Or are these criteria cumulative, requiring all of the grounds together in some combination to explain the Court's ruling?

Regarding the issue of same-sex marriage, privacy does not readily fit the claim for a publicly proclaimed marital status. Equality is a better fit and dignity the best of all.[61] Are two out of the three possible rationales in *Lawrence* enough to invalidate state bans on same-sex marriage? If dignity was the central rationale for *Lawrence*, does this mean that states are barred from regulating all sexual encounters or barred only regarding those encounters in the context of a long-term, emotionally committed relationship? Is this why state prohibition of commercial sex, whether heterosexual or homosexual, is constitutionally permissible? Kennedy noted that the case did not involve commercial prostitution or claims for same-sex marriage. But what if the next case to come to court did involve one or the other? Kennedy's opinion leaves us adrift, with a few hints at most for charting a future course. Oliver Wendell Holmes observed that all that was meant by "law" is a prediction of what judges will do. By this criterion, *Lawrence* is not "law."

This is the basis for Justice Scalia's criticism of *Lawrence* as devoid of "principle and logic." A hierarchical conception of the Court's authority lies behind this criticism in this sense: that the Court is obliged to articulate principles that would at the least guide future decision-makers and preferably would provide explicit commands, specific "marching orders" for

future, hierarchically subordinate actors, whether lower-court judges or elected officials.

Viewed, however, from a different perspective on judicial authority, from the relational interdependence conception, *Lawrence* is a quintessential expression of law. From this perspective, the opacity of the Court's opinion is appropriate and even instrumentally essential. This is because the Court's proper role viewed through the lens of the interdependence mode is to invite others to develop the full implication of its ruling and to this end withhold conclusive resolution of the disputed relationship between homosexuals and the state.

Acting within the relational interdependence conception, the proper role of a court is to upset the established order subjecting one to the total domination of the other and thereby draw the disputing parties into a newly acknowledged relationship, to initiate or promote a conversational exchange between them that had not previously occurred because of the utter subordination of one party by the other. To carry out this function, the court must withhold conclusive resolution in order to avoid the renewed imposition of a hierarchical relationship between the disputants, even if the imposition is intended to command reversal of the old hierarchy. ("Bottom rail on top now, Massa.") The court must engage the parties to work toward a relationship where unilateral dominance or submission makes no psychological sense – as in the shifting and ultimately dissolved hierarchy between mother and infant.

Chief Justice Burger's concurrence in *Bowers* invoking the traditional conception of homosexuality as a "disgrace to human nature" and a crime "unfit to be named" compellingly demonstrates that same-sex lovers had been excluded from any imaginable bonds of social relationship. No conversational engagement can take place where one party regards the other as "beings of an inferior order ... altogether unfit to associate with . . . and so far inferior that they had

no rights which the superior was bound to respect." *Dred Scott* asserted this proposition as a description, not as a criticism of dominant attitudes toward blacks. But from the relational interdependence conception of social authority, this exclusion as such of blacks from the human community, like the exclusion of homosexuals, is the problem to be solved, the wrong that should be corrected.

The remedial processes that follow from this understanding differ from judicial invocation of hierarchical authority. The remedial processes drawing the parties into a relational interdependence were exemplified by the sequella to *Lawrence*. For a decade after 2003, the action shifted from federal courts to state courts and legislatures and an array of different results emerged. Just months after *Lawrence* was decided, the Massachusetts Supreme Judicial Court ruled that the state's constitution required public recognition of same-sex marriages. *Lawrence* hovered in the background of this ruling. The Massachusetts court observed that in *Lawrence,* the possibility of a constitutional right to same-sex marriage was "left open as a matter of federal law [and] the Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution."[62] *Lawrence* was thus not dispositive for the Massachusetts court, but it was not irrelevant. It was as if *Lawrence* had put the issue of same-sex marriage on the state judiciary's agenda, as if it had precipitated but not ended a new conversation.

The Massachusetts ruling was the first court ruling in the country which clearly endorsed a state constitutional command for same-sex marriage. Prior state courts had addressed the issue and had come to more limited or even outright negative conclusions. Thus in 1999, the Vermont Supreme Court had ruled that the state was constitutionally obliged to provide the same practical

benefits to same-sex couples as it offered to mixed-sex married couples.[63] But the court explicitly endorsed a new status of "civil union" for same-sex couples which withheld the honorific title of "married" to them. A 1993 ruling by the Hawaiian Supreme Court had seemed to go further, holding that denial of marriage to same-sex couples presumptively violated the state constitution and remanding the issue to the trial court to give the state an opportunity to demonstrate an adequate basis for this denial (in the formal catchphrase of constitutional adjudication, to show a "compelling state interest" in this legislative denial).[64] Before trial on this issue began, however, the Hawaiian constitution was amended by popular referendum which, in effect, overruled the prior judicial decision.

On first impression, it seemed that the Massachusetts ruling in *Goodridge* was likely to suffer the same fate. But the Massachusetts constitution is more difficult to amend than in the states such as Hawaii that permit amendment by only a one-shot popular referendum. In Massachusetts, a super-majority of the legislature needs to be mustered twice (in consecutively elected legislatures) and then submitted to popular approval or rejection. The first reaction to the *Goodridge* ruling appeared overwhelmingly hostile among elected legislators; but several months later, legislative sentiment seemed to shift and any impetus for launching the amending process vanished.

Like Sherlock Holmes's deduction from the dog that didn't bark, this silence from legislators has profound significance. If silence was the only response from the actors who were officially authorized to launch a state constitutional amendment that would have overruled the Massachusetts court ruling, that implies acquiescence if not endorsement. Similar implications cannot be drawn from legislative silence in response to judicial rulings based on the federal

constitution simply because that document is virtually impossible to amend. By contrast, a state court ruling based on an interpretation of the state's constitution is always an intermixture of the hierarchical assertion and the relational interdependence conception of judicial authority. The state court ruling, that is, is not automatically the last word but is more like an opening gambit in an on-going conversation.

Litigative claims for same-sex marriage were brought in different states by LGBT advocates during the decade after the Massachusetts ruling, with mixed results. Thus the New York high court ruled in 2006 that its state constitution was not violated by the denial of marital status to same-sex couples[65] and in that same year, the New Jersey Supreme Court held that civil unions were constitutionally mandated to vindicate the equality rights of same-sex couples but access to formal marital status was not required. In 2009, the Iowa Supreme Court unanimously ruled that its state constitution demanded marital status for same-sex couples (a ruling informally repudiated by the Iowa electorate's rejection of three Justices in a retention vote – though in 2012 retention was approved for a fourth Justice.)

The workings of the relational interdependence conception was most extensively revealed in a five-year saga between 2008 and 2013 regarding the status of same-sex marriage in California. As the process unfolded, the issue was directly engaged by almost every imaginable institutional actor – state and federal courts, elected state officials and the popular electorate. At the end of this byzantine journey, the federal constitutional right to same-sex marriage emerged victorious in California (but only in California). True to the dictate of the interdependence mode, though the end result was clear, it was impossible to identify a hierarchically superior actor who commanded this result. Instead there were multiple actors with different perspectives who took action at

various stages of the controversy. At the end, rather like the conclusion of Agatha Christie's novel, *Murder on the Orient Express*, every conceivable suspect took part in the assassination and it was therefore impossible to assign exclusive responsibility to any one of them.

The saga began in May 2008, when the California Supreme Court ruled that access to marriage by same-sex couples was required by the state constitution.[66] Just five months later, the California voters by a narrow 52% majority adopted Proposition 8 amending the state constitution so as to overturn the state supreme court's ruling. In May 2009, the state supreme court held that Proposition 8 validly amended the state constitution, thus effectively accepting the reversal of their previous ruling.[67]

This result was not preordained. California precedent could have been cited by the court to require more than popular referendum approval for constitutional amendments that effectively reversed substantial portions of the document.[68] For such matters, prior state rulings rejected one-shot popular referendums in favor of an alternative, more elaborate amendatory process that involved approval by legislative super-majorities followed by popular referendums. Though Proposition 8 dealt on its face with only one limited issue of same-sex marriage, a larger jurisprudential issue was involved. In its initial decision, the court ruled that homosexual persons were a "discrete and insular minority" whose socially disfavored status made them so vulnerable to popular disapproval that special judicial protection was necessary. The court's subsequent willingness to accept a popular vote hostile to this "suspect class" – moreover, a popular vote that had barely mustered a majority vote – makes nonsense of the court's ruling that as a matter of general constitutional jurisprudence, it was obliged to extend special solicitude to the vulnerable minority.

Thus passage of Proposition 8 not only harmed a constitutionally designated "suspect class"; it called into question the fundamental constitutional principle regulating the relationship between courts, popularly elected officials and the electorate. The California supreme court reflexively fell back on a hierarchical conception of social authority by giving automatic deference (and the last word) to a referendum process that reduced issues to television soundbites. The court turned away from requiring a more deliberative process which, because of the supermajority provisions, was more protective of the interests of this vulnerable group.

The court was not obliged to ensure victory to this group by awarding hierarchical prevalence to them; the court was obliged to oversee the deliberative process in matters affecting them to ensure a fair hearing for them. This required judicial amplification of their claims so that their previously suppressed voices could be heard. At its core, this means that the court should see itself as engaged in an iterative process, as part of a relational interdependence that transcends hierarchy.

Three days before the state supreme court deferred to Proposition 8, a lawsuit was filed in federal district court in the Northern District of California, arguing that the same-sex marriage ban enacted by Proposition 8 violated the federal Constitution. The suit was brought by two attorneys, David Boies and Theodore Olson, who had not been active in LGBT litigation and had previously opposed one another in *Bush v. Gore* regarding the Florida vote count in the 2000 presidential election. This federal court filing was not welcomed by the organizations that had previously taken the lead in LGBT cases and had assiduously stayed away from federal courts regarding the marriage issue. In process terms, however, the filing of this lawsuit points to an advantage of litigation over other formats for advocacy as an instrument for building relational

interdependence. Anyone can file a lawsuit and thereby demand some reasoned response; advocates in other forums, whether elective institutions or popular media, can readily be met by nothing more than a wall of silence, which is another tactic for asserting unquestionable hierarchic authority.

In August 2010, the federal district court judge, Vaughn Walker, ruled that the California constitutional ban on same-sex marriage did indeed violate the federal constitution. At this point the state's Republican governor, Arnold Schwarzenegger, and its Democratic Attorney General Jerry Brown independently decided that the state would not appeal Judge Walker's ruling. An appeal was nonetheless filed by private parties who had been active in the referendum campaign advocating passage of Proposition 8. In 2012, the Ninth Circuit Court of Appeals accepted this appeal and affirmed Judge Walker's ruling on its merits,[69] but a year later the U.S. Supreme Court reversed on the ground that the private party appellants lacked standing to sue.[70] The net result of this ruling was to vacate the Ninth Circuit's ruling on the merits of the federal constitutional claim and to leave intact Judge Walker's original ruling because, in effect, the appropriate state officials had refused to appeal it.

Who then bore final responsibility for overturning the California ban on same-sex marriage? In one sense, the last word goes to Judge Walker, the federal district court judge; but this was only by default, since the state governor and attorney general chose not to appeal his ruling. In making this choice, were the two state officials registering the will of the people of California? They were the elected representatives of the people and in this sense were responsive to the popular will. But the voters had clearly (if by a narrow margin) registered their preference on this specific issue by enacting Proposition 8. There was thus no single "voice of the people"

involved in the federal lawsuit; there were instead competing voices, all claiming superior though conflicting authority to represent the popular will.

Though the various actors certainly did not self-consciously intend this, there could have been no better demonstration of the interdependent conception of social authority than this saga. The interdependent conception could, however, been aborted in the final act by the U. S. Supreme Court if that tribunal had ruled on the merits of the claim, whether for or against the constitutionality of same-sex marriage bans – a ruling that would have applied not only in California but nation-wide. (Judge Walker had jurisdiction – the authority to "speak the law" – only in California and his ruling is final there because of the procedural quirk that no valid appeal was filed. His ruling is suggestive as an interpretation of the federal constitution but not dispositive for other federal district or state court judges.)

On the same day that the U.S. Supreme Court issued its ruling in the California case, it decided another case regarding the constitutional status of same-sex marriages. In that case, *United States v. Windsor*,[71] the Court issued a definitive ruling that the federal Defense of Marriage Act (DOMA) violated the Constitution. DOMA provided that federal law would not recognize marital status in same-sex couplings even if the couples had been validly married under state law. This statute was enacted in 1994, when no state recognized same-sex marriages but just one year after the Hawaiian Supreme Court had cast doubt on that state's marriage ban. On its face, *Windsor* might look like a hierarchical exercise of authority; the U.S. Supreme Court authoritatively declared DOMA unconstitutional and left no room for further debate. But in fact DOMA is only one facet of the larger issue about the status of same-sex marriage. While the statute had considerable financial implications for same-sex couples formally married under state

law, the statute itself did not directly address the underlying question whether any state was obliged to recognize same-sex marriages. (Another section of DOMA, not addressed in *Windsor*, considered whether any state was obliged to recognize same-sex marriages validly entered in another state. DOMA provided that there was no such obligation. This provision, like the ban on federal recognition of same-sex marriages, certainly reflected hostility to same-sex marriages but did not bar any state from endorsing them.)

The Court's action in *Windsor* was not a neutral act regarding the status of same-sex marriage. Justice Kennedy's opinion for the Court had the same fundamental characteristic as his opinion ten years earlier in *Lawrence v. Texas*: though the end result was clear, the reasoning supporting this result was unclear and open to multiple interpretations that might or might not subsequently be relevant to the Court's resolution of the overarching constitutional claim for the right to same-sex marriage. On one side, Kennedy's opinion set out a narrow basis for overturning DOMA that would have no direct relevance to the overarching claim; he said that marriage was traditionally reserved for state regulation and on that ground, the federal government violated federalism principles by refusing to recognize same-sex marriages approved under state law. But more broadly, Kennedy criticized DOMA for its hostility to same-sex marriage as such and appeared to rely on this hostility as an independent ground for overturning the statute. As with *Lawrence,* the Court's ruling in *Windsor* was somewhat inscrutable, a significant contribution to an ongoing national conversation but not the final word.

The open-ended quality of Kennedy's opinion distinguishes it from the rigorously logical structure that characteristically that arises from the premises of the bounded self. By contrast, Kennedy's opinion was more free-form, suggestive but not definitive in a way that is characteristic

of unconscious thinking that derives from the premises of the unbounded self. Kennedy's evident sympathy for the same-sex couples speaks to his empathic identification with them, a boundless connection with them. He invites a similar empathic response but this invitation is much more in the format as a question than as a command. Unlike a command, this question could only be answered by further interaction between the citizenry, officials in state and national forums and the Justices themselves. One might say that Kennedy's opinion is more like a dream of future harmony between same-sex couples and the rest of the community than a commandment favoring same-sex couples over their antagonists.

However much Justice Kennedy's disposition in *Windsor* and *Lawrence* illustrates my interdependence conception of judicial authority, it is reasonably clear that Kennedy in particular did not embrace it. In the Ninth Circuit case where the Court acted consistently with the interdependence conception by denying standing (and giving dispositive significance to the California elected officials, the governor and attorney general, in their acceptance of same-sex marriage), Justice Kennedy dissented. It thus appears that Kennedy was ready for the Supreme Court to speak the final word about the constitutional status of same-sex marriage, notwithstanding that the issue is still the subject of passionate debate and dramatically shifting attitudes in the country at large.

The question when enough talk has occurred is not amenable to clear-cut determination under the interdependence conception but Kennedy seems at odds with himself on this question. The murkiness of his opinion in *Windsor* suggests a conscious avoidance of the larger constitutional issue. If, that is, the Court were willing to hold flatly that same–sex couples had a constitutional right to state-recognized marriage, this proposition would have been quite sufficient

to justify a decision overturning DOMA. But Kennedy merely hinted at this proposition and held back from clearly embracing it in *Windsor*. In the Ninth Circuit case, however, although Kennedy expressed no opinion on the constitutional issue, he would have been required to reach it if, as he argued in dissent, the private petitioners had standing to appeal Judge Walker's ruling.

During the past decade, popular answers regarding LGBT rights have emerged in different and often conflicting ways. In recent years, some state legislatures have been favorably disposed to same-sex relationships. Between 2006 and 2013, seven states endorsed civil union status for same-sex couples providing state benefits formally equal to mixed-sex couples but without the honorific designation of "marriage." In 2009, the Vermont legislature endorsed same-sex marriage as such, thus becoming the first state to authorize this by statute rather than as a result of a state court ruling; two months later, the New Hampshire legislature did the same. In New York, notwithstanding the ruling of its supreme court that same-sex marriage was not required under the state constitution, the state legislature approved same-sex marriage in 2011. In 2012, Maine, Maryland and Washington State approved same-sex marriage by popular referenda. In that year, Minnesota voters rejected a state constitutional amendment forbidding same-sex marriage, which was followed in 2013 by a legislative act authorizing it. Also in 2013, the legislatures of Rhode Island and Delaware approved same-sex marriage.

Thus, as of 2013, thirteen states and the District of Columbia had endorsed same-sex marriage, two by state courts' constitutional rulings, seven by independent legislation (one of which, California, resulted from elected officials' refusal to appeal a federal district court ruling based on the U.S. Constitution) and three by popular referenda. Seven states had provided for civil unions, and thirty states had withheld both marriage and civil union status from same-sex

couples.

It is not clear whether more states will choose to join the list approving same-sex marriage, though the Supreme Court's decision in 2013 overturning DOMA creates a newly strong incentive for those states currently approving civil unions to raise this status to full-fledged marriage in order to obtain the substantial federal benefits that now would accrue to same-sex couples. It is not clear whether a majority of the Supreme Court Justices will soon be moved to read the federal constitution as requiring state approval of same-sex marriage. All that is clear in retrospect since 2003 is that the U.S. Supreme Court has not (or not yet) invoked its hierarchic authority to conclude the on-going dispute about the constitutional status of same-sex marriage but has instead participated along with other institutions and the populace in a relational interdependence of shared authority on this issue.

Thus the twisting, turning path of the California case exemplifies the interactive, mutually engaged, non-hierarchical relational interdependence modality, even though none of the multiple participants in that case self-consciously understood themselves through that lens. If the federal judges in particular had understood virtues of this modality, there was a formal jurisprudential doctrine resolution that was available for their explicit invocation. That doctrine has two related names – ripeness or abstention. The ripeness rubric holds that some issues are not sufficiently well developed, not "ripe," for adjudication even though they can be abstractly fitted into the conventional jurisdictional framework. This rubric has more academic than explicit judicial attention; in particular, the constitutional law scholar Alexander Bickel placed the ripeness idea at the center of his jurisprudence.[72] The abstention doctrine is more commonly invoked by judges; it applies to relationships between federal and state judicial processes and enjoins federal courts to

withhold judgment from certain issues because they are better suited, at least for initial consideration, by state courts.[73] This doctrine has clear relevance to the same-sex marriage debate. As the Supreme Court's DOMA decision recognized, states have been the primary center for regulation of marriage generally and this could form the basis for withholding federal constitutional resolution until state courts had extended opportunities to address the same-sex marriage claim. Neither the ripeness nor the abstention doctrine requires federal court deference to state processes; the doctrines are available if the federal judges understand the reasons why this deference – at least for some extended period of time – would serve the interests of a just result by eschewing the hierarchical command in favor of the interdependence modality.

It is not at all clear that any external intervention will succeed in converting a deeply hostile confrontation between oppressor and oppressed into an empathic relationship. In particular, the oppressor may be unshakably committed to maintaining his dominance in the service of projecting the intolerable aspects of his own divided psyche onto the oppressed. In that event, other means must be devised to protect the oppressed. But these means – essentially to draw tentative truce lines without working toward peaceful resolution of the underlying battle – are less satisfying for the long-range welfare not just for the oppressed but also for the oppressor.

The oppressed understand their suffering but it is much more difficult to show the oppressor that he is inflicting injury on himself by his relentless struggle with and enslavement by his own inner demons. The oppressor is powerfully committed to defending himself against this acknowledgment by painting his inner demons onto the face of the oppressed. Taking ownership of and acknowledging personal responsibility for those demons is inevitably painful and aversive, however liberating and beneficial this acceptance might be in the long run.

The crucial step in this psychological process is for the oppressor to accept this personal responsibility. Hans Loewald observed that "to appropriate, to own up to, one's own history is the task of psychoanalysis as a therapeutic endeavor. . . . To own up to our own history, to be responsible for our unconscious, in an important sense means, to bring unconscious forms of experiencing into the context and onto the level of the more mature, more lucid life of the adult mind."[74]

Judicial processes are not conventionally understood as psychotherapeutic encounters. Judges are not in the business of interpreting the unconscious motives of the litigants before them. There are nonetheless some illuminating similarities. First of all, both litigation and psychotherapeutic consultations involve recollections of past events (sometimes long past and sometimes recent) to make them available for discussion and evaluation as a purposeful alternative to thoughtless repetition in action of those events. Second, these recollections take place before a person who was not involved in the past events and provides a protected, orderly setting for recollection of disorderly and often disturbing conduct and thoughts. Third, both focus not only on the past but also on future conduct where evaluative discussion of the past indicates that some remedial changes are needed.

This focus on future remedial action has a special connection between the substantive goals of both corrective litigation and psychotherapy. Psychoanalytically based psychotherapy tries to foster the emergence of unconscious thoughts into conscious awareness. Judicial interventions do not explicitly aim for this goal. But when the end result sought by the judicial intervention is to replace past hostile relations between the litigants with a new regime of mutual respect – and especially when the goal sought is to emancipate one litigant from his subjugation by the other –

the most effective remedy is typically to appeal to the possibility of empathic identification between the previously warring litigants. Though judges almost never think in these terms, this appeal to empathy involves bringing the unconscious connections between the boundless self-conceptions of both parties into conscious awareness, effectively diminishing or even dissolving the consciously distanced relationship dictated by the bounded self-conception.

These psychological abstractions have concrete application in understanding the recurrent cycles in American social history set out in the first chapter – from stable social order built on clear hierarchies of subjugating vulnerable groups to disruptions that explode these hierarchies, which leads to emancipatory interludes succeeded by new hierarchical impositions. The clearcut hierarchies are psychologically based on rigid distinctions between oppressor and oppressed – in other words, social relations derived from the premises of the bounded self. Social crises unsettle these social boundaries and in this unaccustomed fluidity the unconscious premises of the boundless self assert themselves. This establishes the grounding for empathic identifications superceding the rigid distinctions between oppressor and oppressed, between self and other, on which the old regime was based.

When courts self-consciously disrupt established social boundaries separating oppressor and oppressed, in effect they re-enact a limited version of the much more pervasive and shattering disruptions that have occurred in our general historical experience. *Brown v. Board of Education* was one such disruptive act unsettling established relations between whites and blacks; *Roe v. Wade* was another, regarding relations between men and women; *Lawrence v. Texas* was a third, unsettling conventional boundaries in gender relations. With these disruptions, an unaccustomed opening appeared for boundless connections between groups that had been kept in rigidly separate

compartments, both conceptually and physically.

This is not an easy or a smooth process. Loosening the grip of the bounded self in social relations does not only open possibilities for empathic identifications; it also invites the unleashing of a fearful sense of loss of control, of dissolution of social boundaries that had kept violent fantasies and actions in check. This is why the Court's ruling in *Brown* was met not only with "massive resistence" politically but also with eruptions of violence in the South by whites determined to keep blacks in thrall. Violently imposed subjugation had always been the bedrock for relations of Southern whites toward blacks in slavery and Jim Crow regimes; but acknowledgment of this pervasive violence was covered over by the dominant whites' insistence that "our Nigras" were content and protest came only from misinformed "outside agitators." When the Supreme Court visibly joined the outside agitators, however cautiously deliberate rather than speedy, the violent undercurrent of the Jim Crow regime emerged into frenzied public expression.

In psychological terms, this eruption of violence can be understood as a consequence of the release of the constrictions of the bounded self and the unaccustomed awareness of the boundless self – an awareness that is experienced not only as promising liberation but also as threatening disorder. In individual psychotherapy, this threat is a difficult challenge to overcome; because the patient is so fearful of his boundless "out of control" self, his rigid commitment to the bounded self can overwhelm therapeutic efforts to help the patient integrate the warring portions of his own mind. The therapist can try to ally herself with those parts of the patient's wish for liberation; and the best measure of the strength of that wish, as compared to the patient's wish to remain safely in the constricted confines of his bounded defenses against disorder, is his continued willingness to

come to the therapist's office and talk.

Here is an apparently stark difference between psychotherapy and litigation. The judge can order the litigants to appear in court. The psychotherapist can, however, seek a court order, in the form of civil commitment, to control a refractory patient who is "dangerous to self or others" – and one might view judicial authority to command the litigants' appearance as a form of civil commitment. But this parallel doesn't help to understand how judges might find some guidance from the non-coercive techniques used by individual psychotherapists to help patients work toward the preferred (and only truly effective) means of bringing the warring parts of their minds into a harmonious interrelationship.

In psychoanalytically based therapy, this goal is approached by the fearless attitude of the therapist, his willingness to hear anything that might emerge from the patient's mind, any association no matter how aversive it may appear to the patient. This willingness is often described as a nonjudgmental attitude on the part of the therapist toward the patient. By definition, a judge is not supposed to be nonjudgmental; she is a judge. But there is a deeper similarity between the therapist and the judge that this verbal differentiation obscures.

The judge is committed to be impartial between the contesting litigants, not choosing sides until the conclusion of an open deliberative process but committed throughout to do justice between the parties. "Justice" is not the goal that a psychotherapist usually invokes; but his commitment to assisting the patient toward a new attitude to the warring portions of his mind, toward a relationship of mutual acknowledgment and respect, is in fact judgmental. The psychotherapist's judgment favors a just – that is, a mutually respectful – outcome to the war waged by the patient against his own mind.

In the same way that a psychotherapist assists the patient in coming to recognize without fear or hostility the previously warring portions of his mind, so too a judge can self-consciously attempt to lead the warring litigants to recognize one another without fear or hostility. In both settings, the essential technique toward this end is to keep talking – but in a new format, presided over by an impartial person (the therapist or judge) who maintains order and guarantees safety as the hostilities repeat themselves (but this time only in evaluative talk rather than unexplained and therefore unjustified action).

This is the reason to favor judicial remedies that command future interaction between the previously warring litigants but visibly leave open the possibility that the parties will accept responsibility for themselves to frame a new mutually respectful relationship on agreed, not externally imposed, terms. This is the basis for preferring what I have called the interdependence mode in the exercise of judicial authority. There is a role here for the hierarchical command mode, but only insofar as it is aimed at compelling interactions among the hostile parties that might reveal to them their underlying commonalities, their empathic identifications with one another.

As revealed by the fiercely resistant response to *Brown v. Board of Education*, even the limited command for future interaction based on acknowledged equal status before a judge is not readily welcomed by an oppressor whose own sense of identity and safety depends on domination of all forms of interaction with, or on behalf of, the oppressed. The disruptive judicial intervention required to unsettle this social relationship and lay the groundwork for empathic identifications carries ineluctably with it some likelihood that renewed subjugative efforts will follow rather than sustained emancipation. This Gordian knot requires sustained unraveling

rather than abrupt swordsmanship.

Judges must attend to the psychological consequences of their interventions if they hope to remedy oppression; and in this sense, there is correspondence with the work of psychotherapists. As Loewald has described it, the basic goal of psychoanalytically oriented psychotherapy is to bring patients to "own up to [their] own history, to be responsible for [it]." This is the same goal for judicial efforts to remedy oppression. A command simply to change conduct – whether issued by a judge or a psychoanalyst – is unlikely to succeed in this endeavor. The hierarchical command modality locates the supposed solution to the wrongdoing in an external force outside the oppressor; and, even more importantly, this modality locates the wrongdoing itself outside the oppressor. The oppressor cannot be force-fed the liberating insight that he is oppressing himself. The interdependence mode of judicial authority may not succeed in teaching this lesson, but it holds much greater promise than the hierarchical command mode.

We have already encountered one pedagogic model for promoting this process in Socrates' dialogue with Callicles in the *Gorgias*. It is sobering that Socrates failed to dissuade Callicles from his tyrannical course. But even so, Socrates pursued a pedagogic methodology that offered the best hope – I would say, the only hope – for achieving this goal. Socrates engaged Callicles with an offer of an empathic relationship. He extracted a promise from Callicles that the two of them would persist in conversation until they had found common ground. Callicles ultimately reneged on this promise and he mockingly dismissed Socrates' advice. But Socrates never withdrew his offer of empathy, his visible commitment to serve Callicles' interests rather than his own. And he never stopped trying to persuade Callicles as opposed to seeking submission from him. To the very end, after Callicles had definitively withdrawn from engagement, Socrates

persisted in seeking an empathic connection. "Dear Callicles" were Socrates' last words, his final appeal.[75]

There is a second pedagogic model that also teaches the virtues of the interdependent mode of social authority. Though it may seem odd to invoke the figure of Jesus as a model for judicial authority, nonetheless I believe there are important parallels. Unlike Socrates, Jesus had an ultimate claim to superior hierarchic authority. Courts don't claim divine authority but, more than Socrates who only claimed the authority of reason, courts can and regularly do invoke their supreme authority as interpreters of our secular constitution. But when Jesus set out to teach the virtues of treating all men as equals, he deliberately eschewed assertion of his hierarchical superiority. This teaching was in the parable of the Good Samaritan.

The parable appears in the Gospel of Luke, where a "lawyer stood up to put [Jesus] to the test, saying 'Teacher, what shall I do to inherit eternal life?'" The lawyer was a representative of the established social order who was "testing" Jesus in an attempt to discredit him; he was not genuinely seeking enlightenment. But Jesus invited the lawyer to answer his own question, and the lawyer replied, "You shall love the Lord your God with all your heart . . . and [love] your neighbor as yourself." Jesus responded, "You have answered right"[76]

But the lawyer did not recede from his challenge on behalf of the established order. "And who is my neighbor," he asked. Jesus did not answer this question directly but instead recited the parable about a Jew who was set upon by robbers and left half-dead in the street. Two men pass by him without stopping; these two were also Jews. But a third man stopped and, Jesus said, "when he saw him, he had compassion." The man treated his wounds, "brought him to an inn, and took care of him," going so far as to return the next day to reimburse the innkeeper for any

expenditures on the injured man's behalf.

This third man was a Samaritan. Not only did he lack any tribal affiliation with the wounded man but, as the lawyer would vividly know, there was a powerful history of animosity between Jews and Samaritans based on differences in their religious practices. Indeed, Jews were forbidden to marry Samaritans and even warned against travel in Samaria because of a belief that contamination would arise from any direct encounter with them. Thus in the narrative of the parable, the two Jews who passed by the injured man were representative of the dominant social order of the time in categorically excluding themselves from any relationship with the scorned Samaritans. The two Jews who passed by the injured man were the embodiment of categorizing rationality based on a clearcut boundary between Self and Other. The Samaritan, however, ignored the existing social categories; he had an instinctive connection with the wounded man; and this is the hallmark of boundless thinking based on the absence of any distinction between Self and Other.

Jesus then asked the lawyer, "Which of these three, do you think, proved neighbor to the man who fell among the robbers?" The lawyer said, "'The one who showed mercy on him.'" If the lawyer had remained committed to the domain of bounded thinking, he would have said something very conventionally lawyer-like: "This is a complicated question," the lawyer would have said. "In one sense, the wounded man's neighbor is not the Samaritan. His only neighbors are his fellow Jews, the two who shared his tribal affiliation. But from another perspective, the injured man's neighbor is the Samaritan who overrode categorical differences to help a suffering human being. In this sense, everyone is the wounded man's neighbor. But that can't be because neighbors have special connections to one another and are thus categorically different from

non-neighbors.. So I can't answer your question definitively."

The lawyer in the parable, however, did not try to parse the logic of Jesus's question. He responded instinctively, from within the illogical but emotionally gripping premise of boundless connection between the wounded Jew and the Samaritan. Luke concludes, "And Jesus said to him, 'Go and do likewise.'"

We can be sure that Jesus did not have explicitly in mind Freud's distinction between bounded and boundless thinking. But in this parable, Jesus illustrated the distinction and drew a moral preference for one mode over the other. Jesus cannot, however, be expressing a universal moral preference for boundless thinking. To take this absolutist position would mean abandoning all rational thinking, conflating fantasy and reality. Jesus was instead seeking a different balance between the conventional categories of thought. He was urging the lawyer to abandon rigid categorical differentiations between hostile tribes. But he was also implicitly criticizing anyone's rigid suppression of boundless thinking in their own cognitive processes and their corresponding effort to enforce that suppression by subjugating others, by placing them outside the boundaries of human connection.

Jesus thus invoked more than a norm of behavior; he implicitly endorsed a norm of cognition, a way of approaching the inevitably divided character of human thought processes. It is inevitable that our minds are divided between boundless and bounded thinking; no norm can affect this fact. But the internal balance between these processes is open to variation; and on this issue normative guidance is appropriate and indeed necessary.

Jesus' substantive goal was to move the lawyer toward dissolving the boundaries that had been conventionally drawn between Jew and Samaritan – boundaries that had cast the Samaritan

into a hierarchically subordinate position undeserving of sympathy. Jesus's instrumental technique for pursuing this goal was, first of all, to reverse the lawyer's assumption that Jesus was claiming hierarchical authority over him. The lawyer, that is, initially confronted Jesus spoiling for a fight, intending to challenge what he assumed was Jesus's intention to assert his superiority over the lawyer. But Jesus confounded the lawyer's expectation by refusing to answer the question that the lawyer posed to him, "Teacher, what shall I do to inherit eternal life?" Jesus instead turned the question back on him, "What do you say?" The lawyer then gave the conventional answer drawn from the Hebrew Bible, and Jesus concurred. But the lawyer did not relent in his challenge to Jesus or his assumption that the two were engaged in a struggle for prevalence. He posed another question, which Jesus again refused to answer. Jesus instead offered the parable.

In the parable, Jesus portrayal of the Samaritan's action was clearly cast in a favorable light. He provided extensive details of the Samaritan's helpful and even self-sacrificing actions, in contrast with his brief depiction of the two Jews who passed by the wounded man. But even so, Jesus did not directly answer the question, as he might have, that the Samaritan was the only one in the parable who had "loved his neighbor as himself." Jesus instead, once again, turned the question back on the lawyer: "Which of these three, do you think, proved neighbor to the man who fell among the robbers?" The lawyer immediately said, "The one who showed mercy on him."

In contrast to the lawyer's answer to Jesus's initial question, this answer was not formulaic. The lawyer's answer seemed more to come from his own heart, as if Jesus had shown him that he instinctively knew the quality required of a neighbor, to show "mercy," to act on the basis of love

more than formalistic duty. Jesus then responded to the lawyer, "Go and do likewise."

The apparent structure of this imperative was a hierarchical command from a superior to an inferior. But Jesus had already demonstrated to the lawyer that he didn't need Jesus's command in order to recognize the correct course of conduct. The lawyer had discovered the answer in himself. He had known it all along. Jesus brought him to recognize his own instinctive knowledge by withholding any direct answer to his questions. Jesus's final injunction was thus not in effect an assertion of hierarchic authority over the lawyer but a directive to do what his heart already told him.

At the beginning of the parable, so far as the lawyer was concerned, he and Jesus were hostilely divided from one another; by the end, they were at one. Jesus acted on the premise that he and the lawyer were unified from the outset by offering deference rather than conclusive instruction to the lawyer. Though Jesus never disclaimed his authority to instruct the lawyer, he rendered it unnecessary. Jesus thus engaged in a reciprocally respectful relationship – even, one might say, replacing an initially hostile encounter with a loving, neighborly relationship with the lawyer. Jesus's consistent refusal to meet hostility with hostility but instead to offer neighborly love touched something deep in the lawyer. So too, if they properly understand the possibilities, constitutional law judges can do likewise.

V. Let Freedom Ring

Do I contradict myself? Very well, then I contradict myself. I am large. I contain multitudes.

Walt Whitman, Song of Myself

In setting out an analytic framework, we started from the outside focusing our attention on the observable format of social behavior that involve the subordination of some groups by others. We then proceeded to the inside, identifying the interior psychological roots of that behavior in cognitive difficulties that are common to everyone. We can summarize this framework by turning it around, starting from the individual psychological inside and then moving to outward social conduct.

The starting point from the inside is the psychological premise that the human mind is divided into two contradictory modes of cognition: one, from the earliest days of infancy, is premised on the absence of boundaries between self and the universe, including other selves; the second, which is gradually learned during childhood, is premised on the existence of clear distinctions between self and the universe, including others. The second mode is the foundation for all rational thought, and the conventional view is that, as the child matures into adulthood, this second mode refutes and thereby entirely replaces the first mode. In fact, however, the second mode never expunges the first. Instead all cognition is based on the juxtaposition of these two contradictory modes.

If we were continuously aware of the grip of the two inconsistent modes in all of our thought processes, we would be virtually paralyzed by cognitive confusion. Paralysis is avoided by selective inattention – at times by assigning conscious priority to one mode in preference to the

other, at times alternating in conscious awareness of one mode and the other. While the cognitive mechanisms for this inattention are not yet well understood, we have good reason to believe that the first, boundless mode is generally characteristic of unconscious thought processes. These in effect run alongside conscious thought processes which generally are more characterized by later-acquired bounded conceptions of self and other.

The relationship between these two modes of thought is uneasy for everyone and intensely conflictual for some, perhaps even many, people. This unease, this conflict, is appeased by participation in social relationships. Sometimes these relationships are cooperative as people take their cues not only for behavior but for thinking from others. These cooperative relationships – for example, in public places or in intensely emotionally charged intimate relations – reassure everyone that their conduct and thinking are in synchrony with others and thereby threatening to no one. The modern sense of clearly bounded selves, separate from others and from the natural world, paradoxically rests on this synchronous relationship with others. In other words, we are in a boundless relationship with others in the very way that we conceive ourselves as separately bounded. Our two contradictory modes of thought find expression through this paradox.

This process of mutual reassurance is, however, not always experienced as a cooperative endeavor. In the contradictory grip of mutually exclusive modes of cognition, there are many opportunities for interpersonal conflicts that mirror individual intrapsychic conflicts. Some people are disabled by abnormalities in their brain structure from participating in synchronously reassuring social relations and may engage in floridly disturbed – and consequently highly disturbing – behaviors. We don't yet know enough about brain structure to fully understand its relationship to atypical conduct and thinking. But for many people who are capable of

synchronous social behavior, the very existence of these outliers is intensely disturbing. Social measures are sought by these disturbed people to confine and control disturbing people (both categorically and physically). By visibly disrupting conventional modes of conduct and thinking, the disturbing people assault the conventional ways of negotiating the cognitive conflicts that are embedded in the structure of everyone's mind.

Social measures for categorical and physical confinement of disturbing people are not limited to those who are perceived or perceive themselves as insane. Similar measures are devised to combat widely experienced social conflict – measures that themselves speak to both bounded and boundless modes of cognition. Thus we devise social institutions that in effect assign disturbing roles to some people and subject them to visible subordination and control by others who by their acknowledged hierarchic superiority provide reassurance against disruptive impact. These social depictions are the way that everyone participates in a boundless relationship with all others through the etching of bounded distinctions between them – between the "pure" and the "dangerous."

The substantive content of these distinctions vary from era to era. Thus, following the extreme disruption experienced during the American Civil War, new and sharply bounded categorizations and social subordinations were imposed on blacks, on women, on gays, on mentally and physically disabled people. These rigid categorizations and subordinations effectively provided reassurance against the instability of individuals' cognitive processes – until suddenly they didn't, in the face of the unaccustomed social turmoil that climaxed in the eruptions of the 1960s.

This has been the common pattern throughout the American experience: rigid

subordinations unraveled by sudden explosions of social turmoil succeeded by emancipatory interregnums for varying time spans but ultimately followed by new categorical impositions of social subordination. The targets of the subordination have differed but the impetus for imposing some such categorizations remains strong as a defensive psychological maneuver reflecting the persistent contradictions in our cognitive functioning.

At various times in our social history, courts have been enlisted in the efforts to repudiate the categorical subordinations of some people in favor of others. Sometimes courts have been responsive to this enlistment; the saga of race relations following *Brown v. Board of Education* is the most vivid example. Sometimes courts have been dismissive of and even hostile to these emancipatory efforts. The Supreme Court's ruling before the Civil War in the *Dred Scott* case, barring blacks as such from access to federal courts and prohibiting Congress from restricting slavery in the territories, is one notorious example; another example is the active role taken by the Supreme Court for some eighty years following the Civil War, in abandoning the emancipatory promises of the Civil War Amendments to the Constitution; a third example is the Court's 1986 ruling in *Bowers v. Hardwick*, constitutionally validating state laws criminalizing same-sex sexual relationships.

Judges in common with everyone else rely on social ordering to appease intrapsychic conflicts arising from their contradictory modes of cognition. Indeed, it may be that judges in common with most lawyers are especially inclined to prize social order based on tightly bounded selves. In any event, even when the judges intend to liberate previously subordinated groups, the conventional understanding of the exercise of commanding judicial authority can undermine the emancipatory goal by reenacting the social processes of hierarchical subordination generally.

There is, however, a different mode for the exercise of judicial authority – a mode which limits its hierarchical character by promoting an interactive process both among litigants and between litigants and judges, which I have called the relational interdependent mode of shared authority. My prime example for this mode was the evolution of claims supporting the rights of LGBT people during the past decade.

In previous writing, I've explored the adroit interweaving of the hierarchical and relational modes in the emancipatory judicial interventions in race relations between 1940 and the mid-1970s. This intermixture was most visible in the Supreme Court's initial pronouncement in *Brown v. Board of Education I* (1954) commanding the end of the subordinating relationship between whites and blacks – subsequently followed in *Brown II* (1955) by the Court's refusal to order immediate enforcement of its command in *Brown I* . The Court thus gave room for the opposed parties themselves to forge a new relationship based on a mutual recognition of equal interdependence. *Brown II* also provided a forum in the lower federal courts for this development where blacks and whites could approach one another on a new basis of judicially acknowledged equality.[77]

The juxtaposition of *Brown I* and *II* exemplify the techniques available for courts to pursue the emancipatory goal of countermanding rigidly hierarchical social relations without undermining this goal by themselves imposing hierarchic domination over the disputants. A second example, explored in greater detail here, was the progression of federal and state rulings regarding the rights of gays and lesbians following the Supreme Court's 2003 decision in *Lawrence v. Texas* invalidating criminal statutes prohibiting same-sex sexual relations.

The central normative claim that emerges from this overall analysis is that social

subordination of vulnerable groups not only violates traditional values of equality and dignity but that such subordination in itself inflicts psychological injury on the oppressors as well as the oppressed. The injury occurs because at its core the subordination is the oppressor's attempt in the face of social turmoil to establish a stable sense of self-identity by favoring the bounded self to the utter exclusion of the unstructured, unruly unbounded self. This rigid separation between the bounded and unbounded self is accomplished by the projection onto a vulnerable group of the unruly, impure and dangerous elements within the oppressors' own psyche. This effort at self-purification is impossible to achieve; it is an endless state of warfare against the very structure of one's own mind, an internal psychological enactment of Hobbes's war of all against all.

Direct frontal assault from an outside source only increases the imagined urgency of maintaining the rigid division projected by the oppressors onto the oppressed. But if some social setting can be devised where the oppressors can safely relax their guard, they might experience and ultimately embrace relief from their endless internal warfare. The hallmark for this new internal peace is the willingness of the oppressors to experience (through the lens of their unbounded self) a new relationship of empathic identification with the very groups that had previously been the target for the denial of any connection.

This final chapter explores a further example of the two modes of judicial authority, identifies a contemporary imposition of social subordination and explains why an intermixture of the two modes, rather than exclusive reliance on one or the other, is the most effective means for remedying this wrongful oppression.

Judicial response to the abortion dispute provides an especially clear illustration of the merits of the relational interdependent mode and the disadvantages of the hierarchic command

mode of judicial authority. The Supreme Court's first intervention – indeed, the first case in its entire history involving abortion restrictions – was *United States v. Vuitch*, decided in 1971.[78] This ruling is hardly remembered today but it is worth recalling. In *Vuitch*, the Court was offered the opportunity to unsettle the subordination of women implicit in restrictive abortion laws without itself immediately resolving the social dispute and thereby imposing subordination on abortion opponents. The Court, however, declined the invitation. Two years later in *Roe v. Wade*, the Court imposed its own conclusive resolution of the abortion dispute, thus eclipsing *Vuitch* and its alternative possibilities.

In *Vuitch*, a physician in the District of Columbia had been convicted of performing an abortion without the legally requisite demonstration of harm to the pregnant woman's life or health. Dr. Vuitch claimed that the statutory standard for harm was constitutionally "void for vagueness" because it was generally too imprecise and subjective and in particular did not make clear whether psychological harm to the woman qualified as a justification for abortion. This vagueness claim was on its face quite strong; considerable constitutional jurisprudence holds that, in fairness to potential defendants, criminal statutes must delineate their prohibitory ambit with great specificity.[79] With just one dissent, the Court ruled that the D.C. statute was clear enough and construed the statutory justification to include psychological harm, even though there was no such explicit language in the statute itself.

If the Court had found the statute unconstitutionally vague (as it more than plausibly could have ruled), the effect would have been to invalidate the abortion restrictions in virtually every state. This ruling would not have prohibited any state from restricting abortion but would have required new legislation in every state to enact new restrictions. The Court would not have

drafted its own statute (as it did in *Roe*) but would have challenged all states to devise their own. An iterative process would have been initiated in which states might or might not enact new restrictions which the Supreme Court might ultimately approve or again find insufficiently precise.

In this iterative process, moreover, the effective power of subordinated women would have been enhanced because it is always easier for an aroused minority to block new legislation than to obtain legislative action; and in 1971, substantial numbers of women as a group were aroused about their subordinate status, regarding abortion restrictions and a range of other issues, with fervor that had not been seen since the 1920 enactment of the Nineteenth Amendment guaranteeing women's suffrage. In the mid-1960s, a second Feminist Movement had been launched but in *Vuitch* the Court was apparently unaware of the social significance of this new advocacy or of its opportunity to give unaccustomed amplification to women's voices which was necessary to overcome the silence that had been imposed on them by their subordinated status. Overturning abortion laws for vagueness would have promoted an interactive process in which courts were important participants but not the sole or even central authoritative speaker.

Two years later, in 1973, the Court decided *Roe v. Wade*[80]. In the interim, two new Justices had come to the Court but this in itself is not sufficient to explain the sudden willingness of the Court not simply to participate in the abortion dispute but to attempt a conclusive resolution entirely and at once. The Court, moreover, intervened in a way that betrayed its misunderstanding of the issue at stake in the contemporary debate. Justice Harry Blackmun, writing the opinion for the Court, nodded toward the women's claim for a personal privacy right; but, as he reiterated several times, Blackmun relied primarily on the doctor's right to practice medicine as he saw fit without state interference (and Blackmun several times used this gendered depiction, speaking of

"the physician [and] his pregnant patient"[81]).

In subsequent cases, the Court caught up with the advocates for women's right and abandoned the formulation of a "doctor's right," instead relying exclusively on the women's privacy claim.[82] This new reliance itself reflected the Court's wholesale embrace of the hierarchic command mode, not only on behalf of its own authority but as a depiction of all social authority. There were, however, different grounds other than the privacy right that the Court could have offered to invalidate the state abortion statutes and these alternative grounds – unlike the privacy right – would have tended to promote an interactional mode of shared authority in the relationship between supporters and opponents of abortion restrictions.

Legal commentators since *Roe* have offered different formulations from privacy rights for depicting the wrongfulness of abortion restrictions, some favoring denial of "equal protection" between men and women, others specifying derogation of a woman's fundamental "right to dignity."[83] Two of these formulations are based on the existence of a relationship. "Equality" is clearly a relational concept; it depends on the characterization of a relationship between *A* and *B*, whether hierarchical or horizontal, denying or affirming their equal status compared to one another. "Dignity" is also relational. Though not directly addressing whether *A* and *B* treat one another as equals, dignity makes no sense as a status accruing in the abstract, outside of a social relationship. *A* can heap *B* with indignities or respect her claim to be honored with dignity; but *B*'s claim for dignity is incoherent unless it is understood as directed at someone else, an *A*. By contrast, "privacy" is the negation of an interactive relationship.

Justice Louis Brandeis introduced the concept of the "right to privacy" into American constitutional jurisprudence. In his germinal dissenting opinion in *Olmstead v. United States*,

however, he did not speak of privacy as such but instead extolled "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."[84] In one sense, the right to be let alone does describe a relationship, but it is characterized by willful separation from others whereas "equality" and "dignity" depend on engagement with others. The core of the privacy ideal is best captured by defining it as the absence of or refusal to engage in a relationship.

Defined in this way, privacy is psychologically incomplete; it rests solely on the premise of the bounded self – that it is possible and desirable to define oneself as wholly separate from others – and it denies the inevitable entwinement with others posited by the contradictory premise of the boundless self. By contrast, equality and dignity can readily be comprehended through both modes of cognition. The aspiration to be treated as an equal or with dignity depends on an underlying belief – or at least a hope – that harmony between *A* and *B* is possible, no matter how conflictual their past relations have been. The privacy ideal rests on a contrary belief – that harmony is not possible or, at least, not desirable as a goal.

Insofar as it rests on the view that relationships are inherently conflictual and thus to be avoided, the demand for privacy is psychologically defensive. The wall that the privacy ideal erects between self and other is not a mutually satisfying settlement to conflict but more like a temporary truce between warring parties, an interlude between the inevitably renewed eruption of hostilities when, as it must, the contradictory psychological premise of the boundless self reasserts itself.

Some disputes are so deep-rooted that nothing better is possible than a stand-off, a mutually agreed suspension of open warfare. But there is an inherent instability in reliance on the privacy ideal, an instability that does not afflict the alternative conceptions of equality and dignity.

We can see this instability by examining disputes where *A* invokes his right to privacy and the other conflicting party *B* invokes his right to equality or dignity. In effect, *A* says, "I want nothing from *B* but only to be let alone from his intrusions and demands against me." *B* responds, "*A* is ignoring our long-standing history of inequalities and indignities that he has imposed on me and his claim today to be let alone merely ratifies the unjust *status quo*."

In concrete terms, these were the conflicting claims advanced in the nineteenth century in the *Dred Scott* case[85] and *Plessy v. Ferguson*,[86] and recast in the twentieth century in *Brown v. Board of Education.* In *Dred Scott*, the Supreme Court sought to separate the hostile parties by withholding from the opponents of slavery any forum where they could pursue their complaints, both by negating the authority of Congress or the territorial legislatures to limit slavery and by barring blacks from access to federal courts. The southern supporters of slavery were thus guaranteed the right to be let alone – without any acknowledgment that their claim for non-interference was from their adversaries' perspective an imposition on them. In *Plessy*, the Supreme Court was explicit that the right to be let alone was dispositive of the conflict about separate public facilities for blacks and whites. If there is to be any interaction between the conflicting parties, the Court observed, it must be on the basis of mutual agreement; in the absence of such agreement, separation – and the denial of any acknowledged relationship – must prevail.[87] This disposition wholly ignores the competing claim that requiring racially separate facilities was not the absence or the denial of a relationship between blacks and whites but a continuation of a past relationship that was intended by whites to demean blacks and was understood as such by both races.

This characterization of *Dred Scott* and *Plessy* points to parallels with the economic liberty

rulings that the Supreme Court issued in the late nineteenth and early twentieth centuries.[88] In all of these cases, there was conflict between those who sought to deny the existence of any relationship with its adversaries and those who insisted that there was a relationship, albeit an unjust one that must be transformed. In the economic liberty cases, the Court endorsed the claim of capitalists to be let alone because they were sole owners of the property in dispute while the workers claimed some share of the enterprise, some relationship derived from past interactions. The workers sought to enforce their relational claim by legislative action which the Supreme Court overturned, in effect erecting a right to privacy that favored the capitalist employers by protecting the *status quo* from any"outside interference" notwithstanding the competing claims of workers to be "insiders" who deserved a recognized stake in the enterprise.

These uses of the equivalent of the privacy principle to resolve the disputes were unstable in fact. *Dred Scott* inflamed the controversy and played a significant role in precipitating the Civil War (in which the central dispute was between the Southerners who insisted on withdrawing from a relationship with the North and the Northerners who claimed that the relationship persisted and could not justly be denied). *Plessy* bought peace for a time between blacks and whites but the suppressed (though denied) conflict openly erupted after a half-century and in many ways not yet been resolved (though it has abated) another half-century later. The economic liberty cases hardly produced even a temporary truce in hostilities between capitalists and laborers but was recast for the parties by the immense external shock of the Great Depression which undermined the adamant resistence by employers to acknowledge shared stakes with employees.

The use of the privacy principle was also conceptually unstable. This instability is the core problem with the contemporary liberal invocation of John Stuart Mill's "harm principle." I

suggested earlier that Mill's principle is psychologically obtuse because it relies on only one cognitive mode (the bounded self) while giving no recognition to the contradictory mode (the boundless self). This was the reason in principle that the harm principle expresses only one side of an argument but has no conclusive resolving force. We can see concrete instantiation of this conceptual problem in *Dred Scott*, *Plessy* and the economic liberty cases where one disputant asserted that he had no relationship with and therefore could not inflict harm on the other while the other disputant had a contradictory claim that there was a relationship from his perspective and he was oppressive and that he was harmed specifically by the unilateral opposing claim that there was no relationship. . If *A* insists that, from his perspective, he has no relationship with *B,* but *B* insists that regardless of *A's* intention he and A are in fact engaged in a relationship, A must demonstrate that there is no such thing as an unintended relationship. Such a thing, however, does exist.

Privacy and the harm principle have been invoked in the abortion dispute but their shortcomings are evident on the very face of the controversy. If the fetus is regarded as a human being from the moment of conception, then the claim that the pregnant woman's decision is "private" and no one else has a recognizable stake in it is patently false; the fetus is a separate being in a relationship with its mother and has much at stake in her decision to abort or continue the pregnancy. The question whether or when the fetus is a recognized member of the human community, however, cannot be resolved. It is not a scientific question; scientists can only testify about when various developmental markers occur in the gestation of the normal fetus, but science cannot establish which marker or constellation of markers constitute enough of a "full-fledged being" to warrant recognition as such.

Invoking the privacy principle as a way of thinking about the abortion dispute gives no coherent vocabulary for discussion among the disputants and therefore promises nothing more than an endless shouting match about incommensurate values. By contrast, understanding the dispute in relational terms – about the equality or dignity of women as compared to others – does point the disputants toward the possibility of a shared understanding. It is of course conceivable for abortion opponents to insist that fetuses deserve fully equal status or recognized dignity with their mothers. But this argument instantly offers a refutation, that even if the fetus deserves equality or dignity, the pregnant mother deserves the same. Unlike "privacy," there is no temptation to fall back on incoherent formulas for determining when or whether a fetus is ever a human being. Equality or dignity is obviously deserved by both the mother and fetus however it might be ranked on the spectrum of humanness, but debating the relative claims to equal treatment or dignified treatment invites a commensurate metric for comparison in a way that invocation of the privacy principle does not.

The privacy claim depends on making the conflict between maternal and fetal claims disappear by insisting a priori that the decision is "private" so that the fetus vanishes before the dispute begins. The equality and dignity claims invite discussion of the history of women's subordinate status, the role that abortion restrictions played in that subordination and the remedial significance of shifting authority away from doctors in favor of pregnant women as a response to this demeaning social treatment. The privacy principle or its close cousin the harm principle gives no room and therefore no impetus for considering this social history.

Abortion opponents may insist that this history is irrelevant; but they can't exclude it from conversational dispute by an a priori fiat, as the abortion supporters do when they invoke privacy

as the justification for women's priority. And the argument for the irrelevance of the past history of women's oppression, especially regarding abortion restrictions, is difficult to sustain when the dispute takes place regarding the comparative merits of the competing equality and dignity claims. Is there a past history of demeaning or subordinating impositions on fetuses as such? Perhaps so if we consider female fetuses or fetuses with significant mental or physical disabilities; and perhaps this history could justify state restrictions on abortions for gender selection or for narrowly perfectionist goals, but this justification would not extend to abortions for other non-discriminatory reasons. Viewed through the lens of equality or dignity, the disputes about abortion availability would be about real matters that invite some common metric for deliberation rather than about empty abstractions regarding whether the fetus "exists" or not.

If the Court understands its authority as hierarchically commanding, then it makes no difference how it characterizes the abortion dispute. All of the characterizations array incommensurate values against one another and cannot yield definitive resolutions that don't depend at some level on question-begging assumptions. But by conclusively resolving the dispute, the Court misses the opportunity for inviting the disputants to directly confront one another, to characterize for themselves the reasons that they view the other as an oppressor and – most importantly – to decide for themselves whether they are able and willing to relent from what the other regards as oppression. If a mutually satisfactory accommodation is reached through this interactive process, both disputants can feel liberated. If the Court imposes conclusive victory for one and defeat for the other, only the victor feels liberated, but this emancipatory moment might be very brief indeed as the defeated party lashes out, impelled even more intensely by his heightened sense of grievance.

The most promising path for judicial intervention is to use force only in the service of compelling interaction between the oppressors and oppressed and never abandoning the hope that this interaction will lead to empathic identifications that override the past inflictions of subordinations. Some techniques for this pursuit were exemplified in the preceding discussion of LGBT rights cases during the past decade and the much briefer discussion of race segregation cases in the decade before and the two decades after the *Brown* decision. The abortion cases exemplify the Court's failure to understand the potential uses of this relational interdependent mode. Unfortunately, there is a long history of the Supreme Court purposefully turning away from promoting interaction among oppressors and oppressed, imposing instead a command hierarchic mode both for itself and for social relations generally: thus *Dred Scott*, *Plessy v. Ferguson*, the economic liberty rulings between the late nineteenth century and the 1930s.

What are the proper targets for remedial interventions by courts today? There are two lists to explore: the first is a list of the usual suspects, that is, the social relationships that have been visibly at the center of emancipatory claims since the 1960s. Is it right to say, as a Supreme Court majority recently asserted, that past racial oppressions have been essentially erased?[89] Or is this assertion evidence of the cyclical end of the emancipatory moment and its replacement with new and/or renewed inflictions of social subordinations?

The social crises of the 1960s sparked an extraordinary eruption of liberating efforts by and on behalf of formerly subjugated groups – first African-Americans, closely followed by the feminist movement, then the disability rights movement and, most recently, the civil rights claims of lesbians, gay, bisexual and transsexual people. While these groups have not obtained the full equality or respect that they have sought, they have not experienced (or at least have not yet

experienced) the old cyclic pattern of massive, clear-cut retreat from the emancipatory impulse on their behalf.

The emancipatory impulse has persisted with some considerable social force for more than a half-century, a considerable stretch of time by past historical standards. Even though it has encountered progressively stiffened popular resistence, the impulse still persists – reaching what could be described as climactic moments in November 2008 when our first African-American president was elected (who, fifty years ago, would have predicted this?) and when, in his second inaugural address, President Obama resoundingly endorsed marital status for same-sex couples (and who, fifty years ago, would have predicted that?)

The Court has, however, been carelessly inattentive (and even reckless) in blocking occasions for reparative interactions that have been mutually initiated by blacks and whites. Thus the Court erroneously struck down a racial integration plan adopted by the elected, white-majority school board in Seattle, Washington.[90] The Court wrongly invalidated section four of the Voting Rights Act of 1965, which assured continuous monitoring of the racial impact of state voting laws.[91] The Court seems poised to commit another error by prohibiting affirmative action efforts to ensure minority presence in higher education institutions.

The Court justified these actions on the spurious ground that the use of racial classifications as such was the core problem in the oppressions inflicted on blacks from slavery through segregation laws and beyond. The core problem, however, was not the use of race as such but the use of race as a distinctive marker of negative traits, of dangerous impurities. The remedy for such subordination is not to assert that race relations are no longer a problem for blacks or whites but instead to cultivate the occasions for mutually respectful engagement of blacks and whites as such.

Given the stubborn history of black subordination and the cyclic recurrence of oppressions after emancipatory efforts, the Court should acknowledge the need for indefinite concern regarding the future. To this end, it should embrace the willingness of local school boards to foster racial interaction by purposefully drawing multi-racial attendance zones, applaud the concern expressed by substantial majorities in Congress to assure unobstructed minority participation in elections and approve affirmative action plans devised by public and private colleges and universities to assure substantial minority group presence.

The principal role for courts today is to guard against resurgence of the psychological forces that have repeatedly impelled subordination of vulnerable groups – not just blacks but women, LGBT people and people with disabilities. There is, moreover, powerful reason to add a new group to this list of threatened targets for subordination. That new group is convicted criminals. In recent years new degradations have been inflicted on convicted criminals. The publicly avowed intensification of their degraded status may suggest a broader concern: that American society has cyclically moved toward a new expression of its old commitment to rigidly enforced patterns of social order, an expression that might foreshadow a more general retreat from the post-1960s emancipatory moment.

There is some overlap between convicted criminals and African-Americans who were previously subordinated as such, since blacks are disproportionately represented in the prison population generally. (In 2000, black men were incarcerated at 7.7 times the rate of white men; by 2009 this racial disparity had narrowed to 6.4 times that of white men – a significant decline, but still a substantial disparity.[92]) But though this disparity suggests the lingering impact of the old racially-based subordination, it is clear that all blacks as such no longer are predominantly

viewed as socially scorned outcasts; the presidency of Barak Obama is proof enough of this proposition.

Convicted criminals have always been socially scorned. Most notably, the Thirteenth Amendment to our Constitution that abolished slavery contained a significant exception. The text provides, "Neither slavery nor involuntary servitude [shall exist in the United States] except as a punishment for crime whereof the party shall have been duly convicted." This equation of imprisonment with enslavement did not originate with the Thirteenth Amendment; it was first enacted by the Continental Congress in 1784, in barring slavery from the Northwest Territory. This language was simply copied without debate or greater clarification in the wording of the Thirteenth Amendment. Whatever this equation of imprisonment and slavery meant in 1784 or in 1865, it is clear that since the mid-1970s, convicted prisoners as such have been more rigidly treated as permanent outcasts – viewed in effect as "civilly dead" in the terms that the sociologist Orlando Patterson classically used to characterize the legal and social status of slaves.[93]

The existence of the death penalty for convicted murderers – unique in the United States among all Western nations – is one marker of this enslaved, exclusionary status. In the mid-1960s, in the first flush of the emancipatory impulse in the twentieth century, it seemed likely that the death penalty would be abolished. Public opinion polls showed that in 1966 only 42% of the U.S. population supported the death penalty and in 1972, the Supreme Court issued a ruling that seemed to close off any constitutional possibility for executions.[94] But almost immediately following this ruling, thirty-five state legislatures re-enacted their capital punishment statutes, the Supreme Court soon thereafter retreated from its abolitionist position and by 2000 public opinion polls showed a dramatic increase in popular support for the death penalty (80% in 1994, an

all-time high, declining to 60% in 2009).[95]

The popularity of the death penalty is only the most obvious demarcation of prisoners as less than fully human. Because it is so rarely carried out, the formal availability of capital punishment for prisoners has more symbolic than real impact. Since the mid-1970s, however, convicted criminals have been treated as "civilly dead" and excluded from fully human status in a multitude of other ways with very real practical impact. Thus a sharply increased rate of imprisonment has occurred between 1971 (when a total of 450,000 were incarcerated which represented a ratio of 143 per 100,000 population) and 2005 (when 2.19 million were incarcerated at a ratio of 742 per 100,000 population). Since just 1990, the average length of prison sentences has increased by thirty-six percent; and 41,000 people in the United States are now serving life sentences without the possibility of parole. Even for prisoners with fixed terms, their permanently subordinated status persists. Thus notwithstanding the expiration of their prison term, no one convicted of a felony is entitled to vote in any U.S. state.

Those who are convicted of sexual offenses are treated as an even more degraded species. They are subjected to life-long public registration and banned from living in most residential neighborhoods, especially where any contact with children is even a remote possibility (even if the convicted offense did not involve children). Moreover, in new statutes enacted in twenty states since 1990, sexual offenders at the expiration of their prison terms are vulnerable to subsequent life-time confinement. These commitment statutes provide a dramatic illustration of the cycle I have identified generally of repression of vulnerable groups based on fear of disorder, emancipation following some social crisis, and then new or renewed repression.

Between 1935 and the mid-1950s, twenty-six states and the District of Columbia enacted

statutes aimed at so-called "criminal sexual psychopaths."[96] These statutes generally required a finding of mental illness and provided indefinite civil commitment "until cured"; in practice very few of those committed were ever released. In 1969, Chief Judge David L. Bazelon observed that the statutes promised rehabilitative treatment; but "[n]otoriously, this promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits."[97] Two years earlier, in 1967, the U.S. Supreme Court had overturned one such state statute on narrow due process grounds[98]; in the succeeding twenty-years – during the most recent dominance of the emancipatory impulse on behalf of vulnerable groups – most state criminal sexual psychopath laws were invalidated by courts or repealed by legislatures; though thirteen state statutes remained on the books, they were no longer used in practice.

But in 1990, the emancipatory moment as applied to sexual offenders had conclusively ended and a new wave erupted of sexual offender civil commitment statutes; by 2013, such statutes had been enacted in twenty states.[99] Under these statutes, commitment follows if an individual is judicially found to have "serious difficulty in refraining from sexually violent conduct or child molestation if released."[100] No finding of mental illness as such is required. Commitment is indefinite; and no treatment or any promise of treatment is provided in the confinement institutions.

By 2007, some forty-five hundred sex offenders had been civilly committed nationwide, and only some ten percent had been released. Since one state, Minnesota, enacted its commitment statute in 1995, 670 people have been confined and only one has been released.[101] In 1997, in a case from Kansas, the U.S. Supreme Court upheld the constitutionality of these new, avowedly and exclusively custodial statutes.[102] Thus criminals generally, and sexual offenders in

particular, currently have inherited the status that homosexuals in particular had occupied until very recently – the status, that is, of being a different breed of humanity, a diseased and dangerous breed that deserved exclusion from the human community.

Criminals have always been scorned and quarantined. But the contemporary status of criminals in the United States has taken a new turn. In the old modality, criminals were not permanently banned but were assumed to be redeemable and potentially eligible to rejoin the human community. This was the implication of the promise of rehabilitative treatment programs. This promise was hypocritical, more often ignored than implemented. But the promise itself was a marker that criminals were not an indelibly different species of humanity. The dishonesty surrounding the promise epitomized La Rochefoucauld's observation that "hypocrisy is the homage that vice pays to virtue." Today, at least in the United States, the promise of rehabilitative treatment is no longer extended to prisoners; they are indelibly a different breed and this status degradation is no longer seen as a vice that should be disguised.[103] We have finally come to embrace the proviso in the Thirteenth Amendment, that slavery is abolished except for prisoners who have been duly convicted of crimes.

There is special danger from this current derogatory status imposed on prisoners. We have only recently developed the capacity to observe the functioning of living brains and in the next twenty years our capacity to change brain structure in order to control social conduct will most likely increase dramatically. The enlistment of science in the quest to control ourselves and others has a long and destructive history – from the lobotomies inflicted on disturbed and disturbing people during the first half of the twentieth century and eugenically motivated sterilizations to ensure "racial purity" to less grotesque but empirically unsupportable proposals to

control violent conduct by destruction of small portions of the convicted criminal's brain.[104]

In future years, as our knowledge of brain function deepens, the temptation will increase for the use of various forms of psychosurgery and related interventions to control anti-social conduct. Coercive use of these interventions might seem justified because the candidate has an "abnormal brain" which distorts his decision-making processes. Or these interventions might be restricted to "voluntary" deployment, disregarding the devaluation that these "abnormal people" impose on themselves in response to the fear and revulsion they inspire in others.

These possibilities are worrisome, especially in light of the abuses that have historically been inflicted by medical scientists in the service of social control. Our past history of false promises – of self-deception and deception of others – is a basis for great caution in advancing yet new promises. But we must also take care that, in the name of skeptical caution, we do not turn away from alleviating the suffering of violent criminals by offering treatment to them that in effect welcomes their return to full membership in the human community.

As with other oppressed groups, this should be the goal for overseeing social regulation of convicted criminals – to assure the cultivation of opportunities for mutually respectful relationship. This goal is more difficult to pursue for convicted criminals than for members of the other oppressed groups we have discussed. Unlike these latter groups, criminals have been reliably identified ("beyond a reasonable doubt") to have disdained mutually respectful relationships with others. There is thus better reason to fear and confine them than the oppressive inflictions motivated by nothing more than projection of our fears about ourselves. Even so, this psychological impulse is at work in some aspects, at least, of social regulatory attitudes toward criminals. To guard them and us against yielding to this impulse, we must find some reliable

marker to differentiate deserved from undeserved subordinations of criminals.

The key differentiation is the permanence of the subordination imposed. An avowedly temporary subordination does not definitively rule out the possibility that the criminal can be restored to a mutually respectful relationship with others. This restoration need not be automatic; because of his past behavior, the criminal can be required to show some clear evidence that he deserves re-inclusion in ordinary social relations. Demanding such assurance is not inconsistent with social acknowledgment that the confinement and subordination are temporary. Courts moreover should oversee the actual processes available for parole to ensure that the promise of possible release is not chimerical. To this end, courts should mandate an appointed attorney for effective representation of a prisoner in release proceedings.

Administration of the death penalty is, however, the epitome of a permanent, irremediable and irreconcilable exclusion of the criminal from even the possibility of a restored relationship with others. So too is the imposition of life imprisonment without possibility of parole. Courts should hold both practices unconstitutional, as violations of human dignity. Such definitive judicial action would be in service of the goal of promoting a relational interdependent mode of authority. On its face, such judicial ruling looks like an assertion of hierarchical command over popularly elected legislatures rather than inviting them to participate in a relationship deliberating on the future status of the death penalty or life sentences without parole possibility. But this definitive override of a popular majority does not violate the demands of the relational interdependence mode. The death penalty and life sentence without parole permanently excludes the possibility of any future relationship between the criminal and the law-abiding citizen. Indefinite confinement in a mental hospital without a semblance of professional mental health

treatment has the same practical exclusionary consequence. Removing the option of a permanent exclusion under any circumstance is a precondition for the effective application of the relational interdependence mode.

The psychological forces that impel some people to protect themselves by inflicting degradation on others are powerful and often difficult to detect. If I believe I can affirm my sense of righteousness by projecting (without conscious awareness) my destructive impulses onto someone else, it is easy for me to imagine myself as pure-hearted. After all, I am acting in compliance with the directive of my internal compass pointed toward righteousness. This self-justificatory attitude among oppressors is so common, so strong and so much entangled with good motives that it is very difficult for the oppressor to see his actions for what they truly are. Somehow the oppressor must be induced to see his mixture of motives, good and bad, honorable and dishonorable – and to accept full responsibility for what he is doing, one might say, with only half his mind.

This is descriptively inaccurate, of course. All we can know is that our minds are fundamentally divided between two modes of cognition; but this doesn't mean that we are led to victimize others for our own shortcomings because half our mind draws firm boundaries with others and half draws no boundaries. In fact both modes of cognition can conspire together for me to impose my fears about myself boundlessly onto you while at the same time insisting that rigid boundaries separate bad you from good me.

How then can we be led to look honestly and fearlessly at our tangled psyches, our self-contradictory sense of ourselves? We must help one other to accomplish this – with empathic, imaginative tolerance for contradiction and patient persistence in offering help rather

than self-righteously commanding obedience. Judges can constructively offer this help in shaping our social regulations, but only if they understand the need for help. And if they can touch what Lincoln called "the better angels of our nature," they can find an ally in everyone's understanding (if only an unconscious understanding) that the demonization of others is linked to our fears of the demonic in ourselves. Judges (as well as other public officials and private actors) can enlist this understanding to teach the oppressor that his effort to hold others responsible for his wrongdoing is endless, doomed to failure and ultimately demoralizing for him. The goal for this pedagogic process is to liberate everyone – not only those enslaved by others but also those who enslave themselves in the effort to enslave others.

Notes

1. Joel Williamson, The Crucible of Race: Black-White Relations in the American South Since Emancipation (Oxford: Oxford Univ. Press, 1984) at p. 306.

2. "One of the most striking aspects about the lynching phenomenon was . . . the suddenness of its appearance in and after 1889 as a distinctly interracial happening in the South. . . . The cold statistics hardly begin to capture the emotional heat generated by the crises of sex and race in the South in the early 1890s." Id. at 184-85.

3. See sources cited in Lawrence v. Texas, 539 U.S. 558, 568-69 (2003).

4. Ariella Dubler, "Wifely Behavior: A Legal History of Acting Married," 100 Colum. L. Rev. 957, 970 (2000).

5. Michael Grossberg, "Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990," 28 Ind. L. Rev. 273, 278-80 (1995).

6. Nicola Beisel, Imperiled Innocents: Anthony Comstock and Family Reproduction in Victorian America (1997) at pp. 36-37.

7. James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 (1978) at p. 200.

8. President Ulysses S. Grant, State of the Union address (Dec. 4, 1871), available at htt///www.thisnation.com/library/sotu/1871ug.html.

9. See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

10. At this same time, state regulatory ambitions dramatically increased over a wide range of social activities beyond sexual conduct. See Robert Wiebe, The Search for Order, 1877-1920 (New York: Hill and Wang, 1967).

11. See generally C. Vann Woodward, The Strange Career of Jim Crow (New York: Galaxy Books, 1957).

12. See Steven Pinker's qualification of this statement.

13. James McPherson, "Commentary on 'A Census-Based Count of the Civil War Dead'," Civil War History, volume 57, p. 310 (2011).

14. J. David Hacker, "A Census-Based Count of the Civil War Dead" *Id*. at page 308.

15. Id. at page 313.

16. See David E. Stannard, American Holocaust: The Conquest of the New World (Oxford: Oxford Univ. Press, 1992) pp. 105-09.

17. See David Brion Davis, Inhuman Bondage: The Rise and Fall of Slavery in the New World, (Oxford, Oxford Univ. Press, 2006) p. 144.

18. Id. at 152. Thus Vermont outlawed slavery in its 1777 Constitution; Pennsylvania enacted gradual emancipation in 1780, as did Connecticut and Rhode Island in 1784, New York in 1799 and New Jersey in 1804. In Massachusetts, emancipation was achieved by judicial ruling in 1783. See id. at xii-xiv.

19. "[T]he 1780s witnessed a great upsurge of anti-slavery fervor in the upper South as well as in the North. . . . [I]n 1782 Virginia passed a law that eased and even encourage private manumissions. In 1784 the Continental Congress came within one vote of passing Jefferson's bill that purported to exclude slavery from the *entire* trans-Appalachian territory [including what would become] Alabama, Mississippi . . . Kentucky and Ohio. . . . Before the American Revolution the status [of free blacks] had been ambiguous, and the number of free blacks was insignificant. By 1810, however, as a result of the emancipation that had accompanied and followed the Revolution, there were approximately one hundred thousand free blacks and mulattoes in the Southern states." Id. at 154, 204.

20. As Carl Becker classically observed, the American Revolutionary War for "home rule" was a temporary lull in the domestic struggle over "who should rule at home." The History of Political Parties iin the Province of New York, 1760-1776 (Madison: Univ. of Wisc. Press, 1909) at p. 22.

21. Adrienne Koch, Madison's "Advice to My Country," (Princeton: Princeton Univ. Press, 1966) p. 137.

22. Williamson, op. cit. at 15-16.

23. "[After 1810, legislators in the Upper South] tightened restrictions on private acts of freeing slaves . . . A rash of new laws, similar to the later Black Codes of Reconstruction, reduced free blacks almost to the status of slaves without masters. The new laws regulated their freedom of movement, forbade them to associate with slaves, subjected them to surveillance and discipline by whites, denied them the legal right to testify in court against whites, required them to work at approved jobs, and threatened them with penal labor if not actual reenslavement. . . . The intense and even worsening racism from Virginia to New England presented an ominous message with respect to a postemancipation America." Davis, Inhuman Bondage, op. cit. at p. 204. In 1806, the Virginia legislature specified that any subsequently freed slave in the state after manumission would forfeit "his or her right to freedom . . . and may be apprehended and sold by the overseers of the poor." This law was, however, only sporadically enforced; in 1837, in apparent recognition of this fact, the legislature provided that slaves freed after 1806 could remain in the state only after

specific judicial certification of their "peaceable, orderly and industrious" character. Paul Finkleman, The Law of Freedom and Bondage (New York: Oceana Publications, 1986) pp. 114-15; Benjamin Klebaner, "American Manumission Laws and the Responsibility for Supporting Slaves," 63 *Va. Mag. Hist. And Biography* 443, 449 (1955).

24. See Robert A. Burt, The Constitution in Conflict (Cambridge: Harvard Univ. Press, 1992) at pp. 155-59 and sources cited there.

25. Until very recently, this capacity for self-consciousness was believed to be unique to human beings. There is now accumulating evidence that some other animals – dolphins, whales and some species of monkeys – are able to recognize mirror images of themselves as such which has been read to imply capacity for self-consciousness, at least in rudimentary forms.

26. Freud, Civilization and Its Discontents 31, 15 (Norton 1961).

27. Id. at 16-17.

28. Id. at 18.

29. Eric Kandel, The Age of Insight, p. 462 (Random House 2012),

30. Id. at 465.

31. Kandel at 465.

32. Requiem for a Nun (1950).

33. Sigmund Freud, The Interpretation of Dreams (New York: Science Editions, 1961) p. 608. See also Hans Loewald, "The Waning of the Oedipus Complex" in Papers on Psychoanalysis (New Haven: Yale Univ. Press, 1980), pp. 402-02:

> With reference to the problem of individuation and the status and valuation of the individual, psychoanalysis appears to be in an awkward position. On the one hand, it seems to stand and fall with the proposition that the emergence of a relatively autonomous individual is the culmination of human development. . . . On the other hand . . . there is a growing awareness of the force and validity of another striving, that for unity, symbiosis, fusion, merging, or identification – whatever name we wish to give to this sense of and longing for nonseparateness and undifferentiation. . . . The more we understand about primitive mentality, the harder it becomes to escape the idea that its implicit sense of and quest for irrational nondifferentiation of subject and object contains a truth of its own, granted that this other truth fits badly with our rational world view and quest for objectivity. Even a schizophrenic's sense of a continuum or an uncanny, cherished or dreaded affinity and sameness of himself and another person . . . begins to make sense if viewed in the light of deep unconscious levels.

34. See David Rothman, The Discovery of the Asylum

35. Charles Taylor, Sources of the Self: The Making of the Modern Identity (Cambridge: Harvard Univ. Press, 1989) pp. 175-76.

36. Id. at p. 315.

37. Thomas Hobbes, Leviathan (Edwin Curley, ed.) (Indianapolis: Hackett Publ. Co., 1994) p. 9. Hobbes does not claim that this distinction comes naturally to all people or even to most. He continues, "The most difficult discerning of a man's dream from his waking thoughts is . . . when by some accident we observe not that we have slept, which is easy to happen to a man full of fearful thoughts, and whose conscience is much troubled, and that sleepeth without the circumstances of going to bed, or putting off his clothes, as one that noddeth in a chair." Id. at 10.

38. Id. at 23.

39. The Hunting of the Snark (An Agony in 8 Fits) (MacMillan, 1876). See Sydney Williams & Falconer Madan, Handbook of the Literature of C. L. Dodgson, as quotd in Martin Gardner, The Annotated Snark (Penguin Books, 1974).

40. Sigmund Freud, "Female Sexuality," in Standard Edition of the Complete Psychological Works of Sigmund Freud, trans. And ed. James Strachey (London: Hogarth Press, 1953-) 21:234.

41. John Stuart Mill, On Liberty (Oxford: Oxford Univ. Press, 1859 pp. 21-22.

42. See Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation & Constitutional Law (Oxford: Oxford Univ. Press, 2010) pp. 9-10, 56-60.

43. Mary Douglas, Purity and Danger: An analysis of the concepts of pollution and taboo (London: Routledge, 1966).

44. Hans Loewald, Psychoanalysis and the History of the Individual (New Haven: Yale Univ. Press, 1978) p. 56.

45. Jonathan Lear, Therapeutic Action: An Earnest Plea for Irony (New York: Other Press, 2003) at p. 121.

46. Id. at 117.

47. Abraham Lincoln, State of the Union Address, 1862.

48. The Gorgias, in The Collected Dialogues of Plato (E. Hamilton & H. Cairns, eds.) (New York: Bollingen Foundation, 1981) (W. D. Woodhead, trans.) p. 306.

49. See Eugene Genovese, Been in the Storm So Long (?)

50. D. W. Winnicott, "Anxiety Associated with Insecurity," Collected Papers, p. 99.

51. Sigmund Freud, Three Essays on the Theory of Sexuality (New York: Basic Books, (1962 ed.) (James Strachey, trans.) at pp. 85-86 & n. 1.

52. 478 U.S. 186 (1986).

53. Id. at 194.

54. 60 U.S. 393 (1857).

55. 428 U.S. at 197.

56. 539 U.S. 558 (2003).

57. 539 U.S. at 605 (Scalia, J., dissenting).

58. Id. at 578.

59. 539 U.S. at 574.

60. Id. at 577.

61. See Reva Siegel for an exploration of this proposition as it applies to abortion rights. Xxx

62. Goodridge v. Dep't of Public Health, 798 N.E.2d 941, 948-49 (2003).

63. Baker v. Vermont.

64. Bahr v. Lewin

65. Hernandez v. Robles

66. In re Marriage Cases

67. Strauss v. Horton, 207 P.3d 48 (2009).

68. See the cases cited id. at p. 60.

69. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012)

70. Hollingsworth v. Perry, 570 U.S. (2013)

71. 133 S.Ct. 2675 (2013).

72. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics

(Indianapolis: Bobbs-Merrill 1962) pp. 143-56.

73. See Smelt v. County of Orange, 447 F.3d 673, 686 (9th Cir.) *cert. denied* 127 S.Ct. 396 (2006).

74. Loewald, op. cit. supra note xx, Chapter Three, at p. 20-21.

75. The Gorgias, op. cit. supra, n. xx, Chapter III, at p. 307.

76. Luke 10:25-28.

77. Robert A. Burt, The Constitution in Conflict 271-310 (Cambridge: Harvard Univ. Press,1992).

78. 402 U.S. 62 (1971).

79. See Bickel, The Least Dangerous Branch, op. cit. supra, chapter X, note xx, at pp. 149-52.

80. 410 U.S. 113 (1973).

81. 410 U.S. at 163.

82. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).

83. See the sources cited in Geoffrey R. Stone et al., Constitutional Law (6th ed.) (Austin: Wolters Kluwer, 2009) at pp. 851-52.

84. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

85. Dred Scott v. Sandford, 60 U.S. 393 (1857).

86. 163 U.S. 537 (1896).

87. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals." Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

88. See Lochner v. New York, 198 U.S. 45 (1905).

89. See Shelby County, Alabama v. Holder, 1335 S.Ct. 2612, 2619 (2013). (Section 4 of the Voting Rights Act of 1965 "imposes current burdens [on states, but cannot be justified] by current needs."

90. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

91. Shelby County, Alabama v. Holder, supra note xx.

92. Erica Goode, "Incarceration Rates for Blacks Haven Fallen Sharply, Report Shows" NY Times, Feb. 28, 2013, p. A12.

93. Orlando Patterson, Slavery and Social Death: A Comparative Study (Cambridge: Harvard Univ. Press, 1982).

94. Furman v. Georgia, 408 U.S. 238 (1972).

95. See Robert A. Burt, The Constitution in Conflict, op. cit. supra Chapter Four, note xx at pp. 335-37.

96. Tamara Rice Lave, "Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopath Laws," 69 Louisiana L. Rev. 549, 590 (2009).

97.Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir., 1969).

98. Specht v. Patterson, 386 U.S. 605 (1967).

99. Lave, supra at p. 591.

100. Rachel Aviv, "The Science of Sex Abuse," New Yorker, Jan. 14, 2013, p. 39.

101. Id. at p. 41.

102. Kansas v. Hendricks, 521 U.S. 346 (1997).

103. See Robert A. Burt, "Promises to Keep, Miles to Go: Mental Health Law Since 1972," in The Evolution of Mental Health Law (Lynda E. Frost & Richard J. Bonnie, eds.) (Washington, D.C.: American Psychological Ass'n, 2001) pp. 11-30.

104. Elliot S. Valenstein, Great and Desperate Cures: The Rise and Decline of Psychosurgery and Other Radical Treatments for Mental Illness 3-6 (Basic Books: New York, 1986)