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## The Trouble with Inclusion

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# THE TROUBLE WITH INCLUSION

**Yuvraj Joshi\***

## ABSTRACT

*Attempts are being made to include members of excluded groups in societal institutions. Inclusion has been proposed as the solution to the injustice caused by exclusion. Yet, inclusion does not always achieve justice and might sometimes perpetuate injustice. This Article provides a framework for understanding inclusion that may fail to achieve social justice and uses this framework to assess the inclusion of lesbians and gays within marriage (marriage equality) and of women and minorities within organizations (organizational diversity). The former case study examines the legal and social movement for recognizing same-sex marriage while the latter engages a range of contemporary debates, including workplace diversity, gays in the military, women in armed combat and gender mainstreaming at the UN. Each shows that inclusion is less likely to achieve social justice where it misconstrues injustice, maintains the status quo, decouples from justice, legitimizes the institution or rationalizes injustice.*

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## I. INTRODUCTION

From corporate diversity to marriage equality, attempts are being made to include members of excluded groups in societal institutions. Anti-discrimination law is being used to address the exclusion of a broader set of protected classes. Protection is no longer limited to racial minorities and women; it also extends to sexual minorities, the aged and the disabled. At the same time, the target of anti-discrimination law has shifted from the blatant exclusion of minorities to more subtle forms of discrimination. When discrimination becomes formally unlawful, what would previously have been overt discrimination often becomes covert. Anti-discrimination law, with its traditional emphasis on formal equality, seems inadequate to tackle subtle or covert discrimination.<sup>1</sup>

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<sup>1</sup> See, e.g., Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (observing that courts have been less successful in addressing “second generation employment discrimination”—subtle and complex forms of discrimination in contemporary workplaces); Samuel R. Bagenstos, *The Structural Turn and the Limits of Anti-Discrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) (observing that “[u]nconscious bias, interacting with today’s ‘boundaryless workplace,’ generates inequalities that our current anti-discrimination law is not well equipped to solve”).

Against this background, social inclusion has become seen as an alternative to,<sup>2</sup> and a justification for,<sup>3</sup> anti-discrimination law. According to prevailing thought, social justice for marginalized groups requires their inclusion in social life (social inclusion), which in turn requires their inclusion in societal institutions (institutional inclusion).<sup>4</sup> Seen from this perspective, institutional inclusion is not a goal in itself; rather, it is a means to achieve social justice. In many cases, however, social justice requires institutional transformation, and inclusion is not in itself transformative: it is *how* inclusion is framed and claimed that defines its potential.<sup>5</sup>

Much scholarship discusses the injustice of being excluded and poses inclusion as the solution. Much less writing has explored how the kinds of inclusion sought by and granted to members of excluded groups shape what their inclusion can achieve. This Article provides a framework for understanding *inclusion that may fail to achieve social justice*, and uses this framework to assess the inclusion of lesbians and gays within marriage (marriage equality) and of women and minorities within organizations (organizational diversity). The framework comprises five characteristics of inclusion that could inhibit its transformative potential. In overview, inclusion is less likely to achieve social justice where it misconstrues injustice, maintains the status quo, decouples from justice, legitimizes the institution or rationalizes injustice.<sup>6</sup> The more that inclusion strategies embody these

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<sup>2</sup> See, e.g., Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 940–41 (observing that “contemporary axiomatic skepticism about the law” has motivated a “move away from the legal arena to an extralegal sphere of action”).

<sup>3</sup> See, e.g., Hugh Collins, *Discrimination, Equality and Social Inclusion*, 66 MOD. L. REV. 16 (2003) (arguing that social inclusion is a key justification for anti-discrimination laws).

<sup>4</sup> See, e.g., Guy-Uriel E. Charles, *Toward a New Civil Rights Framework*, 30 HARV. J.L. & GENDER 353, 354–55, 359 (2007) (“For those deeply concerned about the persistence of gender and racial inequality, the crucial question of the twenty-first century is how to achieve full inclusion in the absence of explicit race conscious measures by the state and within constitutional limitations . . . . If socio-economic institutions can be induced to serve as promoters of inclusion norms, it becomes possible to improve the lived lives of citizens of color.”).

<sup>5</sup> Inclusion might be mistaken for transformation, but transformation is a different and much more demanding task. To employ a metaphor, inclusion involves climbing mountains, and transformation involves moving them. To make an institution not only more inclusive but altogether more just, those who are included in the institution must move mountains as they climb them. As this Article demonstrates, this Herculean task is made more difficult by the kinds of inclusion sought by and granted to excluded groups.

<sup>6</sup> These five characteristics are not meant to exhaust, but merely to suggest, hypotheses that may be pursued in assessing the effectiveness of inclusion.

characteristics, the less likely it is that an inclusion program will transform an institution in ways that promote social justice.

Why should we assess inclusion on account of justice? There are at least two reasons: one that relates to institutions and another to inclusion. First, justice is an aspect of many societal institutions, and so it seems right to evaluate these institutions against principles of justice. However, an institution is not in itself just or unjust; rather, institutional injustice depends on the relations, actions and effects of individuals occupying an institution.<sup>7</sup> In many cases, injustice emanates from what individuals do or say in their capacity as members of an institution. This should prompt us to question how the process of inclusion shapes what members of an institution are obliged, allowed, or forbidden to do or say in relation to the institution.

Second, on the view of justice propounded here, exclusion is but one form of injustice, and inclusion but one dimension of justice. Accordingly, it is always an open question whether inclusion furthers the cause of justice *all things considered*. Conceivably, justice might at times be better served by a principled rejection of an institution rather than inclusion within it.<sup>8</sup> This is not to say that inclusion is necessarily useless, but to caution that it does not necessarily lead to justice: sometimes it might, sometimes it might not. Inclusion can be a source of change, but it is not inherently or automatically so. The magnitude of

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Furthermore, these characteristics are not mutually exclusive, but interrelated. Indeed, it may be more accurate to think of them as overlapping dimensions, rather than distinct classes, of inclusion.

<sup>7</sup> See Seumas Miller, *Social Institutions*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Fall 2012 ed.), <http://plato.stanford.edu/archives/fall2012/entries/social-institutions/> (last revised Feb. 8, 2011) (describing the two main ways in which an institution may be unjust: “An institution is in some respect or on some occasion *intra-institutionally* unjust if a role occupant(s) of this institution qua role occupant(s) of this institution: (a) stands in an unjust relation to some other role occupant(s) within this institution qua role occupant(s) of this institution or (b) performs an action(s) that is unjust to some role occupant(s) of this institution qua role occupant of this institution . . . . An institution is in some respect or on some occasion *externally* unjust if a role occupant(s) of this institution qua role occupant of this institution: (a) stands in an unjust relation to some other non role occupant(s) of this institution; or (b) performs an action(s) that is unjust to some non role occupant of this institution.”).

<sup>8</sup> The conclusion considers this argument in greater depth. One crucial preliminary caveat is that exclusionary policies and practices that fail to respect fundamental human rights are always unacceptable, and inclusion may be desirable in any form if it represents a secure framework for the protection of fundamental rights. See Miller, *supra* note 7, for a discussion of the conceptual distinction between rights and justice.

change lies somewhere on a broad spectrum, and much depends on the nature of the institution, of the included and of inclusion.<sup>9</sup>

This Article looks at inclusion not from the lens of the institution granting it but from the perspective of those seeking it. It proceeds in four parts. The remainder of Part I discusses various salient accounts of inclusion and institutions. Perspectives on inclusion and institutions emanating from sociological theory as well as philosophy are considered. Part II argues that the transformative potential of inclusion is inhibited by the kinds of inclusion sought by and granted to excluded groups. To elaborate this claim, this Part identifies certain inhibitive characteristics of inclusion and ways that they could become obstacles to transformation. Parts III and IV then use this framework to assess the transformative potential of marriage equality and organizational diversity. Part V concludes with guidelines for securing inclusion that may achieve social justice.

#### A. INCLUSION

To grasp the trouble with inclusion as a means to achieve social justice, one must first try to appreciate the problem of exclusion. Institutional exclusion exists where an institution functions to

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<sup>9</sup> Inclusion is only part of the picture. The adequacy of inclusion strategies or other attempts at changing a given institution will depend in part on the nature and point of that *institution*. For example, some institutions may have as one of their defining ends or functions to ensure conformity with principles of justice, while others may be principally or wholly self-interested. The degree to which an institution is defined in terms of justice may influence the extent to which inclusion can further the cause of justice. Also significant is the societal role played by a given institution: an institution may perpetuate injustice not simply by virtue of its rules and practices, but also by its status as a privileged societal institution. Underlying any discussion on institutional inclusion, therefore, must be an examination of the role of inclusion as a catalyst for successful social change and the place of an institution as a forum for such change. While the focus here is on inclusion, the nature and purpose of and societal role played by an institution are no less important. The picture is rendered more complex still by the nature and disposition of the *included*. Whether individuals are likely to be included within an institution—and then to go on to transform that institution—will depend in part on the social groups and positions occupied by them. See, e.g., Julie Battilana, *Agency and Institutions: The Enabling Role of Individuals' Social Position*, 13 ORGANIZATION 653, 659, 661 (2006) (proposing that “individuals’ social position is a key variable in understanding how they are enabled to act as institutional entrepreneurs despite institutional pressures”); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 590 (1996) (observing that “[p]roblems of exclusion are particularly acute for attorneys who labor under multiple disadvantages such as gender, race, ethnicity, disability, and sexual orientation”).

systematically exclude members of a certain social group.<sup>10</sup> Exclusion can be an issue of *access* (i.e., whether someone is allowed into an institution) and one of *participation* (i.e., whether someone can partake in and benefit from the institution). Exclusion can be direct, such as the exclusion of same-sex relationships from the definition of marriage. It can stem from sociopolitical practices that are implicitly or explicitly sanctioned by the institution, such as workplace discrimination against women and racial minorities. Exclusion can also be reflected in the values and language that are accepted and enforced by the institution, even where formal equality is acknowledged in principle.<sup>11</sup> For example, feminist scholars have noted that a particular (male) perspective defines the legal ideas of the “reasonable person”<sup>12</sup> and “human rights.”<sup>13</sup>

Inclusion has been proposed as the solution to the injustice caused by exclusion. Consider three perspectives on the social justice that inclusion could achieve. One is *distributive* justice, which is concerned with the allocation of socioeconomic benefits and burdens as among individuals and groups.<sup>14</sup> Redistribution is not exclusively concerned with injustices of class; it also encompasses gender, sexual and racial-ethnic injustice. Distributive justice is an aspect of many societal institutions, whose members are the recipients of benefits and the bearers of burdens. Redistributive claims for inclusion postulate that the denial of benefits of institutional membership causes or sustains an inequitable distribution of socioeconomic benefits and burdens. Inclusion is posited

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<sup>10</sup> See Brian Barry, *Social Exclusion, Social Isolation and the Distribution of Income* 4 (Ctr. for Analysis of Social Exclusion, CASEpaper CASE/12, 1998), available at [http://eprints.lse.ac.uk/6516/1/Social\\_Exclusion,\\_Social\\_Isolation\\_and\\_the\\_Distribution\\_of\\_Income.pdf](http://eprints.lse.ac.uk/6516/1/Social_Exclusion,_Social_Isolation_and_the_Distribution_of_Income.pdf) (distinguishing between voluntary and involuntary social exclusion and explaining that “the cause for concern about the self-exclusion of individuals or groups is not the same as the cause for concern about exclusion that arises from processes over which the individual or group has no control”).

<sup>11</sup> See Margaret Davies, *Exclusion and the Identity of Law*, 5 MACQUARIE L.J. 5 (1995) (discussing the relationship between law and forms of social exclusion).

<sup>12</sup> See, e.g., MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* (2003).

<sup>13</sup> See, e.g., HILARY C. CHARLESWORTH & CHRISTINE M. CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 201 (2000).

<sup>14</sup> See Miller, *supra* note 7, § 5 (“The application of principles of distributive justice at the institutional level is, or ought to be, in large part the application of such principles not so much to individuals *per se*, but to groups whose members are known to be, say, systemically discriminated against. Doubtless, much injustice is group-based.”).

as a means to redistribute benefits by giving excluded individuals and groups access to the institution.<sup>15</sup>

Another perspective invoked in debates about inclusion is *egalitarian* justice, which is about equal treatment of people. Its underlying principle is that all people are equal and deserve equal rights and opportunities. Equality claims for inclusion hinge on the unfairness of being denied the rights and opportunities associated with institutional membership.<sup>16</sup> Inclusion is presumed to achieve equality of treatment, at the least for those who are included.

Distributive and egalitarian approaches to justice permeate claims for inclusion.<sup>17</sup> These approaches, however, have limitations when applied to inclusion. Redistributive claims for inclusion tend to assume that an institution's only or most serious affront to distributive justice is that it includes certain individuals and not others, and that including those who are currently excluded is the best or the only way to achieve an equitable redistribution. But neither assumption is necessarily true. For instance, it may be that the institution allocates benefits based on value judgments that are incorrect, biased or unfair, and that distributive injustice cannot be solved without transforming how the institution organizes meaning and values across a social field.<sup>18</sup>

Equality claims for inclusion tend to conflate equality and sameness, presuming that excluded groups are the same as (and thus worthy of the

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<sup>15</sup> See, e.g., David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1610 (2004) (making the case for "pressing corporations to act in ways that might improve the status of black Americans" on the grounds that "integrating corporate America—not to mention building a stable and substantial black middle class—is itself a significant social justice issue").

<sup>16</sup> See, e.g., Barry, *supra* note 10, at 12 ("[T]he principle of justice as equal opportunity holds that people who are equally able (in terms of native talent) should do equally well, unless they make voluntary choices that result in their faring differently . . . . Social exclusion conflicts with equal opportunity in at least the following two ways: first, social exclusion leads to unequal educational and occupational opportunities; and second, social exclusion actually constitutes a denial of equal opportunity in relation to politics.").

<sup>17</sup> Distributive and egalitarian perspectives on justice are not mutually exclusive but interconnected. See, e.g., WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS AND PUBLIC POLICY* 136 (1990) ("The more unequal the distribution of scarce resources among groups in a society, the more differentiation there is in group social participation in the institutions of society and in group culture."); JULIAN LE GRAND, *EQUITY AND CHOICE* 87 (1991) ("[A] distribution is equitable if it is the outcome of informed individuals choosing over equal choice sets.").

<sup>18</sup> As arguably is the case with marriage. See *infra* Part III.A.



same rights and opportunities as) those that are included, and that equality of treatment requires treating them the same. However, justice might at times be better served by treating someone as equal despite their differences, and treating them as equal but not alike. Indeed, it might call for transforming the attitudes, values, norms and ethos that pervade an institution to make difference more acceptable. These are instances where distributive and egalitarian approaches to social justice may fail to be *transformative* when applied to inclusion.

A third approach—and the one followed here—is a *critical-holistic* perspective on social justice that seeks to transform the fundamental institutions of society in the manner that may best promote social justice. This perspective is *critical* in the sense that it requires us not to assume the justice or injustice of an inclusion or institution but to understand and correct its inequitable outcomes. Moreover, it is *holistic* in the sense that it requires us not to treat distinct dimensions of justice as being detached but to tackle each and the interaction between them. Doing so involves discerning the function of inclusion within the whole institution to understand (1) whether it remedies the problem it addresses and (2) whether it could contribute in other ways to justice or injustice. This analysis proceeds by making a distinction between two types of remedies: *affirmative* remedies that aim to correct inequitable outcomes without disturbing the institutional framework that generates the inequitable outcomes, and *transformative* remedies that aim to transform the generative institutional framework to correct inequitable outcomes.<sup>19</sup> In many cases, justice requires the latter, since inclusion that falls short of transforming the institutional framework may fail to correct its inequitable outcomes.<sup>20</sup>

Consider, also, three propositions about the role of inclusion in achieving social justice. The first is that *inclusion is everything*. This is the belief that inclusion is not only necessary but also sufficient to achieve social justice. There is just not enough inclusion, goes the argument, but once there is, there will no longer be injustice and no longer a need to change the institution.<sup>21</sup> This suggests that there is

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<sup>19</sup> See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68, 82 (1995).

<sup>20</sup> See, e.g., Ronald Labonte, *Social Inclusion/Exclusion: Dancing the Dialectic*, 19 HEALTH PROMOTION INT'L 115, 117 (2004) (“[H]ow does one go about including individuals and groups in a set of structured social relationships responsible for excluding them in the first place? Or, put another way, to what extent do efforts at social inclusion accommodate people to relative powerlessness rather than challenge the hierarchies that create it?”).

<sup>21</sup> See, e.g., OUT FACTS: JUST ABOUT EVERYTHING YOU NEED TO KNOW ABOUT GAY AND LESBIAN LIFE 21 (David Groff ed. 1997) (quoting Andrew Sullivan as saying that following legalization of same-sex marriage “and a couple of other

nothing wrong with the existing institutional arrangements except that they exclude members of particular groups. However, exclusion is seldom the sole or primary injustice of most societal institutions. More often than not, exclusion itself is symptomatic of a deeper problem, bias or injustice that must be remedied if inclusion is to be meaningful.<sup>22</sup>

The second proposition is that *inclusion is not enough*. This approach posits that although inclusion does not in itself lead to justice, it is needed to create conditions that are favorable to the pursuit of justice. Here, inclusion is not the end, but a necessary beginning. While this rightly emphasizes the transformative potential of inclusion, it glosses over the fact that not all inclusions are created equally and that inclusion is not always successful in producing conditions that lead to justice.

The third proposition—and the one emphasized here—is that sometimes *inclusion is not the right strategy*. This hints at concerns about whether inclusion is always conducive to achieving social justice. While inclusion is not necessarily unproductive, it may sometimes impede more transformational approaches to achieving justice; in these circumstances, inclusion may do more to hinder the achievement of social justice than it does to facilitate it. Furthermore, inclusion may not address the myriad ways that an institution is unjust and, in failing to do so, perpetuate its injustice. Prevailing thought tends to hold inclusion, at worst, as being everything and, at best, as not being enough. In some instances, however, the problem is neither that there is *not enough inclusion*, nor that *inclusion is not enough*, but that inclusion is not the *right strategy*. This is because not all inclusion achieves justice and some inclusion might actually perpetuate injustice.

Inclusion can be aimed at different goals depending on the perspective one adopts. Most simply, inclusion could aim to secure the *placement* of members of excluded social groups within an institution, for example, by establishing quotas for women and minorities. This remedies direct exclusion to the extent that members of excluded groups are allowed access that was either formally or effectively denied. Mere

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things... I think we should have a party and close down the gay rights movement for good”).

<sup>22</sup> The opposite proposition, one seldom articulated, is that *inclusion is nothing*. This is the belief that inclusion does not make any difference to the plight of excluded groups and that the fight for inclusion is therefore futile. It clearly is not the case, however, that inclusion has no effect on the status of excluded groups. Inclusion does not automatically lead to citizenship, but its consequences are nonetheless significant to the extent that it rectifies the negative outcomes of exclusion. Inclusion puts an end to some of the injustice of exclusion and also renders illegitimate some of the discriminatory treatment of excluded groups.

placement does not mean, however, that such groups can fully participate in and benefit from the institution. Conditions and structures related to class, race, gender and other social categories of distinction might constrain their ability to participate and secure resources in institutional contexts.<sup>23</sup> Consequently, their placement may not enable them to transform the institutional framework that generates inequalities. At worst, mere placement may fail to secure even sustained presence, let alone meaningful participation, of excluded groups.<sup>24</sup>

Given these limitations, many progressives agree that inclusion strategies should strive for *full citizenship* of excluded groups.<sup>25</sup> Full citizenship aims to transform institutional environments in ways that enhance the participation and advancement of members of traditionally

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<sup>23</sup> See, e.g., Alfredo J. Artiles et al., *Inclusion as Social Justice: Critical Notes on Discourses, Assumptions, and the Road Ahead*, 45 THEORY INTO PRACTICE 260, 264 (2006) (“[I]ndividuals do not act in a vacuum, particularly in highly stratified societies like the United States, in which social class, race, gender, and language background (among other markers) afford (or constrain) people’s access to participate or secure resources in institutional contexts. Furthermore, greater access and redistribution of resources or freedom to compete do not transform the historically rooted conditions and structures that created the inequalities in the first place. Hence, access does not necessarily translate into meaningful or equal participation.”); Devon Carbado, Catherine Fisk & Mitu Gulati, *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83 (2008) (“Although access is important, the story of discrimination does not end at the moment of access. *Inclusion* in does not mean the *absence of discrimination from*. Under certain conditions, an employer’s desire to grant access coexists with discriminatory policies and practices. Put another way, access can both reflect and facilitate discrimination.”).

<sup>24</sup> Inclusion of women and minorities in the legal profession is a case in point. See, e.g., Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011); Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011).

<sup>25</sup> See, e.g., Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 250 (2006) (describing the goal of full institutional citizenship as “identifying and removing institutional barriers that arbitrarily thwart the participation of women, people of color, and other excluded groups” and arguing that “[t]aking steps to eliminate those institutional barriers often advances the more general goal of enabling full and fair participation, even as it also focuses attention on the circumstances particular to racial or gender exclusion”); Lani Guinier & Martha Minow, *Dynamism, Not Just Diversity*, 30 HARV. J.L. & GENDER 269, 277 (2007) (“[F]ull citizenship cannot be measured solely by counting the number of women and people of color in the institution. Ultimately, the aspiration of full citizenship requires asking new questions and stimulating measures of cultural transformation, not just changing the faces of people performing the old roles.”).

excluded groups, for example, by establishing mentorship programs and diversity goals. As such, full citizenship is more transformational than mere placement, which is principally concerned with gaining access to an institution rather than changing the institutional environment.

Most ambitiously of all, inclusion could strive towards *transformation* in making an institution not only more inclusive but altogether more just. Doing so involves enhancing the participation of excluded groups in ways that increase the likelihood that institutional processes will promote justice. On the conception of justice developed here, inclusion of excluded groups does not automatically render an institution just. The promise of inclusion lies in the potential for the included to change the institution from within. In other words, being there is not enough; it is what they do when they are there that matters. Inclusion can help to dismantle—or alternatively, serve to entrench—unjust institutional practices. Inclusion that does not work towards transformation may not bring to an end, and could well sustain, institutional injustices.<sup>26</sup>

There are at least three criticisms that may be leveled against the argument presented here. One is that to the extent that an institution is generally (although not perfectly) just, inclusion within it does not give rise to profound ethical or political concerns. In a generally just institution, inclusion can be a means to change an unjust situation (lack of inclusiveness) into a more just situation (greater inclusiveness), even if perfect justice is unattainable. Yet, taking a critical view of justice requires us not to assume the justice or injustice of an institution or inclusion or to accept too readily its inequitable outcomes. In addition, it is always necessary to consider whether inclusion furthers the cause of justice all things considered.

A second criticism is that justice relating to institutional access and participation is separable from other aspects of justice, such that a generally just institution could decide to embark upon an unjust course of action, without this threatening the justice of its terms of inclusion. To put this criticism another way, it is not the case that all aspects of justice must be instantiated simultaneously for any of the others to be preserved. Even assuming that justice in one respect (access and participation) can coexist with injustice in others, taking a holistic view of justice requires us not to treat distinct dimensions of justice as being detached but to tackle each and the interaction between them. If inclusion is a means to achieve social justice, then strategies to achieve inclusion cannot be

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<sup>26</sup> That social justice at times requires institutional transformation does not mean that all institutional transformations necessarily lead to social justice. For example, the current focus on inclusion and diversity can be understood as a form of “disruptive innovation” that helps to create new markets and value networks for businesses but does relatively little to further the cause of justice.

oblivious to the ways that an institution continues to perpetuate social injustice while being successfully inclusive.

Third, some might object that by focusing on the limits of inclusion rather than its contribution to justice, this argument risks diminishing efforts to achieve inclusion and, in so doing, throwing the baby (greater inclusiveness) out with the bathwater (the perils of inclusion). However, the argument developed below is not for or against inclusion as a strategy; rather, it is an argument for making choices based on a calculation of the pros and cons of different strategies and for developing multiple courses of action so as to avoid the perils of uncritical reliance on one strategy. A related criticism is that inclusion is no panacea: it is wrong to expect it to cure all ills. Indeed, many progressives see inclusion as a worthwhile and harmless start, not the end. But while inclusion may open doors for certain people and pave the way for certain kinds of social change, it may also obstruct justice for others. If social justice requires transformation, and if strategies to achieve inclusion inhibit transformation, then inclusion becomes a perilous path for pursuing social change.<sup>27</sup>

### B. INSTITUTIONS

The term ‘institution’ does not lend itself to conceptual specificity. Two variations in the Oxford Dictionary’s definition capture “an established law or practice: the institution of marriage” and “an organization founded for a religious, educational, professional, or social purpose.”<sup>28</sup> Marriage and organizations are the twin case studies with which this discussion on inclusion is principally concerned. At this stage, it may be difficult to see how marriage equality is like (or is different from) the inclusion of women and minorities in an organization, or how we can speak meaningfully about organizations across the public and private sectors. Certainly, they are very different. There are different drivers, different actors and different rule-makers. Accordingly, different considerations and problems will arise in different contexts. Therefore, there is a need, in any discussion on institutional inclusion, to contextualize the discourse.<sup>29</sup> At the same time, institutional analyses have developed explanations for the relative absence of variation across cases, observing, for example, that organizations and nation-states resemble one another more than one would expect given their different circumstances.<sup>30</sup> While there is much to be gained by attending to both

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<sup>27</sup> This discussion benefited from a conversation with Benjamin Passfield.

<sup>28</sup> *Institution*, OXFORD DICTIONARIES (2013), [http://www.oxforddictionaries.com/us/definition/american\\_english/institution?q=institution](http://www.oxforddictionaries.com/us/definition/american_english/institution?q=institution).

<sup>29</sup> As the case studies on marriage equality and organizational diversity illustrate. See *infra* Parts III and IV.

<sup>30</sup> See, e.g., Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*,

similarity and variation between institutions,<sup>31</sup> the framework developed here is geared toward explaining similarities in inclusion across institutional contexts.

In this Article, a contemporary sociological usage of the term will be followed. Doing so has the virtue of grounding our discussion in the most salient discipline and to develop a framework that can be applied in various contexts. Sociologists have tended to understand institutions as “complex social forms that reproduce themselves.”<sup>32</sup> Institutions can be distinguished from less complex social forms, like the social norms and rules that are the constitutive elements of institutions, and more complex and more complete social forms of which institutions are constitutive elements, like society itself.<sup>33</sup> Institutions typically have certain ends or functions and purport to produce some human good or social benefit: marriage purports to facilitate the raising and moral development of children, whereas capitalist and governmental organizations purport to produce material and social well-being.<sup>34</sup>

How do institutions influence the behavior of individuals who occupy them? Institutional accounts suggest that “[t]he patterning of social life is not produced solely by the aggregation of individual and organizational behavior but also by institutions that structure action.”<sup>35</sup> Indeed, one definition of institutions describes them as “rules, norms, and beliefs that describe reality for the organization, explaining what is and is not, what can be acted upon and what cannot.”<sup>36</sup> Richard Scott writes that institutional environments are “characterized by the elaboration of rules and requirements to which individual organizations must conform if they are to receive support and legitimacy.”<sup>37</sup> Scott

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48 AM. SOC. REV. 147 (1983); John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977).

<sup>31</sup> DiMaggio & Powell, *supra* note 30, at 158.

<sup>32</sup> Miller, *supra* note 7; see also ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 24 (1984) (“Institutions by definition are the more enduring features of social life.”); JONATHAN TURNER, *THE INSTITUTIONAL ORDER* 6 (1997) (defining an institution as “a complex of positions, roles, norms and values lodged in particular types of social structures and organizing relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment”).

<sup>33</sup> Miller, *supra* note 7.

<sup>34</sup> *Id.*

<sup>35</sup> Elisabeth S. Clemens & James M. Cook, *Politics and Institutionalism: Explaining Durability and Change*, 25 ANN. REV. SOC. 441 (1999).

<sup>36</sup> Andrew J. Hoffman, *Institutional Evolution and Change: Environmentalism and the U.S. Chemical Industry*, ACAD. MGMT. J. 351, 351 (1999).

<sup>37</sup> RICHARD SCOTT, *INSTITUTIONS AND ORGANIZATIONS* 132 (1995).

organizes the work of institutions around “three pillars” that constrain and guide behavior: the *regulative*, which involves coercion and threat of formal sanction; the *normative*, which concerns norms of acceptability and morality; and the *cognitive*, which captures the categories and frames by which actors know and interpret their world.<sup>38</sup>

How can actors change an institution when their beliefs and actions are shaped by the institution they wish to change? This is the so-called “paradox of embedded agency.”<sup>39</sup> One resolution to this paradox is recognizing “the purposive action of individuals and organizations aimed at creating, maintaining and disrupting institutions”—something Thomas Lawrence and Roy Suddaby call “institutional work.”<sup>40</sup> According to them, “there will very often be actors whose interests are not served by existing institutional arrangements, and who will consequently work when possible to disrupt the extant set of institutions.”<sup>41</sup> Disruptive institutional work is aimed at “attacking or undermining the mechanisms that lead members to comply with institutions.”<sup>42</sup> This involves disconnecting sanctions/rewards from some set of practices or rules, dissociating the set of practices or rules from its moral foundations, and undermining core assumptions and beliefs about the institution.<sup>43</sup>

Applying these insights from institutional theory to inclusion, we are left with an overarching question: Does inclusion disrupt institutional processes in ways that promote social justice? To answer this question, this Article makes a number of specific inquiries: (1) Does inclusion dissociate institutional rules and practices from their moral foundations, or is it conditional on adhering to norms of acceptability and morality? (2) Does inclusion detach rewards and sanctions from institutional rules and practices, or is inclusion itself the reward for conforming to institutional norms and exclusion the sanction for non-conformance? (3) Where the judiciary grants inclusion, for example, to same-sex relationships in the definition of marriage, does it invalidate the institution or reaffirm its validity? (4) Where inclusion reconstitutes actors and reconfigures relationships between them, for example, by constructing some as being worthy of inclusion and others as being unworthy, does it redefine concepts or accept and enforce prevailing institutional logics?

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<sup>38</sup> *Id.*

<sup>39</sup> See Raghu Garud et al., *Institutional Entrepreneurship As Embedded Agency: An Introduction to the Special Issue*, 28 *ORG. STUD.* 957 (2007).

<sup>40</sup> Thomas B. Lawrence & Roy Suddaby, *Institutions and Institutional Work*, in *HANDBOOK OF ORGANIZATION STUDIES* 215 (Stewart R. Clegg et al. eds., 2006).

<sup>41</sup> *Id.* at 235.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 235–37.

## II. INCLUSION THAT MAY FAIL TO ACHIEVE SOCIAL JUSTICE

The discussion in Part I suggested that institutional inclusion does not always achieve social justice and might sometimes perpetuate injustice. This should prompt us to identify the ways that some kinds of inclusion contribute to making institutions inclusive and just and differentiate them from those that perpetuate exclusion and injustice. To make this distinction, Part II presents a framework for understanding inclusion that may fail to achieve social justice, and subsequent parts will demonstrate how this framework may be applied in various contexts. In overview, inclusion is less likely to achieve social justice where it (a) misconstrues injustice, (b) maintains the status quo, (c) decouples from justice, (d) legitimizes the institution or (e) rationalizes injustice.

### *A. INCLUSION THAT MISCONSTRUES INJUSTICE*

There are multiple ways of thinking about the injustice that stems from institutional exclusion. The most familiar way focuses on the injustice of *exclusion*. Injustice in this relational sense consists in the fact that someone has suffered or benefited but others have not. It might be said that a social group is treated unfairly if it is denied the benefits and status of institutional membership. This is an issue of access; inclusion can solve it by giving access to members of the excluded group. So long as access then leads to meaningful participation, exclusion ceases to be an issue, at least for those who are included.

But there is another way to think about this injustice, one that emphasizes the injustice of *inclusion*. Injustice in this fundamental sense consists in the fact that *anyone* has suffered or benefited when they ought not to have. It might be considered unjust that certain benefits that should be available to all are granted or denied on the basis of inclusion. This too is an issue of access, but the question here is different. It is not whether a social group should be allowed access to some privileged benefits, but if access to those benefits should be privileged in the first place. Here, justice requires something different from simply including members of an excluded group in the institution, or extending privileged benefits to them; it demands eliminating the privileged status of those benefits. Inclusion cannot solve this injustice, since inclusion does not eliminate the privileged status of institutional membership, but merely shifts its boundaries.

The importance of this distinction is borne out by the case study on marriage equality.<sup>44</sup> For same-sex couples that want to get married but cannot, marriage equality removes the unfairness of being left out of marriage (i.e., the injustice of exclusion). But marriage equality does not

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<sup>44</sup> See *infra* Part III.A.



address—and thus leaves intact and arguably aggravates—the injustice of legal, financial and social benefits being tied to marital status (i.e., the injustice of inclusion).

Institutions are also unjust in ways that have little or nothing to do with access. Suppose that an institution allocates worth and benefits based on value judgments that are incorrect, biased, or unfair. Here, justice demands transforming how the institution organizes meaning and values across a social field. Inclusion may not bring about such a transformation; it may simply accept and enforce prevailing value judgments and subject even greater numbers to incorrect, biased or unfair judgments. The discussion on marriage equality also alludes to this concern. Marriage grants legitimacy to and confers protection on certain intimate relationships but not others, and marriage equality does nothing to change this.<sup>45</sup>

From another perspective, an institution might treat its subjects in ways that are morally problematic, or it might impose negative externalities upon society. Inclusion that seeks access to an institution *for the sake of having access* does not address the myriad ways that the institution may be unjust. Consequently, it may make little difference to unjust institutional practices. This point is made in the context of corporate diversity. A corporation with a diverse board may still pollute excessively, evade taxes, or monopolize business; mere placement of women and minorities on its board may do little to change this.<sup>46</sup>

Inclusion tends to focus solely or largely on the injustice that stems from exclusion and not to pay heed to other injustices. Such inclusion errs in assuming that the only or most serious injustice perpetrated by an institution is that it excludes members of a particular group, or that different injustices can be tackled simultaneously. Consequently, it is liable to leave intact the institutional framework generating those injustices

#### *B. INCLUSION THAT MAINTAINS THE STATUS QUO*

Inclusion is typically a purposeful social action designed to further some goal.<sup>47</sup> But the reasons given for inclusion may not reveal the

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<sup>45</sup> See *infra* Part III.A.

<sup>46</sup> See *infra* Part IV.A.

<sup>47</sup> See, e.g., SARA AHMED, ON BEING INCLUDED: RACISM AND DIVERSITY IN INSTITUTIONAL LIFE 23 (2012) (observing that “[h]aving an institutional aim to make diversity a goal can even be a sign that diversity is *not* an institutional goal”); Charles, *supra* note 4, at 360 (“When institutions ask themselves why they ought to care about racial inclusion, answers might vary. Certainly, almost all will have an economic justification—inclusion is good for the bottom line. But they can also have a political theoretical justification: as citizens (though

actual purpose of inclusion. Discriminating between rationalization and truth is difficult in cases where explicit statements of goal and procedure may not always be true, for example, where there are external pressures to be inclusive.<sup>48</sup> Ascertaining the actual purpose of inclusion is important because that purpose shapes who is included and on what terms, and what their inclusion can achieve.

Inclusion can be understood as an effort to maintain and strengthen the institution. This involves making the institution numerically diverse (and thus more resilient to critiques about the underrepresentation of minorities) without actually changing it, since inclusion that challenges the status quo (i.e., practices and policies that characterize the current institutional culture) may be seen as a threat to the institution.

Different aspects of inclusion may serve to maintain the status quo. One is the preservation of institutional rules and logics, meaning that inclusion does not disturb the institutional framework that generates inequitable outcomes. For example, marriage equality does not alter the current system of relationship recognition, which recognizes and values marriage above all other relationships. Marriage remains privileged in spite of structural change, while other relationships receive less respect.<sup>49</sup>

Another is the production of surface diversity, meaning that inclusion does not produce diversity of perspectives and experiences that might actually challenge the status quo.<sup>50</sup> This is more likely to happen where the most privileged members of the excluded group, those least likely to disrupt the status quo, are most likely to be included. In

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citizens perhaps of a slightly different sort), socio-economic institutions bear responsibility for being agents of inclusion within the spheres under their control.”).

<sup>48</sup> See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 897 (1936) (discussing the problem of ascertaining the actual purposes of a given action).

<sup>49</sup> See *infra* Part III.B.

<sup>50</sup> See, e.g., Rebecca K. Lee, *Core Diversity*, 19 TEMP. POL. & CIV. RTS. L. REV. 477, 479 (2010) (“Most employers implement models of diversity that promote only what I call ‘surface diversity’ and ‘marginal diversity,’ both of which focus on diversifying the organization’s ranks but which stop short of valuing diversity in full form, thus inhibiting substantive equity. The surface and marginal diversity paradigms neglect to treat the malady of embedded discrimination because they emphasize demographic diversity rather than diversity in a substantive sense. A focus on numerical parity alone, however, will not bring about racial and gender equity.”).

institutional terms, such inclusion fails to produce the kind of “heterogeneity” that “disrupts reliable reproduction.”<sup>51</sup>

In the short run, inclusion may be carried out with the intention of furthering the interests of a certain social group or maintaining the stability of the existing order. However, in the long run, inclusions that are most just must also contribute to the instability and eventual transformation of unjust institutional arrangements.

### C. INCLUSION THAT DECOUPLES FROM JUSTICE

Inclusion claims can become decoupled from social justice claims, obstructing transformative inclusion. Inclusion tends to be granted to those who are deemed “worthy” of it, where worthiness is established by the ability and willingness to adhere to institutional norms of behavior. Those norms may prescribe *respectability*, which ensures conformity of behavior to an acceptable standard; *apathy*, which involves stifling one’s personal ethical and political commitments and also being agnostic to the ethics and politics of the institution; or *institutional commitment*, which amounts to knowing and interpreting the world through the institutional lens and accepting institutional practices largely unconcerned by their consequences for others.

Unless one’s behavior naturally coincides with institutional norms, one must modulate one’s behavior so as to become worthy of inclusion. This means strategically constructing and carrying out one’s identity in ways that comport with institutional norms and downplaying aspects of one’s identity that mark one as being different from the norm. People are thus called upon to be performers in everyday life. As the discussion on marriage equality suggests, the legal and social movement for recognizing same-sex marriage has emphasized gay and lesbian couples’ *sameness* to heterosexuals, while downplaying their differences. This is apparent in the factual accounts of model plaintiffs advanced in same-

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<sup>51</sup> Clemens & Cook, *supra* note 35, at 453; see also DiMaggio & Powell, *supra* note 30, at 152–53 (“Universities and professional training institutions are important centers for the development of organizational norms among professional managers and their staff. Professional and trade associations are another vehicle for the definition and promulgation of normative rules about organizational and professional behavior. Such mechanisms create a pool of almost interchangeable individuals who occupy similar positions across a range of organizations and possess a similarity of orientation and disposition that may override variations in tradition and control that might otherwise shape organizational behavior . . . . To the extent managers and key staff are drawn from the same universities and filtered on a common set of attributes, they will tend to view problems in a similar fashion, see the same policies, procedures and structures as normatively sanctioned and legitimated, and approach decisions in much the same way.”).

sex marriage litigation in order to establish couples' stability and heteronormativity.<sup>52</sup>

The terms of inclusion determine who is included and what they are obliged, allowed or forbidden to do or say in relation to the institution. These terms shape how they behave toward, think about and speak about the institution and might therefore limit their agency and their opportunities to effect institutional change. These terms do not necessarily preclude individual action, but do necessarily influence what can and cannot be acted upon. This might, in turn, shape what kinds of social justice claims are brought and what kinds of justice can and cannot be done.<sup>53</sup> As discussed below, many lesbians and gays who seek to be married express admiration for marriage as an institution; indeed, it is difficult to ask to be included within marriage and simultaneously critique it. Once included, married lesbians and gays may be disinclined to challenge the institution to which they have publicly committed themselves and from which they derive benefit.<sup>54</sup>

Additionally, inclusion fails to detach rewards and sanctions from institutional rules and practices. Those rules and practices are in place to stifle deviation from the norm and reinforce the status quo. Those who accept the rules are rewarded with rights, recognitions and legitimacy, so long as they continue to toe the institutional line. The rewards of institutional identification and the costs of disidentification make it both unprofitable to have alternate normative commitments and difficult to articulate and act upon them.

#### *D. INCLUSION THAT LEGITIMIZES THE INSTITUTION*

Inclusion can also become an institutional process that heightens an institution's legitimacy and enhances the taken-for-grantedness of its norms and practices.<sup>55</sup> The whole institution may gain legitimacy merely

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<sup>52</sup> See *infra* Part III.C.; see also Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415 (2012) (arguing that “public recognition of gay people and relationships is contingent upon their acquiring a respectable social identity that is actually constituted by public performances of respectability and by privately queer practices”).

<sup>53</sup> See, e.g., Paul DiMaggio, *Culture and Cognition*, 23 ANN. REV. SOC. 263, 268 (1997) (explaining that the stability of institutions rests on their capacity to “constrain[] people’s capacity to imagine alternatives to existing arrangements”); Clemens & Cook, *supra* note 35, at 454 (“[M]ore is at stake in politics than . . . ‘who gets what, when, how?’ The ultimate distribution of benefits is determined, at least in part, by a different sort of politics that centers on expanding or eliminating alternatives and opportunities for exit.”).

<sup>54</sup> See *infra* Part III.C.

<sup>55</sup> See Jeannette A. Colyvas & Walter W. Powell, *Roads to Institutionalization: The Remaking of Boundaries Between Public and Private Science*, 27 RES. ORG. BEHAV. 305, 306–08 (2006) (“[I]nstitutionalization is driven by the self-

by including (or even attempting to include) members of excluded groups. Inclusion may support a generalized perception that the actions of an institution are desirable, proper or appropriate. This perception may be reinforced by the willingness of members of excluded groups to accept existing institutional arrangements. Their inclusion may function simply to suggest that there is nothing wrong with those arrangements except for their exclusion, and in so doing, disguise institutional injustices. As the discussion on marriage equality cautions, inclusion of same-sex relationships in the definition of marriage may function simply to suggest that marriage is now modern and egalitarian and therefore does not need to be transformed.<sup>56</sup>

The heightened legitimacy associated with inclusion may be shared by unjust institutional norms and practices. At the same time, inclusion may enhance the taken-for-grantedness of those norms and practices and, in turn, render them more resistant to critique and change. This means that new members are more likely to conform to the existing norm, rather than experiment with a new one.

Inclusion of excluded groups does not automatically render an institution just. The promise of inclusion lies in the potential for the included to change the institution from within. However, rather than being a catalyst for successful social change, inclusion may simply implicate newly included members in institutional injustices and contain or co-opt their ideas for change.<sup>57</sup>

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reinforcing feedback dynamics of heightened legitimacy and enhanced taken-for-grantedness. Consequently, the expansion and deepening of these constructs are the motors of a wider process of institutionalization . . . .” Here, legitimacy is “a generalized perception or assumption that the actions of any entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs, and definitions”; and taken-for-grantedness is “the extent to which practices become embedded in organizational routines and become largely unquestioned.”; see also Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 574 (1995), cited in Colyvas & Powell, *supra*, at 308.

<sup>56</sup> See *infra* Part III.D.

<sup>57</sup> See, e.g., Susan B. Boyd & Claire F.L. Young, *From Same-Sex to No Sex: Trends Towards Recognition of (Same-Sex) Relationships in Canada*, 1 SEATTLE J. SOC. JUST. 757, 757 (2003) (“[T]he terms of . . . inclusion may result in the diminishing of the radical potential of the ‘othered’ group in relation to social transformation. In turn, the dominant system may be reinforced even as it extends its citizenship to those who did not formerly belong.”); PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 8, 13 (1970); PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (1984) (explaining how systems of domination persist without generating strong resistance, even conscious recognition, from those who are dominated).

*E. INCLUSION THAT RATIONALIZES INJUSTICE*

All inclusions require exclusions. Strategies to make institutions more inclusive do not result in non-exclusive institutions, only differently exclusive institutions. This is because inclusion does not eliminate the privileged status of institutional membership, but merely shifts its boundaries; in these circumstances, inclusion confers privilege alongside other relations of inequality.<sup>58</sup> Injustice here consists in the fact that someone has suffered or benefited *because* others have not, and is exacerbated by the inclusion of the most privileged of the excluded group. The paradox of inclusion is that by including the privileged and privileging the included, it risks widening the gap between the privileged and the underprivileged, and the included and the excluded.<sup>59</sup>

As inclusion shapes and defines the parameters of exclusion, inclusion of particular individuals and groups may serve to explain and justify the exclusion of the rest. The very logic used to justify why someone *is* worthy of inclusion may equally be used to justify why someone else *is not*. Thus, the belief that greater inclusion of particular groups and individuals will automatically lead to greater inclusiveness toward others is misguided: the opposite might be true.

A case in point is the notion of “merit”—the quality of being worthy—which is a tool for the definition and promulgation of normative rules about organizational and professional behavior. Anti-discrimination law means that minorities cannot be categorically excluded from an organization in most cases simply because they are minorities. Yet, minority individuals who most closely adhere to traditional notions of merit may be most likely to be included.<sup>60</sup>

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<sup>58</sup> See, e.g., AHMED, *supra* note 47, at 8 (discussing the relationship between equality regimes, which seek to increase institutional diversity, and inequality regimes, which are “the interrelated practices, processes, action and meanings that result in and maintain class, gender and race inequalities” and suggesting that understanding this relationship “requires not only that we do not assume that an equality regime is necessarily aimed at the overcoming of an inequality regime but also that we recognize that an equality regime can be an inequality regime given new form, a set of processes that maintain what is supposedly being addressed”); Labonte, *supra* note 20, at 119 (“Does success in including one group come at the expense of excluding another? Are we at risk, not of redistributing wealth and opportunity, but of redistributing poverty and marginalization?”).

<sup>59</sup> See, e.g., Ayelet Shachar, *On Citizenship and Multicultural Vulnerability*, 28 POL. THEORY 64, 65 (2000) (describing the “paradox of multicultural vulnerability” that arises where “state accommodation policies intended to mitigate the power differential between groups end up reinforcing power hierarchies within them”).

<sup>60</sup> See *infra* Part IV.E.

This kind of partial inclusion creates its own obstacles to institutional transformation. It may vindicate the false belief that discrimination is no longer an issue for a given institution and provide a rationale for being complacent about tackling systemic forms of institutional injustice. For example, inclusion of some women and minorities may give the impression that an organization distributes resources according to merit. This belief in meritocracy may become a socially embedded license to discriminate, and may also engender complacency about tackling persisting inequality and injustice.<sup>61</sup>

### III. MARRIAGE EQUALITY

The first, and perhaps most salient, case study that demonstrates the trouble with inclusion as a means to achieve social justice is *marriage equality*. Marriage has become more inclusive in many jurisdictions, extending to same-sex couples. Using the framework developed in Part II, the discussion below examines the legal and social movement for recognizing same-sex marriage to assess the likelihood that marriage equality will transform either marriage as an institution or its place in society. In overview, marriage equality is less likely to be transformative where it (a) does not detach the distribution of benefits from marital status, (b) maintains the status hierarchy of relationships, (c) is achieved by demonstrating the sameness and respectability of same-sex couples, (d) legitimates marriage as an institution and a norm, and (e) privileges certain lesbians and gays and their relationships.

#### *A. MARRIAGE EQUALITY DOES NOT DETACH THE DISTRIBUTION OF BENEFITS FROM MARITAL STATUS*

Judicial attempts to achieve marriage equality capture the appeal of inclusion as a means to achieve social justice. In *Goodridge v. Department of Public Health*,<sup>62</sup> the Massachusetts Supreme Court held that refusing a marriage license to same-sex couples did not have a rational basis and contravened the equal protection principle in the state constitution.<sup>63</sup> In *Halpern v. Canada*,<sup>64</sup> the Ontario Court of Appeal also held that exclusion from marriage unfairly denies same-sex couples the recognition, dignity and benefits only available to married persons.<sup>65</sup> These cases illustrate the movement in anti-discrimination jurisprudence toward the language of inclusion. That both cases relied on equal protection provisions illustrates the claim that social inclusion is a key

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<sup>61</sup> See *infra* Part IV.E.

<sup>62</sup> 440 Mass. 309 (2003).

<sup>63</sup> *Id.* at 312, 334, 342.

<sup>64</sup> *Halpern et al. v. Att'y Gen. of Canada et al.* (2003), 225 D.L.R. 4th 529 (Can. Ont. C.A.).

<sup>65</sup> *Id.* ¶ 107.

justification for anti-discrimination laws.<sup>66</sup> More recently in *United States v. Windsor*,<sup>67</sup> the United States Supreme Court held Section 3 of the Defense of Marriage Act (DOMA), which excludes a same-sex partner from the definition of “spouse” as that term is used in federal statutes, to be unconstitutional “as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.”<sup>68</sup>

In these pronouncements, the courts sought to address the injustice of being denied the legal, financial and social benefits of marriage. But nowhere were the courts invited to consider the injustice of those benefits being tied to marital status.<sup>69</sup> Nancy Polikoff describes the fundamental injustice of marriage being the dividing line for what benefits are granted to couples:

Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. Couples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have to* marry to reap specific and unique legal benefits.<sup>70</sup>

The solution to this injustice cannot lie in simply including same-sex relationships in the definition of marriage, or extending the legal benefits of marriage to “marriage-like” relationships. In other words, justice here requires something different from inclusion; it demands transforming how the law understands and values relationships. Polikoff advocates such a transformational approach that she calls “valuing all families”:

A law reform agenda that values all LGBT families and relationships, and by extension those of heterosexuals as well, does *not* start with the package of rights that marriage gives different-sex couples and work down from there, strategizing about how many of those rights politicians are willing to grant same-sex

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<sup>66</sup> See Collins, *supra* note 3.

<sup>67</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>68</sup> *Id.* at 2680.

<sup>69</sup> Underlying this discussion is a political/philosophical debate about the role of states and, by extension, of legal mechanisms as engines of societal progress. At extremes, this debate performs an either/or by suggesting that reform through legal mechanisms is intrinsically and necessarily flawed, or alternatively, that only reform undertaken by the state is legitimate and effective. In reality, legal mechanisms are sometimes necessary, sometimes useful, and sometimes not. Almost always, however, the utility of legal mechanisms is a function of *how*, rather than merely whether, they are deployed.

<sup>70</sup> NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 3 (2008).



couples who sign up with the state in a status called civil union or domestic partnership. Instead, such an agenda starts by identifying the needs of all LGBT people and works up from there to craft legislative proposals to meet those needs.<sup>71</sup>

This is not the justice envisioned by the marriage equality movement. This is a movement for gay civil rights that wants the benefits of marriage to be granted to same-sex couples. Advocates of marriage equality relate the social exclusion of lesbians and gays to their exclusion from the institution of marriage; for them, marriage is an institution without which lesbians and gays cannot achieve their full rights as citizens.<sup>72</sup> Rather than redressing this injustice by promoting legal alternatives to marriage that are open to all, they seek inclusion within marriage exactly as it exists today. The aim is “to rectify a

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<sup>71</sup> *Id.* at 209. In the English context, for example, the different rules for settling money issues at the end of a marriage versus a cohabiting relationship have caused indefensible hardship. To illustrate, *Burns v. Burns*, [1984] 1 All ER 244, is an English property law case in which, after 19 years of unmarried cohabitation, Valerie Burns was unable to establish either an express or inferred “common intention” sufficient to found a constructive trust under which she and her partner would have shared ownership of their family home. Since she had no beneficial interest in the home purchased in her partner’s name and had no other legal redress available to her, she left the relationship with nothing. As the Court of Appeal recognized in that case, this was in sharp contrast to spouses, where family assets may be redistributed on divorce whether or not there are minor children, and largely regardless of the original ownership of assets. The injustice of inclusion further unfolds in *Kokosinski v Kokosinski*, [1980] 1 All ER 1106, an exceptional case in which the court recognized the contributions of a wife during twenty-two years of cohabitation, but only because the couple could not marry during a substantial part of that period and only after they had been married for a very short period of time. Interestingly, in the case of same-sex couples in the U.K. who enter civil partnerships, dissolution laws apply if they separate. Nancy Polikoff rightly argues that such reform is not sufficient, since formalization should not be required for achieving a fair allocation of the costs associated with the end of a couple’s life together.

<sup>72</sup> See, e.g., WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 62–63 (1996) (claiming that “[w]ithout the right to marry, gay Americans are second-class citizens” and that “the United States will not be gay-civilized until its states include same-sex couples in the institution of marriage”); Angela Bolte, *Do Wedding Dresses Come in Lavender? The Prospects and Implications of Same-Sex Marriage*, in THE GAY & LESBIAN MARRIAGE & FAMILY READER: ANALYSES OF PROBLEMS AND PROSPECTS FOR THE 21ST CENTURY 25, 29 (Jennifer M. Lehmann ed., 2001) (rejecting domestic partnership as an alternative to marriage, arguing that only through marriage will lesbians and gays achieve their full rights as citizens).

perceived unfairness within marriage for an equality-seeking constituency.”<sup>73</sup> Nicola Barker explains:

Formal equality arguments do not engage with the institution of marriage in a critical way, instead seeking access to it for same-sex relationships on the basis that they are the same as heterosexual relationships and thus deserving of the same legal provisions and recognition for the state, whatever their substantive content and effects . . . . Therefore, arguments based on sameness and formal equality suggest that either the goal of access to the institution of marriage for same-sex couples is a more pressing need than resolving other inequalities or that both can be tackled simultaneously.<sup>74</sup>

Marriage equality also fails to address fundamental concerns about marriage as an institution. Michael Warner disputes the notion that “the state should be allowed to grant legitimacy to some kinds of consensual sex but not others or to confer respectability on some people’s sexuality but not others.”<sup>75</sup> Accordingly, he is skeptical of “any institution, like marriage, that is designed both to reward those inside it and discipline those outside it.”<sup>76</sup> Paula Ettelbrick asserts that “[m]arriage runs contrary to two of the primary goals of the lesbian and gay movement: the affirmation of gay identity and culture; and the validation of many forms

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<sup>73</sup> Carl F. Stychin, *Family Friendly? Rights, Responsibilities and Relationship Recognition*, in *FEMINIST PERSPECTIVES ON FAMILY LAW* 21, 31 (Alison Diduck & Katherine O’Donovan eds., 2006).

<sup>74</sup> NICOLA BARKER, *NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE* 109–11 (2012); *see also* PEW RESEARCH CTR., *A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES* 3 (2013), *available at* [http://www.pewsocialtrends.org/files/2013/06/SDT\\_LGBT-Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf) (“Despite nearly universal support for same-sex marriage among LGBT adults, a significant minority of that population—39%—say that the issue has drawn too much attention away from other issues that are important to people who are LGBT. However, 58% say it should be the top priority even if it takes attention away from other issues.”).

<sup>75</sup> Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 52 *GLQ: J. LESBIAN & GAY STUD.* 119, 123 (1999); *cf.* *United States v. Windsor*, 133 S. Ct. 2675, 2698 (“For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. 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. It reflects both the community’s considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.”).

<sup>76</sup> Warner, *supra* note 75, at 123.

of relationships.”<sup>77</sup> For her, the right to marry is essentially the right to be the same as heterosexuals, whereas the essence of liberation is not having to conform to a heterosexual mold.<sup>78</sup> Susan Boyd and Claire Young argue that lesbians and gays who seek marriage “[reinforce] a class based disadvantage without using the radical aspects of our relationships to challenge the fundamental underlying class and gender hierarchies that are built into the system.”<sup>79</sup>

For same-sex couples that want to get married but cannot, marriage equality removes the unfairness of being left out of marriage. But it does not address—and thus leaves intact and arguably aggravates<sup>80</sup>—the injustice of legal, financial and social benefits being tied to marital status.

#### B. MARRIAGE EQUALITY MAINTAINS THE STATUS HIERARCHY OF RELATIONSHIPS

Certain opponents of marriage equality have argued that including same-sex relationships in the definition of marriage will diminish the institution of marriage. Supporters of marriage equality have countered that expanding marriage to include same-sex relationships will actually strengthen marriage as an institution. This perspective has found some judicial support. The court in *Goodridge* found that the legalization of same-sex marriage would not harm but support marriage. Chief Justice Marshall said:

Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage . . . . If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament

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<sup>77</sup> Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK IN GAY AND LESBIAN POLITICS* 757, 758 (Mark Blasius & Shane Phelan eds., 1997).

<sup>78</sup> *Id.* at 758. (“As a lesbian, I am fundamentally different from non-lesbian women. That’s the point. Marriage, as it exists today, is antithetical to my liberation as a lesbian and as a woman because it mainstreams my life and voice.”).

<sup>79</sup> Boyd & Young, *supra* note 57, at 775.

<sup>80</sup> Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1549 (1993) (cautioning that “[a]dvocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all”).

to the enduring place of marriage in our laws and in the human spirit.<sup>81</sup>

This is in stark contrast to judicial discourse that reduces marriage to heterosexuality. Consider Lord Millet's dissenting opinion in the English case of *Ghaidan v. Godin-Mendoza*,<sup>82</sup> in which he describes "the lawful union of a man and a woman" as being "the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting, or contented."<sup>83</sup> Heterosexuality, however, is not the essence of marriage; same-sex marriage is not a misnomer, but the law in several jurisdictions. This means that marriage without heterosexuality is still marriage.<sup>84</sup>

What, then, is the essence of marriage, the indispensable quality without which marriage would not be what it is today?<sup>85</sup> The court in *Goodridge* described civil marriage as "at once a deeply personal commitment to another human being and a highly public celebration of

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<sup>81</sup> *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 337 (2003); see also Matthew d'Ancona, *The Case for Gay Marriage Is Fundamentally Conservative—It Will Strengthen Britain's Social Fabric*, DAILY TELEGRAPH (London), March 10, 2012, <http://www.telegraph.co.uk/news/politics/david-cameron/9135181/The-case-for-gay-marriage-is-fundamentally-conservative-it-will-strengthen-Britains-social-fabric.html> ("If marriage is indeed the cornerstone of a stable society . . . then its extension to same-sex couples will be a stabilising force. Gay couples who marry will not only be exercising a new right; they will be recruited to, and reinforcing, an ancient institution.").

<sup>82</sup> *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30.

<sup>83</sup> *Id.* at ¶ 78.

<sup>84</sup> 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. For marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization. That belief, for many who long have held it, became even more urgent, more cherished when challenged. For others, however, came the beginnings of a new perspective, a new insight. Accordingly some States concluded that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other. The limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and certain other States as an unjust exclusion.").

<sup>85</sup> See Yuvraj Joshi, Book Review, 24 CHILD & FAM. L.Q. 489 (2012) (reviewing NICOLA BARKER, *NOT THE MARRYING KIND: A FEMINIST CRITIQUE OF SAME-SEX MARRIAGE* (2012) and CAROLINE SÖRGJERD, *RECONSTRUCTING MARRIAGE: THE LEGAL STATUS OF RELATIONSHIPS IN A CHANGING SOCIETY* (2012)).

the ideals of mutuality, companionship, intimacy, fidelity, and family.”<sup>86</sup> But this is neither law nor fact; a marriage that is neither committed nor faithful does not cease to be legally valid, nor does each marriage embody a catalogue of “ideals.” Rather, this is marriage *ideology*, invoked by courts in deciding what marriage is or what marriage ought to be.<sup>87</sup> The essence of marriage is that marriage symbolizes the current ideal family relationship. Precisely because it represents the ideal, marriage is privileged, while other relationships receive less respect.<sup>88</sup>

Marriage equality does not alter the current system, which recognizes and values marriage above all other relationships. This is apparent in the reasons given by same-sex couples (and cited by courts) for why same-sex couples should be allowed to marry. The decision in *Halpern* recognized that seven lesbian and gay couples’ reasons for wanting to engage in civil marriage—“to celebrate their love and commitment to each other”<sup>89</sup>—were the same as those of heterosexual couples. In reaching this conclusion, the court cited the affidavits of three of the lesbians and gays who sought to be married. These applicants defined and valued “marriage” in the most traditional and heterosexual sense of that word: “I want the family that Dawn and I have created to be understood by all of the people in our lives and by society.”<sup>90</sup> Moreover, they sought inclusion within marriage to gain “the public recognition of [their] union as a ‘valid’ relationship,”<sup>91</sup> illustrating the claim that “many gays who desire marriage ceremonies are precisely those who are . . . anxious to assert the absolute validity of long-term commitments over other forms of loving.”<sup>92</sup>

Marriage equality modernizes marriage by changing its formal gender structure from one man and one woman to two people of the same gender. Yet, marriage remains privileged in spite of structural change because marriage equality reinforces and justifies the status of marriage as the “gold standard” of relationships. This status-reinforcing

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<sup>86</sup> *Goodridge*, 440 Mass. at 322.

<sup>87</sup> See BARKER, *supra* note 74, at 21 (“[M]arriage is much more an ideology than a fixed definition and . . . this ideology may be extended to forms of relationship that are not called marriage . . .”).

<sup>88</sup> See, e.g., Fraser, *supra* note 19, at 72 (“[E]conomic injustice and cultural injustice are usually interimbricated so as to reinforce each other dialectically.”).

<sup>89</sup> *Halpern et al. v. Att’y Gen. of Canada et al.* (2003), 225 D.L.R. 4th 529 ¶ 9 (Can. Ont. C.A.).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Suzanna Danuta Walters, *Take My Domestic Partner, Please: Gays and Marriage in the Era of the Visible*, in QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 338, 349 (Mary Bernstein & Renate Reimann eds., 2001).

move is an instance of what Reva Siegel calls “preservation-through-transformation”:

[The] process of ceding and defending status privileges will result in changes in the constitutive rules of the regime and in its justificatory rhetoric—with the result that, over time, status relationships will be translated from an older, socially contested idiom into a newer, more socially acceptable idiom. In short, civil rights reform is an important engine of social change. Yet civil rights reform does not simply abolish a status regime; in important respects, it modernizes the rules and rhetoric through which status relations are enforced and justified.<sup>93</sup>

Marriage equality preserves the status hierarchy of relationships, with marriage on top, “marriage-like” relationships in the middle, and relationships that bear no semblance to marriage at the bottom. One might expect that recognition of different forms of relationship will diminish the ascendancy of marriage, but this is not necessarily the case. Any legal reform that reaffirms the absolute validity of marriage over other forms of relationship may only preserve the essence of marriage.

*C. MARRIAGE EQUALITY IS ACHIEVED BY DEMONSTRATING THE SAMENESS AND RESPECTABILITY OF SAME-SEX COUPLES*

Gay marriage is the recognition that same-sex relationships are the same as (meaning just as good and thus worthy of the same name as) heterosexual relationships. Consequently, the legal and social movement for recognizing same-sex marriage has emphasized gay and lesbian couples’ *sameness* to heterosexuals, while downplaying their differences.<sup>94</sup> This is apparent in the factual accounts of model plaintiffs advanced in same-sex marriage litigation in order to establish couples’ stability and heteronormativity.<sup>95</sup> In Nicola Barker’s study of common

<sup>93</sup> Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–79 (1996).

<sup>94</sup> See, e.g., Joshi, *supra* note 52.

<sup>95</sup> See, e.g., Katherine M. Franke, *Sexuality and Marriage: The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (“[T]he citizen-subjects who have signed up for this form of enfranchisement are called upon to enact a peculiar set of public performances: lining up in pairs outside of City Hall the moment the Mayor deems the marriage registry open to homo business; placing your wedding announcement in the New York Times; posing model homo families—our perfect plaintiffs—before the media.”). The point here is neither that *only* lesbians and gay men are performers in everyday life, nor that no one performs identity *except for* when required by institutional norms. Indeed, articulating or acting out one’s sense of true self too involves identity performances. Rather, the emphasis here is on the ways that institutional

themes in legal arguments used to gain same-sex marriage, the sameness of same-sex couples to heterosexual couples emerges as a key theme underpinning constitutional claims to formal equality. She explains: “[C]onservative arguments for same-sex marriage suggest that lesbians and gay men are different from the heterosexuals only (or largely) because they are unable to marry. They rest on the premise that ideally they *should* be the same as heterosexuals but will not be until marriage is available.”<sup>96</sup>

But it is perilous to seek inclusion by eliminating or downplaying the very difference that gives rise to exclusion. Paula Ettelbrick cautions:

Justice for gay men and lesbians will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships . . . . The moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices.<sup>97</sup>

Barker argues that “claiming relationship recognition on the basis of sameness does not leave room for subsequent arguments of difference”<sup>98</sup> and, therefore, “emphasizing sameness means that the potential for same-sex marriage to positively impact on the institution as a whole is limited.”<sup>99</sup>

In addition, the push for same-sex marriage has proceeded by attempting to demonstrate gay men and lesbians’ *respectability*.<sup>100</sup> Respectability involves efforts made by lesbians and gay men to remake themselves as worthy of inclusion in marriage. But these efforts do not cease with advancing arguments to courts; lesbians and gay men are called upon to be performers in everyday life. Thus, in a departure from

norms may require a particular kind of performance, one that may conflict with a person’s sense of her true self.

<sup>96</sup> BARKER, *supra* note 74, at 97 (emphasis in original).

<sup>97</sup> Ettelbrick, *supra* note 77, at 758 (emphasis in original); *see also* PEW RESEARCH CTR., *supra* note 74, at 12–13 (describing different points of view among LGBT Americans about how fully they should seek to become integrated into the broader culture) (“About half of survey respondents (49%) say the best way to achieve equality is to become a part of mainstream culture and institutions such as marriage, but an equal share say LGBT adults should be able to achieve equality while still maintaining their own distinct culture and way of life.”).

<sup>98</sup> BARKER, *supra* note 74, at 110–11.

<sup>99</sup> *Id.* at 127.

<sup>100</sup> *See* Joshi, *supra* note 52.

the traditional hypersexual media representations of gay men, an article about a middle-class gay male couple focuses entirely on the financial and logistical details of their upcoming wedding, saying or implying nothing about their sexual lives.<sup>101</sup> On closer inspection, this newfound respectability appears reductive and carefully calibrated. It also casts doubt on the argument that same-sex marriage will substantially broaden the definition of what is acceptable, and in turn make other forms of difference more acceptable. For lesbians and gays are not being seen and accepted as their queer selves, but rather seen only in part so as to be made respectable, and only to that extent, acceptable.

Those lesbians and gays who seek inclusion within marriage may not be interested in changing marriage beyond their immediate purpose.<sup>102</sup> Nicola Barker notes that in same-sex marriage litigation where procreation was singled out as the essence of marriage:

[T]he litigants did not always reject the premise of this claim by arguing that procreation is not central to contemporary understandings of marriage. Instead, they attempted (generally successfully) to overcome the issue by demonstrating that same-sex couples also have children and perform the same societal functions as heterosexual couples.<sup>103</sup>

Barker concludes, “[I]t is clear that the goal of same-sex marriage for those who engage discourses of formal equality is not to undermine or challenge marriage in any way.”<sup>104</sup> Chai Feldblum points out that the acceptance of the status quo “allows advocates . . . to remain agnostic on the question of whether marriage itself is a normative good.”<sup>105</sup>

Once included within privileged private unions protected by law, married lesbians and gays may be disinclined to challenge the institution to which they have publicly committed themselves and from which they derive benefit. Paradoxically, marriage for lesbians and gays involves

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<sup>101</sup> See Mariana Valverde, *A New Entity in the History of Sexuality: The Respectable Same-Sex Couple*, 32 *FEMINIST STUD.* 155, 159 (2006).

<sup>102</sup> See, e.g., Bec Zajac, *The Reasons Why Gay People Want To Get Married*, *SYDNEY MORNING HERALD*, July 5, 2013, <http://www.smh.com.au/comment/the-reasons-why-gay-people-want-to-get-married-20130704-2pesb.html> (“When same-sex marriage is discussed, people often ask me: ‘Marriage is such a traditional, gendered, capitalist institution, why would you even want to be part of it?’ . . . For my partner and I, it’s not about wanting to be part of an institution that is, in many ways, very problematic. It’s about wanting not to be actively excluded from it.”).

<sup>103</sup> BARKER, *supra* note 74, at 89.

<sup>104</sup> *Id.* at 110–11.

<sup>105</sup> Chai R. Feldblum, *Gay Is Good: The Moral Case for Marriage Equality and More*, 17 *YALE J. L. & FEMINISM* 139, 182 (2005).



identifying as citizen-subjects of the state that until recently criminalized their sexualities, and thus entails abandoning a history of resistance against the state.<sup>106</sup> Michael Warner describes marriage as the perfect “dequeering” issue because it produces lesbians and gays with “no politics, no public, no history of activism or resistance, no inclination to deviate from the norm, and no form of collective life distinct in any way from that of ‘society.’”<sup>107</sup> Victoria Clarke is concerned that “lesbians and gay men will relax into the complacency of being married—of having the right to marry—and be too busy registering at Harvey Nichols to transform the institution from within.”<sup>108</sup> As if to illustrate this point, a recent cover story in *The Times Magazine* featured a series of “gay couples defying convention by marrying young—and in style.”<sup>109</sup>

*D. MARRIAGE EQUALITY LEGITIMATES MARRIAGE AS AN INSTITUTION AND A NORM*

Marriage symbolizes the most legitimate form of sexual and intimate relationship.<sup>110</sup> Marriage equality does not challenge marriage as an ideal: it reaffirms the absolute validity of marriage over other forms of relationship and entrenches its position as a vital societal institution.<sup>111</sup>

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<sup>106</sup> See, e.g., Judith Butler, *Competing Universalities* (2000), reprinted in THE JUDITH BUTLER READER (Sara Salih & Judith Butler eds., 2004) (arguing that those who seek marriage “identify not only with those who have gained the blessing of the state, but with the state itself”); see also Franke, *supra* note 95, at 245 (observing that marriage encourages “an identification with a form of normative kinship and more importantly an identification with the state”).

<sup>107</sup> Warner, *supra* note 75, at 152.

<sup>108</sup> Victoria Clarke, *Lesbian and Gay Marriage: Transformation or Normalization?*, 13 FEMINISM & PSYCH. 519, 524 (2003).

<sup>109</sup> Louise Carpenter, *Young, Gay and Married: The Changing Face of Modern Matrimony*, TIMES (London), Nov. 5, 2011, (Magazine), at 28.

<sup>110</sup> See, e.g., *Wilkinson v. Kitzinger & Ors*, [2006] EWHC 2022 (Fam), at ¶ 118 (describing marriage is “an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or ‘nuclear family’) in which both maternal and paternal influences are available in respect of their nurture and upbringing”); *Hernandez v. Robles*, 805 N.Y.S.2d 354, 360 (N.Y. App. Div. 2005) (“The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing.”).

<sup>111</sup> See, e.g., *Goodridge v. Dep’t of Pub. Health*, 440 Mass. 309, 332 (2003) (“Marriage is a vital societal institution.”); *Halpern et al. v. Att’y Gen. of Canada et al.* (2003), 225 D.L.R. 4th 529 (Can. Ont. C.A.) (“[S]ame-sex couples are excluded from a fundamental societal institution – marriage.”); Butler, *supra* note 106 (“[T]he petition to gain entry into the institution of marriage . . . extends the power of the very institution, and, in extending that power,

Indeed, the greatest beneficiary of marriage equality may be marriage itself. Inclusion of same-sex relationships in the definition of marriage may function simply to suggest that marriage is now modern and egalitarian and therefore does not need to be transformed. Reva Siegel observes how a status quo regime may be preserved precisely because a rhetorical shift allows actors to tell a progressive narrative that legitimates the status quo:

Social struggle over the legitimacy of a status regime will produce changes in its formal structure until such a point as its legitimacy can be reestablished and the reformed body of law can once again be justified as “reasonable.” At this point, the legal system may *still* be enforcing social stratification, but by new means: Especially under changing social conditions, it is possible to modify the rules and reasons by which the legal system distributes social goods so as to produce a new regime, formally distinguishable from its predecessor, that will protect the privileges of heretofore dominant groups, although not necessarily to the same degree.<sup>112</sup>

The legal regime that emerges from same-sex marriage neither challenges the ascendancy of marriage nor significantly alters the distribution of legal, financial and social benefits as among different forms of relationships. Yet, the status quo ante can be justified as more “reasonable” now that marriage includes same-sex relationships. This, in turn, makes it difficult to challenge the absolute validity of marriage above all other relationships and the injustice of legal, financial and social benefits being tied to marital status. Nancy Polikoff cautions:

[Advocating lesbian and gay marriage will] require a rhetorical strategy that emphasizes similarities between our relationships and heterosexual marriages, values long-term monogamous coupling above all other relationships, and denies the potential of lesbian and gay marriage to transform the gendered nature of marriage for all people. I fear that the very process of employing that rhetorical strategy for the years it will take to achieve its objective will lead our movement’s public representatives, and the countless lesbians and gay men who hear us, to believe exactly what we say.<sup>113</sup>

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exacerbates the distinction between those forms of intimate alliance that are legitimated by the state, and those that are not.”)

<sup>112</sup> Siegel, *supra* note 93, at 2180 (emphasis in original).

<sup>113</sup> Polikoff, *supra* note 80, at 1549–50.

Nicola Barker draws out the implications of conservative arguments for same-sex marriage:

At worst, they suggest that same-sex marriage would strengthen the institution by making it universal: every responsible citizen, gay or straight, could (and would be expected to) marry. Additionally, there would no longer be a reason to allow legal reform that does erode the institution by recognizing relationships outside of marriage.<sup>114</sup>

This can also be expected to deepen the taken-for-grantedness of the norm of marriage. That norm prescribes lifelong commitment and sexual monogamy and constructs sexuality as a necessarily private aspect of identity. The hallmark of its embeddedness seems to be that “[t]he ways in which people are defining and living their intimate (or couple) relationships remain to a large extent modelled on marriage.”<sup>115</sup> This means that new relationships are likely to conform to the existing norm of marriage, rather than experiment with a new norm.

Many lesbians and gays who seek to be married express admiration for marriage as an institution; indeed, it is difficult to ask to be included within marriage and simultaneously critique it.<sup>116</sup> Yet, this does not mean that everyone accepts marriage exactly as it is.<sup>117</sup> Nor does acceptance of the norm of marriage in public mean that the norm has become embedded in people’s private lives.<sup>118</sup>

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<sup>114</sup> BARKER, *supra* note 74, at 97.

<sup>115</sup> *Id.* at 152.

<sup>116</sup> *See, e.g.*, Polikoff, *supra* note 80, at 1546 (“[A]n effort to legalize lesbian and gay marriage would make a public critique of the institution of marriage impossible. Long-term, monogamous couples would almost certainly be the exemplars of the movement, sharing stories of adversity resulting from their unmarried status . . . . Marriage would be touted as the solution to these couples’ problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed.”).

<sup>117</sup> *See, e.g.*, Pamela J. Lannutti, *For Better or Worse: Exploring the Meanings of Same-Sex Marriage Within the Lesbian, Gay, Bisexual and Transgendered Community*, 22 J. SOC. & PERS. RELATIONSHIPS 5, 10 (2005) (discussing a U.S. study in which participants supported same-sex relationship recognition as a matter of legal equality but noting that this was only an “external veneer” for deeper tensions in the perceived effects of marriage on same-sex relationships).

<sup>118</sup> *See, e.g.*, Colyvas & Powell, *supra* note 55, at 312 (“[S]ome practices can be routinized and taken-for-granted through compliance to external pressures, but fail to become deeply cognitively embedded. In such cases, there may be widespread public compliance, but privately individuals or organizational representatives can challenge or grumble over the value of particular practices.”).

The legal and social movement for recognizing same-sex marriage has re-privatized queer desire and sexual practices. Openness about queer desire becomes difficult as public recognition of gay relationships is secured on the basis of their sameness and respectability. Desire may split into two parts, as the same lesbian and gay subjects desire to be publicly respectable and privately queer.<sup>119</sup> For example, some couples' motivation in seeking marriage and monogamy (or at least the appearance of monogamy) may be shaped by their desire for children and by society's desire to see gay parents as respectable and therefore not dangerous to children. However, some couples might experience a dissonance between the appearance of monogamy in public and their privately non-monogamous existence.<sup>120</sup>

Such is the predicament of those who take up public forms of recognition while knowing that their private lives do not match publicly articulated and sustained assumptions. Their resistance to the norm comes at the expense of narrative and personal continuity, since their relationship with their environment is not continuous but changes from one moment to the next. Furthermore, their resistance to the norm in private does not supersede their adherence to the norm in public. Their resistance fails to be transformative insofar as their cumulative actions (and inactions) maintain the norm and leave it intact.

*E. MARRIAGE EQUALITY PRIVILEGES CERTAIN LESBIANS AND GAYS AND THEIR RELATIONSHIPS*

Marriage equality may contribute to the exclusion of unmarried lesbians and gays for at least two reasons. The first is that marriage equality readjusts the parameters of unlawful (and lawful) discrimination. Legal recognition defines which interests need and deserve the law's protection and which remain outside the scope of protection, either because they are deviant or altogether unintelligible. As equality jurisprudence involving married lesbians and gays gains traction, it might render discrimination claims by unmarried lesbians and gays less legally cognizable, and even implicitly sanction discrimination against these unmarried couples. ("If you wanted equal rights, you should've gotten married.") The second reason is that marriage equality does not eliminate the privileged status of marriage, but merely shifts its boundaries. As lesbians and gays become included in marriage, those who resist inclusion might become less accepted. To put the point another way, self-exclusion of lesbians and gays from marriage could function to explain and justify their exclusion from political institutions of law and citizenship. Paula Ettelbrick, writing in 1989, cautioned that recognizing same-sex marriage would further marginalize lesbians and

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<sup>119</sup> See Joshi, *supra* note 52, at 446–49.

<sup>120</sup> See *id.* at 451–52.

gays who choose not to marry, particularly women, people of color, and poor and working-class people.<sup>121</sup>

Some supporters of marriage equality have been unmoved by such concerns. William Eskridge predicts that each stage of recognition will educate heterosexuals and prepare them for the next stage of greater recognition, and eventually greater acceptance, of all lesbians, gays and bisexuals.<sup>122</sup> In contrast, Angela Bolte accepts that lesbians and gays who choose not to marry will be discriminated against “at times,” but believes that the long-term effect of same-sex marriage will be liberalizing.<sup>123</sup> These arguments are really only convincing if one believes in a trickle-down model—that greater recognition for married lesbians and gays will translate into progress for the remainder of the LGBT community. What these authors fail to explain convincingly is precisely how the invisible hand of recognition would benefit those LGBT people who cannot or choose not to marry. It seems either false, or at best overly optimistic, to suggest that marriage will diminish prejudice and discrimination against them.

Who actually benefits from marriage equality? Do all beneficiaries benefit equally? If not, who stands to gain the most and who the least? Empirical evidence has been sparse, although a growing body of research on the personal and social benefits of relationship recognition is now emerging. This research suggests that the change from institutional exclusion to inclusion that we see in the marriage equality context does not necessarily reflect a commensurate change in social inclusion for all lesbians and gays.

In two studies that drew on qualitative data from nineteen same-sex couples in the Netherlands and 556 people married to same-sex partners in Massachusetts, M. V. Lee Badgett found that “[t]he right to marry and exercising the right to marry were associated with greater feelings of social inclusion among people in same-sex couples.”<sup>124</sup> A striking aspect of Badgett’s research is what she calls the “privilege hypothesis”—that “marriage equality might generate greater feelings of inclusiveness for individuals in relatively privileged groups, namely men, White people, and higher-income people.”<sup>125</sup> She explains: “[T]he right to marry moves [high-income White] gay men much closer to full privileged status than marriage would for people of color, women, or lower-income people, so marriage-induced feelings of inclusion might be greater for high-income

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<sup>121</sup> Ettlbrick, *supra* note 77.

<sup>122</sup> ESKRIDGE, *supra* note 72, at 82–83.

<sup>123</sup> Bolte, *supra* note 72, at 38.

<sup>124</sup> M.V. Lee Badgett, *Social Inclusion and the Value of Marriage Equality in Massachusetts and the Netherlands*, 67 J. SOC. ISSUES 316, 316 (2011).

<sup>125</sup> *Id.* at 319.

White gay men.”<sup>126</sup> The Massachusetts data found that White, male, high-income respondents were 9 to 13% more likely to report feelings of social inclusion related to marriage than other groups, with race being the main driver of the privilege effect.<sup>127</sup> Badgett reasons that these findings might relate to “different norms of marriage behavior across race and class,” or they might have “psychological roots in individuals’ valuing of their privileged positions in those other domains.”<sup>128</sup> However, these differential feelings of inclusion might also have to do with different living standards and degrees of actual social inclusion.

Implicit in the privilege hypothesis is an *underprivilege* hypothesis—that marriage equality might generate lesser feelings of inclusiveness for individuals in relatively underprivileged groups, particularly women, people of color, and poor and working-class people. This hints at the complex vulnerabilities that stem from the combination of race, gender and class with sexual orientation and gender identity. As a recent report by the Center for American Progress highlights:

[F]amilies headed by black same-sex couples are more likely [than families headed by non-black same-sex couples] to raise their children in poverty, black lesbians are more likely to suffer from chronic diseases, and black gay and transgender youth are more likely to end up homeless and living on the streets.<sup>129</sup>

A remarkable finding is that “the quality of life of many black gay and transgender people remained relatively unchanged over the last decade despite the significant gains the gay and transgender movement achieved.”<sup>130</sup> This suggests that “some of the gay headline policy priorities that garnered the most research, analysis, and advocacy—such as marriage equality—under-serve this population when taken alone, even though they are important for overall progress.”<sup>131</sup>

The picture that emerges is that while marriage equality might lead to greater social inclusion for married couples, especially if they are White, male, and middle-class, it might do relatively little to address the needs of underprivileged groups, like women, people of color, and poor and working-class people. If marriage equality does not confer the

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 329–30.

<sup>128</sup> *Id.* at 332.

<sup>129</sup> AISHA C. MOODIE-MILLS, CTR. FOR AM. PROGRESS, JUMPING BEYOND THE BROOM: WHY BLACK GAY AND TRANSGENDER AMERICANS NEED MORE THAN MARRIAGE EQUALITY 1 (Jan. 19 2012), *available at* [http://www.americanprogress.org/issues/2012/01/pdf/black\\_lgbt.pdf](http://www.americanprogress.org/issues/2012/01/pdf/black_lgbt.pdf).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1–2.

benefits of inclusion equally, how much can it benefit those who are not included in the first place?

In summary, applying the framework developed earlier to marriage equality suggests that marriage equality:

- (a) addresses only the injustice of marriage being denied to lesbians and gays and not the injustice of essential benefits being tied to marital status;
- (b) reinforces that status of marriage as the “gold standard” of relationships, while other relationships receive less respect;
- (c) is achieved by demonstrating the sameness and respectability of same-sex couples, which leaves less scope for acceptance of difference;
- (d) legitimates marriage as an institution and a norm, which makes it difficult to challenge the absolute validity of marriage above all other relationships; and
- (e) privileges certain lesbians and gays and their relationships, which can contribute to the exclusion and marginalization of others.

These are reasons to be skeptical about the transformative potential of marriage equality. This discussion is also but one example of the ways in which the framework developed here can help to assess the effectiveness of an inclusion project.

#### IV. ORGANIZATIONAL DIVERSITY

Part IV introduces a second case study that demonstrates the framework developed in Part II. That case study is *organizational diversity*, or the inclusion of women and minorities in organizations. Social institutions are often organizations occupied by persons with differentiated roles that contribute to the ends or functions of that organization.<sup>132</sup> The question arises whether adding diversity to the persons performing organizational roles may transform an organization in ways that contribute to organizational justice. The discussion below suggests that simply adding diversity may not transform an organization where (a) diversity does not address different forms of organizational injustice, (b) diversity becomes an instrument for preserving organizational interests, (c) diversity is constrained by organizational norms of behavior, (d) diversity (and attempts to be diverse) legitimize

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<sup>132</sup> See SCOTT, *supra* note 37.

organizational norms and structures, and (e) diversity initiatives produce partial inclusion that rationalizes partial exclusion.

*A. DIVERSITY DOES NOT ADDRESS DIFFERENT FORMS OF ORGANIZATIONAL INJUSTICE*

Corporate diversity initiatives signal that an organization is committed to such qualities as fairness, justice and equality of opportunity, and that it promotes diversity because it is “the right thing to do.”<sup>133</sup> Such is the halo effect of diversity that, according to one study, diverse firms are perceived as more ethical, fairer and less deserving of punishment when found guilty of committing a business transgression.<sup>134</sup> This is problematic not only because there is no direct evidence that diverse firms will act more ethically than non-diverse firms,<sup>135</sup> but also because diversity by itself does not make a firm ethical. Corporate social responsibility, according to the International Organizations for Standardization (ISO), is “a balanced approach for organizations to address economic, social and environmental issues in a way that aims to benefit people, communities and society.”<sup>136</sup> Diversity is a part of it, but it also includes consideration of such issues as human rights, unfair business practices, organizational governance and environmental impact.<sup>137</sup> Without addressing the catalogue of relevant issues, a corporation, however diverse, may remain socially irresponsible. For example, a corporation with a diverse board may still pollute excessively, evade taxes, or monopolize business; mere placement of women and minorities on its board may do little to change this.<sup>138</sup> It

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<sup>133</sup> Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1019 (2010) (“One of the explanations given by corporate board members themselves is that diversity efforts send a positive message about their institutions—for example, that their companies are headed in the right direction, are socially responsible, or care about egalitarian norms and social justice. Diversity is, according to this rationale, desirable as a signal of a socially upstanding corporation.”).

<sup>134</sup> See Katherine Phillips and Sun Young Kim, *The Diversity-Morality Link* (Columbia Business School, Working Paper, 2012).

<sup>135</sup> See Sun Young Kim, *Is Corporate Diversity Linked to Ethical Behaviour? Americans Think So*, AL JAZEERA (Dec. 22, 2012), <http://www.aljazeera.com/ind/epth/opinion/2012/12/20121222151830972966.html>.

<sup>136</sup> INT’L ORG. FOR STANDARDIZATION [ISO], STRATEGIC ADVISORY GROUP ON CORPORATE SOCIAL RESPONSIBILITY (2002), available at [http://www.iisd.org/pdf/2003/standards\\_definition.pdf](http://www.iisd.org/pdf/2003/standards_definition.pdf).

<sup>137</sup> *Id.*

<sup>138</sup> There is an interesting argument that diversity might actually enhance the quality of institutional decision-making. Christine Lagarde, Managing Director of the IMF, for example, is reported to attribute the cause of the 2008 financial collapse, at least in part, to male-dominated environments: “Gender-dominated environments are not good . . . particularly in the financial sector where there are too few women. . . . In gender-dominated environments, men have a



might be different if diversity efforts were actually concerned with promoting ethical behavior, but they instead tend to focus solely or largely on the placement of women and minorities *for the sake of having more of them*. Such inclusion does not address the myriad ways that an organization may be unjust and, consequently, its potential contribution to justice is limited.

Recent military inclusions reflect the limits of seeking inclusion for inclusion's sake. In September 2011, the Don't Ask, Don't Tell (DADT) Repeal Act ended the policy, in place since 1993, that allowed openly gay, lesbian and bisexual persons to serve in the military only if they kept their sexual orientation secret and the military did not learn of their sexual orientation. This inclusion (so to speak) was granted on the basis of self-denial of one's sexual identity. The repeal of DADT eliminated the unfairness of gay, lesbian and bisexual persons being barred from military service for being open about their sexual orientation. However, aside from disputing the unfairness of not being allowed to serve, those challenging the military exclusion did not critique the military as an institution. Nancy Polikoff points out:

The strategy that lesbian and gay rights activists have pursued in their quest to eliminate the military exclusion is filled with rhetoric professing respect for the armed services . . . . There is no way to publicly critique the military and simultaneously ask to be let into it, as such criticism would undermine the credibility of the dominant message: that the presence of openly lesbian and gay service members would not harm military effectiveness and, by implication, the United States' position as the world's foremost military power.<sup>139</sup>

Exclusion is not the sole injustice that pervades the military. DADT itself was a product and a symptom of homophobic attitudes in the military that may not be cured by the mere inclusion of gay, lesbian and bisexual persons. Indeed, the implementation of DADT possibly

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tendency to . . . show how hairy chested they are, compared with the man who's sitting next to them. I honestly think that there should never be too much testosterone in one room." *Christine Lagarde: 'There Should Never Be Too Much Testosterone in One Room'*, INDEPENDENT (London), Feb. 7, 2011, <http://www.independent.co.uk/news/people/profiles/christine-lagarde-there-should-never-be-too-much-testosterone-in-one-room-2206357.html>. But since gender domination is entrenched in many institutions, gender diversity, by itself, may not produce a diversity of perspectives and may not counteract gendered norms and practices, for example, if women are expected to behave like men and to conform to the male norms.

<sup>139</sup> Polikoff, *supra* note 80, at 1544.

revealed more than just the military's bias against homosexuals: the U.S. Army and Air Force in 2007 discharged a disproportionate number of women under the policy.<sup>140</sup> By focusing on the injustice of exclusion and largely disregarding the homophobia and gender discrimination reported to be endemic in the military, the campaign to repeal DADT arguably failed to address the different ways that the policy, let alone the military, may be unjust.

More recently, the U.S. Department of Defense has announced another military inclusion that aims to deal with gender discrimination: the inclusion of women in previously closed positions of combat and special ops.<sup>141</sup> Two aspects of the current debate cast doubt on the transformative potential of this inclusion program. One aspect focuses on whether the military's standards should be "lowered" if women are assigned to combat. Defense Secretary Chuck Hagel has said that integrating women into combat positions is "the right thing," but that the military would not artificially "ease" requirements to pave the way for women.<sup>142</sup> The likelihood is that women's inclusion in combat and special ops will be conditional on adhering to (supposedly superior) standards designed for—and largely by—men. The other issue is whether allowing women in combat might alleviate some problems of sexual harassment and assault in the military.<sup>143</sup> Addressing military sexual abuse involves transforming the misogynistic and hierarchical nature of the institution. Inclusion by itself may not address a culture of sexual harassment and assaults toward women, who are significantly

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<sup>140</sup> Thom Shanker, *'Don't Ask, Don't Tell' Hits Women Much More*, N.Y. TIMES, June 23, 2008, <http://www.nytimes.com/2008/06/23/washington/23pentagon.html>.

<sup>141</sup> *News Briefing on Implementing Women into Previously Closed Positions*, U.S. DEP'T OF DEF. (June 18, 2013), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5259>.

<sup>142</sup> Nick Simeone, *Hagel: Opening Combat Jobs to Women the Right Thing to Do*, U.S. DEP'T OF DEF. (June 20, 2013), <http://www.defense.gov/News/NewsArticle.aspx?ID=120343> ("It's not a matter of lowering standards to assist women to get into combat positions.").

<sup>143</sup> See Jennifer Steinhauer, *Elite Units in U.S. Military to Admit Women*, N.Y. TIMES, June 17, 2013, <http://www.nytimes.com/2013/06/18/us/elite-units-in-us-military-to-admit-women.html> ("We've had this ongoing issue with sexual harassment, sexual assault . . . I believe it's because we've had separate classes of military personnel, at some level. Now, you know, it's far more complicated than that, but when you have one part of the population that is designated as warriors and another part that's designated as something else, I think that disparity begins to establish a psychology that in some cases led to that environment. I have to believe, the more we can treat people equally, the more likely they are to treat each other equally." (quoting General Martin E. Dempsey, the chairman of the Joint Chiefs of Staff)).

more likely to experience sexual assault in the military than men.<sup>144</sup> Nor, incidentally, can it be expected to address the sexual assault of men by other men, which in 2012 accounted for fifty-three percent of all reported cases of unwanted sexual contact in the military.<sup>145</sup>

*B. DIVERSITY BECOMES AN INSTRUMENT FOR PRESERVING  
ORGANIZATIONAL INTERESTS*

Milton Friedman, in his 1962 book *Capitalism and Freedom*, declared:

[T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.<sup>146</sup>

Later, in a 1970 article published in the *New York Times Magazine*, Friedman noted: “[T]he doctrine of social responsibility is frequently a cloak for actions that are justified on other grounds rather than a reason for those actions.”<sup>147</sup> Citing community investment and charitable contributions by corporations as examples of such actions, he wrote: “In the present climate of opinion, with its wide spread aversion to ‘capitalism,’ ‘profits,’ the ‘soulless corporation’ and so on, this is one way for a corporation to generate goodwill as a by-product of expenditures that are entirely justified in its own self-interest.”<sup>148</sup>

Some four decades later, Friedman might have invoked a similar argument about diversity. The business case for diversity—that businesses should seek to be diverse because (and to the extent that) diversity is good for business—aligns with the notion that corporate social responsibility is justified if it is self-interested. Diversity is good for business, goes the argument, because a more diverse work force drives innovation and better represents an increasingly diverse marketplace.

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<sup>144</sup> See Barbara Gottfried, *Women in Combat: A Mirror of Society?*, TIME, June 20, 2013, <http://nation.time.com/2013/06/20/women-in-combat-a-mirror-of-society>.

<sup>145</sup> See James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 23, 2013, <http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html>.

<sup>146</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962).

<sup>147</sup> Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, September 13, 1970, at 213.

<sup>148</sup> *Id.*

This begs the question: Is diversity that is *not* good for business still desirable?<sup>149</sup> From an institutional perspective, not all diversity is “good” diversity, which is to say, not all diversity benefits the institution. For one thing, there can be a perception of “too much diversity.” This alludes to an excess of diversity to an extent that diminishes institutional cohesion. This could well be not so much an over-abundance of diversity as diversity that is improperly managed or diversity that threatens the status quo.

Institutional analyses have explained the role of individuals’ social position in shaping their attitudes towards institutional change. Julie Battilana distinguishes between *incumbents*—“individuals who belong to organizations and/or social group(s) that are favored by the existing institutional arrangements, which constitute a source of power for them”—and *challengers*—“[individuals who] belong to organizations and/or social group(s) that are less favoured by the existing institutional arrangements.”<sup>150</sup> The likelihood is that incumbents will use their position of privilege to maintain the existing institutional arrangements that benefit them.<sup>151</sup> This means not only that incumbents *themselves* are unlikely to challenge the existing arrangements, but also that they are unlikely to allow *others* who might disrupt the existing arrangements to enter the institution. In other words, incumbents beckon incumbents, not challengers. Lani Guinier and Martha Minow caution: “[D]iversity programs may open the door selectively—and the most privileged of the excluded group, those least likely to disrupt the framework, may be the most likely to come in.”<sup>152</sup> Devon Carbado and Mitu Gulati suggest that law firms and faculties “will want to promote those who will be highly productive, will not threaten the status quo, and also those who will be good citizens.”<sup>153</sup>

Nor is diversity that is good for business necessarily good for social justice. Diversity may be used for “showcasing,” a “practice[] by which an employer makes its women and minority constituents visible or otherwise salient to observers.”<sup>154</sup> Showcasing is concerned with the

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<sup>149</sup> See, e.g., Sturm, *supra* note 25, at 324 (observing that “[t]he business case for diversity, though strategically important, does not explain why diversity should be pursued as a public value or justify diversity initiatives when the business case is weak”).

<sup>150</sup> Battilana, *supra* note 9, at 659, 661, 663.

<sup>151</sup> *Id.*; see also Paul J. DiMaggio, *Interest and Agency in Institutional Theory*, in *INSTITUTIONAL PATTERNS AND ORGANIZATIONS: CULTURE AND ENVIRONMENT 3* (Lynne G. Zucker ed., 1988).

<sup>152</sup> Guinier & Minow, *supra* note 25, at 275.

<sup>153</sup> Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259, 1276 (2000).

<sup>154</sup> Shin & Gulati, *supra* note 133, at 1035–37 (explaining that showcasing is not meant to increase actual diversity, but rather to “function as a signal of an

*perception* of lack of diversity, rather than the lack of diversity itself. Showcasing diversity may improve an organization's perception to the outside world, and even its perception of itself. By becoming an instrument for showcasing, diversity may strengthen an organization by making it more resilient to critiques about the underrepresentation of minorities without really changing it. Sara Ahmed explains the impact of certain diversity initiatives in this way: "Diversity becomes about changing perceptions of whiteness rather than changing the whiteness of organizations. Changing perceptions of whiteness can be how an institution can reproduce whiteness, as that which exists but is no longer perceived."<sup>155</sup>

In certain circumstances, minority individuals may be able to use business arguments for diversity to justify their own social justice efforts. Doing so involves reformulating claims and normative standing to fit into the organizational world. Discussing public service-minded minority lawyers working in private law firms, David Wilkins suggests:

Market-based diversity arguments provide an alternative way for black lawyers to justify their public service activity. Working in government or to elect black political officials also helps to increase one's contacts and visibility with potential clients and decision makers. Serving on a nonprofit board or heading a black bar association provides valuable leadership experience while raising both the lawyer's and the firm's visibility and reputation in the broader community. Lawyers who wish to engage in these activities can claim that they are not just doing good—they are also helping themselves and their firms do well in the future.<sup>156</sup>

The problem with trying to justify social justice work through market-based logic is that a great deal of projects and goals will not fit. This creates a powerful incentive to prioritize the most "acceptable" issues, not because those issues are most pressing, but precisely because they align with the status quo. For example, in the campaign to overturn California's Proposition 8, companies like Apple and Google donated

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employer's attitude about diversity") ("The key move is to distinguish behaviors such as showcasing, which signal diversity and attitudes towards diversity, from the conditions which would actually constitute diversity . . . . Distinguishing behaviors that signal diversity from the condition of diversity itself implies that one can exist without the other. This is of central importance to our signaling model. An employer can engage in signaling behavior with regard to diversity, such as showcasing, whether or not the employer actually has a workforce that enjoys significant diversity.").

<sup>155</sup> AHMED, *supra* note 47, at 34.

<sup>156</sup> Wilkins, *supra* note 15, at 1607–08.

large sums and issued public statements underlining their own “gay-friendly” employment policies. Their support, however, follows from a straightforward cost-benefit analysis. Recent years have witnessed an increased public acceptance of same-sex marriage, with some opinion polls indicating that most Americans now support marriage equality. This makes marriage the perfect “gay” issue for brands whose support for it might strengthen the loyalty of gay consumers without being offensive to the heterosexual mainstream. The likelihood is that to the extent that an issue cannot be framed in organizational terms, projects and goals will go unaddressed.

### *C. DIVERSITY IS CONSTRAINED BY ORGANIZATIONAL NORMS OF BEHAVIOR*

Inclusion within organizations brings certain benefits, but not without conditions. Sara Ahmed describes such inclusion in terms of “conditional hospitality”: “People of color are welcomed on condition they return that hospitality by integrating into a common organizational culture, or by ‘being’ diverse, and allowing institutions to celebrate their diversity.”<sup>157</sup> Many organizations, even those touted as being inclusive, maintain White, male, middle-class and heteronormative norms of behavior, adherence to which is a precondition of inclusion and citizenship. Women and minorities, if they are to succeed, must tread carefully and refrain from expressing their personal identities in personal and political ways that could be deemed “unprofessional.” Kenji Yoshino calls this “covering”—a form of assimilation in which:

[A] lesbian might be comfortable being gay and saying she is gay, but might nonetheless modulate her identity to permit others to ignore her orientation. She might, for example, (1) not engage in public displays of same-sex affection; (2) not engage in gender-atypical activity that could code as gay; or (3) not engage in gay activism.<sup>158</sup>

Inclusion demands covering—for her to conceal and compromise her lesbian identity, despite being able to identify as lesbian. While downplaying her lesbian identity allows her to become included, it also stifles some of the characteristics that make her lesbian and limits what she can say or do as a lesbian.

Besides covering, inclusion demands performance—to strategically construct and carry out social identity in ways that comport with

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<sup>157</sup> AHMED, *supra* note 47, at 43.

<sup>158</sup> Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002); *see also* Dean Spade, *Be Professional!*, 33 HARV. J.L. & GENDER 71, 77 (2010) (“It is ironic that the more privileged and secure I get in terms of class and profession, the more I am encouraged not to take risks and to tread the most conservative path possible.”).

institutional norms. Devon Carbado and Mitu Gulati describe the “racial conduct discrimination” that derives “not simply from the fact that an employee is, for example, phenotypically Asian American (i.e., her racial status) but also from how [the employee] performs her Asian-American identity in the workplace (i.e., her racial conduct).”<sup>159</sup> Observing that identity performances can be an affirmation or a denial of self,<sup>160</sup> the authors examine the identity performances of an outsider who seeks inclusion:

[I]dentity negotiations often function to make insiders feel comfortable and at ease with the outsider’s difference. Beyond a certain point, an outsider’s efforts to make insiders feel comfortable can translate into a denial of the outsider’s self, or at least the outsider’s idealized sense of self. . . . [M]ost people have experienced what might be referred to as compromising moments of identity performance—moments in which a person’s performance of identity contradicts some political or social image that person has of herself.<sup>161</sup>

At worst, inclusion demands institutional commitment in the sense of an uncritical acceptance of institutional practices and values. Carbado and Gulati describe the expectations imposed on junior employees:

[T]he employee must convince senior employees that he has internalized the social norms of the institution by showing that he values the existing structure and will respect the social hierarchy. In colloquial terms, the junior employee must indicate that he is a collegial, trustworthy team player. These preconditions enable informal social sanctions to work effectively within a group. The junior employee must credibly show that he will not object to institutional practices very often. Some dissent is likely to be valued, but not to a level that will undermine the institutional structure.<sup>162</sup>

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<sup>159</sup> Carbado & Gulati, *supra* note 153, at 1262–63.

<sup>160</sup> This is not to suggest that a person has a true identity or essence that is independent of social context. But even within social context, a person often has a sense of who she is and who she wants to become—a sense of her true-self.

<sup>161</sup> Carbado & Gulati, *supra* note 153, at 1288–89; *see also* Spade, *supra* note 158, at 76 (“The pressure to assert a very one-dimensional, traditionally masculine exterior does not fit with my self-understanding as a radical queer person nor match my internal understandings . . . . The queer fashion sense I wear outside of work . . . clashes with the pressure to bring a particular kind of legibility to my body and gender in the professional world.”).

<sup>162</sup> Carbado & Gulati, *supra* note 153, at 1275.

Many progressives expect minority employees to have normative commitments to inclusion and diversity that will motivate them to challenge exclusionary norms.<sup>163</sup> The presumption is that women and minorities in senior positions will be committed to equality and will therefore act as role models and champions for junior female and minority employees.<sup>164</sup> But not everyone is committed to promoting inclusiveness, particularly where doing so risks his or her own relatively privileged position.<sup>165</sup> Nor are institutional incentives invariably conducive to such identity politics. Carbado and Gulati explain why members of racial minorities may not “lift as they climb” the corporate ladder:

[T]he corporation both selects for and produces racial types to win multiround promotion tournaments. These racial types, we contend, are unlikely to be invested in facilitating the promotion of other nonwhites. We should be clear to point out that this lack of investment does not derive from a normative commitment on the part of senior people of color to disidentify with other racial minorities. The disinvestment exists because of the institutional rewards of racial disidentification and

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<sup>163</sup> Against the assumption that members of traditionally excluded groups necessarily have progressive normative commitments, or that their inclusion is necessarily progressive, see Harry J. Enten, *Why Do New York Liberals Support Conservative Christine Quinn?*, GUARDIAN (London), Mar. 13, 2013, <http://m.guardiannews.com/commentisfree/2013/mar/13/new-york-liberals-support-christine-quinn-for-mayor> (discussing Christine Quinn’s bid to become New York City’s first woman and first openly lesbian mayor) (“[S]ome might see the mere act of voting for a gay, female public official as a progressive statement. The Human Rights Campaign, a LGBT advocacy group, has backed Quinn, even though some have critiqued Quinn for not being liberal enough on HIV/AIDS issues. Quinn’s opponents in the Democratic primary, on the other hand, have been very strong on gay rights.”).

<sup>164</sup> See, e.g., Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 285 (2007) (“Women and minorities in top leadership positions may help women and minorities move into management positions below them for several reasons: they may be committed to equity; they may also improve opportunities by acting as role models, by reducing stereotype threat or self-handicapping by women and minorities, or by reducing the stress associated with tokenism.”).

<sup>165</sup> See, e.g., Mary Louise Fellows & Sherene Razack, *The Race to Innocence: Confronting Hierarchical Relations Among Women*, 1 J. GENDER RACE & JUST. 335, 340 (1998) (explaining that “[o]ur own claim for justice is likely to be undermined if we acknowledge the claims of Others—competing claims that would position us as dominant”).



institutional costs of perceived racial group association.<sup>166</sup>

Promoting diversity and inclusion is a difficult task for any institutional reformer. Yet, changing the institutional culture in ways that promote social justice—particularly if justice requires something fundamentally different from the status quo—is more demanding still. Even strong normative commitments may not be enough when they come into conflict with institutional interests. David Wilkins cautions:

[I]f bringing diversity to the elite ranks of the American legal profession is going to do more than accentuate the yawning gap between the legal haves and have-nots, then those who come to occupy these positions of power must have normative commitments that both shape and constrain the business interests of their powerful clients. To be sure, in today's cutthroat legal market, lawyers who attempt to articulate and act on normative commitments that appear to challenge the prerogatives of corporate power risk jeopardizing their careers. Indeed, this risk constitutes one of the unappreciated limitations of the standard claim that demographic diversity enhances profits by producing a diversity of viewpoints.<sup>167</sup>

The perils of articulating and acting on alternate normative commitments capture the precariousness of inclusion that is granted on problematic terms.

Then again, some individuals are able to act on normative commitments in institutionalized environments. Debra Meyerson and Maureen Scully call them “tempered radicals”—“individuals who identify with and are committed to their organizations, and are also committed to a cause, community, or ideology that is fundamentally different from, and possibly at odds with the dominant culture of their organization[s].”<sup>168</sup> The authors demonstrate how tempered radicals can maintain their critical consciousness and leverage their institutional legitimacy to mobilize institutional change. While acknowledging the ability of embedded individuals to effect positive change, one should question what it takes for them to gain the institutional legitimacy requisite to become an institutional catalyst, how their “radicalism”

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<sup>166</sup> Devon W. Carbado & Mitu Gulati, *Race to the Top of the Corporate Ladder: What Minorities Do When They Get There*, 61 WASH. & LEE L. REV. 1645, 1654 (2004).

<sup>167</sup> Wilkins, *supra* note 15, at 1559.

<sup>168</sup> Debra E. Meyerson & Maureen A. Scully, *Tempered Radicalism and the Politics of Ambivalence and Change*, 6 ORG. SCI. 585, 586 (1995).

becomes “tempered” in the process, and what this means for the kinds of social justice claims they are likely to bring.

*D. DIVERSITY (AND ATTEMPTS TO BE DIVERSE) LEGITIMIZE  
ORGANIZATIONAL NORMS AND STRUCTURES*

Diversity has long been recognized as a mechanism by which institutions may bolster their legitimacy. In business, the access-and-legitimacy model of diversity management suggests that organizations need a diverse workforce to gain access to diverse clients and to gain legitimacy with them.<sup>169</sup> In politics, the theory of descriptive representation posits that a political institution must reflect society if it is to be viewed as legitimate by all segments of that society.<sup>170</sup>

Less understood are the ways that the mere presence of diversity—and even attempts to be diverse—may serve to legitimize institutional norms and structures, including those that are discriminatory and unjust. In relation to status hierarchies, Lani Guinier and Gerald Torres note that granting a few members of traditionally excluded groups “insider access” may function simply to suggest that “existing forms of hierarchy are acceptable and merely need to be inclusive of a more diverse group of participants.”<sup>171</sup> Similarly, Guinier and Minow caution: “[T]he presence of diversity is not alone the solution . . . [B]ringing people in without changing the institution can both reproduce and legitimate new forms of marginalization.”<sup>172</sup> To illustrate these concerns, Dianne Otto reflects on how a strategy to achieve gender mainstreaming at the UN ascribes power and legitimacy to the Security Council, “a strategy that is reliant on hegemonic and imperial power to achieve feminist goals, and endorses ‘law-making’ by a completely unrepresentative body.”<sup>173</sup> Susan Carle questions whether a preoccupation with diversity in academic

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<sup>169</sup> See, e.g., David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996, at 79.

<sup>170</sup> See, e.g., ANTHONY H. BIRCH, *THE CONCEPTS AND THEORIES OF MODERN DEMOCRACY* (1993).

<sup>171</sup> LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 125 (2002).

<sup>172</sup> Guinier & Minow, *supra* note 25, at 269.

<sup>173</sup> Dianne Otto, *The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade*, MELB. J. INT’L. L., May 2009, at 16 (“What [was] missing from the strategy . . . was a critical understanding of the Security Council and of the law as vehicles for the realisation of feminist goals. The unaccountability of the Security Council’s ‘great’ powers, and the proven unreliability of ‘law’ to serve the goals that feminist reformers hope for, especially in the legal regulation of sexual conduct, seemed forgotten.”).

institutions might disguise and sustain deeper structural inequalities in those institutions and in society.<sup>174</sup>

The promise of inclusion lies in the potential for the included to change the institution from within. But as inclusion itself becomes institutionalized—and so too the included—that transformative potential might wane in the process. Guinier and Minow caution: “In their efforts to build in mutually reinforcing dimensions of various strategies, reformers who institutionalize change could undermine its dynamic potential. The dynamism of change may simply be captured and domesticated by a different, even if more diverse, elite.”<sup>175</sup> Dianne Otto’s discussion on gender mainstreaming at the UN suggests that “the institutional reception and management of feminist ideas works to divest them of their emancipatory content . . . . Stripped of its political content, the gender mainstreaming project is a long way from fundamentally challenging women’s inequality, let alone the gendered assumptions that underpin the discipline of international law.”<sup>176</sup> Similarly, Hilary Charlesworth disputes the claim that feminists are “running things” in international law, suggesting that it is important not to be “dazzled by the inclusive language” that has spread through the UN system, and that it is necessary to “look below the surface” where inclusive language has made little difference in practice.<sup>177</sup>

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<sup>174</sup> Susan D. Carle, *Progressive Lawyering in Politically Depressing Times: Can New Models for Institutional Self-Reform Achieve More Effective Structural Change?*, 30 HARV. J.L. & GENDER 323, 344 (2007) (“Is the current preoccupation with ‘diversity’ among academic institutions mere window dressing that has pernicious effects in masking far deeper problems of structural inequalities in society? Is a focus on the social identities of faces that occupy privileged positions in academia primarily a question of aesthetics? We want to see female as well as male faces represented among the ranks of academic scientists. But is this because we like academic institutions to project a certain look, involving the pleasing symbolic representation of a multicultural world? And is that preoccupation disguising deeper structural problems, such as lack of job mobility for women in academic settings overall; or the way race and sex combine to create structural barriers for black women in the sciences, . . . or the fact that the questions being asked and the populations being studied in science are still focused on males . . . ? And, least explored of all, does a focus on gender diversity mask growing inequalities and roadblocks to the penetration of elite hierarchies based on powerful but often unmentioned factors such as social and economic class?”).

<sup>175</sup> Guinier & Minow, *supra* note 25, at 275.

<sup>176</sup> Otto, *supra* note 173, at 3.

<sup>177</sup> Hilary Charlesworth, *Talking to Ourselves? Feminist Scholarship in International Law*, in FEMINIST PERSPECTIVES ON CONTEMPORARY INTERNATIONAL LAW: BETWEEN RESISTANCE AND COMPLIANCE? 17, 22–23 (Sari Kouvo & Zoe Pearson eds., 2011) (referring to JANET E. HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006)).

Despite an increasing reliance on diversity initiatives, empirical evidence on their effects on discrimination has been sparse, although a growing body of research is now emerging. This research suggests that the mere existence of diversity initiatives can function to obscure institutional discrimination. In one recent study, Cheryl Kaiser and colleagues tested four types of “diversity structures” (diversity policies, diversity training, diversity awards, and idiosyncratically generated diversity structures from participants’ own organizations) between two “high-status groups” (Whites and men) in tests involving several types of discrimination (discriminatory promotion practices, adverse impact in hiring, wage discrimination).<sup>178</sup> Their findings suggest that:

[D]iversity structures have the potential to create an *illusion of fairness*, whereby high-status group members’ perceptions of how fairly members of underrepresented groups are treated may be influenced by the presence, not the efficacy, of a diversity structure. This illusion, in turn, impairs high-status group members’ ability to detect discrimination against members of underrepresented groups and causes them to react more harshly toward members of underrepresented groups who claim to experience discrimination.<sup>179</sup>

In another study, Lauren Edelman and colleagues examined “legal endogeneity—a powerful process through which institutionalized organizational structures and practices influence judicial conceptions of

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<sup>178</sup> Cheryl R. Kaiser et al., *Presumed Fair: Ironic Effects of Organizational Diversity Structures*, 104 *J. PERSONALITY & SOC. PSYCHOL.* 504, 504 (2013).

<sup>179</sup> *Id.* (emphasis in original). Kaiser and colleagues considered the implications of the illusion of fairness and underestimation of discrimination for organizations, law, diversity initiatives and the targets of discrimination: “[O]rganizations and observers may erroneously use the presence of diversity structures at a company as indicators of the efficacy of diversity efforts, even though these structures might not actually achieve equity . . . . [J]ust as the presence of diversity policies and structures within organizations can make it more difficult for employees of these organizations to recognize discrimination, these policies can also blind judges and juries . . . . Because companies that have diversity structures are seen as more egalitarian and procedurally fair by majority group members, discrimination claims brought against companies by individuals from underrepresented groups will seem even less legitimate to majority group members, increasing the likelihood that they will penalize a discrimination claimant.” *Id.* at 516–17. The authors illustrate this point with the example of “female employees at Wal-Mart Corporation [who] accused Wal-Mart of systematic sex discrimination across stores in the United States. Company representatives retorted that the accusations were unfounded, pointing out that ‘Wal-Mart has had, for many years, strong policies against discrimination and these policies are there to ensure women are promoted and paid well.’” *Id.* at 516.

legality and compliance with anti-discrimination law.”<sup>180</sup> The authors explain:

In some instances, structures become so closely associated with rationality and nondiscriminatory treatment that judges no longer scrutinize their quality or evaluate whether they actually operate to reduce discrimination. In other cases, judges ignore clear evidence that the organizational structures in a particular case fail to ensure fair or nondiscriminatory treatment. Rather, judges simply defer to the structure, assuming that the mere presence of the structure means that the organization is complying with civil rights law, irrespective of whether the structure actually protects employees from discrimination or provides a more rational, fair, and nonarbitrary system of governance.<sup>181</sup>

Edelman and colleagues studied a random sample of 1024 federal employment discrimination decisions from 1965-1999 and found observable manifestations of legal endogeneity.<sup>182</sup> They concluded that “legal endogeneity weakens the impact of law when organizational structures are viewed as indicators of legal compliance even in the face of discriminatory actions.”<sup>183</sup>

The risks of creating an illusion of fairness and legal endogeneity are exacerbated by the increasing use of diversity benchmarking. Consider the Stonewall Workplace Equality Index, marketed as “Britain’s leading tool for employers to measure their efforts to tackle discrimination and create inclusive workplaces for lesbian, gay and bisexual employees.”<sup>184</sup> Colleen Humphrey, Stonewall’s director of Workplace Programs, explains: “At £2,500, annual membership represents value for money and a cost-effective way of implementing employers’ responsibilities under the Equality Act 2010.”<sup>185</sup> Other benefits of membership include “[u]se of the Stonewall logo and sponsorship opportunities [that] help to build your brand reputation in the LGB community, in competitive markets and in the communities you serve.”<sup>186</sup> The Stonewall program arguably creates an illusion of fairness by proclaiming paying members

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<sup>180</sup> Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 888 (2011).

<sup>181</sup> *Id.* at 894.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 888.

<sup>184</sup> STONEWALL, STONEWALL TOP 100 EMPLOYERS 2013: THE WORKPLACE EQUALITY INDEX (2013), available at [http://www.stonewall.org.uk/documents/final\\_top\\_100\\_booklet\\_website\\_version\\_high\\_res.pdf](http://www.stonewall.org.uk/documents/final_top_100_booklet_website_version_high_res.pdf).

<sup>185</sup> *Id.* at 25.

<sup>186</sup> *Id.*

as “Diversity Champions” and anticipates legal endogeneity by suggesting membership as a way of implementing anti-discrimination law.<sup>187</sup>

Now imagine a company that touts its gay-friendly culture: it has a strongly worded diversity policy and an active LGBT committee and it has paid £2500 to become a Diversity Champion. However, a gay male employee of this company does not experience it as being particularly gay-friendly. He is successful at work, but some of his colleagues routinely make insensitive and inappropriate comments, like asking him if he has AIDS. Suppose that a straight male colleague is attempting a humorous caricature of a Ugandan pastor condemning homosexuality that this gay male employee thinks is offensive. Should he object to the caricature or refuse to laugh, his actions might be resented. Should he file a complaint with human resources, the staff might struggle to understand his grievance or adjudge him overly sensitive. More disturbingly, should the gay male employee decide to leave the company as a result of the incident, he will almost certainly find himself on the defensive.<sup>188</sup> The company will have as ammunition not just its diversity policy and its status as a Diversity Champion but also a potential pipeline of gay men willing to attest to how inclusive it is of gay people. Another gay male employee, without any normative commitments of his own and desperate to be a part of the “boys-club,” might corroborate the

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<sup>187</sup> By way of a case study, after the chairman of Barilla Group (which owns the Barilla brand of pasta) said that LGBT people could “go eat another brand” and that he had “no respect for adoption by gay families,” the company issued a statement by CEO Claudio Colzani stating: “Diversity, inclusion and equality have long been grounded in Barilla’s culture, values and code of conduct. They are reflected in our policies and the benefits we provide to all employees, regardless of age, disability, gender, race, religion, or sexual orientation. At the same time, we are committed to promoting diversity further because we firmly believe that it’s the right thing to do.” In addition, Barilla Group announced a newly-established Diversity & Inclusion Board and its participation in the Human Rights Campaign’s Corporate Equality Index. *See Barilla Announces Leadership Initiative in Diversity & Inclusion*, BARILLA (Nov. 4, 2013) <http://www.barillagroup.com/corporate/en/home/media/company-news/barilla-announces-leadership-initiative-in-diversity-and-inclusion.html>; Jase Peebles, *Barilla Pasta Announces New Company ‘Diversity and Inclusion’ Initiative*, ADVOCATE (Nov. 4, 2013), <http://www.advocate.com/business/2013/11/04/barilla-pasta-announces-new-company-diversity-and-inclusion-initiative>.

<sup>188</sup> *See Barry, supra* note 10, at 2 (“[W]e should always look at apparently voluntary self-exclusion with some skepticism. The evaluation of any voluntary act depends on the quality of the choices on offer: that the action chosen appeared to the agent preferable to the alternatives available at the time does not tell us much. Thus, an individual or the members of a group may withdraw from participation in the wider society in response to experience of hostility and discrimination. Here, the actual withdrawal is voluntary but the context within which it occurs still makes it a case of social exclusion . . .”).

caricature as being humorous and light-hearted rather than ignorant and odious. Inclusion that legitimates an institution while discrediting potentially legitimate claims of prejudice does not advance, but rather obstructs, the cause of justice.

*E. DIVERSITY INITIATIVES PRODUCE PARTIAL INCLUSION THAT  
RATIONALIZES PARTIAL EXCLUSION*

Diversity initiatives may be more concerned with signaling diversity than producing it. They may seek to produce “some diversity” so as to make an organization appear benevolent, but not “too much diversity” that might be seen to diminish organizational cohesion or threaten the status quo. Consequently, they may not produce diversity at all, or they may produce *partial* rather than total diversity.<sup>189</sup> Partial diversity means that an organization grants access to a few members of traditionally excluded groups but not to others. Determining who is and is not included is a matter of organizational logic based on competencies and values.

The belief in “meritocracy”—a system in which “merit or talent is the basis for sorting people into positions and distributing rewards”<sup>190</sup>—pervades many organizations today.<sup>191</sup> Proponents stress that everyone in a meritocracy has an equal chance to gain access and obtain rewards, regardless of their class, race, gender and other non-merit factors. In the United States, studies reveal that most people support meritocracy as a social system for allocating resources, believing that this is how the system should work and how it does work.<sup>192</sup>

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<sup>189</sup> See, e.g., Carbado & Gulati, *supra* note 166, at 1658 (identifying partial diversity as one of the consequences of the “diversity constraint” experienced by corporations) (“Large corporations are under some public pressure to racially diversify their management ranks. Thus, there is a disincentive for them to make promotional decisions that result in zero people of color at the top. Corporate racism, in this sense, is often designed to achieve partial, and not total, exclusion.”); Meyer & Rowan, *supra* note 30 (highlighting that organizational procedures and structures are often designed to be “rituals” that are symbolically adopted to gain legitimacy but do not necessarily achieve their stated purpose).

<sup>190</sup> Maureen A. Scully, *Meritocracy*, in BLACKWELL ENCYCLOPEDIA OF BUSINESS ETHICS 412, 412 (P. H. Werhane & R. E. Freeman eds., 1997).

<sup>191</sup> See, e.g., Frank Dobbin et al., *Someone to Watch Over Me: Coupling, Decoupling, and Unintended Consequences in Corporate Equal Opportunity* (Harvard Univ. Dep’t of Sociology, Working Paper 2009) (discussing a survey of personnel procedures used in 826 firms in the United States that found a sharp rise in the percentage of companies using performance evaluations at the workplace, from approximately 45% in 1971 to more than 95% in 2002).

<sup>192</sup> See, e.g., E.C. LADD & K. H. BOWMAN, ATTITUDES TOWARD ECONOMIC INEQUALITY (1998).

This belief in meritocracy has, however, been challenged as being unfounded. Critics point out that non-merit factors suppress, neutralize and negate the effects of merit and create barriers to inclusion.<sup>193</sup> The existence of factors like inheritance, citizenship, location and just plain luck means that, contrary to the adage, the cream does not always rise to the top.<sup>194</sup> According to this criticism, meritocracy does not work for reasons extrinsic to the system, i.e., the non-merit factors that limit the effects of merit. Although valid, this criticism does not capture the ways that the notion of “merit” and the belief in meritocracy themselves perpetuate exclusion and injustice.

The notion of “merit”—the quality of being worthy—is a tool for the definition and promulgation of normative rules about organizational and professional behavior. Often embedded in traditional notions of merit are dominant assumptions about class, race, gender and other social categories of distinction that exclude women and minorities.<sup>195</sup> Anti-discrimination law means that minorities cannot be categorically excluded from an organization in most cases simply because they are minorities. Yet, minority individuals who most closely adhere to traditional notions of merit may be most likely to be included. Carbado and Gulati explain this effect in terms of “palatability,” observing that:

[a] corporation will hire and promote some nonwhites—those it perceives to be, and those it perceives have the capacity to become, racially palatable . . . . A person is racially palatable if she is perceived to be peripherally or unsterotypically nonwhite; she is racially salient if she is perceived to be centrally or stereotypically nonwhite.<sup>196</sup>

Furthermore, certain notions of merit encompass traits like ethical plasticity that could generate negative externalities. Donald Langevoort argues that corporate environments favor people who are “ethically and socially nimble” and “disinclin[ed] to worry about relationships, commitments, or ethical distractions when there is good reason to move

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<sup>193</sup> See STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., *THE MERITOCRACY MYTH* (2004).

<sup>194</sup> *Id.*

<sup>195</sup> See, e.g., Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1006 (1997) (proposing an “equality of result” model that calls on the legal profession to recognize that “racial differences—racial classifications and the identities they produce—do exist among its members, but that the only way to eradicate the illegitimate results created by these differences is to destabilize traditional notions of meritocracy”).

<sup>196</sup> Carbado & Gulati, *supra* note 166, at 1658.



on.”<sup>197</sup> Thus, success within a meritocratic framework does not necessarily promote, and could well undermine, a concern for justice, even where the meritorious individuals are women and minorities.

Inclusion of a few women and minorities may function to perpetuate the “meritocracy myth”<sup>198</sup>—that an institution distributes resources according to merit—without ever questioning, let alone challenging, the underlying notion of merit. This belief in meritocracy may become a socially embedded, if not socially sanctioned, license to discriminate. Emilio Castilla and Stephen Benard demonstrate this “paradox of meritocracy” effect in their study that found that “when an organizational culture promotes meritocracy (compared with when it does not), managers in that organization may ironically show greater bias in favor of men over equally performing women in translating employee performance evaluations into rewards and other key career outcomes.”<sup>199</sup>

Furthermore, inclusion may also engender complacency about tackling persisting inequality and injustice. Deborah Rhode observes how “partial progress” has the ironic effect of creating its own obstacles to further reform:

Women’s growing opportunities are often taken as evidence that the “woman problem” has been solved. . . . [A] common response to gender bias surveys is that barriers have broken down, women have moved up, and full equality is just around the corner. This myth of meritocracy rests on two dominant assumptions: (1) that female lawyers are already achieving close to proportionate representation in almost all professional contexts; and (2) that any lingering disparities are attributable to women’s own “different” choices and capabilities.<sup>200</sup>

Susan Carle points out that a bit of diversity, taken on its own, may actually shield the institution from challenges:

[I]t is not *necessarily* the case that enhancing diversity with respect to one aspect of social identity will lead to an institution becoming more inclusive overall. . . .

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<sup>197</sup> Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV., 1615, 1630 (2004).

<sup>198</sup> See MCNAMEE & MILLER, *supra* note 193.

<sup>199</sup> See Emilio J. Castilla & Stephen Benard, *The Paradox of Meritocracy in Organizations*, 55 ADMIN. SCI. Q. 543 (2010).

<sup>200</sup> Rhode, *supra* note 9, at 585–86.

[W]hile highlighting gender disparities *might* illuminate other forms of institutional unfairness, this is not necessarily or obviously so. Indeed, it can plausibly be argued . . . that change toward more diversity, without more, simply helps to insulate institutions from more fundamental challenges to the way they perpetuate privilege and produce illegitimate hierarchies through unexamined features of their organizational structures.<sup>201</sup>

## V. CONCLUSION

Inclusion politics and strategies are fraught with difficulties akin to those seen with anti-discrimination law. Guy-Uriel Charles reflects on how the civil rights movement stalled following litigation victories like the Supreme Court decision in *Brown v. Board of Education*<sup>202</sup>: “Because of [a] court-centric approach, progressives underestimated the intractability of racial inequality and overestimated the capacity of courts as agents of change.”<sup>203</sup> Today, the promise of anti-discrimination is being replaced by the promise of inclusion, characterized by an analogous overestimation of the capacity of private actors as agents of change and overreliance on inclusion as an instrument of change.

Does this mean that progressives should give up on inclusion? Doing so would disregard the tremendous difference that inclusion has made in certain institutional contexts.<sup>204</sup> The challenge for progressives today is to identify the ways that some kinds of inclusion contribute to making institutions inclusive and just and differentiate them from those that perpetuate exclusion and injustice. The framework developed here can help to assess the effectiveness of inclusion in many institutions while recognizing that different considerations and problems will emerge across different contexts.

A primary question in assessing the effectiveness of inclusion is: *Is inclusion transformative?* Inclusion should aim to be transformative so

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<sup>201</sup> Carle, *supra* note 174, at 347; *see also* Lobel, *supra* note 2, at 952 (observing, in the context of workplace equality, that “the claims of various identity groups for inclusion often come at the price of a more comprehensive agenda about workplace justice and the fair and decent treatment of all workers”).

<sup>202</sup> *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

<sup>203</sup> Charles, *supra* note 4, at 355.

<sup>204</sup> *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 193 (1990) (noting that “[b]uilding from both the women’s movement of the 1960s and the increasing presence of women in the academy, women—and men—have addressed anthropology, psychology, sociology, philosophy, history, literature, and even science with questions about women’s experiences and perspectives”).

as to disturb the institutional framework that generates inequitable outcomes. The transformative potential of inclusion, however, is neither a given, nor static. Nancy Polikoff observes:

Demands for social change often have begun with a movement at first articulating the rhetoric of radical transformation and then later discarding that rhetoric to make the demands more socially acceptable. The movement's rhetoric is modified or altered when those opposing reform explore the radical and transformative possibilities of that rhetoric, causing its advocates to issue reassurances promising that such transformation is not what the movement is about at all.<sup>205</sup>

Perhaps many of today's progressives have given up on transformation as a goal for social and legal reform,<sup>206</sup> but that fact in itself does not diminish the normative value of transformation for social movements. Inclusion that does not disturb the institutional framework generating inequitable outcomes may do little to further the cause of justice, no matter how beneficial it may be for the included.

A second question one must ask is: *Is inclusion the only strategy?* Understanding the limits of inclusion reveals the perils of uncritical reliance on one strategy and the need to develop multiple courses of action. Dianne Otto argues: “[A]ctivism outside the UN’s institutions is essential to counter the unintended effects of institutionalisation and needs to resist becoming fully ‘harnessed’ by the institution. Feminist goals are not served by misreading institutional inclusion as feminist activism.”<sup>207</sup> Ronald Labonte asks: “To what degree might we consider willful social exclusion by groups an important moment of conflict, an empowered act of resistance to socio-economic systems that, by their logic and rules, continue to replicate and heighten the material hierarchies of inequality?”<sup>208</sup> In some instances, the *principled rejection* of an institution could be an alternative way for excluded groups to seek social justice. Principled rejection is a choice based on a calculation of the pros and cons of different strategies for achieving justice: institutional inclusion and acceptance on the one hand and self-exclusion and rejection on the other. Rejection involves *acting* from outside of the

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<sup>205</sup> Polikoff, *supra* note 80, at 1541.

<sup>206</sup> See, e.g., Carle, *supra* note 174, at 328 (“Many of today’s reformers have abandoned grand hopes for fundamental change as the long-term goal of their work. Instead, they have moved toward a model for social change that looks for micro-locations of possibility for minor interruptions or interventions. These may shake established structures loose a bit, but really cannot be expected to achieve much more than that.”).

<sup>207</sup> Otto, *supra* note 173, at 19.

<sup>208</sup> Labonte, *supra* note 20, at 117.

institution in the interests of justice; it should not be mistaken for symbolic acts without further action. Nor is it avoiding or ‘opting out’ of an institution; such avoidance would be self-defeating because it conceals the ways that societal institutions play a crucial role in all spheres of life.<sup>209</sup> To illustrate this point, couples might ‘opt out’ of marriage by choosing not to marry, but their lives will continue to be impacted by a legal regime that privileges marriage above all other relationships. By contrast, a principled rejection of marriage would involve denouncing the ascendancy of marriage and advocating law reform that values all families. This could well further the cause of justice more than seeking inclusion in marriage exactly as it exists. Of course, rejection connotes a choice to be made, and choice is a privilege not available equally to everyone. For many, inclusion will be the only tenable solution to their plight, or self-exclusion will come at too great a price. But to the extent that inclusion is used as a strategy to achieve social justice, it should be employed in the manner that may best promote social justice.

This brings us to a third question: *Is it the right inclusion?* Implicit in this inquiry into inclusion that may fail to achieve social justice is the recognition that inclusion need not always fail in this respect. An overarching aim of this Article has been to forge stronger links between inclusion and social justice. In the same vein, Iris Marion Young argues for a model of deliberative democracy that “implies a strong meaning of inclusion and political equality which, when implemented, increases the likelihood that democratic decision-making processes will promote justice.”<sup>210</sup> Of particular concern has been the tendency of equality claims for inclusion to conflate equality and sameness. However, Sandra Fredman points out that a “rich idea of equality sees equality as participation and inclusion of all groups, which in turn requires valuing difference and at times treating groups relevantly differently.”<sup>211</sup> Asking about the kinds of inclusion being sought by and granted to excluded groups is crucial to securing inclusion that may achieve social justice.

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<sup>209</sup> See, e.g., Lobel, *supra* note 2, at 982 (arguing that “[r]ather than opting out of the legal arena, it is possible to accept the need to diversify modes of activism and legal categories while using legal reform in ways that are responsive to new realities”).

<sup>210</sup> IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 6 (2000).

<sup>211</sup> Sandra Fredman, *Equality: A New Generation?*, 30 *INDUS. L.J.* 145, 157 (2001).

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