

Syracuse University

SURFACE

College of Law - Faculty Scholarship

College of Law

2005

Good Manners, Gay Rights and the Law

Keith J. Bybee

Syracuse University, College of Law, kjbybee@maxwell.syr.edu

Follow this and additional works at: <https://surface.syr.edu/lawpub>



Part of the [Law and Society Commons](#), [Legal History Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Bybee, Keith J., "Good Manners, Gay Rights and the Law" (2005). *College of Law - Faculty Scholarship*. 52. <https://surface.syr.edu/lawpub/52>

This Article is brought to you for free and open access by the College of Law at SURFACE. It has been accepted for inclusion in College of Law - Faculty Scholarship by an authorized administrator of SURFACE. For more information, please contact surface@syr.edu.

Good Manners, Gay Rights and the Law

Keith J. Bybee
Michael O. Sawyer Chair of
Constitutional Law and Politics

The Maxwell School
321 Eggers Hall
Syracuse University
Syracuse, NY 13244

kjbybee@maxwell.syr.edu
tel. 315-443-9743

ABSTRACT

In this paper, I argue that the expansion of LGBT rights requires engagement with the common practices of courtesy that confer and reinforce social standing. In order to understand what this engagement with good manners might look like, I outline the basic features of common courtesy and illustrate how courtesy depends on a mix of utility, habit, and pleasure. I argue that if the practice of courtesy is to be re-appropriated, then all three of the factors that underwrite courtesy must be addressed. I also consider the general possibilities for re-configuring courtesy. And, in this vein, I suggest that the law may provide an important means by which the re-appropriation of common courtesy can occur.

“Nothing, at first sight, seems less important than the external formalities of human behavior, yet there is nothing to which men attach more importance. They can get used to anything except living in a society which does not share their manners.”

-Alexis de Tocqueville¹

I. Introduction

In the final debate of the 2004 presidential election, the Democratic candidate John Kerry was asked whether homosexuality was a choice. “We’re all God’s children,” Kerry answered. “And I think if you were to talk to Dick Cheney’s daughter, who is a lesbian, she would tell you that she’s being who she was. She’s being who she was born as. I think that if you talk to anybody, it’s not a choice.”² Following the debate, the Bush campaign attacked Kerry’s answer as a “crass, below-the-belt” effort to alienate conservative voters from the Bush-Cheney ticket by outing Mary Cheney as a homosexual. Kerry dismissed the criticism and argued that he was simply “trying to say something positive about the way strong families deal with the issue.” Elizabeth Edwards, the wife of Kerry’s running mate, went further and suggested that the Republicans’ criticism was an overreaction rooted in a “certain amount of shame with respect to [Mary Cheney’s] sexual preference.”

For those interested in the future of LGBT rights in the United States, the controversy over Kerry’s remarks is instructive – not because of the accusations of homophobia and gay baiting that were slung back and forth, but because these

¹ Alexis de Tocqueville, *Democracy in America*, J.P. Mayer, ed., George Lawrence, trans., (New York: Harper & Collins, 1969), p. 605.

² All of the quotations in this paragraph are drawn from “Cheneys Indignant About Kerry Remark,” CNN.com, October 14, 2004. Visited on November 19, 2004. <<http://www.cnn.com/2004/ALLPOLITICS/10/14/lynne.cheney.ap>>

accusations were exchanged over a question of good manners. Basic rules of campaign etiquette in the United States generally place candidates' children outside the bounds of political debate.³ When a candidate's children are mentioned at all, it is usually in a positive, almost apolitical way. To breach this rule of campaign etiquette is to be politically impolite, to convert an otherwise legitimate political disagreement into an illegitimate personal attack by raising private issues that are not of public concern. The Bush campaign claimed that Kerry had been politically impolite in precisely this way. In their heated reactions to Kerry's comments, Vice President Cheney and his wife, Lynne, described themselves, respectively, as an "angry father" and as an "indignant mom," lashing out in response to a personal insult.⁴ The Kerry campaign did not deny that campaign etiquette required the Democrats to draw a line between the rough-and-tumble of political debate and candidates' children. On the contrary, the Kerry campaign claimed that this particular rule of campaign etiquette had been suspended by the political use the Cheneys had previously made of their daughter's sexual orientation. Mary Cheney's homosexuality was fair game for Kerry, Democratic vice-presidential candidate John Edwards argued, because the Cheneys "had themselves brought it up."

Ultimately, then, the controversy over Kerry's remarks was about how issues of sexual orientation are to be handled relative to the courtesies that govern political discussion. In this instance, the rules of etiquette were invoked to head-off an open debate about homosexuality and to focus attention instead on the issue of appropriate candidate behavior. This example is instructive because it is not just an artifact of

³ Stephen Hess, The Little Book of Campaign Etiquette: For Everyone with a Stake in Politician and Journalists (Washington, D.C.: Brookings Institution Press, 2000), pp.60-1.

⁴ All the quotations in this paragraph are drawn from "Cheneys Indignant."

presidential elections. As Randall Kennedy has noted, the political efforts of marginalized groups are frequently bound up with questions of courtesy.⁵ Codes of courtesy typically mark-off and counter-pose the groups that comprise a given polity, providing a means of reinforcing existing hierarchies across classes. Thus, in order to win an equal standing in society, marginalized groups must often call into question accepted standards of politeness.

We can see examples of this in many different areas of LGBT political action. In their efforts to spur stronger governmental responses to the AIDS crisis, members of ACT UP self-consciously contested the prevailing norms of courtesy that disparaged public displays of anger and treated LGBT sexuality as an object of shame.⁶ Similarly, a variety of activists have agitated against the U.S. military's comprehensive "don't ask, don't tell" code of etiquette that skews speech and action in a decidedly heterosexual direction.⁷

⁵ Randall Kennedy, "The Case Against Civility," The American Prospect 9 (November 1, 1998 – December 1, 1998). Available at American Prospect Website. Visited February 18, 2005. <<http://www.prospect.org/print/V9/41/kennedy-r.html>>

⁶ Deborah B. Gould, "Life During Wartime: Emotions and the Development of ACT UP," Mobilization 7 (2002), pp. 177-200. As Gould notes, contestation is not the only response that AIDS activists have had to the prevailing norms of courtesy. Prior to the rise of ACT UP, AIDS activists adopted a more accommodationist "politics of respectability," attempting to remove the shame attached to LGBT sexuality by actively embracing conventional rules of acceptable behavior.

⁷ Aaron Belkin and Geoffrey Bateman, eds., Don't Ask, Don't Tell: Debating the Gay Ban in the Military (Boulder, Colorado: Lynne Rienner Publishers, 2003). In this vein, it is worth noting that foreign militaries which have lifted their bans on homosexuals find that the integration of gays into the military ranks, like the earlier integration of women, is largely a matter of instilling "good manners" among the troops. See "New Course by the Royal Navy: A Campaign to Recruit Gays," New York Times, February 22, 2005. Available at <<http://www.nytimes.com/2005/02/22/international/europe/22britain.html?ex=1109739600&en=b01039380bbef45d&ei=5070>>

Proponents of same-sex marriage have also found themselves bedeviled by manners. To see this, consider that in addition to being a civil contract, a bundle of legal rights, and (for many) a religious sacrament, marriage is also a particular social status. Polite society attaches a special degree of respect and a distinctive set of expectations to husbands and wives that is not extended to unmarried couples. The social standing of married couples is related to the legal rights and religious beliefs associated with marriage, but it is not dependent on the active exercise of rights or the genuine embodiment of beliefs. A given married couple may not have been united in a religious ceremony, may not visibly exercise conjugally conferred rights, and may even fail to sustain a stable or peaceful relationship (a relatively common result reflected in the country's rates of divorce and domestic violence). Yet this married couple, like all married couples, will nonetheless receive the courteous respect bestowed on those individuals joined in matrimony. Marriage certainly provides a means of promoting interests and a way of realizing religious ideals, but marriage is not valued solely (or even principally) on these grounds. To borrow the words of Judith Shklar, one might say that that marriage operates socially as “a certificate of full membership” and “its value depends primarily on its capacity to confer a minimum of social dignity.”⁸

Although husbands and wives need not invoke particular rights nor achieve religious ideals in order to enjoy special social standing, same-sex couples are denied such standing whether or not their relationships actually make use of marriage-like rights or live up to religious expectations. Same-sex couples are thus denied the basic social

⁸ Judith N. Shklar, American Citizenship (Cambridge: Harvard University Press, 1991), p. 2.

dignity that comes from the mere fact of being married.⁹ For many Americans the idea of same-sex marriage seems to be a kind of rudeness, an inappropriate claim to social standing that should be met with indignant disapproval. Voters in Ohio underscored this point last November. They approved a ban on same-sex marriage that, among other things, prohibited the state from recognizing same-sex relationships in any way intended to approximate the “significance” of marriage.¹⁰ Even though the very first sentence of the Ohio ban excluded same-sex couples from the legal definition of marriage, authors of the ban wished to make sure that no alternative means of promoting the social standing of same-sex relationships could be pursued.

The above examples suggest that, in addition to the repeal of restrictive laws and the passage of favorable policies, the expansion of LGBT rights requires engagement with the practices of courtesy that confer and reinforce social standing. What might this process of engagement look like? It is tempting to call for a straightforward crusade against an artificial and unjust hierarchy based on sexual orientation. But the engagement must be more nuanced than that because courtesy is not simply a system of rules manufactured to serve the interests of the powerful.

In this article, I outline the basic features of common courtesy and illustrate how courtesy depends on a mix of utility, habit, and pleasure. I argue that if the practice of courtesy is to be re-appropriated, then all three of the factors that underwrite courtesy

⁹ This is not to say that all same-sex couples are therefore in favor of same-sex marriage. For some same-sex couples, the social standing of marriage is not desired; at most, it is the possession and exercise of marriage-like benefits that matters. For an example of one such couple, see Daniel Pinello, “Oregon’s Struggle for Same-Sex Marriage,” available at <<http://www.danpinello.com/Oregon.htm>>, visited on March 1, 2005.

¹⁰ For the full text of the ban, see The Smart Voter Webpage, <<http://www.smartvoter.org/2004/11/02/oh/state/issue/>>, visited on February 18, 2005.

must be addressed. I then consider the general possibilities for re-configuring courtesy. In this vein, I suggest that the law may provide an important means by which the re-appropriation of common courtesy can occur. More specifically, I argue that the law depends on the same factors as common courtesy; thus, the law may be understood as an alternative kind of politeness, a form of “legal courtesy” that offers a way of contesting the claims and hierarchies of common courtesy. If I am right, then the law is an integral part of the LGBT political project, not only for the vindication of rights-claims that the courts may provide, but also for the kind of etiquette the law may help make possible, giving reason to hope that in some future presidential debate the discussion of sexual orientation will not be deemed impolite.

II. Common Courtesy

If questions of courtesy are at stake in the debate over LGBT rights, then it pays to know something about how courtesy functions.

Courtesy is, as most writers acknowledge, artificial and open to hypocritical exploitation.¹¹ Courteous behavior may reflect genuine personal decency or it merely

¹¹ The leading works here are by Norbert Elias: The History of Manners, Vol. 1 of The Civilizing Process, trans. Edmund Jephcott (New York: Urizen, 1978, originally published 1939); Power and Civility, Vol. II of The Civilizing Process, trans. Edmund Jephcott (New York: Pantheon, 1982, originally published 1939); and The Court Society, trans. Edmund Jephcott (New York: Pantheon, 1983, originally published 1969). See also Erving Goffman, The Presentation of Self in Everyday Life (Garden City, NY: Doubleday Anchor Books, 1959); Judith N. Shklar, Ordinary Vices (Cambridge: The Belknap Press of Harvard University, 1984); Ruth W. Grant, Hypocrisy and Integrity: Machiavelli, Rousseau, and the Ethics of Politics (Chicago: University of Chicago Press, 1987); and Jenny Davidson, Hypocrisy and the Politics of Politeness: Manners and Morals from Locke to Austen (New York: Cambridge University Press, 2004). For very

may reflect the desire to appear genuinely decent; the truly gracious soul and the unrepentant rogue may both be unfailingly polite. It is therefore difficult to tell when courtesy is actually meant and when it is just being faked. Judith Martin, the etiquette maven and author of the syndicated “Miss Manners” column, points out that courtesy can easily be used instrumentally and it often seems to be the case that “really mean people get the advantage of practicing ingratiating behavior.”¹²

The artificiality of courtesy, coupled with the ever present possibility of hypocrisy, would seem to be fatal flaws. How can such a practice persist? The short answer is that courtesy does not survive in spite of artificiality and hypocrisy, but because of artificiality and hypocrisy. These factors are essential to courtesy’s success because people are often separated by sharply conflicting opinions and interests. To know another person is not to love him. As Miss Manners puts it, to argue that people can get along easily if they just get to know one another “trivializes intellectual, emotional, and spiritual convictions by characterizing any difference between one person’s and another’s as no more than a simple misunderstanding, easily resolved by frank exchanges or orchestrated ‘encounters’.”¹³ It is the inauthenticity of courtesy – the insistence that individuals conform to an artificial code of decent behavior whether or not they actually

useful “first-hand” accounts of courtesy, see Lord Chesterfield, Letters, ed. David Roberts (New York: Cambridge University Press, 1992) and the following works by Judith Martin (also known as Miss Manners): Common Courtesy: In Which Miss Manners Solves the Problem that Baffled Mr. Jefferson (New York: Athenaeum, 1985) and Miss Manners Rescues Civilization From Sexual Harassment, Frivolous Lawsuits, Dissing, and Other Lapses of Civility (New York: Crown Publishers, 1996). For my take on the subject, on which the current article draws, see Keith J. Bybee, “Legal Realism, Common Courtesy, and Hypocrisy,” Law, Culture and the Humanities, 1(2005), pp.75-102 and “The Polite Thing To Do,” forthcoming in The Future of Gay Rights in America, H.N. Hirsch, ed. (New York: Routledge).

¹² Martin, Rescues Civilization, p. 15.

¹³ Martin, Common Courtesy, p. 12.

like or respect one another – that makes social peace and smooth interaction possible, without unrealistically attempting to reconcile stubborn conflicts and without romantically wishing away deep differences. Sincerity has far less promise of securing social coordination. When people do not agree, any public policy that begins with a call for honesty in human relations is likely to end with citizens shouting at each other in the streets. Of course, within the ideal world of true intimates, where there is perfect compatibility, politely hypocritical posturing would be destructive. But in actual society, where there is mutual dependence and conflicting interests, hypocritical courtesies help “false friends” make collectively useful arrangements without requiring deep agreement or genuine affinity.¹⁴ Lord Chesterfield, the great eighteenth-century champion of courtesy, identified this very dynamic in the early practice of politesse among European aristocrats. Chesterfield argued that royal courts “are, unquestionably, the seats of politeness and good-breeding; were they not so, they would be the seats of slaughter and desolation. Those who now smile upon and embrace, would affront and stab each other, if manners did not interpose; but ambition and avarice, the two prevailing passions at courts, found dissimulation more effectual than violence; and dissimulation introduced the habit of politeness.”¹⁵

None of this is to say that courtesy is neutral between all groups in society. Norbert Elias has shown that civilized manners are inextricably tied to the development of the modern state: in order to understand the finely calibrated, comprehensive controls that constitute civilized conduct, the growth of state-centric chains of social interdependence must be charted and the rise of state monopolies over taxation and

¹⁴ Grant, *Hypocrisy and Integrity*, pp. 20-21.

¹⁵ Chesterfield, *Letters*, p. 144.

violence must be documented.¹⁶ Courtesy is not the handiwork of generic individuals confronted with the general problem of coordinating their action; instead, it is the consequence and hallmark of a particular political order. Therefore, it is inaccurate to assume that courtesy necessarily facilitates accommodations among equals. Codes of courtesy are by no means perfectly symmetric; on the contrary, they typically sustain hierarchies across different classes of people.

The inequities of courtesy lead us back to the question of courtesy's survival: How does an admittedly artificial code of behavior persist when it is not only open to hypocritical manipulation, but also selectively promoting the status of certain groups? The utility-based answer that I gave when first confronted with courtesy's artificialities and hypocrisies has some weight here. One can acknowledge that effects of courtesy are unequal across groups and yet maintain that courteous interactions are not without some benefit for all parties involved. All sorts of false friends draw benefits from courtesy even if they do not all benefit to the same degree.

But the argument from utility does not provide a complete answer to the question of courtesy's survival. If individuals valued courtesy solely because it helped enlist the cooperation of others, then they would stop being courteous the moment a more promising mode of behavior recommended itself – a realization that may happen sooner rather than later given the role courtesy plays in shoring up existing hierarchies. Good manners therefore cannot be merely a matter of self-control for the sake of self-advancement. Individuals must feel some kind of normative attachment to being polite if courtesy is to be widely and consistently observed.

¹⁶ Elias, Manners; Power and Civility; Court Society.

How can courtesy be normative? On one hand, it does seem true that, in spite of all its thinness and artificiality, courtesy is not typically experienced as a mere *modus vivendi*. There does appear to be a normative feel to courtesy, a sense that being polite is the right thing to do. Yet, on the other hand, manners and morals would seem to be quite distinct. Courtesy is disconnected from personal motive. Intentions matter a great deal in morality, but they hardly matter at all in manners. A person performing a moral action for the wrong reasons is considered to be immoral while a person acting courteously is considered to be courteous regardless of her motives – and that is why courtesy is decried for being hypocritical. If manners and moral are different, then how can the dictates of etiquette be normative principles that are followed when they are convenient as well as when they are not?

The answer is, in part, that the basic elements of courtesy are introduced to most people when they are young. Courtesy achieves part of its “oughtness” through sheer habit. Children are not usually persuaded to be polite; instead, they are habituated to courteous behavior through a prolonged program of repetition enforced by the inflexible say-so of parents. The continuous drill of courtesy lessons during childhood produces adults who are disposed to follow the conventions of etiquette and who can be shamed whenever they stray from the path of courtesy. Adults schooled in courtesy need not be truly virtuous; they are committed to particular forms of conduct and need not actually accept the substantive notions of concern and respect behind these forms. It may be, of course, that the practice of polite conduct will occasionally encourage the development of genuine virtue. It may be, as Miss Manners observes, that “if you write enough thank-

you letters, you may actually come to feel a flicker of gratitude.”¹⁷ But the habit of courtesy is, at base, a habit of action and such habits cannot be lightly set aside. Courtesy remains artificial, but the properly trained adult is nonetheless attached to courtesy as a routine for negotiating social interaction.

The sense that one ought to be polite stems not only from habit, but also from the gratification of desire. Courtesy provides an agreed-upon means for granting respect and giving praise to truly deserving individuals, providing a way of satisfying the legitimate desire to recognize and reward exemplary individuals. But courtesy also serves to gratify the desires of the undeserving. Chesterfield made this point at some length. He linked the courtesies employed in royal courts to the gratification of ambition and avarice, as I have already noted. More generally, Chesterfield linked courtesy to the satisfaction of self-love. A “mistaken self-love” is harmful, Chesterfield conceded, because it induces individuals to “take the immediate and indiscriminate gratification of a passion, or appetite, for real happiness.” Yet the sensible indulgence of self-love is the defining characteristic of polite society. “If a man has a mind to be thought wiser, and a woman handsomer, than they really are, their error is a comfortable one to themselves, and an innocent one with regard to other people; and I would rather make them my friends by indulging them in it, than my enemies by endeavoring (and that to no purpose) to undeceive them.” It is no use lamenting that self-love drives people to place so much stock in such shallow talk, for the “world is taken by the outside of things, and we must take the world as it is; you or I cannot set it right.” Besides, the way of the world makes

¹⁷ Martin, Common Courtesy, p. 11-12. For an extended meditation on the possibility of becoming what one pretends to be, see William Ian Miller, Faking It (New York: Cambridge University Press, 2003).

the pleasures of politeness available to everyone. The reciprocal practice of courtesy allows all to appease the vanities of each, binding the heart of every individual in polite society to the conventions of good manners. Thus, it is not only useful to be polite, but it also positively feels like the right thing to do. “Pleasing in company,” Chesterfield noted, “is the only way of being pleased in it yourself.”¹⁸

III. Possibilities for Change

According to the foregoing sketch, common courtesy is at once artificial, open to hypocritical manipulation, rooted in habit, sustained by self-love, tied to hierarchy, and essential for securing social coordination in contexts of diversity and disagreement. This complex picture of courtesy contains some promising signs for those whom wish to alter polite society. First, the artificiality of manners suggests that codes of courtesy can be drawn up in any number of ways. In principle, there is no reason why the pleasures of politeness cannot be derived from many different schemes of etiquette (though the gratification of vanity will undoubtedly be higher for specific individuals in a system that clearly privileges small elites). Same-sex couples may currently be denied social standing in polite society, but this need not be a permanent condition.

Second, the potential for hypocrisy built into the basic structure of courtesy indicates that change may occur without fundamentally altering individual beliefs. Public

¹⁸ Chesterfield, *Letters*, pp. 90, 61, 185, 88. Chesterfield traced his outlook to La Rochefoucauld, but antecedents can also be found in the writings of Machiavelli and of Guicciardini. See Francesco Guicciardini, *Maxims and Reflections (Ricordi)*, trans. Mario Domandi (Philadelphia: University of Pennsylvania Press, 1965). For a discussion of Machiavelli along these lines, see Grant, *Hypocrisy*, pp. 18-56.

opinion polls from the past twenty-five years indicate that a majority of Americans consider homosexuality to be morally wrong.¹⁹ Yet the average American need not be genuinely convinced that every sexual orientation is deserving of equal treatment in order for new codes of courtesy to be introduced. After all, intentions are not central to the practice of courtesy. Politeness is as politeness does. Common courtesy will change when Americans, for whatever reason, learn to act as if the committed relationships of heterosexuals and non-heterosexuals deserve the same measure of respect, just as they currently act as if all husbands and wives deserve respect. A revolution in manners will not necessarily erase the underlying differences in belief and identity that divide us, but it will substantially re-structure the way in which those differences are managed.

If my portrait of courtesy contains signs of hope, it also gives reason to doubt that change will be either easy or swift. The artificiality of manners means that particular requirements of courtesy cannot be invalidated simply by pointing out that these requirements are contrived and inconsistent with the facts of contemporary life. Thus, even though it is true that the prevailing polite view of marriage is belied by the high rates of domestic violence and divorce in the United States, this does not mean that the polite view of marriage is loosely held. The general utility of artificial rules, coupled with the force of habit and the pleasures of politeness, make established manners difficult to dislodge. Well-mannered individuals may easily dismiss new patterns of behavior as examples of rudeness and simply continue drumming the status quo rudiments of good behavior into their children.

¹⁹ Gregory B. Lewis, "Contentious and Consensus Gay Rights Issues: Public Opinion and State Laws on Non-discrimination and Same-sex Marriage," paper presented to the Center for Policy Research, The Maxwell School, Syracuse University, December 2, 2004.

The resistance to change is compounded by courtesy's decentralization. There is no central agency or institution that controls the terms of politeness. One might argue this lack of institutional centralization confers distinct advantages, allowing the rules of etiquette to be easily and continuously applied in a wide variety of settings without cumbersome procedures or expense. But the lack of centralization also makes common courtesy an unwieldy and seemingly ungovernable system. Consider the plight of Miss Manners. Although she insists that manners are necessary for life in common, she also finds the form of manners practiced by many Americans to be unacceptable. In her view, too many people choose either to adhere to the retrograde courtesy codes of a bygone era or to invent their own personal "style" of politeness. Miss Manners laments the existence of such errant courtesies, but there is really little that she can do about them.²⁰ Without a central entity capable of enforcing good manners, the development of courtesy may easily frustrate those whom wish to change its course.

IV. Legal Courtesy

In spite of such barriers, it is nonetheless true that American manners have been purposefully altered. Jim Crow segregation was surrounded and sustained by well-established rules of racial etiquette. The Civil Rights Movement of the 1960s, among other things, engaged in a series of "rude" actions like lunch-counter sit-ins that contravened the prevailing etiquette and initiated a transition toward a less hierarchical

²⁰ This is not to say that Miss Manners is entirely helpless. She can (and does) criticize boorish behavior – a tactic that she considers effective because her own "look of disapproval has been known to sizzle bacon" (Martin, Rescues Civilization, p. 32).

form of civility between the races. The transformation in racial etiquette is arguably incomplete, but a shift has undeniably occurred and, in this regard, the Civil Rights Movement must be judged a success. For those involved in a crusade to change courtesy, what lessons does the experience of the Civil Rights Movement hold?²¹

Law was central to the success of the Civil Rights Movement. Path-breaking legislation and landmark judicial decisions invalidated racially discriminatory practices that excluded African Americans from important political and civic arenas. Moreover, and more importantly for my purposes here, the law granted African Americans new standing. Judges developed a new set of legal doctrines under the Equal Protection Clause that gave African Americans a special status in legal reasoning (a status that was later generalized to all groups classified by race). By the end of the 1960s, the courts had made it clear that any legal arguments assigning an individual a different standing on the basis of race would be subject to the strictest form of judicial scrutiny. Relegated to a subordinate position in polite society, African Americans found their equal status recognized and confirmed in the world of law.

African Americans ultimately used the shift in legal status to leverage a shift in social status. One might argue that this leveraging was a direct result of the courts' enforcement powers. After all, judicial orders are backed by state force and victories won in court can be directly imposed on society. But this explanation is too simple.

²¹ The claim that the current struggle for LGBT rights is analogous to the Civil Rights Movement is, of course, a contentious one denied by opponents of same-sex marriage. See Pinello, "Oregon's Struggle."

First, it overestimates the judiciary's reserves of independent power.²² Second, it underestimates the difficulty of altering common courtesy – a practice that is, as I suggested above, quite resistant to change for a number of reasons.

The better explanation, I would argue, is that African Americans were able to leverage new forms of legal treatment into new forms of polite treatment because both law and courtesy operate on essentially the same terms of habit, pleasure, and utility. The key difference is that law has a centralized institutional structure, a structure that allows alterations in legal reasoning to be propagated throughout the legal system in an agreed-upon manner. Thus, once a change in legal reasoning has been consolidated, the law may be invoked to influence common courtesy, placing consistent pressure on the habits, pleasures, and utilitarian accommodations on which good manners depend. Rather than relying on a few self-appointed authorities to shame individuals into adopting a new kind of etiquette (the Miss Manners model), the legal system slowly erodes old courtesies throughout the entire society as new laws are enforced and the courts process disputes.²³

My reference to changes in racial etiquette is meant to be suggestive. My aim here is not to provide the empirical support necessary to sustain a particular account of how racial courtesies have developed in the United States (a task that is beyond the scope

²² Martin Shapiro, Courts: A Comparative and Political Analysis (Chicago: University of Chicago Press, 1981); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991).

²³ Miss Manners herself recognizes the powerful influence the legal system may have on manners and she openly deplors it. In her view, to allow law to influence manners is to favor the expensive, punitive practice of litigation over the gentle, voluntary methods of politeness. There may be some truth to her claim, but in focusing on the risk of increasing litigiousness, she overlooks the progressive influence that law has had on courtesy. Many of the boorish behaviors that Miss Manners has decried (including various forms of sexist and racist exclusion) are on their way out because of changes in law.

of this article), but to suggest that legal reasoning itself may operate like a form of politeness and, as such, may be useful to groups contesting the ways in which common courtesy confers social standing.

In what sense, then, can legal reasoning be said to be a form of politeness? That is, if one were to project a vision of the legal process based on the rendering of courtesy I have given, what might one see? At the most general level, one would see legal reasoning presented as a method of handling endemic political conflicts. Disputes would not be resolved, but only more or less successfully managed. Moreover, for such dispute management to occur, it would not be necessary for individuals to check their political commitments at the courthouse door nor would it be necessary to call political partisans before a judge so that they could be joyfully reconciled. Without requiring political conflict to be sequestered or transformed, law would work as a means of dispute management so long as all parties continued to argue in legal terms. Law, like courtesy, would be an artificial medium in which otherwise opposed parties could jointly find a means of moving on. From this perspective, the possibility of hypocrisy (defined as the opportunity to put distance between the political roots of a conflict and the conflict's courtroom rendering) would not be an aberration in legal reasoning so much as a basic condition of its operation. Everyone, including the judge, would be given the chance to be insincere in order to produce mutually useful arrangements. Indeed, it would be because legal actors are not always required to mean what they say that the legal system would effectively process conflict and disagreement.²⁴

²⁴ It is worth emphasizing that in saying law and courtesy are open to hypocrisy I am not saying these two systems are only used by hypocrites (in the case of courtesy, I have already noted that politeness may be the authentic expression of a gracious nature, and

If the analogy from courtesy is valid, then one would expect several conditions to obtain. First, one would expect that legal actors would actually attempt to accommodate conflicting interests in a “courteously thin” fashion. The courtesy analogy envisions legal actors whom seek ways of handling litigant interests without necessarily altering – or even addressing – the fundamental conflicts that gave rise to dispute. Thus, rather than emphasizing the conceptual depth or logical rigor of judicial decisions, the courtesy analogy leads one to expect that judicial decisions need only be thin. Second, if the courtesy analogy is valid, one would expect ordinary citizens to accept the courteously thin decisions that the law offers. After all, for courtesy to be common, it must be shared by all parties. Third, one would expect habit and pleasure to play key roles in the legal process. If law is like courtesy, then the normative attachment that individuals have to law should be rooted in routinized behavior and the gratification of desire. Fourth, one would expect law to sustain inequalities across social groups. Changes in law may level selected hierarchies, but, if legal reasoning is like courtesy, then the accommodations provided by law will always be asymmetric in some fashion (even though the accommodations will also be of some benefit to all).²⁵ Courteous legal settlements should tend to promote certain claims and classes above others.

that the existence of an agreed-upon code of courtesy provides a ready means for granting respect and giving praise to truly deserving individuals). My point is not to deny that either courtesy or law are important for people of goodwill and sincere virtue, but rather to argue (i) that this is not the only set of people for whom such systems important; and (ii) that the overall operation of courtesy and law cannot be understood if we think of them simply as the ways genuinely nice people treat one another.

²⁵ Indeed, scholars have argued that in the case of African Americans the gains in legal standing have not translated into completely equal treatment. See Alan Freeman, Alan D. Freeman, “Legitimizing Racial Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine, *Minnesota Law Review* 62 (1978).

In my view, all the expectations suggested by the courtesy analogy are plausible and empirically supported. Let me begin with the expectation that legal actors will accommodate conflicting interests and do so courteously. It is clear that many American legal actors positively value courtesy. Since the late 1980s, “civility codes” have been developed and formally adopted by at least forty-one separate bar associations, including the American Bar Association, and by nine different courts, including the Supreme Courts of Utah and Wisconsin, and the Seventh Circuit Court of Appeals.²⁶ The practice of legal civility has been actively promoted by the American Inns of Courts, a national legal association with 325 chapters and over 75,000 active and alumni members.²⁷ The importance of legal civility has also been publicly endorsed by two of the justices currently sitting on the United States Supreme Court.²⁸ Indeed, evidence indicates not only that many legal actors positively value courtesy, but also that courts actually manage

²⁶ My tally undoubtedly undercounts the number of civility codes. To my knowledge, the most comprehensive list of professional codes for lawyers and judges is maintained by the American Bar Association (ABA Website. Visited February 18, 2005. <<http://www.abanet.org/cpr/profcodes.html>>). The ABA list is incomplete. It does not include, for example, the civility code adopted by the Utah Supreme Court in 2003 (Utah State Courts Website. Visited February 18, 2005. <<http://www.utcourts.gov/courts/sup/civility.htm>>); the civility code adopted by the Boston Bar Association in 1997 (see Cathleen Cavell, “Please Please Me: Voluntary Civility Standards for Lawyers.” Massachusetts Government Website. Visited February 18, 2005. <<http://www.mass.gov/obcbbo/please.htm>>); and the civility code adopted by a federal district court in Dondi Properties Corp. v. Commerce Savings & Loan Ass’n, 121 F.R.D. 284 (N.D.Tex.1988) – see Committee on Civility of the Seventh Federal Judicial Circuit, “Interim Report,” April 1991, reprinted in 143 F.R.D. 371, 414-15. Moreover, I have compiled the bulk of my tally from the ABA list by examining the titles of the professional codes. It is likely that many bar associations and courts with civility codes have appended these codes to existing standards of professional conduct that do not themselves mention “civility” or “courtesy” in their titles.

²⁷ <<http://www.innsforcourt.org/>> Visited February 18, 2005.

²⁸ See Paul L. Friedman, “Taking the High Road: Civility, Judicial Independence, and the Rule of Law,” New York University Annual Survey of Law 58 (2001), pp.187-202; Ruth Bader Ginsburg, “Speaking in a Judicial Voice,” New York University Law Review 67 (1992).

to arrive at courteously thin accommodations much of the time. Scholars have found that American judges often produce fragmented and incomplete decisions rather than sweeping statements of principle. Instead of being models of well-specified justification, judicial opinions often appear to be piecemeal, ramshackle affairs cobbled together to dispose of the case at hand. The ambiguities and inconsistencies of such opinions mean that the bulk of any given dispute often goes unaddressed. Thus, in many instances, the key judicial decision is to leave matters undecided. Cass Sunstein, the leading scholar in this area, argues that such “minimalist” judicial decisions serve the “great goal” of a free society: to make agreement possible when agreement is necessary, and to make agreement unnecessary when it is impossible.²⁹ In view of my account of courtesy, one might simply say that these decisions are “polite.”

Do ordinary citizens find courteous legal action acceptable? Evidence suggests that they often do. The ambiguous, incomplete judicial opinion itself invites litigant compliance.³⁰ By failing to articulate the entire principled basis of a decision or by offering a compromise ruling, a judge can simultaneously recognize the conflicting claims of both litigants, even as she ultimately rules in favor of one party over the other. No one is likely to be entirely satisfied with the result and, considered as devices for securing deep consensus or as exercises in principled logic, ambiguous judicial decisions are rightly deemed failures. Yet, by leaving many dimensions of the dispute open and the principled underpinning of the opinion under-developed, ambiguous decisions reward victorious litigants with less than they might have won and divest defeated litigants of

²⁹ Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Cambridge: Harvard University Press, 1999), p. 50. See also Edward Levi, An Introduction to Legal Reasoning (Chicago: University of Chicago Press, 1949).

³⁰ Shapiro, Courts; Sunstein, One Case.

less than they might have lost. Both winner and loser might have done better, but they also could have done worse. Moreover, both winner and loser are left with a flexible legal framework that over time can be invoked to meet different demands and adapted to address developing disputes.

Independent of the attractions found in ambiguous judicial decisions, citizens may be satisfied simply when the legal process treats them with courtesy and respect.³¹ In part, individuals weigh the quality of treatment heavily because popular culture has habituated them to basic ideas of decency and fairness. People carry their ideas of decent treatment into court and expect their ideas to be confirmed, even if the judge's ultimate decision is not their favor. The quality of treatment also matters for reasons of pleasure. To be treated with courtesy and respect by a court is to be given the gratification of being recognized as a rights-bearing individual with equal standing in the community of citizens. Citizens often care less about controlling the judicial process than about how that process goes about assigning and confirming their status.

The acceptance of courteous accommodations is also cemented by the habit of legal thinking common among Americans. Our public discourse is permeated with legal talk and judicial decisions. As Tocqueville noted over 150 years ago, "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."³² His observation still rings true.³³ Americans are habituated by mass culture and

³¹ Tom R. Tyler, Why People Obey the Law (New Haven: Yale University Press, 1990); Tom R. Tyler and Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts (New York: Russell Sage Foundation, 2002). Individuals weigh the quality of treatment most heavily when evaluating their direct experiences in court, but the quality of treatment also informs more general evaluations of court performance (Tyler and Huo, Trust in Law, pp.177-97).

³² Tocqueville, Democracy in America, p.270.

by political practice to “think like a lawyer” and, thus, find it natural to re-frame issues in terms of legal argument.

For all its utility, does law, like courtesy, sustain social hierarchies? There is good reason to think so. First, there is no guarantee that the habits or desires on which the law depends are geared to serve collective interests in an evenhanded way. Many Americans may “think like a lawyer,” but it is questionable whether a habitual reliance on legal terms provides the most fruitful way of framing problems and formulating policies.³⁴ Similarly, many Americans may be gratified by having their day in court, but it is debatable whether the desire to experience the supposed “majesty of the law” promotes an egalitarian relationship to the legal process.³⁵ Beyond the issues of habit and pleasure, the evidence suggests that the legal process manages disputes in a way that protects and sustains prevailing distributions of power. The civility codes that have been instituted around the country, for example, have been explicitly deployed as defensive measures against a growing number of lawyers and judges with new interests contrary to the time honored values of the profession.³⁶ The problem is not that the judicial process

³³ Robert N. Bellah, William Sullivan, Ann Swindler, and Steven Tipton, Habits of the Heart: Individualism and Commitment in American Life (Berkeley: University of California Press, 1985); Patricia Ewick and Susan Silbey, The Common Place of Law: Stories from Everyday Life (Chicago: University of Chicago Press, 1998).

³⁴ Donald L. Horowitz, The Courts and Social Policy (Washington, D.C.: Brookings, 1977); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (Chicago: University of Chicago Press, 1991); and Michael W. McCann, Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (Chicago: University of Chicago Press, 1994).

³⁵ Ewick and Silbey, Common Place. The fact that courtesy may be collectively problematic does not mean that it is not beneficial for select groups. Indeed, as Elias notes (Court Society, pp.78-104), etiquette may become preposterously burdensome and still serve the interests of ruling elites.

³⁶ In the case of lawyers, the perceived new interest is in winning at all costs and making as much money as possible; in the case of judges, the perceived new interest is in making

literally could not be run on the basis of these new interests, but that a judicial process so constituted would allocate institutional resources differently and would no longer be “civil.”³⁷ Legal courtesy promises to lift judges, lawyers, and citizens above the fray of contending interests in order to make available new opportunities for dispute management. But, as with common courtesy, legal courtesy is not neutral; it is organized around a specific order and dedicated to keeping people in their proper place. Although the specific mechanism is somewhat different, the end result is one that has been confirmed by three decades of sociolegal scholarship: the individualized processing of discrete legal conflicts yields systematically skewed results.³⁸

one’s personal views prevail in written opinions (thus it is not the proliferation of judicial dissents *per se* that is a threat to civility, but the unvarnished manner in which dissents are expressed). See Seventh Circuit, “Interim Report” and “Final Report.”

³⁷ The same dynamic is evident in contemporary efforts to maintain civility in Congress. Since 1997, members of Congress have openly worried about declining legislative civility and attempted to address the problem by commissioning studies, holding hearings, and convening bipartisan retreats. Observers have linked the decline to a shift in political commitments away from specific government institutions and toward personal re-election efforts and perpetual campaigning. Congress has grown less civil, in other words, because members of Congress increasingly practice a different kind of politics. See “Civility in the House of Representatives – Transcript,” April 17, 1997 and May 1, 1997.” United State House of Representatives Website. Visited February 18, 2005. <<http://www.house.gov/rules>> Kathleen Hall Jamieson, “Civility in the House of Representatives – Executive Summary, March 1997.” United State House of Representatives Website. Visited February 18, 2005. <<http://www.house.gov/rules/jami01.htm>> Kathleen Hall Jamieson and Erika Falk, “Civility in the House of Representatives: An Update.”; “Civility in the House of Representatives: The 105th Congress.”; “Civility in the House of Representatives: The 106th Congress.” Annenberg Public Policy Center Website. Visited February 18, 2005. <<http://www.appcpenn.org/pubs.htm>> For additional arguments that link civility to a particular political order, see Kennedy, “Against Civility” and Virginia Sapiro, “Considering Political Civility Historically: A Case Study of the United States,” unpublished conference paper, Annual Meeting of the International Society for Political Psychology, Amsterdam, The Netherlands, July 1999.

³⁸ See Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* 9 (1974), pp. 95-160 and the essays collected in

V. Conclusion

I have argued that the advancement of LGBT rights depends on changing the standing that non-heterosexuals enjoy as a matter of common courtesy. Based on an account of how common courtesy works, I have outlined the possibilities and constraints confronting any effort to alter prevailing manners. In this vein, I have also suggested that the law may be a useful agent of change: it serves the same purposes (and operates on the same basis) as courtesy and, thus, may function as an alternative kind of politeness, a form of “legal courtesy” that offers a way of contesting the claims and hierarchies of common courtesy. The alternative presented by law is not perfect, for the law has its own exclusions and inequities. But, unlike courtesy, the law is centrally organized. At least some parts of the law can be more readily reformed than manners and subsequently can be used to alter the ways in which social standing is distributed.³⁹

Of course, at this stage in time, it is unclear how much legal reform will actually occur. In 2004, constitutional amendments barring same-sex marriage were passed in 13 states. More state bans are on the ballot in 2005 and the idea of an anti-same-sex marriage ban is also being entertained at the federal level. Yet, if the prospect of legal reform is an open question, the difference that legal reform can make in the social

Herbert M. Kritzer and Susan Silbey, eds., In Litigation: Do The “Haves” Still Come Out Ahead? (Stanford: Stanford University Press, 2003).

³⁹ In saying this, I do not mean to suggest that politeness, as a matter of either common courtesy or of legal practice, is the only political ideal to which we should aspire. Politeness has its virtues, but it is by no means a panacea that eliminates all political pathologies. It is possible, for example, to be both polite and cruel (see Miller, Faking it, p. 42). If we think that that cruelty is a political vice to be avoided, then we must infuse our politics with more than politeness. See Judith N. Shklar, Ordinary Vices (Cambridge: Belknap Press of Harvard University, 1984).

standing of non-heterosexuals is not. Stories from the regions in which same-sex marriage has been permitted suggest that the legal recognition of same-sex relationships has engendered a new measure social respect even for those couples already accepted by family and friends.

The story of Roey Thorpe, executive director of Basic Rights Oregon and the leader of the effort that (briefly) legalized same-sex marriage in Multnomah County, is illustrative and, in closing, deserves to be quoted at length.⁴⁰ “I’ll tell you a story,” Thorpe says. “What you should know is that I am a person who never wanted to get married. I did when I was a kid, but as an adult, I’ve not wanted to do that. I’ve never lived with any of my partners until the current one. We’ve been together for three years. I would not have been the person who proposed marriage in our relationship. But we got married at our house on the Saturday after the marriages started.”

“My partner invited her whole family, who all live here in Portland, and her friends. I invited my friends. My most important people are scattered all over the country, and there was no time for them to be here. Our wedding was very emotional, as were all of the weddings I observed. Her family has always been so supportive of me. They have treated me like a member of the family since they met me. They’ve included me in every way that you could be included. It’s remarkable. Not only are we both women, but I’m a gay rights activist. That’s not a very easy thing to integrate into your family. But her family has not batted an eye.”

“[Even so], my partner’s sister came up to me after the wedding and said, ‘Welcome to the family.’ It was a profound moment for me. What I realized was that,

⁴⁰ Thorpe tells her story in Pinello, “Oregon’s Struggle.”

although I didn't feel any more like a member of the family than I had before, for her, that ritual, that wedding was a rite of passage.... I had not even been aware of that before."

"I'll give you another example. Her 85-year-old grandmother was there with her boyfriend [she giggles]. She's about as big as a minute. She's a tiny little lady, all pink and white. She came to our wedding, and we talked about it afterward. She said, 'You know, it was just like every other wedding.' She was surprised by that. Well, the year before, I had invited her to come to Basic Rights Oregon's annual dinner. My partner and I had bought a table, and we invited her whole family to come. She said, 'You know, dear, I just don't know if I would be comfortable.' I said, 'That's fine. I understand. No problem.' But I resolved that I would ask her every year. So this year, in October, after our wedding, I asked her again. She said, 'I would love to.' And I said, 'So what changed for you?' I thought her answer was going to be something like, 'I came to your wedding, and I realized that gay people are OK. I got more comfortable.' Instead, what she said was, 'Well, dear, it's a family thing now.' So today I'm her granddaughter-in-law, or whatever you call it. And now for her, it's something that I'm doing. So she'll go, because it's about family."

"This is the most profound thing that I learned. It's also the most profoundly painful thing, because – I don't even know if I can say this without crying – it means that we aren't family without it, [she does cry as she says] and I don't think we realize that until it happens.... That pain is something that we are not in touch with. And we can't be. Because in order to live your life, you have to deny that pain. In order to have any kind of happiness, you can't think about it all the time. Our movement's been

remarkable in helping people deal with that, and helping us think it through, and helping us believe and support the idea that we can have a ceremony in our church or that we can have a domestic partnership or we can have something and it doesn't matter what other people think because we know what we have. But you know what – it matters.”