1987

Towards a Modern Art of Law

Laura S. Fitzgerald

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/ylj/vol96/iss8/12

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Towards a Modern Art of Law

Laura S. Fitzgerald

[T]here is nothing more dangerous than justice in the hands of judges, and a paintbrush in the hands of a painter. Just think of the danger to society!

—Picasso

Law is a builder of worlds. Through constitution-framing, legislation, and adjudication, law structures individuals into patterns of rights and responsibilities. Decisionmakers conceive an image of legal reality that becomes concrete through state enforcement.

To acknowledge the creative quality of law is to recognize its kinship to other endeavors traditionally called “art.” Inasmuch as it creates visual realities within the confines of the canvas, art, too, is a builder of worlds. Yet, while both art and law exhibit a capacity for creativity, they do so in dramatically different ways. A work of art is, at one level, an overt expression of the artist’s will to create: A central purpose of the artistic endeavor is to bring into being an object that has not existed in concrete form before the creative act. Law’s creative quality is far less conspicuous. Judges, for example, seldom decide cases with the express purpose of manufacturing a wholly new legal picture. Nevertheless, judicial alloca-

2. Professor Cover portrays law as “world building” in another sense: “We inhabit a nomos—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . [L]aw becomes not merely a system of rules to be observed, but a world in which we live.” Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 4-5 (1983) [hereinafter Nomos and Narrative]; see id. at 4 n.4 (citing other theorists’ notions of normative “world building”). This essay focuses not on Cover’s “legal world conceived purely as legal meaning,” id. at 10; rather, it contemplates a legal world conceived as a pattern of human relationships. See infra notes 8, 49-50 and accompanying text.
3. This essay considers mainly the world-building character of law’s formal institutions—those most often associated with governmental authority. Undoubtedly, electorates, juries, and litigants contour the worlds created by law’s institutional decisionmakers. In addition, noninstitutional decisionmakers construct their own worlds, which at some points coincide with or make use of law’s formal institutions and at others remain isolated from them. “[P]rivate lawmakersing . . . through religious authority, contract, property, and corporate law (and of course through all private associational activity). . . . [is sometimes used] to create an entire nomos—an integrated world of obligation and reality . . . .” Nomos and Narrative, supra note 2, at 31. Although in this essay I explore only the worlds constructed by law’s formal decisionmaking institutions, I recognize that these are not the only, nor necessarily the most valuable, of all the worlds built around us. Cf. id. at 16, 53 (observing that “always many worlds are created” by communities generating legal meaning, but that state institutions may threaten to destroy their “luxuriant growth”).
4. We are understandably reluctant to celebrate the creative aspect of judicial decisionmaking.
tion of rights and responsibilities undeniably shapes legal relationships among parties, patterning not only their own worlds but also the larger worlds that they inhabit.

This essay explores ideas that have evolved within the discipline of visual art in order to stimulate a rethinking of the discipline of law. By developing an analogy between law and an enterprise in which the creative quality is paramount, it aspires to illuminate the less apparent creativity inherent in law. There is value in the very self-consciousness that would accompany this recognition: Decisionmakers would do well to acknowledge that worlds are often built as a larger consequence of isolated legal events. Even more intriguing is the possibility that, by adopting art as an analytic model, law will be better able to exploit its own creative potential in order to build worlds that are just by design. The goal is to encourage the artist in the decisionmaker: to evolve an art of law.

A legal aesthetic, a philosophy of law as art, may provoke a reevaluation of each of the state’s decisionmaking institutions. In sketching its analogy, however, this essay focuses primarily on adjudication. Fur-

There is something obscene about a judge approaching disputes in precisely the way an artist would her canvas. As an instrument of the state, the judge wields an immense coercive power unknown to the artist. A judge’s legal picture is enforced, directly and often drastically altering the lives of the persons who inhabit the social canvas. See Cover, Violence and the Word, 95 Yale L.J. 1601, 1601 (1986) (“Legal interpretive acts signal and occasion the imposition of violence upon others . . .”); id. at 1613 (efficacy of judicial interpretation depends on social practice of violence).

An artist’s new “visual reality” is, in this sense, imposed upon no one. Consequently, an artist is not held socially responsible for her creative act. Cf. id. at 1609 & n.20 (literal violence visited through law distinguishes adjudication from art). Acts of a judge, in contrast, must fit into an elaborate framework of political and institutional responsibility in order to justify the imposition upon society of a given pattern of right and responsibility. See infra note 6 (qualifying concept of “aesthetic judge”). For one view of what constrains law, see R. DWORKIN, LAW’S EMPIRE 93 (1986) (“Law insists that force not be used or withheld . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.”).

5. Injustice in the current legal picture may be linked to a failure on the part of those who wield power to recognize their impact on the worlds that are built. Cf. infra note 62.

6. This should not be an alarming suggestion. I do not propose that lawmakers exchange the institutional values that now guide their decisions for values based on a subjective idea of what is merely “beautiful.” One commentator proposes that legal theorists ought to “decide not whether the worlds [they] envision are true or false, right or wrong. Rather [they] must decide whether they are attractive or repulsive, beautiful or ugly.” West, Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory, 60 N.Y.U. L. REV. 145, 210 (1985). Professor West is careful to address her proposal only to those who do not “make law . . . [and thus] have the freedom which institutional responsibility does not allow . . .” Id. at 211. She distinguishes this category from one that includes judges, legislators, and lawyers, who must keep their aesthetic “instincts separate from the act of lawmaking . . .” Id.

West’s conception of “aesthetics” is unnecessarily restrictive because it implies an assignment of value only to that which is immediately pleasing to one’s senses. The “beautiful” in art can mean something far more complex—something linked to the idea of “truth” that West sets up in contrast. Id. at 210; see J. RUSSELL, THE MEANINGS OF MODERN ART 225 (1981) (for some members of twentieth-century avant-garde, aesthetic question “was not ‘Is it beautiful’ but ‘Is it true?’ . . . Truth and falsehood, not beauty and ugliness, were the criteria . . .”). Consequently, it is not inconsistent with law’s institutional responsibilities to propose that its truths and values be reconceptualized from the broader perspective of aesthetics.
thermore, although viewing law as art might well spark a rethinking of many substantive legal issues, this discussion concentrates on the equal protection clause of the Fourteenth Amendment to the Constitution.\(^7\)

Equal protection jurisprudence provides a compelling focus for an analogy of law to art because it has proven itself able to undertake radical projects of world-building.\(^8\) The equal protection clause is commonly invoked by those who are frustrated in their attempts to enter into relationships with others;\(^9\) an equal protection claim appeals directly to law's capacity to structure relationships by allocating rights and responsibilities.\(^10\)

To probe the potential of equal protection jurisprudence as art, this essay begins by exploring some issues arising from social and legal practices that disfavor homosexual persons.\(^11\) It then imagines worlds that law might build in contexts of sex and ethnicity.

I. An Audacious Art

Movements of art in all periods of history have exhibited in some way the creativity here encouraged in law—a legal aesthetic could glean inspiration from many sources. Yet, twentieth-century abstract painters isolated in a distinctive way the constructive aspect of art's world-building enterprise. This quality distinguishes abstract art as a singularly intriguing model for the proposed rethinking of law.

To grasp the significance of abstract painting for this essay, one must place that movement within a larger history of art. A tradition of representation had dominated painting through the nineteenth century: A work of art was to function as a window on the world.\(^12\)

---


9. This conception of equal protection differentiates the appropriate occasions for its intervention from those in which a court adjudicates a dispute arising out of an existing relationship (e.g. commercial sales contract), as well as from those in which the only "relationship" is the adversarial one between parties to a suit (e.g. tort action). I wish to suggest the paradigm in which an individual or group claims a wrongful denial of access to or of particular status within relationships such as those with employers, educational institutions, or other individuals.

10. See infra note 49 and accompanying text.

11. This essay uses the term "homosexual" synonymously with "gay" while it recognizes that the latter is preferred within the gay community. See D. ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 6, 34-35 (1982). Except where otherwise distinguished, "gay" and "homosexual" refer both to gay men and to lesbian women.

12. This metaphor is attributed to Leon Battista Alberti, a fifteenth-century architect and theorist. See L. ALBERTI, ON PAINTING AND ON SCULPTURE (C. Grayson trans. 1972).
within that tradition endeavored to recreate on canvas the forms and objects they beheld in observable reality. Modern painters, however, increasingly rejected the conventions of figurative representation, and sought instead "a pure art which[, like music and architecture,] did not have to imitate objects but derived its effects from elements peculiar to itself." Finally, abstract artists divorced painting from observable reality altogether. "Abstract art . . . destroyed the image in its natural appearance, and thereby liberated painting from the necessity of reproducing the visual appearance of the world."

Free from the compulsion to describe or depict the observable world, abstract painting could concentrate on the construction of a different reality on the canvas. "The goal [was] not to be concerned with the reconstitution of an anecdotal fact but with constitution of a pictorial fact." This stance in defiance of the conventional world order recommends ab-

13. For this essay's purposes, "representational" painting refers to art that in some way renders an image of the palpable world. The term embraces "figurative," "objective," and "naturalistic" art. Characterizing all pre-twentieth-century painting as "representational" obscures a great heterogeneity among artists of that tradition. Moreover, the term itself misleads—"representational" art did not consist in the "passive mirroring of things." M. SCHAPIRO, Nature of Abstract Art, in MODERN ART, NINETEENTH AND TWENTIETH CENTURIES: SELECTED PAPERS 185, 195 (1970) [hereinafter M. SCHAPIRO], nor in the "imitation of natural appearance," id. at 188. Realism, a distinct movement of nineteenth-century figurative art, did "aim . . . to give a truthful, objective and impartial representation of the real world, based on meticulous observation of contemporary life." L. NOCHLIN, REALISM 13 (1971). Even so, the notion that Realism was "a mere simulacrum or mirror image of visual reality . . . is a gross simplification . . . ." Id. at 14. Schapiro prefers a conception of representational art that captures its "capacity to recreate the world minutely in a narrow, intimate field by series of . . . calculations of perspective and gradation of color." M. SCHAPIRO, supra, at 196.

14. Devices for representation included conventions of linear perspective, proportion, anatomy, and chiaroscuro. Cf. M. SCHAPIRO, supra note 13, at 199 (such devices should not be "misunderstood as merely imitative means").

15. M. SCHAPIRO, supra note 13, at 185. Cubism, though falling short of complete abstraction, abandoned conventions of representation in favor of a "vocabulary . . . [derived] by breaking down the forms of natural objects into abstract or semi-abstract shapes, and then reconstituting them into a dynamic arrangement . . . ." CHIP, Neo-plasticism and Constructivism: Abstract and Non-objective Art, in H. CHIP, supra note 1, at 309, 309.

16. As in the case with "representational art," see supra note 13, the essence of "abstract art" cannot easily be captured in a single term. I use "abstract" to denote painting in which "there appear[s] . . . [no] image of the outside world[in which] . . . real objects indissolubly linked to form [have] been superseded." D. VALLIER, ABSTRACT ART 1-2 (J. Griffin trans. 1970); see P. MONDRIAN, A New Realism, in PLASTIC ART AND PURE PLASTIC ART AND OTHER ESSAYS 16, 17 (R. MOTHERWELL ed. 1943) [hereinafter ESSAYS] (noting that some abstract artists themselves objected to ambiguity in term "Abstract Art"; defining abstraction for himself as "reducing particularities to their essential aspect").


18. Braque, Thoughts and Reflections on Art, in H. CHIP, supra note 1, at 260; see Gleizes & Metzinger, Cubism, in MODERN ARTISTS ON ART 1, 3 (R. Herbert ed. 1964) (painters seeking realism permitted "retina [to] predominate[ ] over the brain"). Braque, with Picasso, pioneered Cubism, which, throughout its most violent distortions of the observable world, still retained a vital and recognizable link to objects found in that reality. Consequently, Braque's work was neither strictly "representational" nor truly "abstract," as this essay uses the terms. Nonetheless, Cubism reflected a radical shift in interest towards the relationships established by an artist among forms within a painted image. "[I]n order to discover one true relationship it is necessary to sacrifice a thousand surface appearances . . . ." Id.
Abstract art as a model for law because of one serious flaw in the existing legal world order: Persons suffer harm within a conventional social reality shaped by patterns of discrimination. Conceived as modern art, law would inherit a readiness to reconstruct this existing legal picture.

A. Mondrian: Reality Through Abstract Art

Nonrepresentational painting achieved its greatest purity in the work of Piet Mondrian. His theory of art, known as Neo-plasticism, attempted complete abstraction. Mondrian described his feat as "the total abolition of the limiting form and particular representation." Through the final rejection of representation, Mondrian approached the abstractionist goal of an autonomous art—art that was "an absolute entity with no relation to the objects of the visible world . . . ."

Autonomy allowed Neo-plasticism to liberate the constructive elements of pictorial composition—line and color—from subordinate figurative roles. This liberation, in turn, compelled art to look behind the surface

---


20. Born Pieter Cornelis Mondriaan (later altered to "Mondrian") in Amersfoort, Holland on March 7, 1872, the artist died in New York City on February 1, 1944. See Chipp, supra note 15, at 314 (work of Mondrian and colleagues in De Stijl Group represent "purest of the abstract movements"). Mondrian's art changed considerably over the course of his career, reflecting the influence of Cubism and of his association with De Stijl, as well as developments in his own philosophy of painting. For comprehensive discussions of Mondrian's oeuvre, see K. CHAMPA, MONDRIAN STUDIES (1985); H. JAFFE, MONDRIAN (1985). This essay focuses on Mondrian's abstract art, which began to emerge around 1916 and remained a preoccupation until his death. See id. at 24–31.

21. Mondrian's aesthetic is highly sophisticated, and a thorough exposition of its ideas is beyond the scope and expertise of this essay. I have outlined those facets of Neo-plasticism that seem most germane to the analogy explored here. For more on this intricate and fascinating aesthetic, see Essays, supra note 16; see also K. CHAMPA, supra note 20; H. JAFFE, supra note 20.

22. Wiegand, supra note 17, at 67.


24. Chipp, supra note 15, at 309. Mondrian maintained that the true artist was moved by art's "line, color and relationships for their own sake and not by what they may represent." Pure Plastic Art, supra note 23, at 31; see also Gleizes & Metzinger, supra note 18, at 7 ("Let the picture imitate nothing and let it present nakedly its raison d'être").

25. See P. MONDRIAN, Liberation from Oppression in Art and Life, in Essays, supra note 16, at 37, 44 [hereinafter Liberation from Oppression] (encouraging in plastic art "a progressive reduction of forms and colors . . . [a] freeing of form and color from their particular appearance in nature"); see also infra Sections I.B. & I.C. As early as 1890, a nascent abstractionism informed some figurative artists' attitudes towards the constructive elements: "[A] picture, before it is a warhorse, a nude woman or anything at all, is essentially a plane surface covered with colors assembled in a certain order." D. VALLIER, supra note 16, at 11 (quoting Maurice Denis and describing remark as "the moment abstract art was virtually born").
of the visual world once represented through the constructive elements.\textsuperscript{26} Mondrian believed that a truer and more constant reality lay veiled beneath that world's superficial aspect.\textsuperscript{27} Neo-plasticism sought a clear view of that reality in order to express it for the first time through painting.\textsuperscript{28}

B. Liberation: A Search for Identity

In order to achieve the liberation of constructive elements, thus to create Neo-plasticist reality, Mondrian demanded that art purify its "plastic means"\textsuperscript{29}—those actual lines and colors manipulated by the artist to achieve a desired compositional result. In so doing, art could systematically divert attention from its conventional ends in order to determine a compositional value for the constructive elements themselves. No longer would a line be defined solely as a means of describing, for example, the other side of a tree.

If the purification of the plastic means had been sufficiently thorough, if every vestige of observable reality had been pared away, the artist could recognize in each element an identity independent of that imposed upon it in its traditional descriptive role.\textsuperscript{30} Ultimately, Mondrian reduced his compositional material to the straight line and primary color;\textsuperscript{31} the constructive elements refined to an unmediated state.

\textsuperscript{26} Mondrian couched this command as a "law of the denaturalization of matter." Denaturalization represented an attempt to escape the patterns of nature, in which "relations are veiled by matter appearing as form . . . or its natural properties." Mondrian, Principles of Neo-Plasticism, in M. S. Seuphor, Piet Mondrian: Life and Work 166 (n.d.). Neo-plasticism proposed that "the natural should only be cleared of what is most external, but not demolished . . . ." Mondrian, Natural Reality and Abstract Reality, in M. Seuphor, supra, at 301, 317 [hereinafter Abstract Reality].

\textsuperscript{27} See P. Mondrian, Toward the True Vision of Reality, in Essays, supra note 16, at 9, 10; id. at 15 (plastic art gropes for "disclosure of true reality by means of the abstraction of reality's appearance").

\textsuperscript{28} See P. Mondrian, A New Realism, supra note 16, at 18–19 (abstract art is aesthetic expression of intrinsic reality).

\textsuperscript{29} See Plastic Art and Pure Plastic Art, in H. Chipp, supra note 1, at 349, 350 [hereinafter Plastic Art]; see also Liberation from Oppression, supra note 25, at 39 (progressive art seeks "a dissolution of . . . form and a determination of the freed constructive elements (planes, colors, lines)") (emphasis omitted)).

\textsuperscript{30} "Every form, every line has its own expression." Plastic Art, supra note 29, at 353. Neo-plasticism did not require complete de-contextualization of the plastic means. "Everything is constituted by relation and reciprocity. Color exists only through another color, dimension is defined by another dimension; there is no position except by opposition to another position. . . . One thing can only be known through something else." Abstract Reality, supra note 26, at 306. Mondrian sought to free the constructive means from the forms of conventional reality; he did not seek to isolate them from each other.

\textsuperscript{31} "Primary colors" are those "in terms of which all other colors may be described or from which all other colors may be evoked by mixture." Webster's New Collegiate Dictionary 162 (1961). In painting, the primary colors are red, yellow, and blue. Id.
C. Re-composition: To Build a Visual World

Mondrian challenged Neo-plasticism to venture beyond destruction. Art required a purpose beyond the liberation of line and color. Once the visible world had been reduced to its fundamental elements, the artist had to recompose a new pictorial reality. Mondrian’s aesthetic discarded static form, as a compositional end in itself, in favor of the establishment of dynamic equilibrium among the constructive elements. It sought “the destruction of particular form and the construction of a rhythm of mutual relations, of mutual forms of free lines.” Consequently, relationships became central to Neo-plasticist composition.

Two kinds of information influenced the patterns of relationship for recomposed reality. Once refined to its pure essence, the line or color suggested its own placement in relation to other elements in the composition. “Purified constructive elements set up pure relationships.” However authentic, particular relationships uncovered through the purification process could not alone govern composition of the painting’s visual reality. Mondrian maintained, “Art makes us realize that there are fixed laws which . . . point to the use of the constructive elements, of the composition and of the inherent interrelationships between them.”


33. Plastic Art, supra note 29, at 355 (emphasis omitted). Mondrian believed that Neo-plasticism marked the demise of traditional ideology in art: “[T]he culture of particular form is approaching its end. The culture of determined relations has begun.” Id. (emphasis omitted).

34. See Plastic Art, supra note 29, at 350 (non-figurative art purified plastic means in order to “bring[] out the relationships between them” (emphasis omitted)); see supra note 18 (noting non-representational artists’ preoccupation with relationships among forms in composition). For Mondrian, abstractionism’s rejection of conventional form was a newly emphatic expression of an old truth: [A]rt has demonstrated that universal beauty does not arise from the particular character of the form, but from the dynamic rhythm of its inherent relationships, or—in a composition—from the mutual relations of forms. . . . [A]rt has revealed that the forms exist only for the creation of relationships; that forms create relations and that relations create forms. Plastic Art, supra note 29, at 350. Neo-plasticism concentrated on the “relation of position” which “lies not in the size of lines and planes, but in the position of lines and planes with respect to each other.” Abstract Reality, supra note 26, at 304.

35. Plastic Art, supra note 29, at 351.

36. Id. at 353 (emphasis omitted). Mondrian recognized that the modern era invited skepticism towards claims of “fixed laws, of a single truth,” id., that could admit order to everyday reality. Conceding that “[o]ne realizes more and more the relativity of everything,” id., he nevertheless maintained that there exist unchanging laws through which a constant reality might be understood.

Mondrian’s “truth” characterized reality as an ultimate duality. “The real” is a fundamental state incorporating two fundamentally different elements, conceived either as interiority and exteriority, see Abstract Reality, supra note 26, at 304, or as individuality and universality, see Plastic Art, supra note 29, at 350. By embracing duality as the foundation of his “truth for all time,” Mondrian reinforced the centrality of relation to Neo-plasticist composition. See Mondrian, Toward the True Vision of Reality, supra note 27, at 10 (because contrast of means establishes compositional equilibrium, “relationship becomes the chief preoccupation of the artist”). In painting, the clearest statement of
Piet Mondrian, *Diamond Painting in Red, Yellow, Blue* (c. 1921-1925)
National Gallery of Art, Washington, D.C.

Reproduced with permission.
Modern Art of Law

II. A CHALLENGE FOR LAW

As an alternate model of world-building, Neo-plasticism illuminates the creative potential of law. Like Mondrian's straight line and primary color prior to their liberation from conventional forms, persons in society are defined through their positions within patterns of burden and privilege designed by those in power. Where the powerful define the powerless as the dispreferred, the result is a legal world patterned by injustice.

A. Liberation: A Search for Identity

This power relationship accounts in part for the experience of those who exhibit a difference such as homosexuality. In the existing legal reality, the relationship of the heterosexual majority to the homosexual minority is characterized by discrimination and disrespect. Defined according to the majority's biases, homosexuality is unnatural and immoral. So identified, it is not surprising that no place is created for homosexuals within significant relationships, such as those among students and teachers in public schools or among members of the armed forces. To express the modernist spirit, an art of law would challenge rather than reinforce these oppressive legal patterns. Mondrian's de-composition of the visual world suggests one possible approach.

Mondrian's fixed law was the right angle, which "expresses the relation between two extremes." Abstract Reality, supra note 26, at 304.

37. The ranks of the "empowered" include different kinds of decisionmakers in contexts public and private, political and commercial. Effective "power" can reside, for example, in a political majority, in a strategic coalition, or in a minority with inordinate wealth or education. When I refer to "the empowered," I do not intend to evoke only a particular kind of institution, such as the federal judiciary, that enjoys a particular kind of formal authority.

For the purpose of this essay, "power" denotes an authority in one entity to allocate (or effectively influence the allocation of) advantage or disadvantage among other entities, which do not possess a comparable reciprocal authority. This definition occupies a necessarily high plane of abstraction: To rethink the existing social canvas is ultimately to reconsider more than the formal exercise of public power. Consequently, although the examples I cite tend to arise in the latter context, the reader should understand "empowerment" as a phenomenon pervading both public and non-public life.

38. See supra note 19. For a comprehensive survey of ways in which homosexuals have been disadvantaged on the basis of status or conduct, see Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings L.J. 799 (1979).

39. See Bowers v. Hardwick, 106 S. Ct. 2841, 2847 (1986) (Burger, C.J., concurring) (recounting "millenia of moral teaching" that condemns sodomy, "the infamous crime against nature" (quoting Blackstone)). Chief Justice Burger, while serving as a judge on the United States Court of Appeals for the D.C. Circuit, characterized homosexuals as suffering from "infirmities" analogous to those that plague chronic alcoholics and former felons. Scott v. Macy, 349 F.2d 182, 190 (D.C. Cir. 1965) (Burger, J., dissenting).


42. See Liberation from Oppression, supra note 25, at 41 (insisting that Neo-plasticism's "new constructions . . . not be created in the spirit of the past; they should not be repetitions of what has been previously expressed").
Law could engage in the "purification" of its own "plastic means." Perceiving the individual as the basic constructive element of legal composition, the artist-decisionmaker would reject all definitions of that person imposed within old patterns of legal reality. In this way, the individual's essential identity could be apprehended, allowing appreciation of her positive compositional value in the world to be constructed.\(^4\) Just as Neo-plasticism freed the line from the other side of the tree, so law would free the homosexual from the other side of heterosexuality.

B. Re-composition: To Build a Legal World

De-composition is only half of the task for a modern art of law; composition of the alternative legal picture would remain. Legal world-builders, like Neo-plasticist painters, would follow a fixed compositional principle when re-constructing relationships among law's fundamental human elements. To be useful as a standard for world-building, such a principle must exist prior to and independent of the act of composition itself, as does Mondrian's "truth for all time."\(^4\)

When exploring fresh possibilities for world-building within the existing legal framework, it would be neither necessary nor, indeed, possible to grant a compositional principle the status of "universal truth" that Mondrian claimed for the pure right angle.\(^4\) It is enough to accept such a principle in law as a convention of truth, whose usefulness to the constructive project does not depend upon an ultimate, objective reality as "Truth."\(^4\) Given this understanding, an art of law may discover a valua-

---

43. The practical impossibility of further reducing a primary color simplified Mondrian's process of purification. Such a project would be more complicated for the artist-decisionmaker, given the difficulty of determining what are individuals' fundamental identifying characteristics. Moreover, the identity of a human being rarely can be reduced to and exhausted by a single characteristic. Although this essay speaks of homosexual persons, blacks, and women as pure plastic means, see infra Section III, it recognizes that every person integrates sexuality, ethnicity, and sex differently within her own identity. A person accords each fundamental quality a different significance relative to all others she possesses. Furthermore, persons typically advance identities as individuals at the same time that they share the identity, the status, and the experience of one or many groups. This essay adopts neither the view that identity is located wholly in the individual nor the view that it resides wholly in her group associations. Instead, this essay recognizes that identity is protean—it varies in character and origin with changes in context and circumstance.

Consequently, to apprehend an authentic identity for one of law's plastic means, this essay employs a notion of self-definition. It emphasizes the perspective of the gay, the black, or the woman in determining what constitutes that person's identity. See infra notes 86-95 and accompanying text; infra Section III.C.

44. See supra note 36 and accompanying text. If there were no such principle to govern legal composition, every relation established within existing legal reality would be self-justifying. No external standard would exist by which to identify a normative preference for relationships of one nature over those of another.

45. See supra note 36 and accompanying text.

46. I do not wish to join the current debate about whether "true" legal principles enjoy an objective existence. See generally Kennedy & Klare, A Bibliography of Critical Legal Studies, 94 Yale L.J. 461 (1984). Without taking a position on the rather daunting question of whether the United
ble compositional principle in the equal protection clause of the Fourteenth Amendment. 47

This essay has characterized law as a process whereby rights are granted and responsibilities imposed 48 in such a way that a pattern of right and responsibility emerges. 49 In this context, to declare that no person shall be denied the equal protection of law is to articulate an ideal that the legal relations forming that pattern manifest the compositional principle of equality. 50

The ideal of equal protection has been translated into an assumption that relationships reflect "equality" when individuals within those relationships are treated as though already "equal" on some basic level. 51 Thus, the Constitution is said to direct that "all persons similarly circumstanced . . . be treated alike." 52 This interpretation has resulted in an urge to minimize the significance of any apparent "un-likeness," to challenge the relevance of traits that controvert the constitutional presumption of sameness. 53

Classic equal protection doctrine proceeds from a conviction that the

---

47. See also supra notes 7-9 and accompanying text.
48. See supra text accompanying notes 2-3.
49. Within this pattern, individuals and groups may be mutually related—that is, placed into relationship—by virtue of the right or responsibility itself. A "right" accorded one may denote a corresponding responsibility in another to honor, if not to protect, that right. Additionally, a responsibility will often link one person directly to another person. For example, responsibilities are imposed upon a parent to preserve a certain relationship with a child. See, e.g., supra note 9 and accompanying text (equal protection doctrine employed to restructure relationships).
51. This characterization accords with the classic formulation that the constitutional norm of equality prohibits government from employing classifications that distinguish between persons who should be regarded as similar. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 993 (1978). As one commentator has observed, this reveals a belief that "if members of social groups . . . can be viewed as if they are the same, then actions predicated upon such a view will produce equal treatment, which will contribute to rational social equality." C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 119 (1979).
53. A seminal exploration of equal protection's doctrinal potential identifies this presumption of sameness as fundamental to the ideal of human equality. "[D]ifferences in color or creed, birth or status, are [not] significant or relevant to the way in which men should be treated." Under the Constitution, "[i]f these factors . . . are irrelevant accidents in the face of our common humanity." Tussman & tenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 353 (1949).
constitutional ideal is a world in which all persons join in undifferentiated “humanity.”\textsuperscript{54} Commonly, however, non-judicial decisionmakers stray from that ideal by recognizing and acting upon relative dissimilarity among individuals and groups.\textsuperscript{55} Decisions that allocate rights and responsibility on the basis of dissimilarity are incompatible with an “equal protection” based on a principle of sameness; conventional Fourteenth Amendment doctrine responds with suspicion. When persons or groups receive different treatment on the basis of distinguishing characteristics, such as personal traits or life circumstance, the decision to treat differently is frequently subjected to judicial review.\textsuperscript{66} The classification upon which different treatment is predicated must be related to the purpose underlying the decision: The characteristic must mark a difference that is relevant.\textsuperscript{67}

A corollary to the maxim that like cases should be treated alike is that unlike cases may be treated “unalike.”\textsuperscript{68} Accordingly, classifications based on “unlikeness” survive judicial review when decisionmakers overcome the Constitution’s presumption that differences are irrelevant “in the face of our common humanity.”\textsuperscript{69} Equal protection doctrine thus looks for a constitutionally relevant difference before permitting something other than uniform treatment. In practice, the status quo and its powerful persons occupy a privileged starting point for this analysis. The identity of the decisionmaker sets the standard by which differentness is recognized and measured.\textsuperscript{60} Relevance is defined from the single perspective of the em-

\textsuperscript{54} Id.
\textsuperscript{55} Even so, similarity remains a compelling goal. When a group is pronounced dissimilar from society at large, that conclusion must be further justified according to similarity among members of the designated class. “The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.” Tussman & tenBroek, \textit{supra} note 53, at 344.

\textsuperscript{56} When challenged under the equal protection clause, a classification is ordinarily reviewed under a minimum rationality standard. \textit{See}, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (classification presumed to be valid and will be sustained if rationally related to legitimate state interest). Scrutiny is more stringent when the classification rests on a trait, such as race, national origin, or religion, that has exposed an individual or group to systematic discrimination. \textit{See}, e.g., Graham v. Richardson, 403 U.S. 365, 372, 376 (1971) (classification must be necessary to promote compelling state interest). A third category of traits, including sex and illegitimacy, trigger intermediate review. \textit{See} Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (gender classifications must be substantially related to achievement of important governmental objectives).

\textsuperscript{57} “The equal protection clause ceases to assure either equality or protection if it is avoided by any conceivable difference that can be pointed out between those bound and those left free. . . . [T]he differentiation must have an appropriate relation to the object of the legislation or ordinance.” Railway Express Agency v. New York, 336 U.S. 106, 115 (1949).

\textsuperscript{58} “The Constitution does not require things . . . different in fact or opinion to be treated in law as though they were the same.” Tigner v. Texas, 310 U.S. 141, 147 (1940). “[T]hings that are unalike should be treated unalike in proportion to their unlikeness.” \textit{Aristotle, supra} note 52, at V.3.III.1B. Yet being treated unalike does not necessarily mean being treated unequally. \textit{See} C. \textit{MacKinnon, supra} note 51, at 119 (criticizing attitude that “[i]f members of [different] groups cannot be viewed as if they are the same, their differences merit inequality”).

\textsuperscript{59} Tussman & tenBroek, \textit{supra} note 53, at 353.
\textsuperscript{60} An institution like the judiciary often maintains an internal standard of “non-differentness”
powered, not from that of the individuals whose differentness is in question.61

Persistent discrimination against those who exhibit a dispreferred difference betrays the poverty of the conventional equality principle.62 For instance, because a heterosexual majority characterizes a difference in sexual orientation as a difference to be abhorred, homosexuality is considered relevant. It is not only unworthy of affirmation as a positive quality, but it warrants disadvantaging treatment as well. Even those differences, like race, that have been declared presumptively irrelevant as a basis for imposing social burdens63 have not been given an affirmative value within the legal composition.64

Commonality and not differentness is the current constitutional goal.65 Yet, when one recognizes the dynamic between the empowered and those who are different, it becomes apparent that the contours of "common humanity" coincide to a great extent with the identity of those holding power.66 Pursuit of this kind of equality is, in effect, pursuit of assimilation. From this perspective, for example, school integration appears not so much the result of holding skin color irrelevant for purposes of public

that amplifies and extends the identity of any one of its individual decisionmakers. Professor Dworkin has described legal interpretation as a practice demanding that its participants share a "form of life": "They must share a vocabulary . . . They must understand the world in sufficiently similar ways and have [similar] interests and convictions . . . ." R. DWORKIN, LAW'S EMPIRE 63 (1986).

61. Professor Brest notes that racial distinctions between more and less powerful groups inevitably lead to "racially selective sympathy and indifference . . . []" which distort the political process by which decisions are made. Brest, The Supreme Court, 1975 Term: Foreword—In Defense of the Antidiscrimination Principle, 90 HARY. L. REV. 1, 8 (1976). Brest defines this phenomenon of selective indifference as "the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given . . . to one's own group." Id. at 7–8 (footnote omitted).

62. Minow develops a view that the empowered's store of knowledge about differentness "is rooted in specific perspectives . . . ." Minow, supra note 50, at 128. Consequently, the structure of society reflects the "perspectives of those in positions to enforce their points of view." Id. Patterns of disadvantage may be attributed to the narrowness of that empowered point of view. "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

63. See infra note 81 and accompanying text (discussing suspect classification doctrine under current equal protection theory).

64. Cf. infra notes 126–27 and accompanying text (describing world in which race is given affirmative value).

65. See supra text accompanying notes 51–57.

66. Professor MacKinnon observes this phenomenon in situations where race and sex inequalities are evaluated according to an antidiscrimination principle, which requires like treatment for those who are the "same."

Just as men set . . . standards [of sexual sameness] according to a standard of masculinity, . . . [which also provides] the ruling definition of equal treatment (which is to say, "sameness" . . . suppresses the fact that the referent for the "same as" is men), white culture sets the standard of racial equality according to a standard of whiteness. That standard too, suppresses its referent.

education as the result of holding blackness irrelevant for purposes of absorption into the white culture of a white school.\textsuperscript{67}

This skewing of the equality principle has produced a legal world to which the “unlike” gains admission by proving that it is fundamentally “like.”\textsuperscript{68} The empowered tolerate differentness only so long as the disparate element can be absorbed into the undisrupted patterns of the status quo.\textsuperscript{69} What is constructed is a series of relationships between like and unlike in which differences ignored by the former persist for the latter with frustrating vividness.\textsuperscript{70} “Equal protection” is made an instrument of internal exile.

\textsuperscript{67} See infra notes 116–125 and accompanying text.

\textsuperscript{68} MacKinnon develops this idea in her analysis of sex discrimination: “[D]ifferential treatment is prohibited only so long as the sexes are relevantly the same or enough the same for their treatment to be compared.” C. MacKinnon, \textit{supra} note 51, at 115.

\textsuperscript{69} As long as one's differentness does not interfere with performance against established standards of merit and success—as long as it is inconspicuous—that differentness may be overlooked. Women's experience provides a compelling example:

[I]f one enters a world in which the standard is already constructed according to an implicit but suppressed male referent, [one has] a marketplace structured according to a male biography, a male-based series of social expectations. . . . Only women who are most \textit{like} the male norm are advanced or advantaged by [an assimilationist notion of equality]. . . . [W]e can play with the boys but we cannot question competition as a measure of merit[,] . . . as the test of accomplishment.

\textit{Feminist Discourse, supra} note 66, at 23 (remarks of Catharine MacKinnon); see Note, \textit{Toward a Redefinition of Sexual Equality}, \textit{95} \textit{Harv. L. Rev.} \textit{487} (1981) (criticizing view of sex equality that forces women to accept, at best, a chance to assimilate themselves into existing educational, labor, and other social institutions); \textit{infra} Section III.C.3 (speculating on status of women in non-assimilationist world).

\textsuperscript{70} The harm can occur when one who is able to assimilate does so at a cost to the integrity of her identity. There is damage also when one who is unable to assimilate is for that reason relegated to a position of subordination. Cf. Bell, \textit{The Dialectics of School Desegregation}, \textit{32} \textit{Ala. L. Rev.} \textit{281}, 291 (1981) (criticizing meritocracy “based on whiteness”) [hereinafter \textit{Dialectics}]. Law has at times exhibited a formal disregard of differentness when “neutral” employment criteria have a disproportionate negative impact on racial minorities. Compare Washington v. Davis, 426 U.S. 229 (1976) (absent proof of discriminatory purpose, intelligence test criterion for employment as police officer held constitutionally valid regardless of resulting disproportionate exclusion of blacks from force) \textit{with} Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment criterion that excluded disproportionately high percentage of racial minority members held prima facie violation of Title VII). The Court decided \textit{Washington} on constitutional rather than statutory grounds; nonetheless, the conceptual retreat from \textit{Griggs} suggests a reluctance to acknowledge that racial differentness, and the systematic disadvantage that has accompanied it, can be excruciatingly relevant to performance on racially “neutral” tests formulated essentially by whites for whites. \textit{Washington}’s “discriminatory purpose” hurdle obscures the reality that a disproportionate number of applicants will continue to fail the test because of their non-white identity—that is, their non-white culture, background and experience do not score points on a test designed to measure whiteness. See also Minow, \textit{Learning To Live with the Dilemma of Difference: Bilingual and Special Education}, \textit{48} \textit{Law & Contemp. Prosbs.} \textit{157}, 159–60 (1985) (arguing that nonrecognition of differences perpetuates “faulty neutrality” that may disadvantage minorities).
A. Of Differentness and Equivalence

In rethinking law as a modern art, I propose a reevaluation of the compositional principle available in the Fourteenth Amendment. The concept of differentness provides the point of departure for a fresh exploration of the ideal of equality.

Once Mondrian had purified the plastic means, he was left with the free line and primary color. Not only could his compositional theory accommodate two distinct kinds of constructive elements, but it also embraced three fundamental colors: red, yellow, and blue. It is its absolute "otherness" that characterizes a color as primary. Neo-plasticism is, in this sense, a celebration of differentness. While used in the same composition to complement, contradict, and challenge one another, the colors never blend into one another to mitigate each's essential dissimilarity.

Law can benefit from the vision of Mondrian. To assign positive value to differentness is to recognize alternative norms of identity. It is to pursue an ideal of "humanity" that is not "undifferentiated" but that is instead defined by many identities and from many perspectives. By acknowledging the differentness among law's "plastic means," an artist-decisionmaker could realize new possibilities for composition along the ideal of equality.

The urge to enforce similarity would be supplanted by an anti-

71. In this, the art of law would differ greatly from Neo-plasticism. Whereas Mondrian could reduce the constructive elements to three colors and the line, the artist-decisionmaker would confront a more varied array of pure plastic means. See supra note 43.

72. The concept of differentness has shown itself to be as potentially destructive in law as it is constructive in art. Professor Law observes that legal constructs have at times given "oppressive social significance to . . . differences and thereby [have] limit[ed] human liberty and equality." Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 969 (1984). This criticism is valid with regard to differences of race, see Plessy v. Ferguson, 163 U.S. 537, 540 (1896) (upholding statute providing for "equal but separate accommodations for the white, and colored races"), of sex, see Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (refusal to admit women to state bar justified because "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother"), and of sexual orientation, see Bowers v. Hardwick, 106 S. Ct. 2841, 2844 (1986) (upholding sodomy statute against constitutional privacy challenge in part because "[n]o connection between family, marriage, or procreation . . . and homosexual activity . . . has been demonstrated").

In a modern art of law, the process of determining relevant differences and their compositional significance would provide as great an opportunity for abuse—for using differentness to justify disad-
assimilation principle.\textsuperscript{73}

This principle is not without foundation elsewhere in the Constitution. Because it privileges the freedoms of religion and speech, the First Amendment\textsuperscript{74} may be characterized as protecting enumerated differentiations from state-enforced assimilation.\textsuperscript{76} The equal protection clause may, in turn, be employed to protect unenumerated differentiations. So construed, it promises a fertile compositional principle for a world-building law.

A shift in focus from sameness to differentness suggests a shift from the goal of uniformity to an ideal of equivalence. "Equivalence" captures the essence of a relationship in which two things maintain their essential differentness while asserting a compelling claim to equal significance and respect. It is an ideal demanding not that dissimilar individuals be forced into sameness, but that they, like Mondrian's three primary colors, be given equal compositional value within the legal construction.\textsuperscript{76} Neovantage—as presently exists. Recognizing the danger, this essay concentrates on the potential for good in a "differentness" approach. This approach is appropriate for decisionmakers only if accompanied by a commitment to assign positive value to differentness when composing the legal canvas. Cf. C. MacKinnon, supra note 51, at 106 (to remedy inequality between sexes "women's differences from men must be equally accommodated and equally valued"). For an example from the international arena of how a differentness principle might be implemented, see Minority Schools in Albania, 1935 P.C.I.J. (ser. A/B) No. 64, at 19 (advisory opinion) (declaring that Minority Treaty's promise of equality "may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations").

73. I understand "assimilation" to mean the effort "to make similar or alike[,]. . . [t]o appropriate and incorporate into the substance of the appropriating body[, or] to absorb." Webster's New Collegiate Dictionary 53 (1961). So defined, assimilation connotes not merely a willingness to countenance similarity, but in fact a commitment to enforce it. My anti-assimilation principle challenges practices that have the effect of mandating the camouflage or dissolution of differentness within the "substance of the appropriating body." Professor Wasserstrom advocates an assimilation principle that purports to advance equality without incorporating persons who are different into the dominant group. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 U.C.L.A. L. Rev. 581, 604 n.46 (1977). When Wasserstrom applies his assimilationist model to the problem of sex inequality, however, his conclusion is startling: "Given the present state of medical knowledge and the natural realities of female pregnancy, it is difficult to see why any important institutional or interpersonal arrangements must take the existing gender difference of in utero pregnancy into account." Id. at 612.

Wasserstrom sells equality to women at the price of childbearing—the expression of the biological capacity that sets them apart as "different" from men. His ideal does require that women "incorporate" themselves into the dominant group and become, like men, persons who do not bear children. See Law, supra note 72, at 966 ("An assimilationist vision that ignores differences between men and women does not help us to reconcile the ideal of equality with the reality of difference.").

74. "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech . . . ." U.S. Const. amend. I.


76. The concept of equivalence is central to the Neo-plasticist aesthetic. "Equivalence is neither equality nor similarity . . . . [i]n Neo-Plasticism we always have two equivalent terms, i.e., an explicit duality." Mondrian, Abstract Reality, supra note 26, at 320; see also supra note 36 (discussing
B. In Pursuit of Plastic Means

This essay has proposed that law begin its task of world-building by "purifying its plastic means"—by attempting to uncover the essential identities of the persons who are its own constructive elements. The identification process would present a significant, but not utterly unfamiliar, challenge to the artist-decisionmaker. For instance, under any degree of judicial scrutiny exercised within classic equal protection jurisprudence, a judge must evaluate particular characteristics that have been designated "differentiating" traits by another decisionmaker in order to determine whether different treatment is justified. This exercise has generated legal standards by which traits of differentness are routinely sorted.

centrality of right angle to Neo-plasticist composition). This duality remains "differentiated," id.; Mondrian's insight underscores the value of the anti-assimilation principle to equal protection jurisprudence. Insisting that Neo-plasticism aspire to the ideal of equivalence, Mondrian declared that the plastic means, although "different in size and color . . . should nevertheless have equal value." Mondrian, Principles of Neo-Plasticism, supra note 26, at 166.

77. Id. at 168. In a Neo-plasticist world, the equivalence principle would find expression in every facet of personal and social existence: "Real life is the mutual interaction of two oppositions of the same value but of a different aspect and nature." Plastic Art, supra note 29, at 354 (emphasis omitted).

78. Once again, this challenge is not negligible. See supra note 43.

79. See supra note 56 (describing three standards of review).

80. Id.; see also supra notes 58–59 and accompanying text.

81. Equal protection doctrine has evolved criteria for determining which differentiating traits should induce particular judicial vigilance against discrimination. Many find the germ of these criteria in Justice Stone's dictum in United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), in which he intimated that legislation would be subject to stringent judicial review if it disadvantaged "particular religious . . . or national . . . or racial minorities." Id. (citations omitted). Some read the footnote only to recommend judicial intervention only when a defect in political process is apparent or likely. See, e.g., J. ELY, DEMOCRACY AND DISTRUST 77 (1980) (arguing that footnote was concerned with obstacles to participation in political process). A second interpretation focuses not on the process resulting in disadvantage to those who are different but on the differentiating trait itself.

Justice Stone specified religion, national origin, and race as traits identifying "discrete and insular minorities." Carolene Prods., 304 U.S. at 152 n.4. When a decision disadvantages on the basis of one of these traits, judicial interference is appropriate not only to correct process but also to vindicate a minority's substantive rights. See Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 741 (1985) (interpreting footnote to assert that "there are certain substantive principles . . . that pluralist politicians are simply not allowed to bargain over in normal American politics").

Much of modern equal protection doctrine has developed around efforts to analogize religion, national origin, and race to other differentiating traits in order to extend the protective reach of heightened judicial scrutiny. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (illegal alien status); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy). Judicial decisionmakers have evaluated such claims by using a catalog of characteristics that may indicate a group's "discrete and insular" nature or its standing as a suspect class. See, e.g., Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of certiorari) (homosexuals arguably constitute suspect class in part because public opprobrium renders them
Decisionmakers have evaluated differentness, however, within a tradition that asserts the "moral irrelevance of any trait which reveals nothing about the moral worth or desert of a person."82 Consequently, when differentiating traits are identified by a judge, they are likely to be deemed irrelevant.88 To say that a given trait reveals nothing about an individual's moral worth, however, is not to say that the trait reveals nothing about an individual's identity as a person—as one of law's compositional elements.84 Differentiating traits considered irrelevant to the assignment of powerless to pursue rights openly in political arena); Frontiero v. Richardson, 411 U.S. 677, 688, 686 n.17 (1973) (plurality opinion) (sex classification "inherently suspect" in part because women are "vastly underrepresented in . . . decisionmaking councils," though not "small and powerless minority").

Classifications may be suspect when they rest on an immutable trait or one not voluntarily adopted or perpetuated, see, e.g., Flyler v. Doe, 457 U.S. at 216 n.14, 219 n.19, 220 (1982) (classification somewhat suspect because children neither choose illegal alien status nor exercise control over it); or on "stereotyped characteristics not truly indicative of . . . abilit[y]," Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (articulating criterion but denying suspect class status to group of police officers over age of fifty). Suspect classes are commonly identified by historical experience as "the object of pernicious and sustained hostility." Mad River, 470 U.S. at 1014 (Brennan, J., dissenting from denial of certiorari). The "traditional indicia of suspectness" emerge where a class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (denying suspect class status to public school pupils in state's less affluent districts).

82. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1065 (1979). Professor Perry argues further that the equal protection clause mandates equality among moral equals. "To say that one person is the moral equal of another . . . [means] that the former is no less worthy . . . than the latter of respect, concern, [and] opportunity for self-fulfillment . . . and no more deserving of subordination to or domination by others." Id. at 1030.

83. This holds true especially when the trait involved, like race, triggers strict judicial scrutiny. Since 1945, no legislative classification explicitly burdening a racial minority has survived the ordeal of proving a "compelling" state interest. The requirement of compelling justification for racial discrimination has been "strict' in theory and fatal in fact." Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).

I have suggested that some differentiating characteristics, while deemed "irrelevant" by decisionmakers, remain intensely relevant to the individual in question. Relying on their judgment that a difference is irrelevant, judicial decisionmakers invalidate particular allocations of burden on the basis of that difference. But that judgment may also frustrate the individual's attempt to assert and preserve the relevance of her differentiated identity within the legal composition. See supra text accompanying notes 67-70; see also infra notes 117-18 and accompanying text (discussing disadvantage to blacks when ethnic and cultural differences are held "irrelevant" to educational policies); infra notes 137-39 and accompanying text (noting disadvantage to women when reproductive differences are held "irrelevant" to employment policies).

84. Professor Perry would prohibit discrimination based on "morally irrelevant" identificational traits, among which he includes race. Perry, supra note 82, at 1030. In his view, some fundamental aspects of a person's identity augment or diminish her moral worth, thus providing justification for unequal treatment. "[N]ot every person is the moral equal . . . of every other person." Id. "The extent of the respect [and] concern . . . that one person accords another is . . . a function of the extent to which the former approves, disapproves, or regards with indifference the latter's choices and activities, his or her self-definition." Id. at 1030-31 (emphasis added) (footnote omitted).

Perry suggests that, unlike race, alienage and homosexuality are two traits that can be deemed morally relevant. Consequently, the Fourteenth Amendment should not protect an individual possessing either trait from treatment as a moral unequal on account of that trait. Id. at 1066-67. In contrast, I argue that legal world-building ought not to proceed at the level of morals described by Perry,
burden can be central to personhood. This essay proposes that law pursue an individual's essential identity not to impose burdens, but to realize the positive compositional potential of that human element. Traits of difference may enjoy a new relevance.

C. Painting the Legal Canvas

If decisionmakers were to compose law's human constructive elements along a principle of equality, what new worlds might emerge on the legal canvas? Three case studies may give an inkling.

1. The Homosexual in Relationship

The artist-decisionmaker's first challenge would be among her most difficult: There is no ready formula for purifying law's plastic means, for determining which qualities of differentness are integral to identity and therefore relevant when composing legal worlds. Homosexuals would present, in this respect, a particularly perplexing task.

Unlike race or biological sex, sexual orientation is a characteristic whose etiology is a matter of great controversy. As a quality of different-at which an empowered decisionmaker approves or disapproves another person's self-definition. In a modern art of law, traits integral to identity would be accorded equal compositional value regardless of the artist's approval. Cf. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1, 6 (1977) (Fourteenth Amendment requires "organized society [to] treat each individual as a person, one who is worthy of respect, one who 'belongs' "); Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1063, 1077 (1980) (law unjustly discriminates if it is "part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity ").

85. When one considers that, in practice, "personhood" has been a synonym for the state of being a white, heterosexual male, it becomes apparent that race, sex, and sexual orientation are in fact fundamental constituents of the personhood norm. See Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118, 1152 n.151 (1986) (homogenous ideal is neither objective nor inclusive but is linked to white, Anglo-Saxon Protestant, male values and experiences). From this perspective, traditional equal protection doctrine may be understood to proceed on an unarticulated urge to include other races and the other sex in the definition of personhood: to make "non-whiteness" and "non-maleness" additional criteria upon which to allocate rights. Emphasis on irrelevance may bespeak a deeper notion that traits like race and sex are relevant, even integral, to personhood.

86. In elaborating their "forbidden classification doctrine," Tussman and tenBroek admit that their foremost difficulty is the determination of which traits to treat as constitutionally irrelevant. Tussman & tenBroek, supra note 53, at 355; cf. Wright, Color-Blind Theories and Color-Conscious Remedies, 47 U. CHI. L. REV. 213, 231-32 (1980) (affirmative action remedies inevitably confront courts with difficult questions about how "each of us is to be assigned to 'our' race" (quoting Van Alstyne, Rites of Passage: Race, the Supreme Court, and the Constitution, 46 U. CHI. L. REV. 775 (1979))). Similar difficulties would arise when determining the traits relevant to the project of world-building.

87. "[T]here is still no essential agreement in the scientific community about the nature of human sexuality. Whether humans are 'homosexual' or 'heterosexual' or 'bisexual' by birth, by training, by choice, or at all is still an open question." Boswell, Revolution, Universals and Sexual Categories, 58-59 SALMAGUNDI 89, 96 (1982-83) (footnote omitted). Explanations for homosexuality have included genetic loading, altered prenatal levels of male hormones caused by abnormal stress during pregnancy, Oedipus/Electra complexes, and role-modeling or social learning. Green, The Best Inter-
ness, sexual orientation is often considered simply a choice of behavior or lifestyle rather than an integral facet of a person’s identity. This characterization obscures the fact that for many it is as fundamental to identity as one’s race or biological sex. When confronting discrimination against gay persons, the artist-decisionmaker would have to resolve the tension between an individual’s characterization of her own essential identity with a Lesbian Mother, 10 BULL. AM. ACAD. PSYCHIATRY & L. 7-9 (1982). But see Richards, Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution, 30 HASTINGS L. J. 957, 985 & n.125 (1979) (observing that “prevailing view” appears to be that homosexual orientation results from life experience and noting rejection of theories based in genetics and hormonal imbalance). Not until 1974 did the Board of Trustees of the American Psychiatric Association remove homosexuality per se from the Diagnostic and Statistical Manual of Mental Disorders. Green, supra, at 9-10.

Debate persists over the relationship of homosexual behavior to identity. See Storms, Theories of Sexual Orientation, 38 J. PERS. & SOC. PSYCHOLOGY 783, 783-84 (1980) (some theorists “place[] sexual orientation within . . . context of . . . overall sex role identity”; others focus solely on “individual’s acquired erotic responsiveness to stimuli associated with one sex or the other[,]” rejecting sex role identity and behavior as “merely the secondary effects of social labeling”); Warren, Homosexuality and Stigma, in HOMOSEXUAL BEHAVIOR 123, 124 (J. Marmor ed. 1980) (“homosexuals are viewed generally not just as people who do a certain type of thing, but . . . as people who are a certain type of being . . . English . . . has no verb ‘to homosexual’ as it does for many other behaviors such as ‘to swim’ . . .”).

Official condemnation of homosexuality repeatedly has assumed the form of criminal statutes that sanction sodomy, the conduct associated with practicing homosexuals. For a sampling of states having such legislation as of July 1986, see Bowers, 106 S. Ct. at 2847 n.1 (Powell, J., concurring). Most states do not distinguish formally between homosexual and heterosexual sodomy. See N.Y. Times, July 1, 1986, at A11, col. 4 (map showing that twenty of twenty-five states having sodomy laws proscribe both homosexual and heterosexual sodomy). These criminal statutes effectively deny homosexuals but not heterosexuals the right to have sexual relations at all. Gay rights advocates have challenged sodomy statutes and other official discriminatory action as infringements on the homosexual person’s constitutional right to privacy, see Griswold v. Connecticut, 381 U.S. 479 (1965), which protects consensual non-procreative sexual behavior between heterosexuals. Id. at 485-86; see, e.g., Bowers, 106 S. Ct. at 2842-43 (characterizing in this way Hardwick’s challenge to Georgia sodomy statute); see also Richards, Homosexuality and the Constitutional Right to Privacy, 8 N.Y.U. REV. L. & SOC. CHANGE 311, 314 (1979). This strategy has proven unsuccessful. See Bowers, 106 S. Ct. at 2843 (1986) (right to privacy in intimate association does not protect consensual sodomy between adult homosexuals); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (right to privacy does not invalidate military discharge for homosexual conduct); cf. Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 HARV. L. REV. 1285, 1290 (1985) [hereinafter Constitutional Status] (privacy approach to homosexual rights is inadequate because it “assumes that homosexuality is merely a form of conduct . . . rather than a continuous aspect of . . . personhood”).

Or one’s heterosexuality. “Homosexual and heterosexual responsiveness in human beings are not always clearly differentiated patterns. . . . [T]hese levels of responsiveness are points on a continuum that ranges from exclusive heterosexual reactivity to exclusive homosexual reactivity with various gradations in between.” Marmor, Overview: The Multiple Roots of Homosexual Behavior, in HOMOSEXUAL BEHAVIOR, supra note 88, at 5-6; see also A. BELL, M. WEINBERG & S. HAMMERSMITH, SEXUAL PREFERENCE: ITS DEVELOPMENT IN MEN AND WOMEN 211, 222 (1981) (“Homosexuality is just as deeply ingrained in a person as is heterosexuality.”).
tity and the heterosexual majority’s characterization of her “immoral” and “unnatural” conduct.\textsuperscript{91}

When purifying art’s plastic means, Mondrian looked to the constructive element itself for guidance as to its placement within the Neo-plasticist composition.\textsuperscript{92} In the same way, an artist-decisionmaker would be guided by the individual’s self-identity, so as “not to enforce a general vision of what men and women are really like, but rather to respect each person’s authority to define herself or himself . . . .”\textsuperscript{93}

When positioning the gay person within a legal composition, the artist-decisionmaker might adopt a definition for that constructive element which embraces both outward manifestations of homosexuality\textsuperscript{94} and its

\textsuperscript{90} Justice Blackmun in \textit{Bowers} argues that “sexual intimacy is . . . ‘central to . . . the development of human personality’ . . . . [I]ndividuals define themselves in a significant way through their intimate sexual relationships with others . . . .” 106 S. Ct. at 2851 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).

\textsuperscript{91} Cf. Richards, \textit{supra} note 87, at 975–99 (identifying and rejecting moral arguments for censuring homosexuality). A tension between conduct and identity also surfaces when a state attempts to punish individuals for \textit{status} associated with criminal behavior and not just the behavior itself. \textit{See} Robinson v. California, 370 U.S. 660 (1962) (invalidating criminal provision that sanctioned drug addiction as well as drug use).

\textsuperscript{92} \textit{See supra} notes 30, 35–36 and accompanying text.

\textsuperscript{93} \textit{See supra} note 72, at 969; \textit{see supra} note 43 (introducing this essay’s reliance on self-identity).

\textsuperscript{94} As a differentiating characteristic, sexual orientation does not supply a catalogue of physical traits, behaviors, or attitudes through which it is uniformly, or even typically, manifested. Commentators note that “gay identity” varies greatly within and among communities. \textit{See}, e.g., D. ALT\textsc{m}AN, \textit{supra} note 11, at 146–58. Those who do speak of cognizable, though highly generalized, “gay identities” report continuous permutation in recent decades. \textit{See id.} at 1–35 (discussing “invention” of “new homosexual”); Humphreys & Miller, \textit{Identities in the Emerging Gay Culture}, in \textit{HOMOSEXUAL BEHAVIOR}, \textit{supra} note 88, at 142 (exploring cultural factors and their impact on formation of personal gay identity). When attempting to define the gay person as an authentic constructive element, the artist-decisionmaker would need to resist behavioral stereotypes such as effeminity, \textit{see}, e.g., D. ALT\textsc{m}AN, \textit{supra}, at 55–56 (“common depiction of homosexuals has been of men and women who reject commonly accepted gender roles . . . . leading to mannish women and effeminate men”), and promiscuity, \textit{see}, e.g., Humphreys & Miller, \textit{supra}, at 145 (rejecting argument that gay persons inhabit “impoveryished cultural unit” and that “community members often have only their sexual commitment in common”). Particularly when a dispute concerns gay schoolteachers, the decisionmaker would confront a powerful stereotype that associates homosexuality with pedophilia. \textit{See Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S. CAL. L. REV. 797, 822–23 & nn.159–62 (1984) [hereinafter Heightened Scrutiny] (refuting misperception that homosexuals are more likely or more willing to molest children than are heterosexuals).}

Except for the latter example, stereotypes about outward manifestations of homosexuality are not always unrelated to the apparent self-identity of gay persons. \textit{See}, e.g., D. ALT\textsc{m}AN, \textit{supra} note 11, at 1, 152–53 (describing some gay men’s exaggerated gender identification as expressed through “effeminate” or “theatrically masculine” personal styles, or through “camp”). A stereotyped identity may appear actually to “fit” or to have been embraced by one or many gay persons. Yet an artist-decisionmaker could not disregard the influence of pervasive stigmatization and discrimination on a homosexual’s self-definition. \textit{See} Warren, \textit{supra} note 88, at 139 (“[S]ociety creates its own homosexuality— . . . the forms homosexuality takes . . . in behavior, identity, or community are profoundly influenced by stigma.”); D. ALT\textsc{m}AN, \textit{supra} note 11, at 153 (although “camp” represented a “form of cultural expression . . . allowing [gay] an identity,” it also arose as “a way of dealing with external hostility”). A self-definition forged in reaction to oppression may differ from that which would have emerged in a less threatening environment. \textit{See generally} B. PONSE, IDENTITY IN THE LESBIAN
reality as a "strong and spontaneous capacity to be erotically aroused by a member of one's own sex." Thus, the identification task would proceed with a presumption against pejorative identities and for preservation of differentness. The decisionmaker would attempt to define "personhood" from the perspective of differentness itself.

Once identified as a basic constructive element, the gay person could be integrated into a legal world recomposed to express the equivalence principle of equality. A first—and, perhaps, familiar—step towards this ideal would be to extend heightened scrutiny to practices that exclude or otherwise disadvantage individuals on the basis of their sexual orientation. To designate homosexuality as a suspect classification would place it alongside traits like race, religion, and national origin. The gay person could then command extraordinary protection by the judiciary because her distinctive characteristic not only targets her for systematic discrimination, but is also an integral component of her identity.

Designating homosexuality a suspect classification would allow an artist-judge to intervene were a majoritarian decisionmaker to impose subordinate compositional roles on the homosexual. Legislation defining the practicing homosexual as a criminal, as well as less formal policies treating her as an element unworthy of inclusion in patterns of legal and social reality, would answer to a stricter standard of justification. For example, the judge could position the gay teacher within a relationship including schoolchildren, parents, colleagues, and administrators. Not only would homosexual identity cease to justify excluding homosexuals from public school teaching posts, but it would also command recognition as a distinctly valuable component of the institution and the educational experience provided there. In much the same way, homosexual marriage

---

WORLD (1978) (analyzing how lesbian identities are constructed in context of secrecy, stigma, and politics). Furthermore, “[m]any homosexuals are, in fact, invisible . . . [and consequently] are incapable of projecting any definition of themselves to the straight communities.” Warren, supra, at 124 (citations omitted). A modern art of law may need first to create time and space for the development of authentic self-definitions in a legal world free of official stigmatization. For the Neo-plasticist, “[e]very form, every line has its own expression.” Plastic Art, supra note 29, at 353. Law too would need to encourage the expressive voice of its plastic means.

95. Marmor, supra note 89, at 5. Marmor defines a homosexual “as one who is motivated . . . by a definite preferential erotic attraction to members of the same sex and who usually (but not necessarily) engages in overt sexual relations with them.” Id. (emphasis omitted).

96. See Section III.A.

97. See supra note 56. For fuller development of like proposals, see Constitutional Status, supra note 88; Heightened Scrutiny, supra note 94.

98. See supra notes 82–85 and accompanying text; cf. Constitutional Status, supra note 88, at 1299–1301 (proposing definition of suspect classifications as those based on characteristics that are both essential to personhood and focal point of discrimination).

99. Professor Tribe has observed, “[F]reedom to have impact on others—to make the ‘statement’ implicit in a public identity—is central to any adequate conception of the self.” L. TRIBE, supra note 51, at § 15–1, at 888 (1978). “[T]here is a fundamental unfairness in allowing teachers to be publicly heterosexual, which affords the heterosexual young role models of how to build a life around their
Modern Art of Law

could enrich the institution of state-endorsed union;\textsuperscript{100} homosexual parenting, the institution of family.\textsuperscript{101} A gay person would be able to preserve the essential differentness of her identity while enjoying the same compositional value as all other plastic means.\textsuperscript{102}

2. Ethnicity in Education

Ethnicity, as a legal “primary color,” presents a distinctive historical problem. Given the experience of blacks in the United States, any suggestion of “purifying plastic means” evokes such images as white supremacists, \textit{de jure} school segregation, and anti-miscegenation laws.\textsuperscript{103} In this essay, I have described a purification principle that does not police the racial integrity of one’s blood or pedigree, but that seeks instead to uncover an authentic identity for law’s constructive elements. To assert that compositional elements are “primary”—characterized by an essential differentness that is worthy of preservation\textsuperscript{104}—is not to say that that differentness should be preserved through coercion.\textsuperscript{105}

Semantics further complicates the application of this essay’s ideas in the context of ethnicity. When purifying the plastic means, the artist-decisionmaker will need to determine some definition for “race” or “ethnicity” in order to discern the core characteristics of the racial iden-

\begin{itemize}
\item sexuality, and not to allow teachers to be publicly homosexual, thus depriving the homosexual young of the education . . . in how to build a life of sexual self-respect.” Richards, supra note 87, at 989 n.136. Homosexuality could further enrich an educational experience through curricula. See Humphreys & Miller, supra note 94, at 149-50 (“Censorship, distortion, and bowdlerization have long excluded homosexual events and persons from history texts.”).
\item See, e.g., Comment, Homosexuals’ Right To Marry: A Constitutional Test and a Legislative Solution, 128 U. Pa. L. Rev. 193 (1979) (arguing that committed homosexual couples are similarly situated to committed heterosexual couples and that it is unconstitutional for state to refuse former the opportunity to make marriage commitment).
\item See supra notes 76-77 and accompanying text.
\item See Loving v. Virginia, 388 U.S. 1 (1967). The anti-miscegenation statute struck down in \textit{Loving} declared it “unlawful for any white person in this State to marry any save a white person . . . . [T]he term ‘white person’ shall apply only to such person as has no trace whatever of any blood other than Caucasian.” Id. at 5 n.4 (quoting Va. Code Ann. § 20-54 (1960 Repl. Vol.)). The Loving Court found that the statutes had been designed to maintain white supremacy. Id. at 11.
\item See supra Section III.A.
\item Principles of anti-assimilation and equivalence, if employed to coerce historically oppressed racial groups into an impenetrable state of segregation, would reinforce and not challenge conventional forms of legal reality: They would not embody the animating spirit of modern art. Cf. Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 425, 427 (1960) (life in segregated community was not one “of mutual separation of whites and Negroes, but of one in-group enjoying full normal communal life and one out-group that is barred from this life and forced into an inferior life of its own”). The odious experience of a legal world founded on enforced differentness compels this essay’s emphasis on self-identification by law’s pure plastic means.

2073
tity. To be sure, there is a biological component to race.\textsuperscript{106} Yet the cultural and social dimensions of the experience of race, of the form of life within an ethnic group,\textsuperscript{107} are crucial as definitional factors. Confronted with a black who has been excluded from a position of significance in the legal picture, it would not be enough for the artist-decisionmaker to designate skin color as a trait that is irrelevant to the proper allocation of burden or privilege. It is not blackness of skin that provides a primary color within the legal composition; rather, it is the distinctive identity that some individuals possess as a result of their cultural and social experience as blacks.

Public school desegregation in the United States illustrates the shortcomings of a world built on the compositional principle that skin color is irrelevant—that it is only an illusion of differentness obscuring a fundamental sameness.\textsuperscript{108} In \textit{Brown v. Board of Education},\textsuperscript{109} the Supreme Court declared that state-enforced school segregation deprives the children of the minority group of equal educational opportunities because it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."\textsuperscript{110} In \textit{Brown II},\textsuperscript{111} the Court ordered that this constitutional harm be remedied by dismantling the dual education structure so as to achieve a "racially nondiscriminatory school system."\textsuperscript{112}

School boards were often ingenious in their efforts to frustrate \textit{Brown}'s

---

\textsuperscript{106} "Race" commonly suggests a community of descent, blood, or heredity. Physical traits like skin color may allow a person's race to be approximated; those traits have also provided the basis for racial disadvantage and subordination. See supra note 81; cf. Note, A Trait-Based Approach to National Origin Claims Under Title VII, 94 YALE L.J. 1164 (1985) (when deciding Title VII disputes, failure to consider heterogeneity of characteristic within single national origin group perpetuates discrimination against its least assimilated members).

\textsuperscript{107} Increasingly, definitions of race or ethnicity focus not on genetic traits but rather on cultural and political communities. An "ethnic group" is a "group[] of a society characterized by a distinct sense of difference owing to culture and descent." Glazer & Moynihan, \textit{Introduction}, in \textit{ETHNICITY: THEORY AND EXPERIENCE} 4 (N. Glazer & D. Moynihan eds. 1975). Glazer and Moynihan argue that the ethnic group is "defined in terms of interest, as an interest group." \textit{Id.} at 7. Traits like language and religion serve as organizing principles for political action. \textit{Id.} Glazer and Moynihan conclude that "ethnicity" encompasses all "forms of identification based on social realities as different as religion, language, and national origin." \textit{Id.} at 18. Overall, "race" may be losing favor as a mode for self-identification; an ethnic definition is at times preferred. Cf. Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019 (1987) (while Jewish persons do not constitute distinct racial group, race-oriented civil rights laws allow them right of action for injury motivated by racial animus).

\textsuperscript{108} I criticize this assimilatist view in Section II.B. and suggest an alternative equality principle founded in difference and equivalence.

\textsuperscript{109} 347 U.S. 483 (1954).

\textsuperscript{110} \textit{Id.} at 494.

\textsuperscript{111} \textit{Brown v. Board of Educ.}, 349 U.S. 294 (1955) (\textit{Brown II}).

\textsuperscript{112} \textit{Id.} at 301. This was the goal associated with "desegregation," originally understood as the elimination of state-imposed racial distinctions in school assignment patterns. See Ravitch, \textit{Desegregation: Varieties of Meaning}, in \textit{SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESSEGREGATION} 31, 31 (D. Bell ed. 1980) (relating how meaning of, and thus policy for, achieving desegregation have changed since \textit{Brown}).
desegregation mandate. Confronting delay by stubborn local authorities, many courts and litigants altered their strategies. Integration emerged as a favored remedy for segregated school systems. Thirteen years after Brown II, the Supreme Court announced that "a unitary, nonracial system of public education was and is the ultimate end to be brought about." In pursuit of "nonracial" public education, integration sought to eradicate the racial identifiability of a region's schools. This often entailed the assignment of the black school-age population to previously all-white schools. Black schools were often closed. Black teachers and principals were demoted or dismissed; they seldom followed their students into institutions of white education. In areas where blacks comprised a minority, remedial schemes that focused on racial proportionality constructed school populations in which black students remained a minority.

Formal recognition that skin color was irrelevant for purposes of school assignment failed to remedy the disadvantage of black children after being admitted to schools created and maintained for whites. Parents charged

113. See, e.g., Green v. County School Bd., 391 U.S. 430, 437-42 (1968); Griffin v. County School Bd., 377 U.S. 218, 229-32 (1964); see also Days, School Desegregation Law in the 1980's: Why Isn't Anybody Laughing? (Book Review), 95 YALE L.J. 1737, 1746-47 (1986) (some courts justified dilatory freedom-of-choice school assignment plans by interpreting Brown as mandate "to desegregate, not to integrate" (footnotes omitted)).

114. See Ravitch, supra note 112, at 31 (desegregation through integration goes beyond nondiscrimination to demand "racial balance"). For example, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), the mathematical ratio of blacks to whites in the community's student population was approved as one indicator of the appropriate racial composition of newly integrated schools. Id. at 22-25. To this end, the Court affirmed segregation remedies that included busing students and altering school attendance zones. Id. at 27-31.

115. See Green, 391 U.S. at 435-36 (noting that although Brown II's principal focus was the eradication of discriminatory school assignment policies, desegregation "was only the first step").

116. See id. Green imposed an affirmative duty on school boards to construct "system[s] without a 'white' school and a 'Negro' school, but just schools." Id. at 442. Remedial schemes emphasized the need to achieve racial balance throughout school systems. See supra note 114.

117. See Dialectics, supra note 70, at 283. "Desegregation . . . is now defined in terms of black attendance at white schools. Effective teaching in all-black, nonsegregated schools is perceived as irrelevant." Bell, Black Colleges and the Desegregation Dilemma, 28 EMORY L.J. 949, 958 (1979) [hereinafter Black Colleges].

118. See Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518, 531 & n.75 (1980) [hereinafter Interest-Convergence]. For an account of one school board's discriminatory firing of black teachers after integration program closed all-black school, see Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189, 190-92 (4th Cir. 1966); see also United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 232 (1969) (upholding remedial faculty assignment plan mandating that ratio of white to black faculty members be substantially same in each of system's schools). For many, integration policies reflected the conviction that racially imbalanced schools were inherently "incapable of providing equal educational opportunity" and that a predominance of non-whites labelled a school as "inferior." Ravitch, supra note 112, at 42-43; see Brown I, 347 U.S. at 495 ("Separate educational facilities are inherently unequal."). These assumptions informed the argument "that 'real' integration could take place only with a white majority." Ravitch, supra note 112, at 42.
that teachers favored the white children.\textsuperscript{120} Systematic attempts to resegregate schools included tracking and the use of standardized tests and achievement scores.\textsuperscript{121} Integration efforts “often altered the racial appearance of dual school systems without eliminating racial discrimination.”\textsuperscript{122}

“Non-racial” schools, consequently, looked very much like their all-white predecessors. Little meaningful attention was paid to the value inherent in blacks’ distinctive experience, culture, and history.\textsuperscript{123} Little care was taken to address special needs of black students.\textsuperscript{124} A conspicuous absence of black teachers not only deprived black children of role models of their own race, but it also deprived white children of role models from a race that for centuries had been defined as naturally subordinate to their own. The minority status of black children in white schools limited their opportunities to participate in school activities and to take significant leadership roles.\textsuperscript{125} At the same time, it limited white students’ opportunities to participate with and be led by those of a different culture and experience. Where “non-racial” has been translated as non-black, the black child’s identity as a black has been neglected. The world-building gesture of \textit{Brown}, in this sense, appears somewhat greater in potential than in result.

This essay has suggested that elements of differentness be given positive compositional value in the legal picture. Facing school desegregation, an artist-decisionmaker could build a world in which children of many identities learn not in a non-racial but in a multi-ethnic environment. Deci-

\begin{enumerate}
\item See Dialectics, supra note 70, at 283.
\item Interest-Convergence, supra note 118, at 531 n.74. Professor Bell cites additional examples of overt racial harassment: Black students were suspended and expelled more frequently than their white peers, were excluded from extracurricular activities, and were subjected to physical violence. \textit{Id.} at 531 (citations omitted).
\item See W. SEDLACEK & G. BROOKS, RACISM IN AMERICAN EDUCATION: A MODEL FOR CHANGE 45-62 (1976). Sedlacek and Brooks define “institutional racism” as “action taken by a social system or institution which results in negative outcomes for members of a certain group or groups.” \textit{Id.} at 45. Examples of racism in educational institutions include the exclusion of minorities from supervisory and decision-making positions, \textit{Id.} at 48, 61, curricula oriented towards white middle-class children, \textit{Id.} at 49, and, specifically in higher education, racially-biased admission standards, \textit{Id.} at 50, and student activities primarily geared towards a white lifestyle, \textit{Id.} at 60.
\item Indeed, some observers and policymakers argued that, for historical reasons, “[b]lacks are a caste, not an ethnic group, and as such, have no culture to preserve.” Ravitch, \textit{supra} note 112, at 43. Belief that black culture was a “culture of poverty,” \textit{Id.} at 42, bolstered the conviction that inferior caste status could be eradicated only through integration into a predominately white setting. \textit{Id.} See \textit{supra} note 119.
\item See, e.g., \textit{Black Colleges}, supra note 117, at 969 (desegregation typically failed to produce facilities “structured to serve special needs of and be responsive to . . . black student[s] . . . ”); cf. W. SEDLACEK & G. BROOKS, supra note 122, at 24-26 (some blacks’ cultural differences may challenge schools’ assumptions about communication patterns, traditional motivation methods, and appropriate reactions to authority).
\item See Dialectics, supra note 70, at 284; see also \textit{Black Colleges}, supra note 117, at 971 (relating argument that “unitary” school systems “only continue or worsen historical limitations on opportunities for blacks to be educated and to play significant leadership roles in the educative process”).
\end{enumerate}
sionmakers might design remedial orders or legislation to ensure representation of non-white races and ethnic groups not only in the student body, but also on faculties and in school administration. Broad standards for diversified curricula could address omissions of black cultural and historical contributions as well as current issues in the black community. Artist-decisionmakers could produce a legal world in which assimilation is exchanged for identity, sameness for equivalence.

3. Women in Composition

Women, like homosexuals and blacks, have been systematically excluded from significance within many of the relationships established in the legal composition. However, of the three fundamental differences pondered in this essay, sex would appear to offer the least controversial definition of itself. Unlike sexual orientation, which is not yet universally accepted as an identity difference, and ethnicity, which is informed, but not exhausted, by its genetic dimension, sex can be reduced to one indisputable biological fact. Many women can bear children; all men cannot.

Beyond the fact of reproduction, however, the definition of sex quickly becomes a source of intense disagreement. Biological sex has a cultural significance that is difficult to parse. It is clear that biological reality is fundamental to the social identity of many women and men, but it is


127. See Lightfoot, Families as Educators: The Forgotten People of Brown, in SHADES OF BROWN, supra note 112, at 3, 16 (“productive environments for learning [require that] . . . the cultural and historical presence of black . . . communities [be] infused into the daily interactions and educational processes of children”); W. SEDLACEK & G. BROOKS, supra note 122, at 134, 123 (suggesting strategies for incorporating black scholars and artists, as well as minority-related content, into curricula).

128. For a brief survey of women’s legal status over the last several centuries, see Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 WomEN’S RTS. L. REP. 175, 176-79 (1982). For an account of contemporary women as a sexual class within a world “structured by patriarchal social relations and phallocratic ideology,” see Z. EISENSTEIN, FEMINISM AND SEXUAL EQUALITY 11 (1984); cf. MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 Signs 515 (1982); MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635 (1983) (Both articles identify interests embodied and expressed in capitalist state with male domination.).

129. See supra notes 87-91.

130. See supra notes 106-07.

131. There is no reason to believe that black and white people are inherently different in any way that should ever be allowed to matter in the law. Men and women, by contrast, are different in significant sex-specific physical ways. . . . [M]ost women and no men possess the capacity to reproduce the species.

Law, supra note 72, at 965.

132. To the extent that constitutional doctrine shapes culture and individual identity, an equality
not at all clear whether that physical distinction is accompanied by other "differences" that can be characterized as fundamental to identity.

One can conceive of other differences as second-order traits that are related, in some organic way, to women's capacity for and experience of childbearing. Or one can look to psychological differences or differences in moral orientation between women and men. Or one can accept the authenticity only of biological reproductive distinctions and reject all other sexual differences as relics of women's history of domination and subjugation by men—as "gender" constructed by an oppressive social regime.

The artist-decisionmaker, then, would undertake the identification of plastic means in the midst of debate about whether an extra-biological identity of differentness can exist for women outside the patterns of social reality that are to be de-composed. This essay's emphasis on the self-

---

133. This perspective on difference has been termed "female essentialism." Z. Eisenstein, supra note 128, at 221-22. Its proponents assert "that woman is different from man in that she is more spiritual, loving, caring and that these differences are located (in some significant sense) in her biological self . . . ." Id. at 223. A similar view is evident in the notion of "maternal thinking," which is described as "a residual power accruing from woman's capacity to bear and nurse infants . . . ." Id. at 217. The biological self "may foster certain features of maternal practice, sensibility, and thought." Ruddick, Maternal Thinking, 6 Feminist Stud. 342, 346 (1980) (footnote omitted).

134. For one influential example of this approach, see C. Gilligan, In A Different Voice (1982). Gilligan concludes that the psychological and moral identity characteristic of women "is defined in a context of relationship and judged by a standard of responsibility and care . . . . [M]orality is seen . . . . as arising from the experience of connection . . . ." Id. at 160. For a discussion of various feminist theories regarding women's moral differentness, see Z. Eisenstein, supra note 128, at 216-18.

135. See Z. Eisenstein, supra note 128, at 231-41. "Gender" denotes the cultural and political manifestation of biological sex; the gendered identity is constructed "within a set of political relations that particularize [women's] bodies. A woman has a body and her body is significant in defining her as a woman within the relations of patriarchy." Id. at 233. MacKinnon defines gender as a "question of dominance . . . . of inequality . . . . Dominance and submission made into sex, made into the gender difference, constitute the suppressed social content of the gender definitions of men and women." Feminist Discourse, supra note 66, at 21, 27 (remarks of Catharine MacKinnon). Elizabeth Wolgast, in contrast, downplays the political to characterize gender in terms of "sex roles," which are "a minimal set of differences, differences in attitude and behavior and in life outlook, stemming from the asymmetries of reproduction and framed by a social context." E. Wolgast, Equality and the Rights of Women 28 (1980). Wolgast argues that "[h]aving sex roles is natural to us and [is] not the creation of society. . . . It is the androgynous role that is artificial, the product of a fictitious view of human nature." Id. at 32. Gilligan integrates these perspectives in a multi-dimensional definition of gender:

Gender is . . . . a component of biology and it is a component of identity; it has a physiological and it has a psychological dimension.

But gender also has a cultural dimension. It is socially constructed. We have gender-based norms and gender values. . . . Human personality . . . . [is] shaped neither simply by nature nor simply by nurture.

Feminist Discourse, supra note 66, at 58 (remarks of Carol Gilligan).

136. "One must wonder how much of what is termed 'difference' is biological sex and how much is gender-related, reflecting society and politics. The creation of gender defines biological differences." Z. Eisenstein, supra note 128, at 238. MacKinnon rejects difference altogether as a futile approach...
identification of law’s constructive elements suggests that a solution to this dilemma may be discovered in the re-compositional stage of Neo-plasticist law.

The difficulty of determining an authentic identification is especially extreme in the case of women and cautions against the artist’s first definitional step away from the basic biological fact of reproduction. If law wishes to realize a world in which the plastic means are composed in accordance with their own fundamental identities, the artist-decisionmaker must construct a reality in which women are not burdened because of their reproductive capacity. Once childbearing ceased to be “an economic, psychological, and cultural liability” to women, the decisionmaker’s world-building acts would need to nurture the potential for idiosyncrasy in women’s extra-biological identification. The law’s ultimate compositional goal would be to reinforce and facilitate “each person’s authority to define herself or himself, free from sex-defined legal constraints.”

To this end, artist-decisionmakers would establish economic and political norms that “create woman’s equality while recognizing her particularity.” These norms would not only ensure reproductive autonomy, but would also mandate the practical institution by employers of, for instance,

to understanding women’s identity. In response to Gilligan’s theory that women possess a distinctive moral “voice” founded in relationship, see supra note 134 and accompanying text, MacKinnon argues, “[T]he voice that we have been said to speak in is . . . the voice of the victim speaking without consciousness.” Feminist Discourse, supra note 66, at 27. She continues, “[W]omen . . . claim our identity in relationships because we have not been allowed to f . . . e a social identity on our own terms. . . . [W]e have never had the power to develop what ours really would be.” Id. at 75 (remarks of Catharine MacKinnon); cf. Williams, supra note 128, at 177–78 (describing nineteenth-century “separate spheres” ideology that excluded women from public world of politics and breadwinning by relegating them to private world of family and home).

137. “[I]n a sexually egalitarian society a woman should be both equal and free to say that her (individual) capacity for childbearing should not determine her social, political, and economic options.” Z. Eisenstein, supra note 128, at 236. Professor Law’s sex-based equality doctrine pursues a similar goal. See supra note 131; see also Note, Toward a Redefinition of Sexual Equality, 95 Harv. L. Rev. 487 (1981). I do not attempt to set out a specific program for achieving equality at this physiological level. My point is that an artist-decisionmaker could go no further than reproductive capacity in defining the woman as plastic means without risking a perpetuation rather than decomposition of society’s conventional forms.

138. Z. Eisenstein, supra note 128, at 244; see Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. Rev. 55, 58 (1979) (“As long as the labor market is hostile to parents, and as long as roles in the American family continue to be allocated on the basis of gender, the labor market gap between the sexes will continue.” (footnote omitted)).

139. The artist-decisionmaker’s first project might be to “dismantle the institutions—sexually specialized division of labor, sexual ghetto in the labor force, enforced heterosexual marriage—in which mothering presently takes place . . . .” Z. Eisenstein, supra note 128, at 244.

140. Law, supra note 72, at 969 (citation omitted). Adrienne Rich advocates the destruction of the institution of motherhood while preserving motherhood itself. She proposes to “release the creation and sustenance of life into the same realm of decision, struggle, surprise, imagination, and conscious intelligence, as any other difficult, but freely chosen work.” A. Rich, Of Woman Born: Motherhood as Experience and Institution 280 (1976) (emphasis added).

141. Z. Eisenstein, supra note 128, at 243.
day care facilities and part-time or flextime opportunities. Maternity
and parenting leaves, illness and vacation benefits sensitive to dependents’
needs, and other institutional accommodations would be necessary to bear
and rear children without forfeit of employment opportunities.

Constructed in this way, the legal canvas would reflect a compositional
value of women as plastic means going beyond their similarity to men.
Ensuring a woman’s effective access to significant relationships in the
world would create space for her to redefine those relationships in order
to express, on her own terms, the extra-biological characteristics of her
own identity as a woman—to reconstruct relationships that reflect her
own image.

IV. CONCLUSION

The law’s current response to the “unlike” casts an illusion of tolerance
over a reality of isolation. A modern art of law promises an equal protec-
tion that can accomplish more than disgruntled accommodation.

Equality dictates a radical change in all relationships within the legal
composition. In an art of law, the reconstructed pattern of rights and re-
sponsibilities would reflect the differentness of those plastic means given
new compositional worth. The value of heterosexuality, of whiteness, of
maleness, could no longer rest on assumptions about their objective moral

142. Id.; see also Frug, supra note 138, at 57-61, 94-103 (stressing that pursuit of options ought
not to result in disproportionate reduction of benefits and career opportunities).
143. See Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 YALE
L.J. 929 (1985) (challenging “parity of treatment” construction of pregnancy-specific sex discrimina-
tion provisions of Title VII). The Note’s author focuses on the “moments” of pregnancy and child-
birth and leaves aside the “social process of parenting, commonly performed by women, but not bio-
logically specific to them.” Id. at 929 n.6. By ending analysis at the moment of delivery she ignores,
for example, the practice of breastfeeding, which is simultaneously a part (albeit optional) of the social
process of parenting and a reproductive phenomenon biologically specific to women. A workplace
that does not accommodate women who nurse their babies can alienate and disadvantage women as se-
verely as do practices that penalize pregnancy and childbirth directly. In this light, the distinction
blurs between biological and social events—between reproduction and parenting. For women and men
whose realities include a child, institutional accommodation of parenting is crucial to the full integra-
tion of their whole identities into the recomposed canvas. More specific agendas for pursuing this ideal
may be found in Finley, supra note 85, at 1172-77; and Frug, supra note 138, at 94-103.
144. See supra notes 133-136. Imagine the legal profession reconceptualized to reflect a woman’s
affiliative morality and distinctive cognitive style. Cf. Menkel-Meadow, Portia in a Different Voice:

145. In the words of MacKinnon:

Gender [is] a question of how people who do not have power are going to get some, and how
people who do not have a voice are going to be able to speak in anything other than a male
voice in a higher register. . . .

It is about how . . . [gender] is going to be turned into something that is not going to look
like our freedom to be feminine, which keeps us where we have been placed, but rather like
something which values us for what we are . . . ; not our freedom to be masculine, but our
right to have access to everything men have always kept for themselves whether we do with it
what they have done with it, or not.

Feminist Discourse, supra note 66, at 28 (remarks of Catharine MacKinnon).
or social superiority as components of identity. Consequently, affirming a positive value in differentness would be costly to those enjoying advantage in the status quo: "Equivalence" demands a reassessment of conventional claims to power, status, and privilege.

By rescinding the privilege of the status quo and embracing an anti-assimilation principle, those who pattern legal reality by determining relationships may compose worlds in which equality is not merely a form of tolerance but is instead an ideal made real through re-composition.

---