

Same-Sex Marriage in Windsor and the Indignities of Dignity

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Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 **Harv. J.L. & Gender** (forthcoming 2014), available at [SSRN](https://ssrn.com/abstract=2444444).

In [United States v. Windsor](#), the Supreme Court struck down Section 3 of the Defense of Marriage Act (“DOMA”) as unconstitutional. The decision renders married same-sex couples eligible for the same federal benefits (i.e., tax treatment and social security benefits) as their opposite-sex counterparts. In the midst of a largely celebratory reception of the decision, [Noa Ben-Asher](#) offers a much-needed critical analysis of *Windsor*’s bundle of rhetorical and doctrinal sticks. In *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, Ben-Asher takes us through a genealogy of the “legal homosexual” in Supreme Court case law. As Ben-Asher notes, this genealogy begins with moral opprobrium and ends in *Windsor*’s exalted language about the dignity of state-sanctioned, same-sex couples. Recognizing dignity: Who can be against that, right? Ben-Asher demonstrates that in our post-realist world the story is more complicated.

The first part of Ben-Asher’s contribution is an astute rendering of the Supreme Court’s evolving doctrinal constructions of homosexual conduct and identity. Ben-Asher identifies four stages in what she terms the “metamorphosis of the legal homosexual.” In each stage, Ben-Asher reveals distinct moral assessments of the legal homosexual’s nature and conduct, as well as different understandings of the state’s role in the regulation of morals.

Ben-Asher identifies the first stage with the Court’s 1986 decision in [Bowers v. Hardwick](#), where the Court held anti-sodomy laws constitutional. In so doing, the Court constructed homosexuals as a category of people who engage in same-sex sodomy, initiating an identity-based legal understanding of homosexuality. The moral treatment of homosexuals consisted of outright condemnation. Legislation that was intended solely to regulate morals was deemed constitutionally acceptable. Although the right of privacy had been deployed to invalidate a range of other morality-based laws—laws prohibiting contraceptive use and abortion, among them—under *Bowers*, homosexuals were rendered sodomites removed from the protection of constitutional privacy.

A decade later, [Romer v. Evans](#) inaugurated a second stage in the law’s construction of the legal homosexual according to Ben-Asher. Each one of the discursive and doctrinal elements Ben-Asher identified in *Bowers* began to shift, amounting to what she describes as the “Equal Rights” phase. The first major change can be observed in the description of homosexuals, who moved from being characterized as deviant sodomites to being characterized as individual members of a protected class of citizens. The act of sodomy disappeared from view, giving way to a binary construction of “gay and lesbian” sexual identity that perforce excluded bisexuals. The moral assessment of homosexuality also shifted from the outright disapproval of *Bowers* to a more morally neutral posture. The state’s authority to regulate morality narrowed, as *Romer* held that bare animus towards a class of people was insufficient as a legitimate government interest to support a discriminatory classification.

The third stage in the construction of the legal homosexual, as Ben-Asher explains, can be found in [Lawrence v. Texas](#). Perhaps the most important discursive element in *Lawrence* was the shift away from

an emphasis on homosexual identity to conduct. This time, however, the conduct was not characterized as immoral, libertine sex, but rather as a socially desirable means of constructing a “potentially” more enduring bond between two people. Moral neutrality thus moved into moral recognition of conduct that could potentially lead to coupledness within the privacy of the bedroom.

According to Ben-Asher, *Windsor* represents the fourth and latest stage in the doctrinal construction of the “legal homosexual.” The potentially enduring couple glimpsed in *Lawrence v. Texas* has now matured into the same-sex married couple. Moral recognition of the relationship has similarly advanced into high moral praise. The state, previously entitled to legislate morality, then explicitly restrained in such regulation, is now in the position of bestowing dignity on same-sex couples by recognizing their marriages. As Ben-Asher notes, this turn toward legal recognition is another form of morals legislation—the constitutionalized praise of same-sex marriage.

The *Windsor* genealogy that Ben-Asher offers is important because it underlines how the rhetorical and doctrinal contours of the current construction of the legal homosexual have emerged out of previous case law. The prior stages in this metamorphosis set the stage for the next, such that *Windsor*’s account of “dignity” ends up being a partial overcoming of prior constructions, rather than an all-out rhetorical and doctrinal victory for same-sex marriage proponents.

This last point becomes evident through Ben-Asher’s critical engagement with the concept of dignity, which constitutes the article’s second distinct contribution. As Ben-Asher demonstrates, *Windsor*’s notion of dignity is not the universal, all-encompassing human dignity imagined by liberal philosophy, but a rather stingy, limping dignity, that comes with strings attached to it. The state decides who is and who is not worthy of this dignity. Ben-Asher further argues that even though the religious view of marriage as a sacred institution is not explicitly addressed in *Windsor*, it, nonetheless, provides one of the most important “conceptual links” to the concept of dignity in the decision. The other such link is marriage’s normalizing power, its capacity to convert presumably wildly libidinal homosexuals to monogamous coupledness. Ben-Asher argues that even though neither one of these ideas is explicitly addressed in *Windsor*, its concept of dignity “is hardly intelligible” without them. The problem, Ben-Asher argues, is that the sacralizing link to *Windsor*’s dignity is not appropriate in a liberal state, while the normalizing link entails a negative idea of human sexuality that in itself is based on dubious moral grounds.

Ben-Asher’s final critique of *Windsor*’s dignity lies in its capacity to create injured subjectivities. Accepting *Windsor*’s bestowed dignity implicitly accepts that same-sex couples *should* feel harmed and humiliated in states that don’t recognize their unions, even if they currently do not. Forming a group identity based on injury risks shaping subjects “unable to articulate new values, new ideas, new morality, and new alternatives.” Ben-Asher ends with a brief call for a discursive strategy that relies neither on injury nor on *Windsor*’s thin conception of dignity. She calls for a state that would not distribute dignity but rather recognize it equally for all citizens without implying that marriage enhances one’s dignity.

Assuming that we take on Ben-Asher’s call for liberal human dignity as a doctrinal strategy, how far might that take us? Marriages internalize dependency costs (and can legally be obliged to do so), performing a function that other societies have chosen to assign to the state in its basic welfare provisioning. The dignity of marriage is perhaps a discursive carrot that we provide in our constant effort to channel people into an institution that we have structured as welfare-enhancing, especially against the background of minimal public involvement in the costs of dependency. The dignity of married people is indeed a hierarchical concept. Their dignity implies the indignity of singles, in much the same way that the dignity of the employed carries within it the indignity of the unemployed and welfare-dependent. It may be that we are dealing with a functional equivalent for the sacralizing link to

married dignity that Ben-Asher identified. This functional sacralization of marriage might be hard to disturb without reconsideration of other basic institutions such as the welfare state, and without treading well beyond the confines of constitutional doctrine. Ben-Asher's insightful venturing into some of the indignities of dignity in the constitutional law field opens up fruitful terrain for further inquiry.

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