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*Equality and the Dialectic between Identity and Difference*

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# EQUALITY AND THE DIALECTIC BETWEEN IDENTITY AND DIFFERENCE

By Michel Rosenfeld\*

## 1. Introduction

Modern equality which emerged from the Enlightenment's repudiation of feudalism has had a vexing and persistent problem with difference. Feudalism was built upon status-based differences which divided society into inherently unequal classes of people: noblemen, clergymen, commoners, and serfs. The legacy of the Enlightenment and the core precept of political liberalism, in contrast, is that all human beings are equal because they all share a common identity as autonomous agents with a capacity for moral choice<sup>1</sup>. Consistent with this, equality has been largely correlated to identity and inequality to difference.

Unlike in feudalism, where status-based inequality is a given, in liberalism, equality is the norm, and inequality can only be justified on the basis of the existence of relevant differences. Thus, within a liberal framework, for example, men and women are inherently equal, but differences between the sexes may be invoked in efforts to justify

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<sup>1</sup> There are many different formulations of this essential liberal insight. Rawls, for example, put it in terms of each individual having the capacity to devise and pursue his or her own "plan of life". See John Rawls, *A Theory of Justice* 92-94 (1971). The capacity in question, which is inherently tied to individual autonomy and dignity, is to be taken counterfactually. In other words, because individual moral choice derives from human autonomy and dignity, the fact that the very young, very old or severely disabled may not actually be able to exercise moral choice should not be regarded as detracting from their status as equals. Accordingly, the latter should be treated counterfactually, i.e., as if they could chose for themselves and in terms of as much as possible what they would have chosen had they been able to.

casting women as legal or political unequals<sup>2</sup>. Historically, moreover, embrace of the principle of equality has not resulted in a rapid or even spread of political or legal equality within the polity. Indeed, in many democracies women were denied the franchise for a long time *because* of real or constructed differences among the sexes, while African-Americans in the United States were first enslaved and then treated as free but inferior citizens *because* of racial differences<sup>3</sup>. Furthermore, to the extent that over time legal and political equality have actually achieved greater conformity with the principle of equality, this has been largely due to stress on identities at the expense of differences. Thus, for example, it is now accepted that women and men, and blacks and whites, ought to be treated equally in the realms of politics and employment. This is associated with the belief that gender-based differences and race-based ones have no relevance to suitability for political participation or, in most cases, in relation to qualifications for employment<sup>4</sup>. In short, it seems that once the liberal principle of equality is in place, the actual achievement of equality in various realms such as those of law and politics depends on an evolving shift of focus from differences to identities.

In this context, more recent demands for equality based on identity politics, which call for equality taking account of differences rather than in spite of them, to give full expression to such differences rather than underemphasizing them or restraining them,

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<sup>2</sup> See, e.g., *Bradwell v. Illinois*, 83 U.S. 130 (1873) (barring women from admission to the bar and from practicing law upheld based, in part, on belief of women's greater suitability for raising children in the family home).

<sup>3</sup> See, e.g., the infamous decision in *Dred Scott v. Sanford*, 60 U.S.393 (1857) (slavery argued to be justified based on purported differences between the white and black races), and *Plessy v. Ferguson*, 163 U.S. 537 (1896) (racial segregation in public accommodations held not to violate constitutional equality rights because of supposed differences among the races).

<sup>4</sup>In some small numbers of cases, differences in sex may still be relevant in the realm of employment. For instance, it does not seem inconsistent with legal equality that only women be eligible to play the leading female role in a movie.

have been troubling and perplexing for political liberals. For example, underneath a claim for equal treatment of all religions -- i.e., a claim that from a legal and political standpoint all religions ought to be treated identically in spite of their differences -- may lurk a demand for recognition and acceptance of treatment of women as subordinate in accordance with religious doctrine. In other words, if you take seriously that all religions *qua* religions are identical in the sense that they deserve equal recognition and protection under the law, then you must tolerate or even actively protect the subordination of women to the extent that it derives from an essential precept of one of the active religions within the polity.

How should liberalism handle such identity-based claims for difference? By creating exceptions to generally applicable laws? By promoting group-based autonomy and self-government even at the risk of balkanizing the polity? Or, on the contrary, by rejecting such demands for recognition of differences and by reinforcing equality as identity?

Building upon the idea that liberalism requires establishing a single-status community that must aim at self-realization through law, politics and social relations, Jeremy Waldron advocates responding to claims based on cultural difference by allowing a place for them in the political marketplace of ideas<sup>5</sup>. In essence, what Professor Waldron proposes is that claims to legal or institutional recognition and accommodation of cultural difference be given a fair hearing in the lawmaking process. If an open-minded majority decides to provide accommodation, all the better. If not, that means that the clash between liberalism and the particular cultural difference involved is

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<sup>5</sup> See Jeremy Waldron, *Status versus Equality: The Accommodation of Differences*, in this volume, *supra*, at \_\_\_\_.

irreconcilable and that equality as identity must trump attempts to institutionalize equality-as-difference<sup>6</sup>.

The thesis I defend in what follows is that commitment to equal status on the basis of having the same capacity for moral choice -- a commitment that both Professor Waldron and I share -- does not entail adherence to equality as identity *above* equality-as-difference or require as limited an incorporation of cultural difference as Professor Waldron proposes. If the modern conception of equality is understood dialectically, then commitment to equal status leads eventually beyond liberalism to pluralism and beyond the monolithic nation-state to more elastic and more diverse multi-layered interconnected centers of collective autonomy and self-government. Moreover, within the pluralist perspective and beyond the conception of the polity as a unitary and indivisible nation-state, it becomes apparent that Professor Waldron's conception of equal status leads him to shortchange cultural difference.

To lay out the argument in support of this thesis, Part 2 provides a brief account of the dialectic of equality as a succession of attempts to better reconcile identity and difference. Part 3 indicates why, when placed in proper historical perspective, commitment to equal status eventually calls for transition from liberalism to pluralism. Part 4 takes a closer look at the dynamic between identity and difference. Part 5 inquires into the relationship between equal status and divisibility of the polity. Part 6 assesses cultural differences in the context of pluralism and of the dialectic of equality. Finally, Part 7 considers what legal and institutional framework seems best suited to achieve accommodation of cultural difference consistent with the conclusions reached in Part 6.

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<sup>6</sup> *See, id.*, at \_\_\_ for Professor Waldron's own statement of this view.

## **2. *The Dialectic of Equality: A Three Stage Progression***

Going back to Aristotle, justice and equality require treating equals equally and unequals unequally<sup>7</sup>, or, in other words, treating everyone proportionately. Treating equals unequally or unequals equally is disproportionate as is treating unequals more unequally than they are unequal. The criterion of proportionality, however, does not tell us who is equal to whom, or what makes one equal or unequal to another. To be able to answer these questions it is necessary to have a baseline as well as indicia of identity and of difference, and these vary depending on one's substantive normative criteria. Thus, in a multi-status feudal society one's very being makes one the equal of some and the unequal of others. In a single-status society, in contrast, all human beings as such are equals and, by and large can only become unequals by virtue of what they do or suffer. In a feudal society thus, inequality is the baseline -- e.g., the serf is unequal to the lord from birth till death because of who each of them is -- whereas in a modern single-status society equality is the baseline. In a feudal society, one can be treated unequally because of who one is, whereas in a single-status society, one cannot.

Since in post-Enlightenment liberal single-status societies all humans are considered inherently equal, unequal treatment can only be justified on account of differences between those involved. For example, dispensing free medicine to the sick but not the remainder of the citizenry is justified in terms of differences regarding health and well being. More generally, proportional treatment, sometimes requiring equal treatment, sometimes unequal, depends on identities and differences with respect to what those involved do or suffer. Moreover, it is clear that not all identities or differences are

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<sup>7</sup> See Aristotle, *Nicomachean Ethics*, Bk v.

relevant in the circumstances involved -- e.g., race, sex or eye color differences are irrelevant in the context of dispensing free medicines to cure the sick -- but which identities and which differences ought to be taken into account in given circumstances is often a source of disagreement -- e.g., libertarians do not believe that differences in wealth justify redistribution through taxation and welfare payments whereas egalitarians do.

Ideally, single status societies with equality as the baseline could achieve justice, equality, and proportionality by properly accounting for all *relevant* identities and differences and by disregarding all identities and differences that are irrelevant. This task is not only fraught with great difficulty because of disagreements over the relevance of particular identities or differences, but also because even among those who may be in general agreement concerning such relevance, an identity or difference relevant in one context may be irrelevant in another. For example, there is widespread agreement that religious differences should be irrelevant in the allocation of competitive positions in the liberal professions. However, many who share this latter view would undoubtedly also agree that religious differences ought to matter where accommodation of religion is appropriate -- e.g., facilitating observance of a religiously mandated day of rest would require freeing Muslims on Friday, Jews on Saturday and Christians on Sunday.

In spite of these inevitable disagreements and difficulties, if the origin of modern single-status equality is placed in its historical context and if its conceptual deployment is understood in terms of the dialectic that animates it, one can obtain sufficient insights to determine how cultural difference ought to be treated. Indeed, single-status equality was set against multiple status hierarchy with inequality as the baseline. The most dramatic

historical confrontation between the two, moreover, was the one that occurred during the French Revolution. The revolutionaries leveled all feudal hierarchies and institutionalized a new order based on equal citizenship. In principle and in the abstract, equal citizenship was meant to provide the glue for the single status society and to extend to all individuals within the polity. In practice, however, the concept of equal citizenship had to perform two separate tasks. Looking backward, it stood for negation of the absolute monarch and of feudal privilege; projected forward, on the other hand, equal citizenship was supposed to stand for affirmation of the political equality of all (adult) persons belonging to the polity. Significantly, the French Revolution led to achievement of equal citizenship's negative mission, but not of its affirmative one. It abolished feudal privilege, but it did not extend its benefits to all adults, as, for example, women were not granted the franchise<sup>8</sup>.

It is this discrepancy between concept and practice that sets off the dialectic of equality in modern single-status societies. Those who benefit from the discrepancy are drawn into a struggle with those who suffer from it and seek to overcome it. Moreover, depending on whether one is a beneficiary of a discrepancy or a victim of it, one is more likely to stress identity or difference. Thus, when men alone had the franchise they could only justify the *status quo*, consistent with baseline equality, by pointing to differences (real or constructed) between the sexes, such as that women's responsibilities at the family home left them no time to become informed about political issues and thus they could not exercise the franchise responsibly. Conversely, women under those

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<sup>8</sup> In fact, women were not accorded the right to vote in France until 1944. See <http://www.justice.gouv.fr/actualites/60ansvotefemmes.htm>. Similarly, in the United States, notwithstanding the 1776 Declaration of Independence's famous dictum that "All men are created equal" (meaning 'all humans') women did not obtain the right to vote till 1920. See U.S. Const. Amend. XIX.



circumstances could only combat the *status quo* by denying the differences claimed by men and by stressing identities between the sexes<sup>9</sup>. Accordingly, in the struggles traceable to discrepancies between concept and practice, above and beyond the particular identities and differences that may be relevant, there is a more general tendency to stress identity at the expense of difference or vice versa. Moreover, it is the general tendency that will give direction to the dialectic and hopefully furnish sufficient guidance to deal in a principled manner with the problem of cultural difference. Finally, the need to adhere to a tendency that overly stresses identity or difference in order to overcome a discrepancy skews the optimal balance between identity and difference for those engaged in the struggle regarding that discrepancy. This skewing, in turn, may lead to new discrepancies or exacerbate existing ones. As we shall now see, the adverse effects of the skewing in question leads to new struggles that give shape to the evolving dialectic of equality.

Looking at the trajectory of claims since the institution of modern baseline equality, one can discern a dialectical process that has unfolded in three distinct stages. These stages can be characterized respectively as 1): difference as inequality; 2) equality as identity; and 3) equality as difference. These stages represent above all a logical progression, and although in their broad outlines they have succeeded one another over time, there is no inevitable historical progress. As a matter of fact, there are unavoidable setbacks, reversals, and inconsistencies and time lags among various particular domains of equality. Overall, however, the dialectic operates through shifts in predominance

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<sup>9</sup> I use 'men and 'women' here as shorthand for 'advocates to restrict political rights to men' and 'advocates to extend such rights to women' respectively. It is of course obvious that some men fall in the latter category, and some women in the former.

alternating between identity and difference. Moreover, whereas there may be a fairly constant conflict concerning the relevance of particular identities or differences, the predominance of identity or difference at a given stage of the dialectic imposes a certain order on the realm of particular identities and differences in play, and orients the clashes among them towards certain paths to resolution to the exclusion of other paths.

To illustrate how this three stage dialectic unfolds, I shall focus on the evolving struggle regarding equality between the sexes, which includes but is not limited to issues of gender-based equality. Not only is this example particularly useful because few would deny that some differences between the sexes ought to count while others ought not, but also because frequently claims for recognition of cultural difference seem to clash with *adherence* to women's equality rights<sup>10</sup>.

The subordination of women to men was prevalent during feudalism and congruent with feudalism's status-based stratification, but not necessarily entailed by it. On the other hand, upon the toppling of feudalism and the institution of a single status society, commitment to baseline equality called for elimination of the subordination of women. But whereas this was entailed by the concept upon which the single status society was founded, it was resisted as a practical matter, lest the changes brought by the overthrow of feudalism became too radical or too disruptive to permit a successful transition into a post-feudal order. Consistent with this, a contradiction arose between baseline equality as a general precept and the continuing subordination of women as a matter of practice. In an attempt to overcome this contradiction and to remain faithful to

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<sup>10</sup> See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Pueblo Tribe patriarchal institutional order privileges inheritance rules that clash with woman member's fundamental equality rights under U.S. law).

baseline equality, focus was brought to bear on plausible differences between the sexes which might justify unequal treatment. Specifically, there developed an overemphasis on real and constructed differences between the sexes, including physical and psychological differences as well as those stemming from differentiated gender-based social roles. Thus, pursuant to these perspectives, women were in principle equal to men, but in practice they were perceived as physically weaker, psychologically less stable, and socially as best suited for the role of wife and mother in the home<sup>11</sup>. In sum, in stage 1 equality, women are nominally the equals of men, but with emphasis on the above mentioned differences, they are persistently portrayed as deserving unequal treatment.

To overcome the disadvantages they experience, in stage 1, it is not enough for women to insist on the principle of baseline equality. Instead, they must counter the overemphasis on difference with a concerted effort to shift attention to identity. Focusing on identity is meant to take away from assertions of difference which have come to connote inferiority and hence to lend apparent justification to continuing subordination. In short, in stage 2, women can demand equal treatment by claiming that for all relevant purposes they are essentially similar to men.

For example, in the 1970's feminists in the United States fought against gender based discrimination in employment by stressing identities over differences. Employers had sought to justify discrimination against women on the grounds that the latter were less reliable than men because more apt to leave employment in a few years to start a family and raise children. To counter that perception, many women actually chose to postpone or forgo having children to demonstrate that they were no different than men in

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<sup>11</sup> See *Bradwell v. Illinois*, *supra* which draws on some of these beliefs to justify banning women from practicing law.

the context of employment. What feminists were then advocating, which eventually met with widespread success, was equality as identity.

Passage to stage 2 equality overcomes the contradictions of stage 1, but comes at a price. The shift of focus from difference to identity requires suppression of, or downplaying, certain differences, and that may give rise to new forms of inequality. Thus, for example, to gain equality in employment, certain women may have had to suppress their desire to raise children, thus postponing or abandoning an important part of what they saw as essential to their self-fulfillment in order not to lose the chance to enjoy the satisfaction they sought to derive from a professional career. To the extent that men do not confront such a choice, the pursuit of equality as identity causes women to confront a new form of inequality.<sup>12</sup>

Another consequence of the shift to stage 2 equality is an increase in the level of abstraction suited to the comparisons needed to entrench equality as identity. To justify inequalities in stage 1, real and constructed differences had to be exaggerated and de-contextualized to make them appear as so particular and concrete that they could not be explained away within a larger framework. For its part, the struggle to overcome stage 1 equality and to reach equality as identity required opposing de-contextualized concrete differences through overemphasis on identities. Such emphasis depended on de-contextualizing identities by casting similarities at higher levels of abstractions. For example, to counter the argument that women can be treated differently than men

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<sup>12</sup> See Martha Minow, *Justice Engendered*, 101 Harvard L. Rev. 10 (1987) (arguing that U.S. Supreme Court sex discrimination jurisprudence posits men's experience as the "norm" against which women are measured).

*because* of concrete physical differences between the sexes<sup>13</sup>, one could ascend to the highest level of abstraction and claim that ultimately men and women are identical since they all are human beings. The latter argument is not likely to be effective because it is so abstract that it does not engage claims of difference made from the standpoint of stage 1 equality. A somewhat less abstract argument, however, could be made which would sufficiently address the claims of difference made by an antagonist without abandoning a perspective within which identity remains predominant. For example, the claim that women make less desirable employees because after they are trained they are likely to leave to bear and raise children can be countered by the claim that women are as capable as men to excel in their jobs and that all employees, men and women alike, are subjected to unforeseen circumstances, such as sickness, desire for a career change, etc, which may end up being detrimental to the interests of employers. The most effective strategy against stage 1 arguments, therefore, is to increase the levels of abstraction no more than necessary to neutralize existing advantages based on uses of difference to maintain inequalities, or to portray equality as identity as a more attractive alternative<sup>14</sup>. In any

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<sup>13</sup>See, e.g., *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981) (punishing underage male but not underage female for consensual sex held constitutional on account of fact that only females risk pregnancy. Dissenting opinion argued that invocation of the physical difference in question masked the real reason for differential treatment, which was the biased belief that sixteen years old females were incapable of consenting to sexual relations).

<sup>14</sup> A good example is provided in the now invalidated decision in *Bowers v. Hardwick*, 478 U.S.186 (1986) overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003). The majority in *Bowers* held that it was constitutional to criminalize consensual sodomy among same-sex adult partners even if opposite sex sodomy was legal. The Court's majority in this 5-4 decision, focused on differences between homosexuals and heterosexuals and invoked a history or moral and legal condemnation of homosexuality going back to Judeo-Christian scriptures and extending throughout the history of the common law. The dissenters, in contrast, emphasized that all adults should be left alone to choose adult partners for consensual intimate sexual relations regardless of whether the couplings involved are homosexuals or heterosexual. For the dissenters, therefore, because homosexual sex satisfies the same needs for those who engage in it as does heterosexual sex for those whose choice it is, it ought to be a constitutionally protected privacy right, not a criminal act.

event, what is crucial in the context of the transition to stage 2 equality is that to counter the de-contextualized concreteness of differences it is necessary to press de-contextualized identities at a sufficient level of abstraction to allow for a persuasive case in favor of equal treatment and against entrenched inequalities set in place by the deployment of stage 1 equality.

Equality as identity requires suppressing differences. Moreover, as the above example of women who have to conform to rules designed for men to be accepted as equals in the workplace indicates, often achieving identity demands greater sacrifices from some classes of people than from other classes, hence creating a new inequality. But even aside from that, by requiring that all individuals repress or restrain differences, stage 2 equality frustrates expression of differences and significantly limits the potential for individual self-fulfillment.

Stage 3 equality seeks to overcome both these inequalities and these frustrations by encompassing differences rather than rejecting them. There is no question of reverting to stage 1 treatment of difference as a badge of inferiority (or superiority). Instead, equality is meant to be recast so as to treat every one equally according to the needs and aspirations of each, regardless of whether these stem from similarities or differences among the members of society. Thus, for example, consistent with stage 3 equality, the workplace would accommodate women's desire to both work and have children by allowing for generous leaves, flexible work hours, providing day care, etc. Similarly, in the context of stage 3 equality, a woman's right to have an abortion can be defended as deriving from equality between the sexes. Indeed without a right to abortion a woman

would not have the same control over her body as does a man<sup>15</sup>. More generally, equality as difference seeks to recontextualize identity and difference and to strike a proper balance between them by fostering as much diversity as possible without shattering the unity necessary to preserve identity. The point is to realize that not only is the other like my self in that we both have moral capacity and a perspective of our own, but also that the other has a perspective that is different than mine. In stage 2 equality it is sufficient to treat the other as the owner of a perspective; in contrast, in stage 3 the perspective of the other must be taken into full account.

The pursuit of equality as difference confronts two serious problems. One is the danger of falling back into stage 1. The other is that given the actual differences present in a given society, that society cannot strike a working balance between unity and diversity, or cannot accommodate some differences without suppressing others.

From a *dialectical* standpoint, there is no danger that an attempted transition to stage 3 equality would backfire resulting into a retreat to stage 1. Dialectically, stage 3 resolves the conflicts of the preceding stages and strikes the proper balance between identity and difference by reframing and recasting their relationship. From the standpoint of internalization of the normative and institutional implications of the dialectic of equality in real historical time, however, it is all too possible that some with a purely superficial adherence to stage 2 equality would regard emphasis on suppressed differences as a license to revert to their use for purposes of fostering inequality. Therefore, there may be cases in which it would be logical, but perhaps not politically advisable, to ask for transition to equality as difference.

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<sup>15</sup> See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 North Carolina Law Review 375 (1985).

The dialectic of equality does not by itself provide a solution to the second problem. To determine whether apparent impossibilities relating to striking a minimum balance between unity and diversity or to simultaneously satisfying seemingly mutually exclusive differences can be overcome, it is necessary to turn to more comprehensive theories that place equality in a broader context. Two such theories, liberalism and pluralism, are particularly attractive because they endorse the single-status society, the proposition that all humans have an equal moral capacity, and equality as the baseline.

### ***3. From Liberalism to Pluralism***

Equality is central to both liberalism and pluralism and they each provide criteria of justice, a coherent normative perspective, a vision concerning the “basic structure” of society to use Rawls’s expression<sup>16</sup>, and institutional guidance for dealing with conflicting demands regarding equality. Liberalism places equality within an individualistic framework where the pursuit of individual self-realization within the ambit of just institutions is paramount<sup>17</sup>. Pluralism, on the other hand, and particularly ‘comprehensive pluralism’ which I have elaborated elsewhere<sup>18</sup>, focuses more on equality among the diverse identities variously embraced by different individuals or

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<sup>16</sup> See John Rawls, *A Theory of Justice*, *supra*, at 11-12.

<sup>17</sup> There is a wide range of liberal views as thinkers as diverse as John Stuart Mill, John Rawls, Robert Nozick, Joseph Raz, Ronald Dworkin, Richard Posner and Jeremy Waldron are all proponents of liberalism. Nevertheless, in relation to the divide between liberalism and pluralism all these thinkers remain firmly within the liberal camp.

<sup>18</sup> See Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics*, esp. chaps. 7 and 8 (1998).



groups within a pluralistic society<sup>19</sup>, than an equality among individuals because they each possess an identity. What is paramount for pluralism is not individualism, but promotion of mutual respect and mutual accommodation among as many proponents of competing conceptions of the good as possible. As we will now see, liberalism goes hand in hand with equality as identity, and pluralism with equality as difference. Hence, I will argue that pluralism is superior to liberalism from the standpoint of equality, and will indicate how, in any event, pluralism is better suited to accommodate cultural difference than is liberalism.

Historically, liberalism has played a crucial role in the evolution toward equality. Liberalism in all its versions posits individual equality above all hierarchy and stands for some conception of equality as identity<sup>20</sup>. By positing equal individual autonomy and an equal opportunity for individual pursuit of self-realization<sup>21</sup> as paramount, liberals leave virtually no room for anti-individualistic views or conceptions of the good. It allows for some limited tolerance of non-individualistic views, but is ill-suited to accommodate non-individualistic difference, in general, and collectively based cultural difference in

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<sup>19</sup> Comprehensive pluralism draws a distinction between the fact that a polity is pluralistic or “pluralism-in-fact” -- i.e., different individuals or groups within the polity actually embrace a multiplicity of conceptions of the good that compete, or may be in conflict with one another -- and that the polity ought to have an affirmative obligation to accommodate as many conceptions of the good found within it consistent with the principle of equal accommodation, which position can be referred to as “pluralism-as-norm”. See Michel Rosenfeld, *Just Interpretations*, at 200-01.

<sup>20</sup> It is noteworthy in this respect that a nineteenth century liberal like John Stuart Mill was a champion for stage 2 equality for women. See his *The Subject of Women* (1869).

<sup>21</sup> While agreeing on these general propositions, liberals disagree on what is needed to secure such equal opportunity. For some, it is purely formal equal rights, see e.g., Robert Nozick, *Anarchy, State and Utopia* (1974); for others, it also includes material rights that call for some measure of wealth redistribution, see, e.g., John Rawls, *A Theory of Justice*, *supra*. These differences, however, have no impact on the contrast between liberalism and pluralism.

particular. In short, liberalism is suited to accommodate individual-regarding differences, but not group-regarding ones<sup>22</sup>.

By privileging individual-regarding differences over group-regarding ones, liberalism allows for subordination or disregard of the latter whenever they conflict with the former. With respect to conflicts and incompatibilities among individual-regarding differences, on the other hand, liberalism endeavors to provide neutral rules or standards - - neutral in the sense that they are meant not to favor any of the contending differences over others<sup>23</sup>-- to sort out the difficulties, and if needed to separate the differences that can be accommodated from those that cannot. Moreover, liberalism seems to work best when two institutional devices work smoothly and are accepted as equitable and legitimate. These are: the separation between the public sphere and the private sphere and an open and accessible forum for democratic debate and lawmaking.

The divide between the private sphere and the public sphere allows for space for individual-regarding differences and non-threatening (to liberalism) group-regarding ones buttressed by constitutional protections (e.g., property, privacy, freedom of expression, of assembly) without threatening the unity of the liberal polity. The private sphere thus becomes the realm of (limited) difference, and the public sphere that of unity and equality as identity. So long as the public sphere remains very restricted and the private sphere sharply separated from it, liberalism can accommodate a great deal of difference. In

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<sup>22</sup>Whereas some collective rights can be recast as individual rights -- e.g., the practice of some religions can be safeguarded either through collective rights belonging to the religion as an organized self-governing entity or through individual rights to freedom of expression, freedom of religion and freedom of assembly - others cannot -- e.g., language rights can only be meaningful as groups rights, and the same is true for indigenous tribes functioning as self-contained religious and cultural units under sacred ancestral rules of kinship.

<sup>23</sup> For a critique of liberalism's claims to neutrality, see Michel Rosenfeld, *A Pluralist Critique of Contractarian Proceduralism*, 11 *Ratio Juris* 291 (1998).

more recent times, with the advent of the welfare state and the pervasive expansion of public education, however, the spread and importance of the public sphere has not only greatly increased, but also the boundaries between the two spheres have become increasingly blurred. Under these latter circumstances, liberalism's stress on individualism and equality as identity must become much more aggressive lest the public sphere become dangerously balkanized or seriously risk being taken over by proponents of anti-liberal ideologies<sup>24</sup>.

The forum for democratic debate and lawmaking, on the other hand, provides a procedure that is arguably neutral for settling conflicts among competing differences that do not qualify for constitutional protection. After full debate on how to prioritize competing differences, disagreements are settled by majority vote. As mentioned above, Professor Waldron suggests submitting cultural difference to a somewhat idealized version of this democratic process<sup>25</sup>. This democratic process, however, can only strike losers as fair and legitimate if there is enough unity and identity within the polity so as to avoid a permanent "we" versus "they" division in which the "they" are always in the minority<sup>26</sup> and hence perennial losers. Accordingly, within a unified polity with strong

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<sup>24</sup>The need too reinforce liberal unity and identity does not necessitate foregoing all difference or all stage 3 equality. For example, abortion rights based on equality as difference considerations seem entirely compatible with liberal individualism. Moreover, even a fair amount of cultural difference may be tolerated, although there may be disagreements concerning specific differences from one setting to another. Thus, two liberal polities, France and the United States treat girls seeking to wear the Muslim veil to public school very differently. The French prohibit it, *See French Law 2004-228 of March 15, 2004*, while the Americans permit it, *See, e.g., Muslim Girl in Oklahoma Public School OK'd to Wear Headscarff*, Dallas Morning News, Nov. 12, 2004.. There are many possible explanations for this discrepancy. One is that whereas the American regard wearing the veil as an expression of individuality, the French regard it as an assertion of an anti-liberal (and anti-republican) collective identity.

<sup>25</sup>*See supra*, at \_\_\_\_.

<sup>26</sup>*Cf.* John Hart Ely. *Democracy and Distrust: A Theory of Judicial Review* (1980) (arguing, largely based on the example of race relations in the United States, that permanent "we"/"they" politics distorts democracy and calls for judicial intervention to protect discriminated against minorities).

liberal values and a firm commitment to equality as identity, the democratic process may be optimal as a means to settle policy differences as all participants within the process are likely to be winners some days on some issues and losers on other days on other issues. A cultural minority, and particularly one that adheres to illiberal values, in contrast, seems bound to be permanently relegated to a loser status within such a democracy.

Although pluralism, and in particular comprehensive pluralism, shares much in common with liberalism, it also differs from the latter in two key respects that are critical for present purposes. First, pluralism does not privilege the individual over the group (or vice versa) and therefore does not impose individualism as the norm. Second, pluralism is inherently more open to difference than is liberalism, with the consequence that it is more apt to being open to non-mainstream perspectives, and to the particular importance that a given claim may have *within* the perspective or conception of the good from which it is issued. Moreover, because of its greater openness to difference, pluralism is far better suited for the institution of equality as difference than is liberalism.

Pluralism's rejection of liberalism's inextricable attachment to individualism does not entail repudiation of the individual's capacity for moral choice as providing the equality baseline for single-status societies. What pluralism does reject, however, is liberalism's bias for individualist choices and objectives and its privileging individual pursuits over collective ones. In theory at least, every individual should be free to choose the conception of the good that suits her the best<sup>27</sup>, and such conception may as well be an individualist one as a community-based one. For example, one person may seek self-

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<sup>27</sup> In practice, such choice is bound to be limited by historical, cultural, educational and various other circumstances.

fulfillment through adhesion to a monastic order in which individuals agree to be bound by strict communal norms.

Upon close inspection, liberal individualism is as dependent on collective institutions and commitments as communal-based ideologies consistent with pluralism are on the integrity of the individual. Indeed, a liberal-individualistic polity is not made up of mutual independent monads who interact by accident. Such polity is instead dependent on a shared collective vision and collective institutions, such as strong institutional protection of fundamental individual rights, of contractual rights, and of a culture that promotes individual self-reliance and self-fulfillment. For its part, pluralism though indifferent as between individualist and communal-based ideology, can only accept communally bound groupings that afford respect to individual integrity. At a minimum such groups should grant a right of exit to those individuals who disagree fundamentally with the group's aims or who feel oppressed within it. At best, such groups, should afford each of their members a voice in shaping and carrying out communal affairs.

The second key difference between pluralism and liberalism allows the former to be much more encompassing of diverse perspectives and conceptions of the good without, however, becoming all accepting. From comprehensive pluralism's standpoint, all conceptions of the good with one or a multitude of proponents within a society are *prima facie* entitled to equal acceptance. If such acceptance could be actually realized, it would result in complete and unrestricted realization of stage 3 equality. In no pluralistic society, however, is that ever possible as some conceptions of the good may seek elimination or suppression of others, or even were that not the case, as deployment of the

projects derived from one conception would inevitably bump up against the projects deriving from other such conceptions.

Although pluralism cannot reach its ultimate goal of providing equal accommodation to all competing conceptions of the good, it can strive to approximate that goal as much as possible. This can be done by systematically implementing a process that comprises three distinct operations: a critical one, a constructive one and a comparative one. The critical and the constructive operations, go hand in hand in the pursuit of as extensive as possible an accommodation as much as possible of as many competing conceptions of the good as possible consistent with comprehensive pluralism's normative imperatives. The comparative operation, on the other hand, is essential for purposes of giving each conception of the good that is consistent with comprehensive pluralism its due, by insuring that claims issuing from such a conception are considered from the latter's perspective -- i.e., in terms of its centrality or importance regarding achievement of the aims of the conception to which it is linked -- and not simply weighted directly against competing claims originating in rival conceptions.

The critical operation constitutes the negative moment and the constrictive operation the positive moment in the dynamic set in motion by comprehensive pluralism<sup>28</sup>. In the negative moment, all existing privileges or hierarchies that place certain conceptions of the good above others are shattered -- including any privileged position held by liberalism. In other words, in the negative moment all conceptions of the good are equalized as none is allowed to retain any badge of superiority or inferiority. The positive moment, on the other hand, would ideally make room within the polity for all

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<sup>28</sup> What follows draws upon the more extensive treatment of this subject in Michel Rosenfeld, *Just Interpretations, supra*, at 208-13.

(now) equalized conceptions of the good. This, however, is not possible as certain conceptions of the good, even if bereft of all privileges, are likely to be incompatible with others. For example, a crusading religion that commands converting or killing non-believers does not deserve a place in a pluralist polity<sup>29</sup>. Moreover, a non-violent proselytizing religion that targets children may have to be restrained and its proselytizing activities restricted to adults. Thus, such religion would be admitted in a pluralist polity, but not on its own terms.

More generally, admission within the pluralist polity depends on compatibility with the essential prescriptions of comprehensive pluralism. Moreover to distinguish those prescriptions from those of the conceptions of the good competing within a polity, the latter's prescriptions can be designated as first-order norms and those of comprehensive pluralism as second-order norms. Consistent with this, promotion of first-order norms can only be tolerated or encouraged within the polity if it does not undermine the ordering of the polity or the basis for interaction among proponents of different first-order norms prescribed by pluralism's second-order norms. Admissible first-order norms may be inconsistent with second-order norms, but may not stand in the way of the implementation of an institutional framework designed to vindicate the dictates of second-order norms. For example, a religion that insist that it has a monopoly on the truth advances first-order norms that are contrary to comprehensive pluralism's conviction that the good requires fostering co-existence among as many conceptions of

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<sup>29</sup>Whether the religion itself or only its intolerable activities ought to be banned in a pluralist polity depends on whether there is a workable way to sever the latter from other activities. For example, if a religion were to prescribe both charity to the poor and violence against those who are not poor and do not share the faith, then if the two commands were severable, only the religion's call to violence could be legitimately banned. If the two prescriptions were not severable, however, then the religion would have to be banned altogether.

the good as possible and to the second-order norms stemming from that conviction. The religion in question, however, need not be banished from a pluralist polity so long as promotion of its anti-pluralist (first-order) norms does not actually interfere with societal-wide conformity with second-order norms. Moreover, such actual interference may well be avoided by somewhat restricting the religion's aggressive proselytizing to avoid intimidation of, or excessive confrontation with, proponents of other religions or of secular ideologies.

The third operation mentioned above, the comparative operation, is needed to deal with competing claims issuing from rival conceptions of the good that have secured a place in the pluralist polity. From a pluralist standpoint, competing claims issuing respectively from different conceptions of the good are not necessarily on the same plane. To the extent that pluralism seeks to promote fulfillment of conceptions of the good rather than mere satisfaction of claims, the relative place of a claim within the conception from which it issues is important for purposes of establishing priorities among competing claims. For example, if a claim ranks among the highest within the conception from which it is issued, such that its frustration or denial would impact on the core of that conception's integrity, then it ought to rank higher than a competing claim that is more peripheral to the core aims of the particular conception of the good from which it issues.

Giving priority to competing or conflicting claims according to their hierarchical position within the perspective within which they originate promotes realization of equality as difference. If the highest need from perspective A is X while from perspective B it is Y, then granting X to proponents of A and Y to proponents of B would amount to treating them equally in function of their different needs. Full stage 3 equality



cannot be achieved, however, for two principal reasons. First, a fully accurate comparison of the relative importance of claims issuing from different perspectives would require complete empathy for, and comprehension of, each perspective involved, which is impossible as an ‘outsider’ can never assume the exact same position as an ‘insider’. And, second, the second-order norms of comprehensive pluralism have a different impact on diverse conceptions of the good and on particular claims, such that higher ranking claims from one conception may bump against second-order norms while similar ranking claims from another may not.

Notwithstanding the impossibility of full and accurate comparison, limiting assertions of cultural difference to a fair hearing in the political marketplace, as suggested by Professor Waldron<sup>30</sup>, seems clearly insufficient. As much as possible, an effort must be made to understand the other from the latter’s perspective and this can be done by implementation of the principle of “justice as reversible reciprocity”<sup>31</sup>. Consistent with this principle, all conflicts must be considered from each of the perspectives involved -- and one must as much as possible successively take the place of a proponent of each of the contending conceptions of the good until one grasps the conflict in question from all the perspectives involved -- to insure the greater possible consideration for relevant differences.

The inevitable bumping against the restrictions imposed by pluralism’s second-order norms, on the other hand, serves as a point of convergence towards a common identity that circumscribes the realm of differences entitled to full recognition. As full

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<sup>30</sup> See *supra*, at \_\_\_\_.

<sup>31</sup>For a more extended discussion of this principle, see Michel Rosenfeld, *Just Interpretations*, *supra*, at 245-50.

identity is too abstract to be workable, pure difference makes comparison and hence equality impossible. Ultimately, it is the tension between the imperfect identity derived from pluralism's second-order norms and the inevitably constrained differences mediated by such norms which determines the closest possible approximation to equality as difference.

#### ***4. The Dynamic Between Identity and Difference***

Pluralism as does liberalism and other comprehensive perspectives anchors the relationship between identity and difference. That relationship, moreover, is not only contextual but also dynamic. Identity connotes 'sameness' as in A is identical to A, and it also connotes 'selfhood', a complex relationship of identification above, or in spite of, difference. For example, I conceive of myself as the same continuous and unique self in spite of all the changes I have experienced since childhood, adolescence, early adulthood, etc. Those who share a strong nationalistic bond with their fellow countrymen do so above and beyond manifold differences concerning social class, religious affiliation, family status, political ideology, etc.

Difference also has a double connotation. On the one hand, it connotes 'dissimilarity', and in this sense it is the opposite of identity-as-sameness. On the other hand, difference connotes 'differentiation' in the sense of establishing a distinction between a multiplicity of units that are, in important respects, similar to one another, such as one 'self' is to another 'self'. For example, in some societies each individual constitutes a separate self and is similar to all other individuals qua separate self, yet what makes each individual a *separate* self is that he or she is differentiated from other selves, by beliefs, actions, voluntary affiliations, etc. In contrast, in other societies, the concept

of the individual self is repressed or subordinated to a concept of collective self, such as that of a religious community. In the latter context, moreover, the relevant differentiations are not among individuals but among distinct religious communities.

Which links of identification are constitutive of selfhood and which uncouplings through differentiation yield alterity depends in part on context, in part on the dynamics between identity and difference, and in part on the place that the dynamic in question comes to occupy within the dialectic of equality. Consistent with this, a particular difference may be relevant in one context but not in another. For example, differences between Catholics and Protestants play little if any role in defining the contemporary national political identity of certain countries with significant Catholic and Protestant populations such as Germany or the United States<sup>32</sup>, but they certainly have played a key role in the recent politics of Northern Ireland.

From a dynamic standpoint, identities and differences evolve both in relation to one another and in relation to their own adaptation to context and to the dialectic of equality. Thus, in the context of individualism, such as that associated with liberalism, the predominant identities and differences are individual-regarding rather than group-regarding. The self is the individual and others are other individuals. Both identification and differentiation are predominantly considered from the standpoint of the individual. For example, cultural difference or religious difference is not that important in-itself, but counts mainly as a marker of differentiation among individuals. From a practical standpoint, cultural difference should not obscure the inherent similarity of all individuals

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<sup>32</sup> This is not to say that Catholicism or Protestantism may not have such a role. In that case, however, the influence in question -- say, the Protestant influence on capitalism as envisaged in Max Weber *The Protestant Ethic and the Spirit of Capitalism* (Talcott Parsons & Anthony Giddens, trans. 1930) -- would *prima facie* at least have a similar impact on both Catholics and Protestants.

while at the same time individual expression of cultural difference should be permitted as a means for individuals to lay down a marker of differentiation. In short, in an individualist setting, the optimal is neither too much cultural difference such that it could upset the bond of identity among individuals, nor too little such that it would unduly hamper differentiation among individuals.

In contrast, in a setting in which group-regarding identities and differences are predominant, cultural or religious difference may be paramount. This is so because for a group to cohere it must rally around a culture or a religion. Similarly, to be differentiated from other groups, a group may have to identify with a culture or religion that is other than that which characterizes other groups. Accordingly, the kind of accommodation of cultural difference that is adequate for an individualist setting seems bound to remain highly insufficient for a group-regarding setting.

We have seen that the dialectic of equality results in a greater pull towards identity or towards difference, depending on the particular stage in which it finds itself. Furthermore, because the dialectic in question was set off against the multi-status nature of feudal society, it is logical that it called for focus on individual-regarding identities and differences rather than group-regarding ones in its first two stages. Stage 1 equality, with its concern with mitigation of the full impact of the shift from multi-status to single-status society, individualized differences that are primarily group-regarding to link differentiation to inequality. Thus, for example, gender based differences which pertain or are attributed to men as a group as against women as a group, are individualized to emphasize that an individual woman -- e.g., Myra Bradwell the 19<sup>th</sup> century trained

lawyer who was denied admission to the Illinois bar<sup>33</sup>-- can be differentiated from individual men for in spite of similarities -- e.g., equal capacity for practicing law --there are more important differences -- women's greater frailty and role as wives and mothers which make it undesirable for them to be working outside the home -- which justify unequal treatment -- men but not women are allowed to practice law. Conversely, stage 2 equality, with its focus on equality an identity, promoted even further individualization, by downplaying differentiation through ascension to higher levels of abstraction. Thus, for example, to gain parity in a workplace designed for the needs and aspirations of men, women *qua* individuals must detach themselves from individualized group-regarding characteristics such as the capacity for childrearing and the (social) responsibility for childbearing. Consistent with this, a woman who would want admission on an equal footing to the male dominated realm of employment would have to argue as follows: "Even through as a woman I may be primed to bear and raise children, as an individual I choose to forgo (or postpone) childbearing and childrearing and therefore am entitled to the same employment as an individual man who is as qualified as I am because, as a consequence of my choice, there is no relevant difference between me and a similarly qualified man in the context of employment".

Stage 3 equality, as we have seen, involves a revalorization of difference, this time for purposes of reconciling differentiation with equality rather than tying it to inequality. Whereas in the context of individual-regarding differences the move from equality as-identity to equality-as-difference seems fairly straightforward -- in spite of the danger of regression to equation of difference to inequality -- the incorporation of group-

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<sup>33</sup> See *Bradwell v. Illinois*, *supra*, note \_\_\_\_.

regarding differences in the transition to stage 3 equality seems much more problematic. On the one hand, full equality as difference cannot be achieved (or even approximated) without recognition and attempted accommodation of group-regarding differences such as cultural difference. On the other hand, vindication of group-regarding differences requires some reduction in emphasis on individual differences. In order to obtain accommodation for my culture, particularly if it runs counter to mainstream culture and to individualism, I must down play the individual strains which the need for cultural conformity may force upon me. More generally, to the extent that group-regarding cultural differences run counter to individual-regarding identities-- e.g., a culture that requires what, at least from an individualist standpoint, appears to be subordination of women -- accommodation of group-regarding differences may eventually result in reinstatement of a multi-status society in a polity which aspires to stage 3 equality.

Individualism and liberalism, which seems particularly well suited to stage 2 equality, require that group-related differences be transformed into individual-regarding differences or filtered down to something equivalent to the latter. Pluralism, in contrast, is set, at least in principle, to accommodate group-regarding differences and bets that such accommodation will further the transition to stage 3 equality without seriously risking a fall back into a multi-status society. Analysis of whether such bet is realistic and whether extending acceptable differentiation to group-related assertions of collective identity is consistent within the ambit of pluralism's second-order norms is essential, but will be postponed till Part 6 below. This is, in order to get a better grasp of the dynamics between identity and difference through consideration of a concrete example, which will be discussed immediately below. Furthermore, it is also crucial to consider how group-

related difference may be accommodated in a non-hierarchical society through adjustment in the institutional design of the single-status polity, which will be the focus of Part 5.

One concrete example that well illustrates the dynamic between identity and difference in the context of contemporary Western democracies is that of the struggle for equality waged in relation to differences between homosexuals and heterosexuals. In stage 1 equality, the homosexual can be cast as different and as such treated as an inferior. Consistent with this, discrimination against homosexuals could be justified on two different counts, one relating to sexual practices and the other to non-sexual relations within society. Homosexual sex can be criminalized while heterosexual sex is not in either of two ways: one is by affording legal validity to practices that are exclusively heterosexual, such as genital intercourse among opposite sex partners; the other, by legalizing the same practice, such as sodomy, if engaged in by an opposite sex couple, and penalizing it if occurs between same sex partners. In the first of these two forms of differentiation, heterosexual sex becomes the norm and homosexual sex the exception, with the consequence that passage to stage 2 equality as identity does not apparently pave the way for equal treatment of heterosexual and homosexual sex. In the second form of differentiation, however, it becomes easy for homosexuals to demand de-criminalization of homosexual's sodomy since it involves the same sexual practices as those that are entirely legal if performed among heterosexuals.

Discrimination against homosexuals with respect to non-sexual relations, such as employment, housing, places of worship etc., on the other hand, seem to be status-related or at least group-regarding as involving a distinct life-style which is subject to

disapproval or even condemnation by the heterosexual majority<sup>34</sup>. Reaction against such discrimination, in turn, can either be individualized or conducted mainly at a group-regarding level. As individualized, it can be cast in an analogous way to reactions against discrimination on the basis of race. Just as race is irrelevant for purposes of employment so too is the fact that a would be employee engages in homosexual sex within the privacy of his own home. From a group-regarding lifestyle standpoint, on the other hand, homosexual culture is as entitled to accommodation as heterosexual culture, and homosexuals cannot enjoy equality as difference unless their minority culture can be afforded sufficient protection to co-exist on an equivalent footing with its heterosexual counterpart.

Thought brief and schematic, the above description affords an insight into the complexities confronting any attempt to achieve equality for homosexuals. To the extent that homosexual sex is different than heterosexual sex, it is not clear whether stage 2 or only stage 3 equality can bring about equality for homosexuals. If stage 2 were to, sexual relations would have to be conceived at a high level of abstraction as, e.g., the natural outlet for intimate relations between consenting adults. But at such high level of abstraction it may be impossible to distinguish in any systematic way between heterosexual and homosexual sex, on the one hand, and incest, on the other. Furthermore, if equality for homosexuals seems only achievable in the context of stage 3 equality, it can either be justified in individual-regarding terms -- homosexual sex is to

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<sup>34</sup> Cf. *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional provision forbidding adoption of antidiscrimination laws prohibiting discrimination against homosexuals to protect *inter alia* religious freedom of those whose religion prohibits dealing with homosexuals held to violate federal constitutional equal protection rights).



homosexuals what heterosexual sex is to heterosexuals -- or in group-regarding terms -- gay culture is as deserving of recognition as is straight culture.

In the end, which of the plausible paths referred to above will be most likely to lead to the achievement of equality for homosexuals is likely to depend in part on historical contextual factors, in part on the prevailing interplay between identity and difference, and in part on the actual moment in the dialectic of equality. The possible permutations may seem extensive in the abstract, but they are likely to diminish dramatically once the relevant factors are teased out after choosing between liberalism and pluralism.

##### ***5. Single Status Society and the Federalization of Difference***

A functioning pluralist polity requires establishing a level of common identification making it possible for the polity to operate as a unit; progressive erasure of all correlation of difference with inequality through the spread of stage 2 equality; and accommodation of cultural difference through recourse to stage 3 equality. Even if the spread of stage 2 equality were unproblematic, accommodation of cultural difference may be fraught with difficulties not only in terms of the passage of from equality-as-identity to equality-as-difference, but also because it may threaten the unity of the polity. This is clearly illustrated by the example of a cohesive cultural minority that subordinates women (at least from the vantage point of majority perceptions) within the ambit of its collective life. To the extent that the women members of this cultural minority willingly assume their differentiated role within their cultural group, there seems to be no reason

consistent with pluralism to deny the group stage 3 equality or full membership in the polity. Nevertheless, recognizing the legitimacy of the cultural minority in question may unhinge the equilibrium reached between men and women through implementation of stage 2 equality, and create a fear of regression to stage 1 equality and to the subordination of all women with whom it had been associated. Moreover, in certain cases, such fear may threaten a relatively fragile polity-wide identity tied to the majority culture and to commitment to stage 2 equality among the sexes.

The liberal response to this problem would be to reject the cultural minority's group regarding equality-as-difference claims. From the pluralist standpoint, however, such claims should only be rejected if incompatible with second-order norms, which they need not be<sup>35</sup>. But even if they are not, the most important cultural minority claims may clash with the most important cultural majority claims. One option in such a case would be to federalize the polity comprising the above majority and minority and to make room for greater group-related autonomy and self-determination for both, provided that the unity of the polity -- now the federation as opposed to the federated entities -- is preserved or reconstituted.

Federalization is easiest to accomplish where each diverse cultural group occupies a distinct contiguous territory within the polity. For example, where language functions as a paramount cultural marker, and different languages predominate in different regions, as in the case in Switzerland where cantons are either French, German, Italian or (in part) Romanch -speaking, then language-based federalization seems best

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<sup>35</sup> Women's subordination may be non-coercive, the internal dynamic of the group may leave it open to change, and there may be realistic opportunities for individual exit for those who find group norms oppressive.

suites to reconcile the aspirations of each linguistic community with that of others and with that of the unity of the polity as a whole. Furthermore, with respect to some cultural markers, such as religion, though not others, it is possible to “federalize” on a non-territorial basis. This is what is done through the “millet” system which originated in the Ottoman Empire and according to which each religious community is given autonomy and governance rights over its own membership.

Federalization is available within the nation-state, but by now it has been institutionalized beyond. Supranational association, such as that achieved within the ambit of the European Union makes for additional and novel ways of coordinating poles of identity and poles of difference. This allows, for example, for tensions between sub-national units and national ones to be eased through supra-national dealings. Thus, tensions between Cataluña and Spain or Scotland and the United Kingdom may be reduced by affording sub-national units a voice in European Union bodies. More generally, there are many instances of transnational and even global (e.g., the UN, the WTO, the International Criminal Court) association as well as possibilities of peaceful disengagement through pacted secessions such as that which transformed the former Czechoslovakia into the Czech Republic and Slovakia. Accordingly, the need of common identification of all single-status societies need not be fulfilled within the strictures of the nation-state. Likewise, the opportunities for dealing with conflicting group-regarding agendas through federalization have multiplied well beyond the traditional outlets. This means that there is significant room for accommodating group-regarding equality as difference, including cultural difference, before even having to subject competing claims to the requirements of justice as reversible reciprocity.

## ***6. Accommodating Cultural Difference Within Pluralism and the Dialectic of Equality***

The preceding discussion revealed that stage 3 equality requires accommodation of cultural difference and that pluralism grants rooms to some cultural difference but not all. A culturally differentiated group shares a conception of the good that is distinct from those promoted by others within the polity. If that conception is incompatible with an ordering of the polity pursuant to pluralism's second-order norms, then the cultural difference it promotes is not entitled to acceptance or toleration. On the other hand, if the conception of the good that defines a particular instance of cultural differentiation is in basic harmony with pluralist norms, then its integration within the polity should be welcome and uneventful.

The more difficult problem, already mentioned in Part 4, is whether cultural difference predicated on group-related identities that seem inegalitarian though not incompatible with implementation of second-order norms can genuinely be accommodated consistent with pluralism and transition to stage 3 equality. Take, for example, the case of a culture that appears to give women a subordinate role, but that does not seek to prevent dissidents (including women) from leaving the group or to proselytize outside the group. The argument against granting such group recognition and some measure of self-determination is essentially twofold: 1) the group provides a bad example that may inspire some to attempt reversing liberal gains that led to the implantation of equality as identity; and, 2) most women born into the group and fed on its ideology may not fully appreciate their state of subordination, or even if they do, may be too trapped or inhibited to leave the group. On the other hand, the arguments in favor

of extending the group in question stage 3 equality is also essentially twofold: 1) what appears as subordination from one perspective may not be subordination from another, and suppression of what does not conform to the views of the majority may ultimately prove inegalitarian; and, 2) if one seeks to deny recognition to group-regarding differences that seem unpalatable to a progressive liberal majority, one may well block transition to stage 3 equality and frustrate the deployment of pluralism.

In theory at least, each case involving apparent subordination could be settled through application of the principle of justice as reversible reciprocity. That would allow women belonging to a group that allegedly subordinates them to consider their status from the perspective of outsiders, critics, etc. as compared to their own, and to decide whether, when aware of all available options, they would continue with their own group or opt out. Although it is impossible in practice to fully experience the world from the perspective of another, it certainly seems plausible that women living within a culture that others consider defective from the standpoint of gender-based equality would nonetheless choose to remain within that culture even if they could fully intuit all the benefits and drawbacks of all available alternatives<sup>36</sup>.

Turning to the two objections listed above, the claim that a culture that appears to subordinate women provides a bad example only seems troubling in the context of a society that has not yet firmly implanted stage 2 equality. In one that has, if anything, it is the minority culture that seems non-egalitarian that would appear more vulnerable to

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<sup>36</sup> There are cases where the trade-offs are quite familiar as when Orthodox Jewish or Muslim women who work side by side with secular women, can compare notes, and nonetheless consciously determine that for them secularism would be a less desirable alternative. Of course, these women cannot shed their background, history, upbringing, family, etc., and thus their conclusions could not, strictly speaking, satisfy the test imposed by justice as reversible reciprocity.

intolerance. In any event, if inter-group channels of communication are open, and if the minority culture though benefiting from a fair amount of autonomy cannot avoid openness to other groups and to institutionalized pluralist norms, then it may be subject to pressure for inner reform. This is exemplified by the movements within several religious communities that bar women from the ministry for change opening the way to greater gender-based equality.

With respect to the second objection -- that those subordinated may not be fully aware of their status -- beyond what has already been said, it should be pointed out that the risk of misperception is not one-sided. Indeed, the outsider's risk of misperceiving unfamiliar mores as causing subordination may be equivalent to the insider's risk of misjudging to what extent her role within her culture may conform with some acceptable conception of equality. Furthermore, if an account of the dangers of misperception one were to fall back on liberalism and stage 2 equality, one would not only sacrifice the diversity of a multicultural polity, but also possibly unwittingly restrict the reach of stage 2 equality in difficult or borderline cases such as that concerning homosexuals. Indeed, as we have seen, it is not clear whether promotion of acceptance of gay lifestyles can be encompassed within the ambit of stage 2 equality or whether it is dependent on initiating a transition to stage 3 equality. By rejecting the latter, one may actually constrain full realization of the former.

Overall, it seems that the advantages of pluralism and initiating a transition to stage 3 equality far outweigh the possible disadvantages considered above. This is consistent with what has been argued throughout: cultural difference, pluralism and movement to stage 3 equality are better suited to promote an optimal reconciliation

between identity and difference than are, under current circumstances, liberalism and stage 2 equality.

### ***7 Designing a Legal and Institutional Framework to Accommodate Cultural Difference***

As discussed above in Part 5, federalization provides an important institutional tool for purposes of accommodating cultural difference. Federalization, however, is neither always possible nor always desirable. It is not possible where there is no way to disentangle one culture from another and it is not desirable where it leads unnecessarily at once to further balkanization and to a markedly more abstract and detached realm of common identification. Accordingly, room must be left for accommodation of cultural difference within the very same legal, political and institutional precincts reserved for majority or dominant cultures. In short, the single-status society must be up to a point a single space polity.

Professor Waldron's suggestion that cultural difference be given a voice in parliamentary democracy coupled with his suggestion that exceptions from laws and common practices be available for non-mainstream cultures<sup>37</sup> divides the common space of the polity into areas of inclusion and areas of separation. Inclusion in a political arena in which cultural difference is virtually assured to be a loser, however, far from vindicating equality as difference, either fosters equality as identity -- all can equally propose legislation and all are equally bound by majority backed legislation-- or, in the end, deepens alienation -- having a voice that is never heeded may be as frustrating as being deprived of one. On the other hand, being separated from

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<sup>37</sup> See Jeremy Waldron, *supra*, at \_\_\_.

majorities through series of exceptions that draw attention on the non-conforming nature of proponents of non-mainstream cultures leads to mere toleration of difference rather than to progress toward equality as difference.

Ideally, as already suggested, conflicting claims made from different perspectives should be submitted to the criterion of justice as reversible reciprocity. But since institutional deployment of this criterion is not feasible, it is necessary to turn to the legal, political and institutional tools that may be used to best approximate justice as reversible reciprocity. For cultural difference (to the extent it is compatible with pluralism) to be treated as something as valuable as mainstream ideology (as equality as difference requires) it is necessary to place its highest priorities on the same plane as those of much more widely shared perspectives. This can be done, in turn, by placing the highest priorities of all acceptable conceptions of the good within the realm of constitutional protections while relegating lower priorities to the give and take of everyday parliamentary democracy.

No sharp distinction can be drawn between what ought to be protected by the constitution and what ought to be exposed to ordinary democratic politics. Moreover, where to draw the boundary will likely always be a matter of dispute. Nevertheless, it seems clear that claims likely to directly impact on the identity of the claimant ought to be subject to constitutional regulation whereas claims that relate to benefits and burdens that do not directly impinge on identity concerns should be left to democratic politics.

In the end, the legal and institutional setting best fit to orient a polity towards pluralist equality as difference resembles its typical liberal counterpart. There are,



however, important differences. A pluralist constitution must afford group-equality rights as well as individual ones, and must strike a balance between group-regarding equality rights and the individual-regarding equality rights of dissenters within a constitutionally protected group. The most important difference, though does not concern institutions, but attitude. For liberals, cultural difference is like an outsider who must be accorded the hospitality owed foreign visitors. For the pluralist, in contrast, cultural difference is like an insider who is so intrinsically linked to the rest that he or she need not fear being different.