

THE YALE LAW JOURNAL

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The Anti-Humiliation Principle and Same-Sex Marriage

ABSTRACT. Bruce Ackerman's volume on the civil rights revolution argues that the Second Reconstruction was centrally concerned with the concept of institutionalized humiliation. Ackerman inveighs against the fact that we have turned away from this "anti-humiliation principle" in our modern civil-rights jurisprudence, with the exception of the jurisprudence surrounding same-sex marriage. While I generally agree with Ackerman's account, I believe a closer look at gay-rights jurisprudence might further illuminate his analysis in two ways. I first argue that the anti-humiliation principle in the gay-rights context actually extends well beyond the same-sex marriage debate. I then contend that this jurisprudence also suggests that the mechanisms that Ackerman describes for establishing the anti-humiliation principle need to be supplemented. I suggest that greater use of the civil-rights trial may be a crucial way in which courts might discern the existence of institutionalized humiliation, taking the landmark trial in *Perry v. Schwarzenegger* as my case study.

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INTRODUCTION

Bruce Ackerman's volume on the civil rights revolution casts the Second Reconstruction as centrally concerned with the "anti-humiliation principle."¹ He critiques that revolution for gradually replacing the anti-humiliation principle with more technocratic doctrinal formulations, such as the test for heightened scrutiny. He also outlines two avenues through which jurists might establish the presence of institutionalized humiliation—their "situation sense" and the Brandeis brief. In doing so, he provides an important alternative framework for looking at constitutional civil rights discourse today. Ackerman briefly observes that recent same-sex marriage jurisprudence represents a domain in which this alternative framework has found new life.

In this essay, I supplement Ackerman's analysis in two ways, rooting his analysis more firmly in the gay-rights jurisprudence and offering a different avenue through which institutionalized humiliation might be established. In Part I of this essay, I outline Ackerman's theory of the "anti-humiliation principle," summarizing his critique of how the civil rights movement drifted from the conceptual moorings erected by *Brown v. Board of Education*. In Part II, I elaborate on his view that recent gay-rights jurisprudence revives the anti-humiliation principle, and inquire whether this jurisprudence can be extended into other domains. In Part III, I take up Ackerman's proposed means of establishing the existence of institutionalized humiliation. In Part IV, I argue that the civil rights trial provides an additional resource by focusing on the celebrated trial in *Perry v. Schwarzenegger*.²

I. THE ANTI-HUMILIATION PRINCIPLE

Perhaps the most compelling introduction to Ackerman's anti-humiliation principle can be found in his ringing defense of the opinion in *Brown v. Board of Education*.³ *Brown's* holding needs no champion. Yet Ackerman notes "something very curious about *Brown's* current status: None of the protagonists [in legal debates] takes Chief Justice Warren's opinion seriously."⁴ In the spirit of doing so, Ackerman contends that "a single master-insight will suffice," namely, "the Court's emphasis on the distinctive

1. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014).

2. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

3. 347 U.S. 483 (1954).

4. 3 ACKERMAN, *supra* note 1, at 128.

wrongness of institutionalized humiliation.”⁵ Ackerman cites a famous passage from *Brown* to underscore his point: “Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”⁶ He observes that this emphasis on institutionalized humiliation constitutes the “lost logic” of *Brown*.⁷

This logic was not the special province of the judiciary. One of the book’s core insights is that the constitutional canon should expand beyond Supreme Court cases to encompass the political zeitgeist. Ackerman produces evidence that key political actors—from legislative and popular realms—understood institutionalized humiliation as the distinctive wrong of racism. Ackerman quotes Senator Hubert Humphrey, the sponsor of the Civil Rights Act of 1964: “It is difficult for most of us to comprehend the monstrous humiliations and inconveniences that racial discrimination imposes on our Negro fellow citizens.”⁸ Similarly, Ackerman points to Rosa Parks’s 1955 statement, which accompanied the act that catalyzed the Montgomery bus boycott: “it was the very last time that I would ever ride in humiliation of this kind.”⁹

What, exactly, is “institutionalized humiliation”? In answering that question, Ackerman begins with the more accessible concept of “personal humiliation,” which he defines as “a face-to-face insult in which the victim acquiesces in the effort to impugn his standing as a minimally competent actor within a particular sphere of life.”¹⁰ He then observes that the institutionalization of such harm amplifies its effect. In the institutional context, face-to-face interaction may not be necessary, as signs like “No Negroes Allowed,” or norms expressing the same sentiment, could achieve the same result.¹¹ Nevertheless, the other components remain necessary to his definition. The individual must accept, rather than defy, the affront; the affront must strike at the individual’s minimal competence within a particular sphere of life; and the affront need not (although it may) apply across the board.

5. *Id.* at 128.

6. *Id.* at 132 (citing *Brown*, 347 U.S. at 494).

7. *Id.* at 129.

8. *Id.* at 136 (quoting 110 CONG. REC. 6531-32 (1964) (statement of Sen. Humphrey)).

9. *Id.* at 135.

10. *Id.* at 138 (emphasis omitted).

11. *Id.* at 140.

Ackerman contends that the civil rights movement tragically swerved away from this anti-humiliation principle. He discusses *Loving v. Virginia*¹²—the canonical 1967 case in which the Supreme Court unanimously struck down bans on interracial marriage—as an emblematic misstep.¹³ Ackerman concedes that Chief Justice Earl Warren’s decision to avoid “excessive reliance on *Brown*” was politically understandable.¹⁴ Because desegregation still divided the nation, Warren relied on the Court’s earlier decisions upholding the detention of Japanese-Americans during World War II.¹⁵ This move not only directed attention away from the civil rights revolution and back to World War II, but also replaced a moral principle with a more technocratic legal one concerned with “tiers of scrutiny.”

Ackerman argues that this move effaced the real harm of bans on interracial marriage. In his view, the lived injury of anti-miscegenation laws did not lie in the categorization itself. Rather, it resided in how “the marriage ban forced interracial couples to present their relationship to the larger community as if it were diseased, disreputable, criminal.”¹⁶ In his view, a “discussion of the countless humiliations of everyday life would have yielded a far more compelling vindication of *Brown*’s concerns with real-world stigma . . .”¹⁷

This reading usefully challenges entrenched conventional wisdom. *Brown* is often celebrated for its result, but derogated for its reasoning. *Loving* is lauded not only for its result, but also for establishing modern heightened scrutiny jurisprudence—not least by repurposing *Korematsu*’s notion that racial categories were “inherently suspect.” Ackerman praises *Brown* for capturing the anti-humiliation principle and criticizes *Loving* for deviating from it in favor of the less accusatory—but also less accurate—heightened scrutiny framework.

Carrying that analysis into the present, Ackerman seems correct that in many contexts we have lost sight of the anti-humiliation principle in favor of a more technocratic doctrine that speaks of prongs, tiers, and classifications. In the context of race, Ackerman is surely right that we could not have the race-based jurisprudence we have today if the Court had adhered to the anti-humiliation principle. Our current Supreme Court seems increasingly intent on

12. 388 U.S. 1 (1967).

13. See, e.g., 3 ACKERMAN, *supra* note 1, at 289 (“*Loving v. Virginia* . . . shifted legal attention away from the evil of institutionalized humiliation.”); *id.* at 291 (“I do deny that *Loving* deserves a central place in the civil rights canon.”).

14. *Id.* at 290.

15. E.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

16. See 3 ACKERMAN, *supra* note 1, at 302.

17. *Id.*

privileging the anti-classification principle (which holds that strict scrutiny is triggered whenever the government uses a racial classification)¹⁸ over the anti-subordination principle (which holds that strict scrutiny is only appropriate when the government continues to disadvantage historically subordinated racial groups).¹⁹ We can see the difference this makes in the affirmative action context, in which the anti-classification principle is plainly violated, but the anti-subordination principle is not. The University of Texas's affirmative action program certainly *harms* whites like Abigail Fisher.²⁰ Yet the program does not *humiliate* them, in Ackerman's sense of undermining their minimal competence in the sphere of education.

At the same time, Ackerman correctly sees a potential revival of *Brown's* lost logic in the context of same-sex marriage. He focuses his attention on the Supreme Court's 2013 decision in *United States v. Windsor*, in which the Court struck down congressional legislation that defined marriage for all federal purposes as a union of one man and one woman.²¹ Ackerman observes that Justice Anthony Kennedy's majority opinion in *Windsor* "treats *Loving's* concern with suspect legislative purposes as a secondary issue, emphasizing instead the evils of institutionalized humiliation in vindicating the claims of same-sex couples."²² Ackerman lauds *Windsor* as a "breakthrough," because it invites "a new generation to restore the original understanding of *Brown* to its central place in the civil rights legacy."²³ Returning to this theme later in the book, Ackerman maintains: "In striking down the Defense of Marriage Act, *United States v. Windsor* decisively repudiated the *Hirabayashi-Korematsu* framework inherited from *Loving*, emphasizing instead a version of the anti-humiliation principle inherited from *Brown*."²⁴ He quotes from Justice Kennedy's opinion about the humiliations imposed by DOMA on children being raised by same-sex couples, and writes, "This is a virtual paraphrase of Warren's denunciation of school segregation on the ground that it gives

18. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 229-30 (1995) ("The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection.").

19. See, e.g., *id.* at 245 (Stevens, J., dissenting) ("The consistency that the Court espouses would disregard the difference between a 'No Trespassing' sign and a welcome mat.").

20. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

21. 133 S. Ct. 2675 (2013).

22. 3 ACKERMAN, *supra* note 1, at 291.

23. *Id.*

24. *Id.* at 304.

children ‘a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.’”²⁵

While intriguing, Ackerman’s analysis here bears elaboration. Without understanding the framework within which *Windsor* was decided, it is difficult to assess how much promise this single case holds. One could build a stronger case for the renaissance of the “anti-humiliation principle” by focusing on the concept of dignity in *Windsor* and beyond.

II. THE SUPREME COURT’S EMBRACE OF THE ANTI-HUMILIATION PRINCIPLE

The closest the Supreme Court has come to embracing the anti-humiliation principle is through its use of the term “dignity.” This link should be intuitive—what, after all, is the opposite of “humiliation” but “dignity”? Ackerman recognizes this nexus, but his discussion of it is tantalizingly brief.²⁶ He acknowledges that the link between human dignity and the anti-humiliation principle may be unfamiliar to American constitutional lawyers, given that, in contrast to other jurisdictions, our constitutional traditions are built around the concepts of equality and liberty.²⁷ He posits, however, that the notion of the anti-humiliation principle may give the “notoriously protean notion” of dignity “a more distinctive shape.”²⁸ After one page of discussion, he largely leaves the idea of dignity behind.

If we train our attention on the word “dignity,” however, the potential reach of the anti-humiliation principle can be seen more clearly. Within the gay-rights context, we can see that the Court’s invocation of dignity—and Ackerman’s anti-humiliation principle—began not with *United States v. Windsor* but with a case decided a decade earlier: *Lawrence v. Texas*.²⁹ In *Lawrence*, the Court struck down laws criminalizing intimate sexual activity occurring in the home. In his majority opinion, Justice Kennedy used the word “dignity” three times.³⁰ The mention that drew the ire of Justice Antonin Scalia’s dissent occurred in a quotation from *Planned Parenthood v. Casey*, which noted that “choices central to personal dignity and autonomy, are central to the

25. *Id.* at 308.

26. *See id.* at 137.

27. *Id.*

28. *Id.*

29. 539 U.S. 558 (2003).

30. *Id.* at 567, 574, 575.

liberty protected by the Fourteenth Amendment.”³¹ Yet for purposes of the anti-humiliation principle, the majority opinion’s other two references to “dignity” mattered more. Both focused on the criminal sanctions that attached to sodomy statutes: “It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”³² Later in the opinion, Justice Kennedy reiterates that the Texas sodomy statute carried a criminal sentence: “The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.”³³

Lawrence overruled the Court’s 1986 decision in *Bowers v. Hardwick*, which upheld a Georgia statute criminalizing sodomy. Holding that a state may constitutionally criminalize activity in a sphere of life—here sexual intimacy—is a direct strike at an individual’s “minimal competence” in that sphere. An affront in this single sphere would be sufficient to violate Ackerman’s anti-humiliation principle, as it casts the act as “diseased, disreputable, criminal.”³⁴ Moreover, sodomy statutes have had “ripple effects” far beyond the criminal context.³⁵ To a significant extent, the *Lawrence* Court acknowledged that reality. The majority observed that the petitioners in that case would “bear on their record the history of their criminal convictions,” meaning that they would have to register as sex offenders in “at least four States.”³⁶ It further noted that “the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms.”³⁷ In keeping with the breadth of the harm it recognized, the *Lawrence* Court’s dignitary remedy extended far beyond the elimination of the sodomy statutes.³⁸

31. *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)); *id.* at 588 (Scalia, J., dissenting).

32. *Id.* at 567.

33. *Id.* at 575.

34. 3 ACKERMAN, *supra* note 1, at 302; *see supra* text accompanying note 17.

35. Joseph Landau, *Ripple Effect*, NEW REPUBLIC, June 23, 2003, at 12, 14-16 (noting ripple effect of sodomy statutes in collateral areas of doctrine).

36. *Lawrence*, 539 U.S. at 575.

37. *Id.* at 576.

38. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1741-42 (2008) (“The dignity *Lawrence* protects concerns questions of autonomy and self-definition *and* questions of social standing and respect: the right to be treated as a full member of the polity, not excluded, subordinated, or denigrated.”).

It is *Lawrence*, then, not *Windsor*, that revived the “lost logic” of *Brown*. Indeed, commentary often describes *Lawrence* as a *Brown* of the gay-rights movement, and describes *Bowers* as the *Plessy* of that movement.³⁹ While Ackerman acknowledges *Windsor*’s debt to *Lawrence*, he largely does so to criticize the fact that *Windsor* did not reach further back to the fountainhead of *Brown*.⁴⁰ Yet this move seems to miss that *Lawrence* is to *Brown* as *Windsor* is to Ackerman’s desired rewriting of *Loving*, rather than *Loving* itself. Under such a reading, *Windsor* is redeeming time, carrying the anti-humiliation principle into the marriage context as *Loving* did not.

Again, *Windsor*’s debt to *Lawrence* and its embrace of the anti-humiliation principle can be tracked through the use of the term “dignity.” In *Windsor*, Justice Kennedy doubled down on *Lawrence*, mentioning the word “dignity” or “indignity” almost a dozen times.⁴¹ As Reva Siegel has argued in an important

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39. See, e.g., *Watkins v. U.S. Army*, 847 F.2d 1329, 1358 (9th Cir. 1988), *withdrawn on reh’g*, 875 F.2d 699 (9th Cir. 1989) (“I believe that history will view *Hardwick* much as it views *Plessy v. Ferguson* And I am confident that, in the long run, *Hardwick*, like *Plessy*, will be overruled by a wiser and more enlightened Court.”); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 489 (2005) (“It may not be too much longer before . . . *Lawrence* evolves into the *Brown* of the twenty-first century.”).
40. 3 ACKERMAN, *supra* note 1, at 308 (“In moving beyond the law world to the lifeworld, Justice Kennedy [in *Windsor*] treated his earlier decision in *Lawrence v. Texas* as decisive precedent. In that case, he had led the Court to strike down traditional criminal laws against ‘sodomy’ since their enforcement ‘demean[ed]’ same-sex couples. But his reliance on this relatively recent decision ignored *Windsor*’s deeper roots [in *Brown*.]”).
41. See *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (“It seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage.”); *id.* at 2692 (“Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”); *id.* (“When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.”); *id.* (“That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment.”); *id.* (“By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond.”); *id.* (“This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages.”); *id.* at 2693 (“The history of DOMA’s enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute.”); *id.* at 2694 (“Responsibilities, as well as rights, enhance the dignity and integrity of the person.”); *id.* at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and

precursor to Ackerman's analysis, *Windsor* thereby articulated a return to an older jurisprudence of equality.⁴² Of course, *Windsor* arguably left open whether the real problem with DOMA rested in principles of federalism or in the principle of anti-humiliation.⁴³ Yet as of this writing lower courts have uniformly interpreted *Windsor* to invalidate state bans on same-sex marriage, often citing *Windsor*'s references to "dignity."⁴⁴

To be sure, the insistence on dignity in the Supreme Court's recent gay-rights cases may not constitute a grand endorsement of the anti-humiliation principle. The *Windsor* Court likely eschewed the heightened scrutiny framework embraced by the lower court⁴⁵ and urged upon it by the

effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

42. See Reva B. Siegel, *The Supreme Court, 2012 Term – Foreword: Equality Divided*, 127 HARV. L. REV. 1, 77 (2013) ("What distinguishes *Windsor* from the race cases of the 2012 Term is not the subject matter or reach of the decision, but its determination to redress the dignitary and material injuries law inflicts on a minority group. In *Windsor*, a closely divided Court reasons about equal protection in ways the Court has not reasoned in its race discrimination decisions in a very long time."); see also *id.* at 90-91 ("[*Windsor*] begins from the appreciation that, in the American constitutional order, community judgment about the meaning of 'unjust exclusion' can evolve. The opinion recapitulates that learning process, as it endeavors to understand, and to make plain to others, how law can express and enforce inequality in 'status,' as *Brown* did. These concerns are essential prerequisites of equal protection, more fundamental than any standard of review.").
43. See, e.g., Courtney G. Joslin, *Windsor*, *Federalism and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 164 (2013) (noting competing views on whether *Windsor* "turns on principles of federalism"); David S. Cohen & Dahlia Lithwick, *It's Over: Gay Marriage Can't Lose in the Courts*, SLATE (Feb. 14, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/virginia_s_gay_marriage_ban_ruled_unconstitutional_a_perfect_record_for.html (noting that Justice Kennedy's "less than crystal clear reasoning" left ambiguous whether *Windsor* was rooted in federalism concerns).
44. See *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); *De Leon v. Perry*, SA-13-CA-00982-OLG, 2014 WL 715741, at *20, *23 (W.D. Tex. Feb. 26, 2014) ("This Court finds that Texas cannot define marriage in a way that denies its citizens the 'freedom of personal choice' in deciding whom to marry, nor may it deny the 'same status and dignity' to each citizen's decision."); *Bostic v. Rainey*, No. 2:13-CV-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1278 (N.D. Okla. 2014) ("The *Windsor* majority opinion, authored by Justice Kennedy, held that . . . when a state recognizes same-sex marriage, it confers upon this class of persons 'a dignity and status of immense import.'"); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 982 (S.D. Ohio 2013) ("As the Supreme Court held in *Windsor*, marriage confers 'a dignity and status of immense import.'"); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1193 (D. Utah 2013) ("In other words, Utah believes that it is up to each individual state to decide whether two persons of the same sex may 'occupy the same status and dignity as that of a man and woman in lawful marriage.'").
45. *Windsor v. United States*, 699 F.3d 169, 180-85 (2d Cir. 2012).

government brief⁴⁶ because such a move would effectively commit it to the invalidation of state marriage bans in all fifty states. Eschewing such a rigid standard of review allowed the Court to approach the issue in a more minimalist fashion.⁴⁷ At the same time, if the Court were only looking for a stalling tactic, it had many avenues available to it. It could, for instance, have focused much more of its analysis on the federalism aspect of the decision. The majority opinion's drumbeat insistence on dignity—as Justice Scalia's dissent elaborated through a mad lib substituting the state for the federal sovereign⁴⁸—practically seems to require the so-called “fifty-state solution.”⁴⁹

Of course, the Court might at any point put the brakes on the anti-humiliation principle. This could be true even in the gay-rights context. Once *de jure* restrictions on gay rights are removed, the Court may become blind to second-generation discrimination against gay individuals. If this were the case, the gay-rights jurisprudence would track the race-discrimination

46. Brief for the United States on the Merits Question at 18-36, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); cf. Letter from Eric H. Holder, Jr., Att’y Gen. of the United States, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (“I will instruct the Department’s lawyers to immediately inform the district courts in *Windsor* and *Pedersen* of the Executive Branch’s view that heightened scrutiny is the appropriate standard of review and that, consistent with that standard, Section 3 of DOMA may not be constitutionally applied to same-sex couples whose marriages are legally recognized under state law.”).
47. Cf. Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 99 (1996) (“Minimalism is best understood as an effort to leave things open by limiting the width and depth of judicial judgments. Minimalist judges try to keep their judgments as narrow and as incompletely theorized as possible, consistent with the obligation to offer reasons.”).
48. See, e.g., *Windsor*, 133 S. Ct. at 2709-10 (Scalia, J., dissenting) (“~~DOMA’s~~ This state law’s principal effect is to identify a subset of ~~state sanctioned marriages~~ constitutionally protected sexual relationships, see *Lawrence*, and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And ~~DOMA~~ this state law contrives to deprive some couples ~~married under the laws of their State~~ enjoying constitutionally protected sexual relationships, but not other couples, of both rights and responsibilities.”).
49. Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 128 (2013); see also Siegel, *supra* note 42, at 88 (“The opinion does not bind future judgments about these restrictions by the formal technique of adopting heightened scrutiny. But neither does the opinion practice deference associated with rational basis review, even rational basis of an elevated kind. The Court extends the potential reach of its decision by tying the judgment of unconstitutionality to features of DOMA that the statute shares with other legislation—and by reasoning about the meaning of the Constitution’s equality guarantees in ways the Court has not for years.”).

jurisprudence.⁵⁰ The contemporary jurisprudence around race may be the future of gay constitutional rights, not its past.

Even if the Court continues to be sympathetic to the equal rights of gay individuals, the Court's sympathies may be limited to this context. The gay rights domain may provide a particularly sympathetic context from which dignitary claims would arise, given that gay rights have always been plagued by a politics of shame.⁵¹ In a more practical sense, the fact that gay individuals are dispersed throughout families and institutions across the United States may make their claims to dignity more intelligible than the traditional "discrete and insular minority."⁵²

Nevertheless, it bears note that the use of "dignity" in *Lawrence* cannot be dismissed as a quirk. The United States Supreme Court has used the word "dignity" in its jurisprudence in more than nine hundred opinions; since the 1940s, its use of the word has increased.⁵³ The Court has deployed the term in a wide array of contexts, and Justice Kennedy appears to be particularly drawn to it. I have already alluded to the use of "dignity" in the *Casey* joint opinion (which Justice Kennedy co-wrote). Justice Kennedy has deployed the word "dignity" repeatedly in cases ranging from prison conditions⁵⁴ to partial-birth

50. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142-47 (1997) (observing that the Supreme Court's race jurisprudence has disestablished de jure segregation, while permitting "facially neutral" state action that perpetuates racial stratification, and constraining legislatures from adopting race-based remedial measures).
51. MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 48-74 (1999) (expressing the challenge of claiming dignity for people defined in part by "undignified and abject sex").
52. See *United States v. Carolene Products Co.*, 304 U.S. 144, 154 n.4 (1938). In an interesting turn, Professor Ackerman argued some time ago that "anonymous and diffuse minorities" – including gay individuals – might be more vulnerable in the political process than "discrete and insular minorities." See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 722-31 (1985). I have more recently contended that this assessment might be contingent. See Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010). Ackerman's analysis might hold before a certain critical mass of gay individuals came out of the closet. *Id.* at 1540-41. After they reached a "tipping point," however, the anonymity and diffuseness of gay individuals might begin to work for them. *Id.* at 1541-42 (arguing that the capacity of gays to pass – their anonymity – precludes gatekeeping mechanisms from being used against them, and their diffuseness means every extended family in America includes a gay person).
53. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178-79 (2011).
54. See *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

abortions.⁵⁵ A distinct pattern emerges—when Justice Kennedy ascribes dignity to an entity, that entity generally prevails.⁵⁶

Ackerman clearly understands that *Windsor* provides an immensely promising vehicle for his “anti-humiliation principle.” However, his points about the traction of the anti-humiliation principle in the gay-rights context would have had even greater force if he had situated it within the discourse of dignity. Such context would have permitted Ackerman to have seen that the Supreme Court’s embrace of this idea extends far beyond the single case of *Windsor*.

III. PROPOSED WAYS OF ESTABLISHING THE ANTI-HUMILIATION PRINCIPLE

If we accept the constitutional dimension of the anti-humiliation principle, we must establish a procedure to discern humiliation. Ackerman focuses on two sources from which the Justices might glean this knowledge—the judge’s “situation-sense” and “Brandeis briefs.” In this Part, I argue that the gay-rights context has revealed both the strengths and the weaknesses of these sources of factual information, suggesting that a search for an alternative may be in order.

A. *Situation-Sense*

Returning to his celebration of *Brown*, Ackerman notes that Chief Justice Earl Warren establishes the humiliation encountered by black children in part through an application of judicial common sense. Ackerman begins this argument with Warren’s justly celebrated statement: “To separate them [blacks] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁵⁷ Ackerman observes:

[In this portion of the opinion,] Warren was simply calling upon judges, and the rest of us, to make common-sense judgments about the prevailing meaning of social practices. One of the greatest legal thinkers

55. See *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (“The Act expresses respect for the dignity of human life.”).

56. Noah Feldman, *The United States of Justice Kennedy*, BLOOMBERG (May 30, 2011, 3:48 PM), <http://www.bloomberg.com/news/2011-05-30/how-it-became-the-united-states-of-justice-kennedy-noah-feldman.html>.

57. 3 ACKERMAN, *supra* note 1, at 131 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

of the era, Karl Llewellyn, persuasively argued that judges couldn't decide the most humdrum case without relying on this capacity, which he famously called "situation-sense." Without using their common sense, judges couldn't hope to decide the simplest cases—for example, whether a defendant was a charlatan who had defrauded an innocent victim or whether he was acting reasonably under the circumstances. Warren's contribution in this phase of the argument involved constitutional principle, not judicial method. He was insisting that the Constitution called upon the Justices to use their situation-sense to determine whether segregated schools systematically humiliated black children.⁵⁸

Ackerman believes *Brown* departs from *Plessy* in this moment. Specifically, *Brown* jettisons *Plessy's* understanding that if any inferiority inhered in "separate but equal," "it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."⁵⁹

The trouble with "situation-sense," however, is its gross subjectivity. After all, Justice Brown's reviled quotation in *Plessy* also flowed from his "situation-sense" of whether segregation violated the anti-humiliation principle. It may be true that judges must use their common sense in even the most "humdrum" case. Yet given that this common sense is inevitably affected by the zeitgeist in which the judge is making the decision, situation-sense would seem like a weak lever to use against the status quo.

In the gay-rights context, "situation-sense" arguably led to the movement's greatest jurisprudential setback. It is now familiar history that Justice Lewis Powell stated to his closeted gay clerk that he did not think he knew any homosexuals before casting the deciding vote in the 1986 case *Bowers v. Hardwick*.⁶⁰ That opinion gave the Court's imprimatur to the institutionalized humiliation of gay individuals for seventeen years until it was overruled by *Lawrence*. In his conclusion to *Lawrence*, Justice Kennedy observes that measures once thought "necessary and proper" can be revealed as only serving to oppress.⁶¹ That nod to changing mores acknowledged that Justice Powell's situation-sense was conventional for 1986, in the way that Justice Brown's situation-sense was conventional for 1896.

58. *Id.* at 131.

59. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896); 3 ACKERMAN, *supra* note 1, at 132.

60. See, e.g., EDWARD LAZARUS, *CLOSED CHAMBERS* 386 (2d ed. 2005); Adam Liptak, *Exhibit A for a Major Shift: Justices' Gay Clerks*, N.Y. TIMES, June 9, 2013, at A1.

61. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

B. *The Brandeis Brief*

Ackerman adduces a separate ground on which a court might establish the existence of institutionalized humiliation. He focuses on social science, drawing on Kenneth Clark's famous doll studies introduced at the trial level in *Brown*. Perhaps because Clark's findings were later discredited,⁶² Ackerman pivots away from the battle of the experts at trial and toward the "Brandeis brief." As Ackerman notes:

It was Louis Brandeis, not Thurgood Marshall, who first used social science to convince courts to consider the real-world impact of their doctrines. As early as 1908, the Supreme Court relied heavily on his famous "Brandeis Brief" in upholding maximum-hours laws for women. During the following decades, the law schools became centers of sociological and economic critique of the regnant legal formalism With the triumph of the New Deal, the Progressive use of social science was transformed into jurisprudential bedrock—expertise was the lifeblood of the new administrative state, and New Deal courts recognized the relevance of social science on a broad front. *Brown* was continuing this tradition.⁶³

Unlike the gestalt "situation-sense" of the judges, the Brandeis brief promised hard facts, which could persuade a judge to ground his determination on the stratum of social science.

Recent scholarship, however, has taken a hard line on the Brandeis brief. Brianne Gorod has argued that the Supreme Court often relies on amicus briefs for dubious "facts," ignoring the problem that these facts have not been subjected to adversarial testing at trial.⁶⁴ To take just one of many examples, Gorod notes that Justice Kennedy stated in the *Gonzales v. Carhart* case that some women come to regret their abortions, citing a Brandeis brief making this assertion.⁶⁵ As Gorod points out, opposing counsel was never given the opportunity to respond to this brief before its factual assertion became part of the "bedrock" on which the Partial Birth Abortion Act was upheld.⁶⁶ John

62. See Gwen Bergner, *Black Children, White Preference: Brown v. Board, the Doll Tests, and the Politics of Self-Esteem*, 61 AM. Q. 299, 300-01 (2009).

63. 3 ACKERMAN, *supra* note 1, at 132-33.

64. See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011).

65. *Id.* at 32.

66. *Id.* at 32-33.

Jackson has argued that the Brandeis brief offers “too little, too late” for the same reason and has urged greater use of the civil trial.⁶⁷

In the same-sex marriage context, Brandeis briefs have also been accepted somewhat uncritically. In the *Perry v. Schwarzenegger* case, the court held a twelve-day trial in which the plaintiffs forwarded seventeen witnesses and the proponents of Proposition 8 advanced only two.⁶⁸ Yet many of the issues on which the litigants did not proffer witnesses were raised for the first time through the filing of over a hundred amicus briefs on appeal. To take an instance relevant to the anti-humiliation principle, one brief relied heavily on a book published in 2013 entitled *What Is Marriage?*⁶⁹ The main argument of the brief—and of the book—was that the same-sex marriage debate had everything to do with marriage and nothing to do with gay people. The brief vigorously defended a “conjugal” vision of marriage, according to which marriage is by nature a union of a man and a woman who create a “mind-and-body union” ordered to procreation.⁷⁰ The book on which the brief was based argued that promoting the conjugal vision in law would diminish the humiliation of gay individuals because it would make people less likely to “mistakenly read into the law an endorsement of animus.”⁷¹ Yet unlike the witnesses at trial, the authors of the brief were not subjected to the rigors of cross-examination under oath. (Indeed, in a subsequent trial, the district court disqualified the primary author of the book as an expert witness.⁷²) Nonetheless, Justice Alito (joined by

67. See John Frazier Jackson, *The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts*, 17 AM. J. TRIAL ADVOC. 1 (1993).
68. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010). The proponents of Proposition 8 argued that their witnesses could be subject to “harassment, economic reprisal, threat and even physical violence” if the trial were broadcast, and some witnesses on the proponents’ side said they would withdraw for the same reason. The plaintiffs argued that such concerns were “utterly unsubstantiated and groundless speculation.” See Adam Liptak, *Justices to Review Plan for Webcasts of a Trial*, N.Y. TIMES, Jan. 11, 2010, <http://www.nytimes.com/2010/01/12/us/12camera.html>.
69. SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE* (2012).
70. Brief of Robert P. George et al. as Amici Curiae Supporting Petitioners, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144).
71. GIRGIS, ANDERSON & GEORGE, *supra* note 69, at 88.
72. According to the book’s “Note on Authorship,” Girgis was listed as first author to “reflect his primary role in developing our arguments, and in drafting the book and the article on which it expands.” *Id.* at ix. Girgis was disqualified during the trial proceedings in *DeBoer v. Snyder* in the Eastern District of Michigan. Ed White, *Michigan’s Witness in Gay Marriage Trial Barred*, YAHOO! NEWS (Mar. 3, 2014), <http://news.yahoo.com/michigans-witness-gay-marriage-trial-barred-171156615.html>. The district court in *DeBoer* ultimately ruled in favor of plaintiffs, holding that Michigan’s constitutional same-sex marriage ban violated the

Justice Thomas) went out of his way in his *Windsor* dissent to endorse this reasoning, citing the book.⁷³

IV. THE CIVIL RIGHTS TRIAL AND THE ANTI-HUMILIATION PRINCIPLE

I will now argue that one underutilized source for establishing institutionalized humiliation is the civil rights trial. I return to the quaint idea that trials provide an excellent way of establishing facts, including facts relating to the existence of institutionalized humiliation. I call this idea quaint because, as John Langbein has recently documented, the incidence of civil trials has plummeted.⁷⁴ Langbein affirms this trend, since he believes pre-trial procedures have effectively obviated the need for most trials.⁷⁵ Nonetheless, it is hard to imagine pre-trial proceedings that could have matched the transcript of the twelve-day trial in *Perry v. Schwarzenegger* in terms of settling the many disputed facts regarding same-sex marriage, including the existence of institutionalized humiliation.

One fascinating aspect of the *Perry* trial is the way in which the plaintiffs' attorneys intuited the importance of establishing institutionalized humiliation. If governing law clearly embraced the anti-humiliation principle, then the testimony adduced on this topic would be of obvious relevance. However, if one adopted a "heightened scrutiny" analysis, then the relevance of such testimony would be questionable. After all, even under the highest form of scrutiny, the standard only asks whether the classification is "narrowly tailored to further compelling governmental interests."⁷⁶ The question of whether the state action inflicts no humiliation or enormous humiliation is at least arguably irrelevant.

Nevertheless, the plaintiffs' lawyers put the issue of humiliation before the court in the most aggressive way imaginable. In his opening statement, plaintiffs' attorney Theodore Olson observed: "What Prop 8 does is label gay and lesbian persons as different, inferior, unequal and disfavored. . . . It

Equal Protection Clause. *DeBoer v. Snyder*, No. 12-CV-10285, 2014 WL 1100794, at *17 (E.D. Mich. Mar. 21, 2014).

73. *United States v. Windsor*, 133 S. Ct. 2675, 2718-19 (2013) (Alito, J., dissenting).

74. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

75. *Id.* at 570 (contending that discovery techniques—interrogatories, documentary discovery, and sworn depositions—constitute a "truth-revealing process" so powerful that they ultimately displace the trial by promoting settlement).

76. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

stigmatizes gays and lesbians. It classifies them as outcasts. It causes needless and unrelenting pain and isolation and humiliation.”⁷⁷

Drawing on the trial, I will argue that the civil rights trial has at least three signal attributes that make it an important supplement to a judge’s “situation-sense” or to a Brandeis brief. First, the trial allows plaintiffs and lay witnesses to speak directly on the record about their own experiences with institutionalized humiliation. Second, the trial allows experts on institutionalized humiliation—such as historians, political scientists, or psychologists—to contextualize those individual voices. Finally, the possibility of cross-examination subjects the testimony on both sides to adversarial testing.

A. *Individual Voices*

Trials permit individual plaintiffs to testify to what Ackerman calls “the countless humiliations of everyday life.”⁷⁸ Judges or jury members who might not be jarred from their mindset by their situation-sense or the written words on the page might nonetheless hear the words of living, breathing human beings differently. Appellate courts defer to factfinders at trial for a simple reason: they were there.⁷⁹

The first four witnesses to take the stand—the plaintiffs—all testified directly to the issue of humiliation. Jeffrey Zarrillo described how the inability to marry affected him in his daily interactions across a wide array of spheres:

One example is when Paul and I travel, it’s always an awkward situation at the front desk at the hotel.

There’s on numerous occasions where the individual working at the desk will look at us with a perplexed look on his face and say, “You ordered a king-size bed. Is that really what you want?” And that’s certainly an awkward situation for us. And we—it is. It’s very awkward.

There’s been occasions where I’ve had to open a bank account. Paul and I had to open a bank account. And it was certainly an awkward situation walking to the bank and saying, “My partner and I want to

77. Transcript of Proceedings at 45, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292-VRW).

78. 3 ACKERMAN, *supra* note 1, at 302.

79. See *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (adopting the equity practice of appellate deference to trial court findings “when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged”).

open a joint bank account,” and hearing, you know, “Is it a business account? A partnership?”

It would just be a lot easier to describe the situation—might not make it less awkward for those individuals, but it would make it—crystallize it more by being able to say, “My husband and I are here to check in for our room. My husband and I are here to open a bank account.”⁸⁰

With Zarrillo’s testimony we get a different sense of “institutionalized humiliation” than the one we get from the Supreme Court’s pronouncements about “indignity.”

Directly after Zarrillo testified, his then-partner (now husband) Paul Katami took the stand. Katami crisply demonstrated why personal testimony is such a powerful means of capturing humiliation. On direct examination, Katami’s attorney asked him whether the capacity to marry would alter his relationships to third parties. Counsel for the Proponents lodged an objection on the grounds that Katami was a lay witness, not an expert one. Katami responded with a *cri de coeur*:

I know how I felt when people have asked, “An LLC or an S corporation?” [“]No, not my business partner. My partner.” A puzzled look because we’re gay.

Unless you have to deal with that, unless you have to go through a constant validation of self, there’s no way to really describe how it feels.

And I’m a proud man. I’m proud to be gay. I’m a natural born gay. I love Jeff more than myself.

And being excluded in that way is so incredibly harmful to me. I can’t speak as an expert. I can speak as a human being that’s lived it.⁸¹

In speaking as a “human being that’s lived it,” Katami alluded to a different kind of expertise. Throughout the trial, charges of bias were directed against both sides as well as the judge. Yet at the risk of stating the obvious, being gay may illuminate an experience just as much as it may obscure it.

Katami also discussed a different effect of institutionalized humiliation, observing that the inability to marry had caused him and Jeff to delay having children. He testified:

I think the timeline for us has always been marriage first, before family. For many reasons. But, for us, marriage is so important because it

80. Transcript of Proceedings, *supra* note 77, at 84.

81. *Id.* at 91.

solidifies the relationship. And it—we gain access to, again, that language that is global, where it won't affect our children in the future. They won't have to say, "My dad and dad are domestic partners."⁸²

This testimony suggested the theme that Justice Kennedy would later take up in *Windsor*: by creating the potential for the humiliation of children, bans on same-sex marriage harm rather than protect them. Katami later made this even clearer, observing that "we need to be married before we have kids" in part because "we . . . want our children to be protected . . ."⁸³

The next witness, Kristin Perry, actually used the term "humiliating" in describing the indignities she suffered.

I believe for me, personally as a lesbian, that if I had grown up in a world where the most important decision I was going to make as an adult was treated the same way as everybody else's decision, that I would not have been treated the way I was growing up or as an adult.

There's something so humiliating about everybody knowing that you want to make that decision and you don't get to [do] that, you know, it's hard to face the people at work and the people even here right now. And many of you have this, but I don't.

So I have to still find a way to feel okay and not take every bit of discriminatory behavior toward me too personally because in the end that will only hurt me and my family.

So if Prop 8 were undone and kids like me growing up in Bakersfield right now could never know what this felt like, then I assume that their entire lives would be on a higher arc[]. They would live with a higher sense of themselves that would improve the quality of their entire life.⁸⁴

Like Katami, Perry emphasized the inter-spherical effects of institutionalized humiliation, observing that the invalidation of Proposition 8 would put a new generation of children "on a higher arc." Indeed one theme articulated repeatedly throughout this litigation was the effect that Proposition 8 had on the futures that gay children could imagine for themselves.⁸⁵

82. *Id.* at 89.

83. *Id.* at 90.

84. *Id.* at 159.

85. *See id.* at 827 (testimony of Ilan Meyer) ("[T]he word 'marriage' is something that many people aspire to. Doesn't mean that everybody achieves that, but at least I would say it's a very common, social, socially-approved goal . . . for children as they think about their future and for people as they develop relationships. For young people . . . if you attain it, it's

Perry's partner (now wife) Sandra Stier offered an account of humiliation similar to Zarrillo's. She spoke less in broad terms about humiliation than about the specific daily indignities inflicted by her inability to marry. One of her key examples concerned how she regularly encountered forms that did not include her own relationship status—domestic partner—as an option. Stier also testified about how she had sought to wed Kris Perry in 2004, when Mayor Gavin Newsom stated that San Francisco would perform marriages for same-sex couples. Stier later received a letter noting the marriage was invalid. In 2008, Stier was again offered the opportunity to marry Perry, in the brief window between June and November when marriage was legal in the state. Stier testified that she and Perry could not bring themselves to seize that opportunity: “We thought about it and discussed it. And I really felt very strongly that at my age I don't want to be humiliated any more. It's not okay.”⁸⁶ Stier could easily have quoted Rosa Parks—“it was the very last time that I would ever ride in humiliation of this kind.”⁸⁷

During closing argument, Ted Olson played clips of the four plaintiffs. He stated, “If we had the time, Your Honor, I could not present a more compelling closing argument than simply replaying the testimony in its entirety [of] the four plaintiffs”⁸⁸ Nonetheless, he continued: “But we have so much more. There were eight experts, persons who have studied and written about American history, marriage, psychology, sociology, economics and political science throughout their entire professional lives.”⁸⁹

Olson's acknowledgement of the presence of experts in addition to the plaintiffs and lay witnesses was important. The danger of relying on potentially idiosyncratic individual stories is that judges make decisions that affect

something that gives you pride and respect.”); *id.* at 1914 (testimony of Hak-Shing William Tam) (“It is very important that our children won't grow up to fantasize or think about, [s]hould I marry Jane or John when I grow up?”); *Milestone for LGBT Equality: Prop. 8, DOMA Will Have Their Day in Court*, HUM. RTS. CAMPAIGN (Dec. 7, 2012), <http://www.hrc.org/press-releases/entry/milestone-for-lgbt-equality-prop.-8-doma-will-have-their-day-in-court> (quoting Human Rights Campaign President Chad Griffin) (“Now the Supreme Court has an opportunity to . . . send a resounding message of hope to LGBT young people from coast to coast that they have the same dignity and same opportunities for the future as everyone else.”).

86. Transcript of Proceedings, *supra* note 77, at 169.

87. 3 ACKERMAN, *supra* note 1, at 135.

88. Transcript of Proceedings, *supra* note 77, at 2976.

89. *Id.* There were in fact nine expert witnesses. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932 (N.D. Cal. 2010) (“Plaintiffs presented eight lay witnesses . . . and nine expert witnesses.”).

millions.⁹⁰ Moreover, precisely because individual stories are so intimate and emotional, there may be “strategic risks” for opposing counsel who challenge them.⁹¹ Olson seems to have intuited that he carried the unspoken burden of showing that the individual voices were also representative ones.

B. Expert Framing of Individual Testimony

The literary scholar Elaine Scarry distinguishes “narrative compassion,” which flows from individual stories, from “statistical compassion,” which flows from aggregate data.⁹² In her view, President Ronald Reagan had the former but not the latter. He could, for instance, immediately and genuinely relate to an individual’s story about homelessness, as even his detractors admitted. Yet, in Scarry’s view, President Reagan lacked statistical compassion. He could be offered sheaves of statistics about homelessness but not be able to apprehend the suffering represented therein. Scarry argues that a just decisionmaker must have both faculties.

At multiple junctures during the trial, the plaintiffs’ attorneys drew on individual stories to activate narrative compassion. Yet they never neglected to buttress those individual narratives with hard data. Plaintiff Paul Katami’s testimony about experiencing a hate crime⁹³ was bolstered by political scientist Gary Segura’s federal statistics showing that LGBT individuals are among the most common victims of such crimes.⁹⁴ Lay witness Helen Zia’s testimony about how her family fully accepted her long-term partner only after Zia married her⁹⁵ was shored up by historian Nancy Cott’s claim that in our

90. See Owen M. Fiss, *Reason in All Its Splendor*, 56 *BROOK. L. REV.* 789, 802-03 (1990).

91. The Supreme Court raised this concern in the context of considering the constitutionality of victim impact statements, which are similarly difficult to challenge in court. See *Booth v. Maryland*, 482 U.S. 496, 506-07 (1987), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991).

92. Elaine Scarry, *Speech Acts in Criminal Cases*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 165, 166 (Peter Brooks & Paul Gewirtz eds., 1996).

93. Transcript of Proceedings, *supra* note 77, at 93-94 (“We were struck by these rocks and eggs. And there were slurs. And again we couldn’t see who the people were, but we were definitely hit. And it was a very sobering moment because I just accepted that as, well, that’s part of our struggle.”).

94. *Id.* at 1570-71 (“71 percent of all hate-motivated murders in the United States were of gay men and lesbians in 2008. Fifty-five percent of all hate-motivated rapes were against gays and lesbians in 2008. There is simply no other person in society who endures the likelihood of being harmed as a consequence of their identity than a gay man or lesbian.”).

95. *Id.* at 1232-37.

national tradition, “there is nothing that is like marriage except marriage.”⁹⁶ Lay witness Ryan Kendall’s testimony about how the “therapy” to convert his sexual orientation was unavailing and traumatic⁹⁷ was shored up by expert psychologist Gregory Herek, who opined that such therapies were generally ineffective and harmful.⁹⁸

The plaintiffs adopted a similar strategy with regard to their account of humiliation. Social epidemiologist Ilan Meyer contextualized the plaintiffs’ testimony in the social science research on structural stigma. Meyer, who testified on the fourth day of the trial, had reviewed the transcripts of the plaintiffs’ testimony from the first day. In this way, he was able to frame these individual narratives in the context of social science research.

For instance, Meyer acknowledged that many of the interactions that the plaintiffs had described might seem trivial to an ordinary person – correcting a hotel clerk about a king-size bed, explaining that your partnership was not a business relationship, or filling out a form in a doctor’s office. However, Meyer underscored that these seemingly small indignities had a cumulative effect. With regard to the hotel clerk, Meyer observed: “So, again, a clerk, in a hotel asking you about a king-size bed for any couple would really mean nothing. But for a gay person, it’s an area of great sensitivity because it really talks to their rejection and their rejection of their family members, the people that they feel close to.”⁹⁹ Similarly, Meyer observed that in his own studies on stigma, gay individuals insistently complained about filling out forms that contained no designation that described them. He analyzed Stier’s testimony:

I guess you have to ask yourself, why would a person remember that type of minor incident? And, as I mentioned before, I think the meaning of this incident is more important than, in this case, what has actually happened. So, like I said, if there was some error on this form, where it says “Mr.” or “Mrs.” and somehow the words were not clear and she had to fix that, I don’t think that she would have reported that as a major – something that she remembers. But I think it is, again, the message that the forms, in a sense, echoes about rejection and about I’m not equal to other people, to most people who fill this form.¹⁰⁰

96. *Id.* at 208.

97. *Id.* at 1512-13.

98. *See, e.g., id.* at 2252-54.

99. *Id.* at 844.

100. *Id.* at 851.

Meyer's testimony illuminates the intelligence of Humphrey's juxtaposition of "monstrous humiliations and inconveniences." Meyer testified that the daily inconveniences—in their infinitesimal and infinite nature—were a significant avenue through which gay individuals experience humiliation.

The plaintiffs were clearly mindful that they needed to show not only personal humiliation, but also institutionalized humiliation. Indeed, they needed to show *governmentally* imposed humiliation to meet the state-action requirement of the constitutional challenges they made. So Meyer was asked a battery of questions about whether Proposition 8 increased the stigma experienced by gay and lesbian individuals. Meyer testified: "Well, I think it is quite obvious that Proposition 8, by definition, blocks the marriage institution for gay men and lesbians. This is basically what it says. So, in that sense, it certainly will be responsible for gay men and lesbian not marrying." Meyer elaborated that Proposition 8 also meant that gay individuals would have "to explain why [they] have not married. And by explaining why [they] have not married, [they] also have to explain, I'm really not seen as equal I'm—my status is—is not respected by my state or by my country, by my fellow citizens."¹⁰¹ Meyer additionally pointed to the tutelary effects that Proposition 8 had on individuals who were not gay: "So, in that sense, it's not just damaging to gay people because they feel bad about their rejection. It also sends a message that it is okay to reject. Not only that it is okay, that this is very highly valued by our Constitution to reject gay people, to designate them a different class of people in terms of their intimate relationships."¹⁰²

At the end of his direct examination, plaintiffs' counsel asked Meyer how invalidating Proposition 8 would affect structural stigma against homosexuality. Meyer responded:

I think that if California—and, also, consistent with the things I said earlier in terms of the proscriptive elements of Proposition 8, of the law having a constitutional amendment that basically says, you know, to gay people, you are not welcome here, that the opposite of that clearly would send a positive message. You are welcome here. Your relationships are valued. You are valued. We don't approve with rejection—sorry. We don't approve rejection of you as a gay person as a state. And that has a very significant power.

As we all know, the law in the state is a very important party to creating the social environment. . . . So clearly it's not the only thing

101. *Id.* at 846-47.

102. *Id.* at 863.

that determines even experiences of prejudice and discrimination, but it is certainly a very major player, major factor, in creating this social environment that I described as prejudicial or stigmatizing.¹⁰³

The plaintiffs' attorneys clearly felt this testimony was crucial, as they plucked out both the testimony of the plaintiffs and Meyer's testimony in making their closing arguments to the court.¹⁰⁴ Again, they insisted on underscoring these violations of the anti-humiliation principle even though this principle did not have a clear place in the regnant heightened scrutiny paradigm.

C. *Adversarial Testing*

One final advantage of civil rights trials is that they subject claims to a higher level of adversarial testing. One might contend that our adversarial system of justice inherently guarantees such rigor. Yet as plaintiffs' attorney David Boies argued, the trial offers a different degree of engagement from, say, an exchange of briefs: "Papers never meet each other—it's like people talking past each other. The crucible of cross examination forces the witness to confront the other side; they can't fall back on bumper sticker slogans like marriage is between a man and a woman."¹⁰⁵ After the trial concluded, Boies expanded on this theme, noting:

Well, it's easy to sit around and debate and throw around opinions[,] appeal to people's fear and prejudice, cite studies that either don't exist or don't say what you say they do. In a court of law you've got to come in and you've got to support those opinions. You've got to stand up under oath and cross-examination. And what we saw at trial is that it's very easy for the people who want to deprive gay and lesbian citizens [of] the right to [marry], to make all sorts of statements and campaign literature or in debates where they can't be cross-examined.

But when they come into court and they have to support those opinions and they have to defend those opinions under oath and cross-examination, those opinions just melt away. And that's what happened here. There simply wasn't any evidence. There weren't any of those studies. There weren't any empirical studies. That's just made up. That's junk science.

¹⁰³ *Id.* at 880.

¹⁰⁴ *Id.* at 2976, 2979.

¹⁰⁵ Margaret Talbot, *The Gay Marriage Classroom*, NEW YORKER: NEWS DESK (Feb. 1, 2010), <http://www.newyorker.com/online/blogs/newsdesk/2010/02/the-gay-marriage-classroom.html>.

And it's easy to say that on television. But a witness stand is a lonely place to lie. And when you come into court, you can't do that. And that's what we proved. We put fear and prejudice on trial, and fear and prejudice lost.¹⁰⁶

Boies was not alone in this view. Writing for the *New York Times*, Adam Liptak observed, "Trials do have some things to recommend them, including the possibility of subjecting witnesses' factual assertions to cross-examination, which the legal scholar John Henry Wigmore once called 'the greatest legal engine ever invented for the discovery of truth.' Trials take place in public, and they have been known to advance understanding."¹⁰⁷ Margaret Talbot, writing for the *New Yorker*, acknowledged conventional wisdom when she wrote, "You sometimes hear it said that a courtroom is not the best venue for playing out battles in the culture wars—better that they be fought in the legislature, or at the ballot box, or even in the blogosphere."¹⁰⁸ Nonetheless, Talbot continued: "But following the Perry v. Schwarzenegger trial over the past three weeks has been a reminder that a courtroom can also be a great and theatrical classroom, where the values of thoroughness, precision in speech, and the obligation to reply have a way of laying bare the fundamentals of certain rhetorical positions."¹⁰⁹

In the trial, the question of whether the plaintiffs had suffered institutional humiliation was sometimes addressed directly, as discussed above. Cleaving more closely to established doctrine, the plaintiffs also sought to establish humiliation *indirectly* through discussions of whether bans on same-sex marriage manifested animus against gays and lesbians. The Proponents' star witness, David Blankenhorn, was particularly valuable to them because he had a demonstrable track record of supporting the "equal dignity of gay love" while opposing same-sex marriage.¹¹⁰ This allowed the Proponents to take the position that one could be pro-gay but still oppose same-sex marriage.

106. *CBS News' Face the Nation: August 8, 2010 Transcript*, CBS BROADCASTING INC. 6 (Aug. 8, 2010), http://www.cbsnews.com/htdocs/pdf/FTN_080810.pdf.

107. Adam Liptak, *Trial in Same-Sex Marriage Case Is Challenged*, N.Y. TIMES, Mar. 23, 2010, at A14.

108. Talbot, *supra* note 105.

109. *Id.*

110. See Austin R. Nimocks, *Perry v. Schwarzenegger District Court Trial Blog Posts*, ALLIANCE DEFENDING FREEDOM (Jan. 27, 2010), <http://www.adfmedia.org/News/PRDetail/4897> ("Mr. Blankenhorn throws a huge wrench into the plaintiffs' case since, as described by some, he's 'one of them' and yet doesn't believe that same-sex 'marriage' is good for society.").

During cross examination, however, Boies swiftly revealed the instability of this position. Blankenhorn based his opposition to same-sex marriage to the right of children to be raised by the mother and father who gave birth to them.¹¹¹ However, under cross-examination, Blankenhorn acknowledged several points that undermined his position. For instance, Boies undercut Blankenhorn's position that marriage was necessarily oriented toward procreation by looking at Blankenhorn's own prior definitions of marriage.¹¹² Blankenhorn also conceded under cross-examination that adoptive parents under many circumstances produced better child outcomes because they were so rigorously screened.¹¹³ As one commentator put it, Boies "demolished" Blankenhorn on cross-examination.¹¹⁴

That view of the matter is perhaps supported by Blankenhorn's later evolution to support same-sex marriage. Blankenhorn published an op-ed in the *New York Times* announcing his changed position.¹¹⁵ While he observed that he had not changed any of the positions he had taken at trial, this was at least arguably not the case. At trial, Blankenhorn observed that he had not discerned any animus in the restriction of marriage to opposite-sex couples.¹¹⁶ In the op-ed, however, Blankenhorn stated: "And to my deep regret, much of the opposition to gay marriage seems to stem, at least in part, from an underlying anti-gay animus. To me, a Southerner by birth whose formative moral experience was the civil-rights movement, this fact is profoundly disturbing."¹¹⁷

CONCLUSION

If anything, Ackerman undersells the salience of his anti-humiliation paradigm. The Supreme Court's decisions in the same-sex marriage context hew more closely to the anti-humiliation principle of *Brown* than to the heightened scrutiny framework of *Loving*. To use "dignity" as a tracer for the

111. Transcript of Proceedings, *supra* note 77, at 2744-45.

112. *Id.* at 2914-16.

113. *Id.* at 2794-95.

114. Frank Rich, *Two Weddings, a Divorce, and 'Glee,'* N.Y. TIMES, June 12, 2010, <http://www.nytimes.com/2010/06/13/opinion/13rich.html>.

115. David Blankenhorn, *How My View on Gay Marriage Changed*, N.Y. TIMES, June 22, 2012, <http://www.nytimes.com/2012/06/23/opinion/how-my-view-on-gay-marriage-changed.html>.

116. Transcript of Proceedings, *supra* note 77, at 2765.

117. Blankenhorn, *supra* note 115.

“anti-humiliation principle” is to see that, in fact, the principle cuts a much broader swath within and beyond gay-rights doctrine. These cases open the door to the anti-humiliation principle in a manner that could meaningfully transform constitutional jurisprudence more generally.

Endorsing the anti-humiliation doctrine raises the question of how the Court should establish the existence of institutionalized humiliation. Ackerman suggests two avenues: the judge’s “situation-sense” and the Brandeis brief. Yet the Court’s jurisprudence suggests that these sources of information may not be enough to overcome status quo bias, especially in civil rights cases where settled norms are being challenged. Drawing on the trial in *Perry v. Schwarzenegger*, I have argued that the civil rights trial may be an additional resource for establishing institutionalized humiliation.