Commentary on Robert A. Burt’s Judges, Behavioral Scientists, and the Demands of Humanity.

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Judges, Behavioral Scientists, and the Demands of Humanity grapples with one of the most pressing and difficult challenges of our time—how to overcome deep and enduring conflicts that currently divide our community. Professor Burt offers insights into the importance of empathy and identification in breaking down the categories that we use to distance ourselves from the humanity of others and to justify oppression of those we define as outsiders. His solution is hopeful, almost noble. He exhorts judges, social scientists, and by implication, all of us to be our best selves, to focus on how we are part of one overarching human community, to emphasize our commonalities, and to transcend our differences.

Professor Burt’s interpretation of the Linus cartoon provides a perspective on the role of empathy and understanding in assessing moral responsibility and legal consequences. If only Lucy understood, she would have behaved differently. She and Linus could have worked it out and transcended this conflict. If only we could see that “all human beings are fundamentally alike,” that “each of us can properly be understood as members of the same human species whose essential nature develops according to the same natural rules,” we would understand each other and get along. Indeed, Professor Burt asserts that this acknowledgement of

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2 Professor Burt describes a Peanuts cartoon in which Lucy van Pelt discovers her comic book torn and crumpled on the floor, and confronts her brother Linus with the question, “Are you responsible for this?” Linus responds, “Am I responsible? That is a very difficult question.” After several frames of Linus’s philosophizing and Lucy’s mounting outrage, Lucy rolls up her comic book and hits Linus on the head. “In the final frame, Linus—stunned and floored, his security blanket knocked from his grasp—says sadly, ‘Her kind never understands.’” Id.

3 Id. at 183.
sameness is a prerequisite to our ability and willingness to transcend the enduring social conflict underlying our most difficult legal and social problems.\footnote{According to Professor Burt, 
\[\text{W}e \ can \ reach \ moral \ judgments \ about \ one \ another \ only \ if \ we \ begin \ with 
the \ descriptive \ scientific \ premise \ that \ we \ are \ fundamentally \ alike \ as \ a 
species; \ in \ other \ words, \ unless \ we \ can \ understand \ one \ another \ in \ the \ same 
terms, \ as \ members \ of \ the \ same \ species, \ we \ are \ simply \ mysterious \ and 
inaccessible \ to \ one \ another \ and \ have \ no \ basis \ for \ making \ comparative 
evaluative \ judgments \ of \ any \ sort. \textit{Id.} \ at \ 184.} He calls on social scientists and judges to assume responsibility for resolving these deep conflicts by using their roles to emphasize our sameness rather than our differences.

I share Professor Burt’s aspirations both to transcend enduring hostilities and oppression and to engage judges and behavioral scientists in this endeavor. I, like Professor Burt, seek to develop a framework that promotes understanding and acceptance of all members of the community and rejects the legitimacy of treating any individual in a manner that denies his or her status as a human being. I also embrace the moral premise of Professor Burt’s position—that members of the community share “undifferentiated moral status” as citizens.\footnote{Letter from Robert A. Burt to Susan P. Sturm (Sept. 8, 1994), \textit{in} \textit{143 U. PA. L. REV.} \textbf{195}, 198 (1994) [hereinafter Burt Letter].} Despite this common ground, my comments on Professor Burt’s article proceed from a basic skepticism about proposals that embrace a universal emphasis on sameness.

This tension between a common aspiration toward a moral community and a fundamental difference in our starting assumptions underlies the exchange of ideas embodied in this colloquy. It has led to an extremely interesting and ongoing exchange of ideas following the Symposium, including Professor Burt’s letter responding to my initial written commentary on Judges, Behavioral Scientists, and the Demands of Humanity. This colloquy illustrates a phenomenon that is quite common to discussions about sameness and difference. Participants in the discussion frequently talk past each other because they use the same words to mean very different things. The risk of misunderstanding becomes accentuated when the discussion centers on abstract principles and generalized solutions, rather than concrete responses to particular problems. The failure to communicate can occur because the discussants are
focusing on different levels of generality. It can also occur because participants in the dialogue begin with different sets of experiences or concerns which lead them to concentrate on different aspects of the problem. They may focus their attention on different audiences—the Supreme Court, the lower courts, or actual participants in group conflict. They may proceed from different assumptions about the potential and role of law as a moral force and an instrument of social change. Finally, miscommunication may stem from participants' differing assumptions about power and its role in structuring possible solutions to subordination.

My response to Professor Burt's emphasis on commonality grows out of and reflects the dangers of miscommunication inherent in efforts to address sameness and difference. Each of these differences in perspective and approach has informed and, to some extent, distorted our communication. Understanding the basis for this "communication gap" is perhaps the most important lesson that can be taken from this conversation about sameness and difference.

I read Judges, Behavioral Scientists, and the Demands of Humanity to go beyond asserting that we all should strive to understand how we share a common humanity and equal status as citizens. My reading discerns an insistence on sameness as the predicate for judicial inquiry, regardless of context or the issue under consideration. I also perceive a move to descriptive sameness as a strategy for promoting empathy and transcending social conflict. Professor Burt calls on scientists to participate in the enterprise of "emphasizing the proposition that all human beings are fundamentally alike." This invocation rests on the assumption that scientists can empirically demonstrate commonality and that they should do so.

My portrayal of the role of descriptive inquiry in Professor Burt's scheme for establishing and justifying sameness prompted his

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6 See infra pp. 203-04.
7 See infra pp. 207-10.
8 See infra pp. 215-16.
9 See infra pp. 210-15.
10 See infra p. 205.
11 Burt, supra note 1, at 186.
12 The descriptive argument does not depend on scientists' abilities to demonstrate that we are more alike than different. It only requires that, having chosen to emphasize either sameness or difference, scientists can empirically support that choice.
most forceful dissent. One explanation of our communication gap stems from the differing levels of generality that can frame the sameness inquiry. Are we speaking of the essential attributes of human beings qua human beings or the more specific attributes that might be made relevant by particular legal or scientific inquiries? Professor Burt’s justification for insisting on a commonality solution proceeds at a basic and general level: we are all members of the same species; we are all members of the human community; and hence, we are all entitled to equal moral status.

At this level of generality, sameness is a relatively uncontroversial but, in my view, limited observation. It can play a role in disciplining and forestalling decisions to place individuals outside the bounds of humanity, such as through the death penalty or formal exclusion from citizenship. I do not think, however, that definitional sameness justifies the move to the sameness solution in other contexts. It seems question-begging to rely on a purely definitional, conceptual argument—that human beings are alike as members of the same species—as a basis for the prescriptive claim that scientists should emphasize sameness. That prescriptive claim must rest on descriptive claims and moral arguments.

As a descriptive matter, it would be difficult to defend the position that science can empirically establish our fundamental sameness once we move beyond the level of membership in the species. Professor Burt acknowledges this point. However, I worry that it is very easy to slip from the logical to the descriptive, from the general to the specific, in one’s assertion of sameness and difference. Indeed, this slippage from the logical to the descriptive, either by Professor Burt or by me in my original remarks, seems to account in large part for our communication gap on this issue.

By far the more central and significant aspect of Professor Burt’s argument concerns the moral and strategic justifications for insisting on descriptive sameness rather than difference. Professor Burt is offering more than a logical justification for employing

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13 Professor Burt uses the word “logical” to describe this argument, but I prefer the term “conceptual” to convey this idea.
14 See Burt Letter, supra note 5, at 179.
15 For example, Professor Burt offers Thomas Hobbes’s naturalistic, scientific understanding of human nature that people are “fundamentally alike in being by nature avaricious and self-seeking” as an example of a descriptive scientific premise of fundamental similarity. Burt, supra note 1, at 184. This seems to be pursuing a descriptive rather than conceptual argument about fundamental sameness, although it appears in the paragraph developing the conceptual argument.
science to emphasize sameness. His approach fulfills a moral vision and a strategic concern. His moral vision, which I share, is that people occupy and should strive to achieve undifferentiated moral status as citizens. This moral choice drives his more strategic concern: If we focus on difference, we will inevitably end up justifying oppression.\(^6\) To avoid this end, judges should enlist scientists to emphasize commonalities, rather than differences. We should ask scientists to determine that differences rarely, if ever, matter.

It is not clear to me why we should delegate to scientists the moral or political question of whether sameness or difference matters in a particular legal or social context. Professor Burt has acknowledged that this decision cannot be determined on scientific grounds.\(^7\) The judgment of sameness or difference is not one that scientists are any better equipped or authorized to make than other members of the community. If we direct scientists to make unilateral moral judgments about sameness and difference, we encourage them to merge moral and scientific judgments—a tendency that both Professor Burt and Judge Bazelon have worked to overcome.\(^8\) We remove from public scrutiny the moral judgment that drove the scientific inquiry. We thus hamper our capacity as a community to use the knowledge that scientists can provide and to make responsible moral and political judgments about sameness and difference. Thus, neither morality nor descriptive truth provides a justification for a descriptive sameness solution.

This leaves the strategic argument for descriptive sameness. Professor Burt recounts and appears to endorse the belief that “if human beings focused clearly and rationally on the descriptive scientific proposition that we are all fundamentally alike in our nature, then we would be more inclined to view one another with sympathy, with mutual understanding and fellow feeling.”\(^9\) For me, science’s effectiveness in promoting empathy depends on the context and dynamics surrounding the use of information, rather than on science’s emphasis on sameness as opposed to difference. In some contexts, insistence on sameness can take on an artifi-

\(^6\) See Burt, supra note 1, at 193 (“[U]nless judges and scientists alike emphasize our human commonalities—unless they emphasize the underlying social and psychological forces that can promise to draw us together—then we will be fated to drive one another further and further apart.”).

\(^7\) See Burt Letter, supra note 5, at 195.

\(^8\) See Burt, supra note 1, at 182-84.

\(^9\) Id. at 184-85.
cial—even disingenuous—quality that can easily backfire as a means of transcending social conflict. Facts in and of themselves will not necessarily alter attitudes or behavior, nor will they lead people to acknowledge commonality. The impact of information depends on a context that permits and encourages meaningful communication and assimilation of that information.

Consider the siblings, parents, or teachers of a mentally ill person. They may perceive and emphasize differences in experience, capacity, and needs of the mentally ill and yet appreciate their humanity, their human spirit, their capacity to enjoy life. The issue is not one of factual similarity but of recognition of similarity in one's status as a person and a citizen entitled to respect, dignity, and some measure of control over one's actions. These judgments are moral and political, not empirical; they flow from acceptance as much as identity. It is not difference, but the social and normative significance of difference, that generates and perpetuates conflict.

The importance of context and power in defining the significance of difference leads me to question the wisdom of a sameness solution for judges as well as for behavioral scientists. I do not think that citizens' undifferentiated moral status can justify insisting on sameness in contexts that do not threaten to exclude individuals or groups from membership in the community. If we are considering actions that would place individuals outside the bounds of the human community, such as a decision to disenfranchise a given member or subgroup of the population, equal status as citizens is morally relevant and even dispositive. However, many legal problems do not require drawing outer boundaries of citizenship. Often, judges face more subtle and complex normative judgments that pose such questions as what "citizenship" means, what constitutes fair treatment by the community, or what affirmative obligations to its members the community bears. For example, the question of the appropriate response to state laws mandating disability leave for pregnant workers requires a court to decide whether to focus on equal access to disability leave or on the right to work and have a family. The general principle of equal and undifferentiated moral status as citizens does not dictate the appropriate response to such particularized "dilemmas of difference."

20 Martha Minow, Foreword: Justice Engendered, 101 HARV. L. REV. 10, 40-42 (1987) (defining the dilemma of difference as situations in which either acknowledging or ignoring difference will perpetuate inequality, and illustrating the principle through
Indeed, framing the issue in terms of sameness versus difference poses rather than answers the moral and political questions at stake in many cases. For example, consider the issue of poverty's role in defining criminal justice policy. If, as Judge Bazelon urged, criminal law takes social and economic deprivation into account in assessing criminal responsibility, is that focusing on sameness (these conditions would likely affect the behavior of any human being) or difference (those who suffer social or economic deprivation may experience the world differently)?

Robin Williams illustrated precisely this point in an episode of Sesame Street that aired the morning of the Bazelon Symposium. He stood next to a bird and said, "You may think we are different but we are really the same. We have the same name. We both have two eyes, a mouth, and need food. There is one way in which we are different. I can't sing."

Professor Burt's work exhibits an awareness of these observations about the social construction of sameness and difference. He nonetheless "espous[es] a hierarchy of values, with mutually acknowledged commonality ranking above mutually acknowledged respect for differences"—an approach that I reject in favor of contextualized judgments about the relevance of sameness and difference. This disagreement led us both to search for deeper roots of our differing perspectives. One important explanation lies in the picture of social conflict that informs our analysis of sameness and difference. Professor Burt's paradigmatic social conflicts are first-generation forms of exclusion and oppression—the Supreme Court's inconsistent treatment of pregnancy discrimination in California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) and Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511 (1987)).

See David L. Bazelon, Questioning Authority: Justice and Criminal Law 50-51 (1988). Bazelon stated:

It could be said of my view in Brawner, as Judge Learned Hand said of Durham, that it creates more problems than it solves. I would only change that to read: it recognizes more problems than it solves. If, in a given case involving criminal responsibility, social and economic deprivation is a substantial component of behavior, evidence as to this personal history should not be categorized as "irrelevant" and therefore excluded. The issue of criminal responsibility, like other subjects in the criminal law, does not permit us to ignore the relationship between antisocial conduct, on the one hand, and poverty and social injustice, on the other.

Id. at 51.

Sesame Street (PBS television broadcast, Apr. 1, 1994).

See Burt Letter, supra note 5, at 198.

See id. at 198-99.
Holocaust, forced sterilization of mentally disabled people, legally mandated segregation, and the death penalty. In each of these settings, difference is used to justify deliberate exclusion and subordination. The dominant group, through the state, uses difference to define members of particular groups and to place those group members outside the bounds of the community as unworthy of the moral status afforded to citizens.

Professor Burt's approach to difference grows out of his deep and abiding concern to avoid "the depths of human brutality revealed by the Holocaust." He is worried about the use of science and law "in the justification on supposedly scientific grounds of the subordination and ultimate annihilation of some people by other people." He perceives an ever-present specter of mutually destructive cruelties. This intensely polarized and war-torn context defines his sense of risk and possibility. In such a context, emphasizing differences indeed heightens the prospect that marginalized groups will become targets of oppression and abuse.

As the daughter of a Dachau concentration camp survivor and a student of American corrections policy, I view human conflict with a picture of state-sanctioned brutality in mind. What these pictures leave out, however, are a series of contexts and experiences that are just as germane to today's enduring conflicts. My recent

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25 I use the term "first generation" to refer to legally mandated forms of exclusion and subordination. "Second-generation" discrimination refers to exclusion and subordination stemming from bias, albeit not pursuant to state mandate. "Third-generation" exclusion and subordination refer to institutional practices and conditions that embody the standards and values of the dominant culture and have the effect of excluding members of particular groups.

26 Burt, supra note 1, at 185.

27 Id.

28 See id. at 185-86. This theme emerges in Burt's earlier works as well. See, e.g., Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 465 (1984) ("[T]he Supreme Court through constitutional litigation vividly shows how easily political conflict becomes transformed into diametric opposition regarding the fundamental tenets of our society and how such opposition can lead thus to the brink of civil war . . . .").

experiences as a teacher of two law courses, Critical Perspectives on Race and Gender, and Employment Discrimination, offer pictures of second- and third-generation forms of exclusion, oppression, and inequality that do not involve explicit state policies of oppression. The day-to-day realities underlying current social conflicts, particularly racial conflicts, involve concerns about marginalization, neglect, informal exclusion, material deprivation, and unfairness.\footnote{For a discussion of the social and economic conditions surrounding racial conflict and separation, see generally Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal (1992); Cornell West, Race Matters (1999); Patricia J. Williams, The Alchemy of Race and Rights (1991); see also T. Alexander Aleinikoff, The Constitution in Context: The Continuing Significance of Racism, 63 U. Colo. L. Rev. 325, 328 (1992) ("[T]he persistence and power of racism ought to be seen as an important part of the social 'context' with which constitutional norms regarding equal protection and racial justice interact."); Regina Austin, "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America, 1994 Utah L. Rev. 147, 148-53 (describing continued disrespectful and disparate treatment suffered by Blacks in commercial settings). For discussions of gender and inequality, see Martha A. Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform (1991); Minow, supra note 20, at 10 (discussing the approach taken by the 1986 term Supreme Court towards analyzing cases involving gender issues); Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 797-98 (1989) (discussing the split among feminist theorists over the emphasis on similarities or differences between women and men).}

Some of this continuing subordination can be attributed to intentional forms of exclusion, albeit "disguised and reiterated" in more subtle and coded forms.\footnote{Professor Burt eloquently states this point in his letter. See Burt Letter, supra note 5, at 198.} However, deception is not the only explanation for the persistence of subordination and exclusion. It is also perpetuated by the value choices reflected in prevailing conceptions of merit, access, and participation. Legal and institutional conventions embody the values, cultures, experiences, and modes of interaction developed during a period when Blacks, women, the mentally disabled, and other "different" groups were formally excluded from civil life. In some situations, these conventions continue to favor the dominant group's identity, culture, and values over those of others for whom group identification carries tremendous significance.\footnote{See Lani Guinier, [E]racing Democracy?, 107 Harv. L. Rev. (forthcoming 1994) (manuscript at 47-50, on file with author) ("For many racial minority group members, their racial group membership is meaningful and its meaning is not simply the result of formal government-sanctioned discrimination in the past . . . [M]inority group membership is essential to identity and facilitative of political participation . . . ").} Those who do not conform to the picture of success embodied in traditional institutions may face
exclusion, subordination, and failure—regardless of their capacity to contribute.  

Professor Burt's preoccupation with addressing deliberate bias and oppression, even in the face of oppression that stems from institutional practices such as stereotyping, biased standards, and neglect, explains at least part of my discomfort with his universal emphasis on sameness. As many feminist theories have noted, insisting on sameness in the face of difference can itself perpetuate subordination. Indeed, this insistence on sameness itself denies one of the most basic needs of the black community—acknowledgment and recognition. Those who were previously excluded as a group from membership in the community may be unwilling to engage in the process of identifying common ground unless they have confidence that their identities—their differences—will be respected.

I do not think that normative choices between sameness and difference can appropriately be divorced from the issue of power. At least some outsiders who seek legitimation of their voice and

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33 See generally Lani Guinier et al., Becoming Gentlemen: Women's Experiences at One Ivy League Law School, 143 U. PA. L. Rev. 1 (1994) (discussing the experiences of women in law school and analyzing their academic performances and career plans in comparison and contrast to those of male students).

34 See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990). Professor Minow argues that

"[t]he stigma of difference may be recreated both by ignoring and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual’s ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind."

Id. at 20; see also Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate, 86 COLUM. L. Rev. 1118, 1163-70 (1986) (discussing the importance of examining both similarities and differences between women and men when examining gender issues, rather than focusing on one or the other); Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. Rev. 1279, 1316 (1987) (arguing that women’s “equality interest is infringed by having everything that is associated with women defined as less valuable, less necessary to consider, less important”). See generally Williams, supra note 30 (addressing the problems of categorization, definition, and objectivity in perpetuating the rift between social transformation and theoretical legal understanding).

35 See Howard Winant, Difference and Inequality: Postmodern Racial Politics in the United States, in RACISM, THE CITY AND THE STATE 108, 117 (1993) (“The needs of the ‘others’, both political and cultural, cannot be addressed from this [universalist] perspective, since the most basic need that racial minorities have is that of recognition.”).
their place in the community are likely to be suspicious of claims by insiders that "we are all alike." These claims by those in power may well be perceived as self-serving and patronizing of the minority group's fundamental concerns, and thus as ultimately silencing. It is perhaps because this power dynamic was ignored that I originally read into Professor Burt's insistence on sameness the message to outsiders: "If you think you are different, then you are mistaken. Let us educate you as to how you are just like us. This is not about values. It is about truth."

I think that this skepticism about a universal sameness approach is warranted as a general matter. Claims of universal sameness allow us to impose norms embedded in the status quo without acknowledging that we are doing so, and without responding to those putting forward a different normative agenda. It also absolves the mainstream from responsibility to listen, to question assumptions, to change, to adjust, or to compromise. Difference (or sameness) then appears natural, inevitable, intrinsic, and neutral, rather than "a clue to the social arrangements that make some people less accepted and less integrated while expressing the needs and interests of others who constitute the presumed model."

A universal emphasis on commonality in characteristics, regardless of the context or purpose of the legal or scientific enterprise, places less powerful groups in a high-risk position. By accepting the paradigm that sameness mandates inclusion, we invite the reverse application of this argument: that difference justifies exclusion. If people perceive difference to exist, they will then feel justified in treating people differently. Those who are in fact different, when evaluated by the dominant norm, may then be legitimately excluded or oppressed. By ignoring differences that may in fact matter, we thus leave minorities vulnerable to the racial

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56 As Leonard Rubenstein, the Director of the Judge David L. Bazelon Center for Mental Health Law, reminded me after my oral remarks, the concern about respect for difference does not necessarily characterize the basic concerns of many mentally disabled people who are striving to be included and respected as equals. The person in the wheelchair who has previously been excluded from the workplace wants to be treated "the same" as everyone else. Yet this person would also like a ramp to get up to the front door. These observations underscore for me the importance of adopting a contextualized approach to sameness and difference, rather than insisting on either sameness or difference as the universal solution.

57 MINOW, supra note 34, at 53; see also ROBERT FULGHUM, ALL I REALLY NEEDED TO KNOW I LEARNED IN KINDERGARTEN: UNCOMMON THOUGHTS ON COMMON THINGS 83-85 (Villard Books 1988) (1986) (relating the Mermaid Story, a parable whereby a small child discovers that she does "not fit the norm").
trump card. Those who make and enforce the rules can determine when to expose and act on the difference that we knew was there all along.

The commonality approach hides the allocation of power embedded in the ideal of uniformity. Professor Burt talks about mutual understanding, which suggests an interactive process, but the fundamental premise of legal and scientific discourse—sameness—is imposed from above by judges and scientists. This choice is contested by at least some of those whose status is the subject of judicial inquiry in these cases. Predetermining a hierarchy of values for all situations reinforces the perspective and value choices of those in power. The commonality approach articulated in Professor Burt's paper takes for granted that we treat "them" solely as objects of discussion, not as participants discussing their fate. This approach is inevitable, and thus not inherently objectionable, in efforts to eliminate first-generation forms of exclusion because the group in power must first address its own conduct to recognize and include the outgroup. However, this hierarchical approach need not dictate the structure of discourse addressing second- and third-generation forms of exclusion. Unless we address the power balance implicit in the sameness approach, we risk perpetuating it in our efforts to address subordination.

A universal sameness solution also fails to take into account differences in the normative function of criminal law, civil rights law, and mental disabilities law. It treats issues of difference in each of these legal contexts the same. This approach glosses over potential differences in the roles of criminal law, mental health law, and civil rights law. Some would argue that criminal law is closest to the paradigm of exclusion that most concerns Professor Burt. It is necessarily and tangibly violent and unilateral by design.

I am indebted to Howard Lesnick for this point. See Robert M. Cover, Violence and the Word, 95 YALE L.J. 1601, 1607 n.16 (1986) (stating that the violence of criminal law is relatively direct and pervasive). Both Judge Bazelon and Robert Burt embrace criminal law's pedagogical, transformative role, as well as its boundary-setting function. See BAZELON, supra note 21, at 26 (stating that the criminal law "provides an opportunity to educate ourselves about the people who commit crimes, so that we can begin to do more than strike back at them, one at a time"); Robert A. Burt, Cruelty, Hypocrisy, and the Rehabilitative Ideal in Corrections, 16 INT'L J.L. & PSYCHIATRY 359, 568-69 (1993) (urging "rehabilitation of the rehabilitative ideal" to promote a commitment to the possibility of "reconciliation between the offended and the community").
context, distinctions based on categories such as race and disability may be more likely to function in the oppressive and brutalizing manner characteristic of Professor Burt's paradigm.\textsuperscript{40}

This paradigm does not adequately respond to the challenges of civil rights law. Many current issues facing civil rights law, such as school desegregation, affirmative action, and disparate impact discrimination, involve second- and third-generation forms of exclusion. One of the most persistent failures of civil rights doctrine in these areas concerns the inability to develop a new framework to accommodate the demands of commonality and difference, individuals and groups, justice and fairness. In this context, slavish adherence to a sameness solution merely plays out and perpetuates the inadequacy and instability of the courts' civil rights jurisprudence.

Thus, injustice and oppression can flow from applying a sameness approach, developed for first-generation forms of deliberate exclusion, to second- and third-generation types of subordination. I do not mean to suggest that a universal-difference approach would be preferable. Indeed, in the context of deliberate exclusion based on status, emphasizing commonalities in moral and political status is crucial to delegitimizing inequality. Instead, I am questioning the wisdom of an absolutist approach to sameness and difference. The meaning and dangers of emphasizing difference cannot be assessed universally for all time and concerning all issues. It must be situated in a particular set of questions, concerns, and possibilities.\textsuperscript{41}

Professor Burt's choice of a universal rather than a contextualized approach emerges from what I see as an organizing premise of his paper: we must choose between binary, polarized, and mutually exclusive alternatives.\textsuperscript{42} We cannot avoid choosing between "measured hypocrisy" and "openly voiced hostility,"\textsuperscript{43} between sameness and difference, between rehabilitation and the death penalty. Even in the criminal context, we build in the capacity to differentiate between people based on different forms of conduct. Although universal sameness helps in defining the morality and legitimacy of the penalties we impose, such as the death penalty and inhumane prison conditions, it does not determine the normative content of those legally relevant categories of difference.

\textsuperscript{40} Even in the criminal context, we build in the capacity to differentiate between people based on different forms of conduct. Although universal sameness helps in defining the morality and legitimacy of the penalties we impose, such as the death penalty and inhumane prison conditions, it does not determine the normative content of those legally relevant categories of difference.

\textsuperscript{41} To use Professor Burt's metaphor, whether one sees the glass as half full or half empty may depend on what is in the glass—medicine that tastes bad or a milkshake that you want to savor. See Burt, supra note 1, at 187-88.

\textsuperscript{42} See id. at 187 ("A scientist can choose one or the other emphasis; but—and here is the crucial point—the scientist must make one choice or the other.").

\textsuperscript{43} Burt, supra note 39, at 368.
penalty, between empathy and aversion, between harmony and subordination. We cannot simultaneously see the glass as both half full and half empty, both the duck and the rabbit as the duck-rabbit. He illustrates the difficulties and dangers of focusing on difference with the example of our response to the mentally ill. We must choose between fear and pity, empathic identification and differentiated aversion, and recognize the clear normative implications of our choice. Faced with these stark alternatives, the choice of universal sameness seems defensible and even reasonable.

The sameness solution depends for its legitimacy on a justification of the premise that we face polarized and mutually exclusive choices in dealing with issues of sameness and difference. Professor Burt offers empirical, moral, and strategic justifications for his polarized framework. The empirical argument rests on the observation that "our perceptual, cognitive capacity does not permit us to see both elements at the same time," and that "either side, if dwelled upon, tends to magnify itself and render the opposed perception increasingly out of reach, conceptually implausible, and impossible to imagine." Are our perceptual and normative choices really so impoverished? What about the reactions to difference, such as fascination, intrigue, and romanticization? What about difference as instructive? As exotic? I disagree with the notion that the range of potential reactions to difference is limited to a choice between two mutually exclusive opposites.

This is not to challenge the observation that many of us do sometimes perceive the world and frame discourse in binary, polarized terms that force us to pick a winner and a loser. This tendency may be a function of the tendency of language and reasoning to "treat categories as clear, bounded, and sharp edged." It may be attributable, in part, to gendered modes of discourse embodied in legal analysis. It certainly reflects a

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44 See Burt, supra note 1, at 187-88.
45 Id. at 188.
46 Indeed, my own remarks, which struggle to offer a more contextualized, participatory frame, may have in some instances presented a more starkly polarized picture of our perspectives than may be warranted. Yet this polarized reaction was prompted by my perception that the sameness perspective was being applied in a manner that ignored the significance of power.
47 MINOW, supra note 34, at 59.
48 See generally DEBORAH TANNEN, GENDER AND DISCOURSE 40-46 (1994) (exploring "how male adversativeness and female cooperation are played out, complicated, and contradicted in conversational discourse"); DEBORAH TANNEN, YOU JUST DON'T
tendency in our adversary culture to organize the world in binary and mutually exclusive categories. However, this polarization is neither universal nor inevitable. Other perceptual and institutional approaches exist that enable us to integrate varied perspectives and maintain perceptual complexity. This is particularly true if we are willing to move from individuals to groups as decision-makers.

Another possible justification for insisting on a choice of sameness, or at least a preordained hierarchy, can be inferred from a vision of the law as a moral teacher. One could argue that to cultivate a moral community, it is necessary to develop a consistent and coherent moral position. Under this view, the rhetorical power of the law to influence attitudes and behavior depends on the courts’ articulation of a clear, simple, and universal message. Contextualized judgments about sameness and difference will dilute the power of the message and create the risk of moral cacophony.

In a homogeneous community, this vision of the role of the law has considerable appeal. However, I fear that the effort to realize this vision in a society of diverse communities and competing moral visions is doomed. For the law to fulfill this rhetorical role, its audience must comprise members of the same interpretive community. Diverse community members must be willing and able to hear and internalize the law’s message. But in a polarized community, a theme of commonality conveyed in an adversarial setting is unlikely to be heard by either party to the conflict. The dominant group may perceive the emphasis on sameness as a justification for ignoring the concerns of a subordinated group. It will likely be interpreted by subordinated groups as a justification for their exclusion and marginalization. Law’s rhetorical force thus requires the same shared understanding that Professor Burt seeks to achieve through law.

Even if one were to accept the vision of law as moral teacher, that does not justify adopting the universal sameness solution.

UNDERSTAND: MEN AND WOMEN IN CONVERSATION 24-31 (1990) (identifying tendencies of male discourse to seek universal principles that permit ranking, establishing hierarchy, and finding fixed and certain solutions, and of female discourse to establish rapport).

49 I am indebted to Seth Kreimer for this insight.

50 Professor Burt has explicitly expressed faith in law’s rhetorical power in other works. See, e.g., Burt, supra note 28, at 466. (“I believe, however, that the gravitational pull specially exerted on deeply divisive disputes by courts in our institutional scheme, coupled with their palpable weakness in imposing effective force on the disputing parties, gives courts a pedagogic advantage over other institutions . . . .”.)
Except at the most basic, definitional levels, sameness and difference do not capture the normative message that seems to drive Professor Burt's argument. The key normative concern is better captured by the principle that subordination is bad. This moral principle must also be contextualized to assume meaning, but it is more likely to guide us to the relevant empirical and moral issues than the sameness-difference debate.  

Finally, the insistence on a universal solution may stem from a fundamental mistrust of our capacity to make moral, contextualized decisions about sameness and difference. This fear may be grounded in a basic perception of a "stubborn impulse toward social relations based on subordination and oppression." The prediction that judges, scientists, and citizens will use difference to justify oppression may also underlie the decision to resort to a clear, universal position targeted at discouraging the most blatant forms of oppression.

I fear that there is a self-fulfilling quality to this decision to structure our choices entirely around preventing the worst abuses. This approach ignores the role of law in structuring and facilitating day-to-day interactions. It reinforces the culture of conflict that frames difference as inevitably destructive and violent. It forces discussions about difference into a frame of moral blaming, which simplifies, distorts, and polarizes discussions about difference.

I also doubt that a universal sameness approach can avert the hostility and violence that most concerns Professor Burt. Unlike Professor Burt, I think that we must simultaneously address deliberate oppression and exclusionary institutional arrangements to make progress on either form of subordination and oppression. Moreover, insistence on a sameness paradigm is likely to

51 See C. Edwin Baker, Content-Based Regulation of Persons and Presses, 1994 SUP. CT. REV. (forthcoming) (manuscript at 82-84, on file with author) (articulating that subordination, rather than color blindness, provides substantive content to equal protection analysis, and that "any observation that a practice uses race as a criteria [sic] and, therefore, strict scrutiny applies merely diverts attention from determining whether a substantive evil identified by equal protection theory is present").

52 Burt Letter, supra note 5, at 198.

53 Professor Burt has stated:
I believe that the first-generation forms are exceedingly difficult to dislodge in relations between oppressors and oppressed and that unless and until these forms are expunged—unless and until the oppressors fully admit to themselves and acknowledge to their previous victims that neither group is inherently superior... this second step of mutual respect for acknowledged differences cannot be reliably achieved.
stifle discussion and discourage efforts to identify why difference does or does not matter in a particular context. It pushes that conflict underground, and delegitimizes decisions that fail to correspond with widely shared experiences. It fails to provide a forum for structured discussion and resolution of conflict stemming from perceived and actual differences. It accentuates the hostility and mistrust of those for whom difference matters. These consequences, if left unaddressed, can also erupt into violent social conflict.54

I have a more bottom-up view of how moral communities form and how a just society is achieved. We cannot achieve understanding and resolve conflict without engaging those who are fighting. It is not enough to change social imagery; the imagery must be clear to those participating in the conflict. By artificially constraining the moral and political choices implicated by a particular decision, we will only impoverish our moral vision. Fair, just, and effective conflict resolution requires engagement and dialogue, as I believe this extended colloquy illustrates. This cannot occur if a perspective is stifled or ignored. It cannot occur symbolically, but only through ongoing interaction by those who disagree and who constitute the relevant community. In at least some situations, the moral sensibility of commonality can only emerge from, rather than precede, the decision-making process.

My remarks embrace the premise that fair and just choices about sameness and difference can best be made in contexts that enable and encourage responsible engagement. Transcending enduring social conflict requires that we develop a richer and more subtle framework of perception and interaction around issues of race, sex, disability, and other categories of difference. We need not adopt a jurisprudence and process that permanently privileges one picture of subordination and exclusion over the other. Law should struggle to accommodate both of them. The challenge is to develop processes that permit empathy and cooperation to develop within the current adversarial culture.55 We must introduce intermediate

Burt Letter, supra note 5, at 197-98.

54 An example of this outcome can be found in news reports of the Los Angeles riots. See An Urgent Need for Dialogue on Race Relations in America, FOCUS ON STUDY CIRCLES (Study Circles Resource Ctr., Pomfret, Conn.), Summer 1994, at 2, 3 ("Many reporters said the riots were ... about poverty, despair, and exclusion from the wealth and opportunities of the larger American culture.").

structures and processes that encourage constructive conversation and problem-solving around issues of difference. These institutions need not—indeed cannot—entirely replace the adversary framework; rather, they would comprise a significant component of a comprehensive array of legal institutions available to address social conflict. The way to pursue commonality is not to advocate sameness, even in the face of pervasive, though perhaps socially constructed, differences. We cannot go back to an ideal developed in a world in which those who were "different" did not participate fully as citizens. Instead, we must question and be willing to change the categories and institutions that create the subordinating and divisive significance of difference. It may be that the way to integrate competing but equally valid perceptions and understandings is by including those who see the world differently in the decision-making process and by assuring them the capacity to participate and have a meaningful voice in determining their status. We cannot successfully alter rhetoric and resolve or transcend conflict without altering the process and power dynamic of judicial decision-making.5

My discomfort with descriptive sameness as an organizing framework for behavioral scientists does not mean that I reject Professor Burt's worthy goal of enlisting behavioral scientists in the struggle toward "harmonious social relations." I do not seek to throw the scientists out of the decision-making process, but rather to cast them in a more modest, participatory role. We should be able to identify behavioral scientists' normative assumptions and choices. We should insist that they not make the moral and political choices alone or without the opportunity to question those choices from a variety of perspectives. This would require processes that enable judges and stakeholders in a particular conflict to participate in framing and understanding the moral and political assumptions and choices that are embedded in scientists' findings.58 These process-

a move from blame to responsibility in the context of race discrimination).


57 Burt, supra note 39, at 369.

es would also encourage scientists to limit their judgments about commonality or difference to the context that supports and justifies those judgments.

We must go back to basic principles and ask what science and law offer to help us answer our difficult normative questions. These methodologies do not provide a given, fixed perspective to be superimposed on every problem. Rather, scientific inquiry affords us the capacity to put individual cases into a broader context, to ask a series of structured questions that provides a framework for the particular case under consideration. Law offers us the aspiration toward justice and the possibility of a structured context in which to grapple with and, hopefully, transcend conflicts that disrupt our community and perpetuate injustice. Neither law nor science requires or permits a universal solution framed in terms of sameness or difference, regardless of the question under consideration. Instead, they demand that we move toward a new paradigm that encourages judges, scientists, and citizens to put difference in its proper place and thereby find our common ground.

a new kind of partnership between social scientists and local communities. Social scientists could help members of local communities conduct their own research into the needs and wants of people in their community for social supports for pregnant women and new parents. The very process of conducting such research can . . . constructively address the specific constellation of attitudes and resources in the community.

Id. at 249-50.