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Why Accommodate? Reflections on the Gay Marriage Culture Wars

Maggie Gallagher*

If gay marriage is a constitutional right, a moral good, a basic norm of democratic equality, then why accommodate opposing views?

Why should anyone who believes in gay marriage also support conscience protections for individuals or organizations opposed to gay marriage?

The questions posed above are foundational; the answers to each dictate (in practice) the policy options one is willing to consider in regard to gay marriage, particularly in terms of accommodations. Technical difficulties of legal drafting aside, the reasons underlying one's willingness to consider religious accommodations in the area of gay marriage will dictate the breadth and kind of religious liberty legislation we will be willing to consider. Carefully exploring the core question—Why accommodate?—will enable us to conceptualize why accommodation on this issue is so difficult, and, particularly, why it is so conceptually difficult for gay marriage advocates to tolerate the idea of substantial religious accommodations.

This Article proposes four potential reasons why citizens, legislators, and/or judges who endorse gay marriage should consider accommodating the views of traditional faith communities: practical, civic, moral sympathy, and principle. I argue (perhaps counter-intuitively) that the most urgent need, if we are to reduce the conflict between gay rights and religious liberty, is not merely to argue from principle alone, but also to develop respect for the other reasons for accommodation: practical, civic, and moral sympathy.

I. WHY ACCOMMODATE? FOUR REASONS

Below is a typology of four reasons why gay marriage advocates should support religious liberty accommodations for those opposed to gay marriage.

A. Practical

This is the simplest reason for accommodation to secure political support for gay marriage. To enact gay marriage laws, proponents of gay marriage believe they have to allay concerns of voters they disagree with by providing religious liberty accommodations. The narrowness of religious liberty exemptions typically offered by gay marriage advocates strongly suggests that, at present, allaying voter concerns, not

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creating robust accommodations, is the primary motivation for inclusion of such exemptions in gay marriage legislation.¹

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B. Civic

Large moral conflicts are hard on the fabric of society, especially church-state conflicts. Tolerance is not just a matter of legal rights but also of civic culture (defined as the ways we relate to one another in the absence of legal compulsion). When large blocs in the population disagree on basic moral issues, we as a society look for ways to reduce the tangible expression of these conflicts in order to promote the common good. President Bill Clinton's rule of "maximum feasible accommodation" of religion in the 1990s was one public expression of this view.²

C. Moral Sympathy

If gay marriage is, as David Blankenhorn has written, a "conflict of goods," then even those who judge the balance to be in favor of gay marriage might wish to express respect for the views of those with whom they disagree. (Just as even strong marriage advocates like Blankenhorn may be motivated to seek alternative ways to accommodate gay couples' needs. 4)

Even in the midst of strong moral disagreement, people can often see and acknowledge some value in the position they oppose. Consider the thorny issue of abortion. Some abortion-rights advocates can respect a consistent pro-life position. Though they believe women have the legal right to terminate a pregnancy, they do not

¹ A number of statutory exemptions cover only situations already protected by law, specifically, the extremely slight possibility that clergy will be forced to officiate in weddings of which their denomination disapproves. For instance, Vermont's same-sex marriage law provides that it "does not require a member of the clergy authorized to solemnize a marriage . . . to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action." VT. STAT. ANN. tit. 18, § 5144(b) (2009); *see also* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. CODE § 46-406 (2009); B. A07732 § 4, 2009–2010 Gen. Assem., Reg. Sess. (N.Y. 2009). Other exemptions merely restate existing constitutional guarantees. For instance, Maine's same-sex marriage law, recently repealed by referendum in a people's veto, expressly "does not authorize any court or other state or local governmental body, entity, agency or commission to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy, teaching, or solemnization of marriage within that particular religious faith's tradition as guaranteed by the Maine Constitution, Article 1, Section 3 or the First Amendment of the United States Constitution." An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, ME. REV. STAT. ANN. tit. 19-A, § 650 (repealed 2009).

² This view was first articulated by William A. Galston, a domestic policy advisor to President Clinton, and now a senior fellow at the Brookings Institution. *See* WILLIAM A. GALSTON, THE PRACTICE OF LIBERAL PLURALISM 167 (2005); WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES AND DIVERSITY IN THE LIBERAL STATE 295 (1991). Briefly, this view suggests that the state should allow as much accommodation of religious belief and practice as possible, bounded only by the need for basic social cohesion.

³ DAVID BLANKENHORN, THE FUTURE OF MARRIAGE 171 (2007).

⁴ See David Blankenhorn & Jonathan Rauch, *A Reconciliation on Gay Marriage*, N.Y. TIMES, Feb. 22, 2009, at WK11, *available at* http://www.nytimes.com/2009/02/22/opinion/22rauch.html (calling for legal recognition of civil unions).

⁵ See Emily Heroy, Dear Pro-Life Movement: I Respect Your Opinion. Can You Respect Mine? From Someone Who Believes in Pro-Choice (Jan. 22, 2010), http://genderacrossborders.com/2010/01/22/dear-pro-life-movement-i-respect-your-opinion-can-you-respect-mine-from-someone-who-believes-in-pro-choice/.

want to live in a society that really sees abortion as morally inconsequential, like clipping off a fingernail or taking out an appendix.⁶ These abortion rights advocates may believe that strong pro-life advocates should be given legal protections and accommodations,⁷ because they provide a counterbalance to treating abortion as morally insignificant.⁸

Pacifism is another example of a moral position with which most people do not agree, but which can nonetheless generate substantial respect that leads to a desire for conscience protections. By adopting the strongest and most consistent view—that killing is always wrong—pacifists do a moral service to the rest of us, forcing us to justify our own views and reminding us of the gravity of the act of killing (whether the soldier in war, or the murderer at home) even when we disagree with pacifism.⁹

D. Principle

By principle, I mean the belief that advocates of traditional marriage have a right to their views and lifestyles, which the law is obligated to respect. In general, there are three overlapping but conceptually distinct ways of conceptualizing the principle being protected: respect for religion as a right, respect for liberty generally as a right, ¹⁰ and respect for conscience per se. The difference, then, between the first three reasons for religious accommodations described above and this final reason of principle, is that principle *obligates*. The first three reasons to accommodate are in some sense optional—they depend on charity and prudence, not duty; they are gifts, not rights. Most people in favor of some value prefer obligation to choice.

To further distinguish myself from a legal scholar in this Article, I would like to make the case that the most urgent need in allaying conflicts between gay marriage and religious liberty is to develop arguments for accommodation stressing these center two categories: the civic argument and moral sympathy. The key problem we now face sociologically, politically, and intellectually lies in the relative paucity in the development of these kinds of arguments.

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⁶ Cf. Naomi Wolf, Our Bodies, Our Souls, THE NEW REPUBLIC, Oct. 16, 1995, at 26 ("I still maintain that we need to contextualize the fight to defend abortion rights within a moral framework that admits that the death of a fetus is a real death; that there are degrees of culpability, judgment and responsibility involved in the decision to abort a pregnancy.").

⁷ This includes laws allowing medical professionals not to participate in abortions where doing so would violate their beliefs or laws preventing public funding of abortion so that taxpayers do not have to subsidize a procedure they find abhorrent. *See* 42 U.S.C. § 300a-7(c) (2010) (prohibiting certain federally-funded organizations from discriminating against health care professionals who refuse for religious or moral reasons to participate in abortions); GUTTMACHER INSTITUTE, STATE FUNDING OF ABORTION UNDER MEDICAID (2010), *available at* http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

⁸ See Wolf, supra note 6.

⁹ See Jeff McMahan, The Pacifist Challenge 7 (May 18, 2007) (unpublished manuscript, available at http://experimentalphilosophy.typepad.com/2nd_annual_online_philoso/files/jeff_mcmahan.pdf) ("I also now accept that a certain version of pacifism has much to be said for it and poses a formidable challenge to those of us who believe in the possibility of just wars.").

As Justices O'Connor, Kennedy, and Souter expressed in the 1992 *Planned Parenthood v. Casey* decision, liberty itself, apart from any free exercise analysis, is broadly understood to protect one's concept of meaning and existence. 505 U.S. 833, 851 (1992). "At the heart of liberty is the right to define one's concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*

II. WHY IS ACCOMMODATION DIFFICULT?

Returning to the introductory question—why accommodate?—helps to explain the difficulty of creating accommodations for the competing positions on this issue, particularly for gay marriage advocates to tolerate the idea of substantial religious accommodations.

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Technically, of course, gay marriage does not raise religious liberty issues, but instead is best understood as a church-state conflict. There is no genuinely "neutral" position for the state with regard to marriage. As long as marriage retains a legal status, the law must have some core conception of what marriage is; it cannot leave the definition to individuals or other groups.

Given this reality—that marriage laws will include some and exclude other at least potentially competing visions of marriage—technical and academic legal prowess alone cannot help us name, much less answer, the primary question to drafting accommodation legislation for people and faith communities that do not see same-sex unions as marriages: why should we accommodate religious views at all?

Gay marriage advocates have crafted a public argument that presumes there is no possible good reason to oppose gay marriage. According to some gay marriage advocates, only animus and hatred explains why, after an appropriate time to get used to the idea, any American would seriously object to gay marriage. But we do not draft legislative accommodations for irrational hatred.

Before I continue this line of thought, let me start by stating the obvious: I am not a legal scholar, and in this Article I am not going to play one. The intellectual contribution that I hope to make to this debate is not that of a detached observer whose expertise is in legal codes, but as an active participant in the gay marriage civil discourse (and from the side perhaps least well-represented among law professors, those who oppose gay marriage).

Yet, let me admit something else: on the question of gay rights, I was for many years not a participant on any side. I was a watchful bystander. Like many Americans, I was ambivalent, moved by compassion and civility, held back by a certain apprehension about where a social change this rapid was headed. For better or for worse, I simply did not involve myself in the epic battles around gay rights that unfolded around me, on one side or the other.

However, I began to watch these battles more closely. Marriage, sex, and the family were my principal concerns, and thus I remember the public arguments, especially the sound bites most often repeated in the press. ¹² I remember the public arguments that kept me a bystander, sympathetic, silent, and yet also nervous.

¹¹ See, e.g., Michael B. Farrell, *Prop 8 Trial: Did Animosity Drive California's Gay Marriage Ban*, CHRISTIAN SCI. MONITOR, Jan. 13, 2010, http://www.csmonitor.com/USA/Justice/2010/0113/Prop.-8-trial-Did-animosity-drive-California-s-gay-marriage-ban (reporting attorney Ted Olson's argument that "Proposition 8, and the irrational pattern of California's regulation of marriage which it promulgates, advances no legitimate state interest. All it does is label gay and lesbian persons as different, inferior, unequal, and disfavored.").

¹² See Evan Wolfson & Michael F. Melcher, Constitutional and Legal Defects in the "Defense of Marriage" Act, 16 QUINNIPIAC L. REV. 221 (1996) (promoting the idea that marriage is bigotry); Mark Strasser, Family, Definitions, and the Constitution: On the Antimiscegenation Analogy, 25 SUFFOLK U. L. REV. 981 (1991) (promoting a racial analogy).

The arguments for gay rights generally were (before the gay marriage debate), I suspect, rather deliberately framed in ways that kept me, and people like me, a bystander. Even as the debate began to shift toward same-sex marriage, the presentation of these arguments was clearly designed to minimize the scope of the changes being institutionalized in law, partially or wholly to forestall public opposition. Incrementalism was the watchword of the day. 14

I remember these arguments because I remember the way in which they successfully kept me on the sidelines, out of this culture war, until marriage became the defining issue.

From my limited perch, I see certain truths about the way in which gay rights and gay marriage and religious liberties are likely to conflict. And I can perhaps attempt also to explain the intensity of the current fears around the conflict experienced by supporters of marriage traditions, especially religious people and communities. I offer these not in the spirit of a complaint, but in the spirit of genuine dialogue, which begins by trying to make the way the world looks visible across diverging intellectual, political, and moral lines.

Here's the first insight I can offer: gay marriage advocates and sympathetic cultural elites feel more confident that the new line between gay rights and the rights of dissenters (between competing visions of equality and freedom) will be drawn in a reasonable place, because they feel in charge of drawing the line.¹⁵ Traditional religious believers do not,

bin/article.cgi?f=/e/a/1999/02/12/NEWS7171.dtl (arguing that the marriage debate is about the value of gay persons); Evan Wolfson, Exclusion from Marriage: Historical Parallels (Dec. 1999), http://www.buddybuddy.com/wolfso02.html (arguing that opposition to redefining marriage is analogous to

opposing interracial marriage).

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This is not to say that they are necessarily in charge of drawing the lines on the definition of marriage, only that they are in charge of drawing the lines between what they will consider bigotry or homophobia

and reasonable disagreement.

¹³ See Andrew Sullivan, Why the M Word Matters to Me, TIME, Feb. 8, 2004, http://www.time.com/time/magazine/article/0,9171,1101040216-588877,00.html (linking gay marriage to personal feelings about acceptance by society); Carol Ness, Straights Join Movement for Gay Marriage, S.F. EXAMINER, Feb. 12, 1999, http://www.sfgate.com/cgi-

Incrementalism has been a tactical decision of many prominent gay marriage activists, recommended as a means of minimizing opposition and backlash. See DANIEL CERE, INST. FOR AMERICAN. VALUES, THE FUTURE OF FAMILY LAW: LAW AND THE MARRIAGE CRISIS IN NORTH AMERICA 11–12 (2005), available at http://www.marriagedebate.com/pdf/future of family law.pdf ("Make no mistake: incremental changes do not mean unimportant changes. William Eskridge explains the tactical advantages of advocating only incremental changes to the law. Though he supports same-sex marriage, for strategic reasons, he advises against any direct push for legal redefinition of marriage. He writes that a main benefit of incrementalism is that it leaves resulting changes largely immune from direct public criticism and debate."); see also THOMAS M. MESSNER, HERITAGE FOUND., ENDA AND THE PATH TO SAME-SEX MARRIAGE (2009), available at http://www.heritage.org/research/religion/bg2317.cfm# (compiling additional statements of same-sex marriage supporters advocating an incremental approach to the issue); Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437 (Robert Wintemute & Mads Andenaes eds., 2001) (advocating "the law of small change" as a strategy to same-sex marriage); Evan Wolfson, Marriage and Gays: What Would Lincoln Do?, THE HUFFINGTON POST, Feb. 11, 2009, http://www.huffingtonpost.com/evan-wolfson/marriage-and-gays-what-wo b 165761.html (suggesting the Lincolnian approach would couple moral clarity with incremental action); E.J. Graff, California Leads on Civil Unions, BOSTON GLOBE, Sept. 29, 2003, at A11 ("Legislatures in Connecticut and Rhode Island have, for the past few years, been considering something similar to the California approach. Same-sex marriage activists there, take note: Much can be accomplished incrementally, as legislators and citizens see that fairness won't bring on locusts, boils, plague, et al.").

because they are not in charge of the line and the line keeps shifting with head-spinning rapidity.

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When I was a young adult, in the late 1980s, compassion for AIDS victims was top priority, ¹⁶ and a capacity to separate orientation from behavior was the line between good citizenship and bigotry. Being gay was not a choice. Therefore being gay could not be the ground for moral condemnation. A "good" Catholic could be gay, provided he accepted the teachings of his or her church in regards to sexual practice. ¹⁷ Therefore sexual orientation per se could not reasonably be used to judge a person, but sexual behavior (a voluntary act) was still subject to moral critique.

At this time, not long ago, Cardinal O'Connor of New York could be deemed a hero for washing the feet of AIDS victims and expanding Church services to help fill this need. Additionally, when the Catholic Church's catechism condemned "unjust"

[W]e are alarmed by the increase of negative attitudes as well as acts of violence directed against gay and lesbian people since AIDS has become a national issue. We strongly condemn such violence. Those who are gay or lesbian or suffering from AIDS should not be the objects of discrimination, injustice, or violence. All of God's sons and daughters, all members of our society, are entitled to the recognition of their full human dignity.

U.S. CATHOLIC CONFERENCE ADMIN. BD., PUBL'N NO. 195.4, THE MANY FACES OF AIDS: A GOSPEL RESPONSE (Nov. 14, 1987), available at http://www.usccb.org/sdwp/international/mfa87.shtml.

"The biggest priority is dealing with AIDS in the diocese" [sic] said Msgr. James T. Cassidy, the director of health and hospitals for the archdiocese. . . .

The monsignor said he saw no contradiction between the church's commitment to AIDS patients and its opposition to homosexuality. Many victims of AIDS are homosexual men, and anal intercourse and intravenous drug use are two common ways the virus is transmitted.

"I think what we're saying is we're not interested in what a person's problem is, but their sickness," he said. "We are against homosexual acts, but God says love the sinner, hate the sin. We felt the need was there." . . . The unit receives 10 applications for every one of its 44 beds, which are to be increased to 58 beds in October. A team of medical personnel and social workers from the hospital goes to every hospital in the city, interviewing patients who fit the medical and social criteria for admission.

Eight women and 36 men are now living in the AIDS unit. About 35 of them were intravenous drug users, and many are without friends, family or a home. Since the unit opened, 13 patients have died, but two were released to nursing homes after their symptoms were alleviated.

Almost all the patients are very thin, some to the point of emaciation. One man is blind, and several use wheelchairs. Most have some degree of mental impairment.

The patients receive intensive medical care, which can include blood transfusions and a myriad of daily drugs and procedures. And they say they are grateful for the dignity they are given. "They Treat You Well" [sic]

"It's mainly what the hospital stirs up inside me," said Murray, who is 48 and used heroin

¹⁶ As the Administrative Board of the United States Conference of Catholic Bishops wrote at the time:

¹⁷ Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons (Oct. 1, 1986), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homose xual-persons_en.html ("The intrinsic dignity of each person must always be respected in word, in action and in law. . . . It has been argued that the homosexual orientation in certain cases is not the result of deliberate choice; and so the homosexual person would then have no choice but to behave in a homosexual fashion. Lacking freedom, such a person, even if engaged in homosexual activity, would not be culpable What is at all costs to be avoided is the unfounded and demeaning assumption that the sexual behavior of homosexual persons is always and totally compulsive and therefore inculpable. What is essential is that the fundamental liberty which characterizes the human person and gives him his dignity be recognized as belonging to the homosexual person as well.").

¹⁸ See Felicia R. Lee, At a Catholic Health Center, a Haven for AIDS Patients, N.Y. TIMES, Apr. 21, 1989, at B1:

discrimination" against homosexuals—even as it reaffirmed the Church's traditional teaching that sex is appropriate only in a marital union of husband and wife—it received mainstream plaudits.

The distinction between orientation and behavior, held to be a key distinction only a few years ago, has now collapsed, rejected by gay rights advocates. The status/behavior distinction is no longer operative today. If it is okay to be gay, then it must also be okay to have gay sex. As Chai Feldblum, one of the more generous theorists of gay rights points out, "What do they think being gay means?" 20

Even five years ago, to give another example of rapidly shifting lines, support for civil unions immunized a believer or moralist from the charge of bigotry or hatred against gay people:²¹ While those who opposed all gay legal unions were haters, those who at least supported civil unions were still viewed by mainstream gay marriage advocates as within the scope of civility and good citizenship.²²

In 2009, with the battle over California's Proposition 8, a measure that both overturned gay marriage and yet maintained civil unions, the line between decency and bigotry was once again abruptly re-drawn. Donors, voters, and advocates who oppose gay marriage were treated just as much as haters and bigots if they supported civil unions as if they did not.²³

My point is not to critique these shifting positions as right or wrong, but to note this political, social, and psychological fact: from the standpoint of traditional religious believers who are opposed to gay marriage, rapidly shifting dividing lines create immense uncertainty about where the line between decency and discrimination will next be drawn in the public square.

and cocaine for 25 years. He, like other patients, asked that they be identified only by their first names. He used to share needles, and he believes that is how he contracted AIDS. "We have a little bingo on Tuesdays, movies. They treat you well."

Mr. Koch defends his administration's decision, over the Cardinal's objection, to promote the use of condoms and distribute free needles to drug addicts to help prevent the spread of AIDS. But the Mayor praises the role of the Catholic Church in treating AIDS patients and disparages criticism of Cardinal O'Connor by gay rights groups. "John Cardinal O'Connor is a friend, an invaluable ally for those of us concerned about AIDS," Mr. Koch writes. "Controversies may rise between us, but a common bond will always unite us."

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¹⁹ Perhaps nowhere was the catechism's injunction to treat gays and lesbians with dignity, while at the same time upholding the teachings of the Church regarding sexual ethics, lived out more publicly and consistently than by John Cardinal O'Connor. While many gay activists decried Cardinal O'Connor's consistent opposition to legislation seen as endorsing homosexual conduct, many respected his gracious care, especially for those suffering from AIDS. See Richard Levine, Koch, in Book with O'Connor, Traces Conservative Shift, N.Y. TIMES, Mar. 7, 1989, at A1:

²⁰ Chai Feldblum, Moral Conflict and Liberty: Gay Rights and Religion, 72 BROOK. L. REV. 61, 104

<sup>(2006).

21</sup> Andrew Sullivan, *The Right Call*, THE DAILY DISH, July 10, 2006, 11 July 10, 2006, 17 Jul http://andrewsullivan.theatlantic.com/the_daily_dish/2006/07/the_right_call.html ("Fair-minded people can agree to disagree on support for marriage or civil unions. But denying gay couples any civil protections is on its face hateful.").

²² See, e.g., Frank Rich, The Bigots' Last Hurrah, N.Y. TIMES, Apr. 18, 2009, at WK 10, available at http://www.nytimes.com/2009/04/19/opinion/19Rich.html? r=1 (lauding Utah governor Jon Huntsman for supporting civil unions and distinguishing him from "bigots" who oppose same-sex marriage); see also Stuart Taylor, Gay Marriage by Judicial Decree, NATIONAL JOURNAL, May 24, 2008, http://www.nationaljournal.com/njmagazine/or_20080524_4694.php.

²³ THOMAS M. MESSNER, HERITAGE FOUND., THE PRICE OF PROP 8 (2009), available at http://www.heritage.org/Research/Family/bg2328.cfm.

Those who support gay marriage appear confident and serene about where that line will be drawn, primarily because they are likely to be in charge of dictating where it will be drawn: between so-called acceptable ideas and those seen as grounded in irrational hatred, a.k.a. bigotry.²⁴

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To advocates of the traditional understanding of marriage, which includes the vast majority of America's major faith traditions and a majority of American voters, recent experience is far more disturbing, fluid, and uncertain. What has happened already, which perhaps understandably seems minor to gay marriage advocates, is already deeply disturbing and unexpected.

For instance, I never expected to live in an America where a state would not permit a Catholic adoption agency to place children up for adoption unless they were also willing to place children with same-sex couples, ²⁵ or where a city council would vote for a resolution urging a Catholic bishop and ordinary Catholics to defy their faith as "un-American." In the larger scale of human history, one may believe that these are small things. The sky has not fallen, so to speak. However, there is a large, jagged crack in the ceiling of our culture that appears to increasingly demand one to choose between one's faith and one's citizenship.

The conflict between religious liberty and state power in Europe and Canada on this issue is shocking to the American conscience, and yet the sky is not falling there. Grotesque government intrusions of religious liberty in the name of equality are treated as normal, and even celebrated as gay rights advances.²⁷

This cultural process of redefining traditional views on sexual morality as illegitimate bigotry does not only affect how society views gay people, it also affects what might be called respect the for "the natural family." In 2003, when I first entered the marriage debate, I said, "[t]he ideal for a child is a mother and father, and marriage

²⁴ See Shannon Gilreath, Not a Moral Issue: Same-Sex Marriage and Religious Liberty, 2010 ILL. L. REV. 205 (2010); Marci Hamilton, Religious Liberty, Same-Sex Marriage, and the Coming Pressure on Legislatures to Reach An Appropriate Permissive Accommodation of Religious Entities That Discriminate Against Gay Couples (Nov. 1, 2007), http://writ.news.findlaw.com/hamilton/20071101.html. For a gay marriage supporter who is more sympathetic to the liberty concerns of traditional believers, see Eugene Volokh, Same-Sex Marriage and Slippery Slopes, 33 HOFSTRA L. REV. 101 (2006), and ANDREW KOPPELMAN & GEORGE W. DENT, MUST GAY RIGHTS CONFLICT WITH RELIGIOUS LIBERTY? (forthcoming

http://www.justice.gouv.qc.ca/english/publications/rapports/pdf/homophobie-a.pdf (setting forth strong new policy to combat what the government believes to be homophobia, including in non-public settings); Sarah Lyall, *Who is a Jew? Court Ruling in Britain Raises Question*, N.Y. TIMES, Nov. 7, 2009, at A8, *available at* http://www.nytimes.com/2009/11/08/world/europe/08britain.html (discussing a British ruling that a Jewish school cannot exclude non-Jews from enrollment); Laurie Goodstein, *A Line in the Sand for Same-Sex Marriage Foes*, N.Y. TIMES, Oct. 26, 2008, at A12 (describing religious liberty conflicts).

²⁵ See Maggie Gallagher, Banned in Boston, WEEKLY STANDARD, May 15, 2006, at 20; John Garvey, State Putting Church Out of Adoption Business, BOSTON GLOBE, Mar. 14, 2006, at A15 (describing the decision of the state not to accommodate the organization's desire to continue placing children for adoption but not placing them with same-sex couples).

placing them with same-sex couples).

²⁶ See Rachel Gordon, Supervisors Slam Vatican on Adoptions, S.F. CHRONICLE, Mar. 22, 2006, at B3.

²⁷ See Heintz v. Christian Horizons, [2008] 2008 H.R.T.O. 22 (Can.), available at http://www.canlii.org/en/on/onhrt/doc/2008/2008hrto22/2008hrto22.pdf (holding Christian residential center cannot require employees to comply with moral code); Reaney v. Hereford Diocesan Bd. of Fin., No. 1602844/2006 (Employment Trib. of Cardiff July 17, 2007), available at http://thinkinganglicans.org.uk/uploads/herefordtribunaljudgment.html (holding Anglican Bishop cannot dismiss youth minister in a same-sex relationship); QUE. MINISTRY OF JUSTICE, QUEBEC POLICY AGAINST HOMOPHOBIA (Dec. 2009), available at http://www.justice.gouv.qc.ca/english/publications/rapports/pdf/homophobie-a.pdf (setting forth strong

exists to further this ideal."²⁸ Gay marriage advocates mostly responded that gay marriage would not change that ideal: "Gay marriage would have no consequences for you," I was most often told.²⁹

Yet by September of 2009, just a few years down this road, I did a Maine radio interview in which I said, "[m]arriage is not discrimination because unions of husband and wife really are special. These are the only kind of unions that can make new life and connect those children in love to their mother and father." Instantly, the host responded, "I can't believe I'm hearing such bigotry!" 30

Indeed, in Maine, though the majority of local voters disagreed, gay marriage advocates felt confident enough in their position that they went after the social work license of a high school counselor after she appeared in a TV ad opposing same-sex marriage.³¹ Conversely, a teacher who appeared in a pro-gay marriage ad faced no such threat to her livelihood.³² I never expected to live in an America where individuals could be threatened with a loss of their livelihood for expressing their position on marriage laws.

There exist many other instances of apparent deception (or perhaps, more charitably, rapid "incrementalism") by gay marriage advocates. For instance, in 2005, gay rights advocates succeeded in passing a civil union law in Connecticut, ³³ publicly promising it was not about gay marriage. ³⁴ But the next day gay marriage advocates turned around in court and used the existence of a civil union law to persuade the Connecticut Supreme Court that the state's marriage laws were discriminatory.³⁵

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²⁸ Maggie Gallagher, *The Stakes*, NAT'L REV. ONLINE, July 14, 2003, http://article.nationalreview.com/269352/the-stakes/maggie-gallagher.

²⁹ See Steve Chapman, An Odd Silence on Gay Marriage, REASON.COM, Aug. 20, 2009, http://reason.com/archives/2009/08/20/an-odd-silence-on-gay-marriage.

³⁰ NOM News Digest, http://opine-editorials.blogspot.com/2009/09/nom-news-digest.html (Sept. 2009) (reporting on an appearance by Maggie Gallagher on The Ken and Mike Morning News Show, 560 WGAN, on September 4, 2009, available at http://podcast.560wgan.com/wgan/1937751.mp3).

The initial attacks on Carrie Prejean, including the comment by a pageant official that "I am personally ... hurt that Miss California believes marriage rights belong only to a man and a woman," also reflect this view that opposition to gay marriage itself, however innocently and civilly expressed, is hateful bigotry. See Carrie Prejean Says Answer to Gay Marriage Question Cost Her Miss USA Crown, FOX NEWS, Apr. 20, 2009, http://www.foxnews.com/entertainment/2009/04/20/carrie-prejean-says-answer-gay-marriagequestion-cost-miss-usa-crown/.

Obviously, it is surprising to hear the cross-cultural and, until very recently, almost universally accepted idea that marriage is the union of a man and a woman (because that type of relationship alone can produce children without third party intervention) characterized as bigotry. Advocates of so-called "traditional" marriage do not see bigotry; they see what is, to them, an obvious reflection of a natural reality.

³¹ See Maine Counselor's Career Threatened for Support for Marriage (Oct. 30, 2009), http://www.alliancedefensefund.org/news/story.aspx?cid=5112.

 $^{^{32}}$ Id

³³ An Act Concerning Civil Unions, Conn. Pub. Act No. 05-10 (2005).

³⁴ Connecticut OKs Civil Unions for Gay Couples, MSNBC.COM, Apr. 20, 2005, http://www.msnbc.msn.com/id/7579226/.

³⁵ Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 416 (Conn. 2008).

Similarly, when gay adoption was institutionalized, advocates in public seldom made an argument for equality. They did not tell the general public that the reason we should permit gay adoption is because our ideal of marriage and the natural family was bigoted and discriminatory, or that all family forms are the same. Indeed, they did not say kids were no better off with a mom and dad than a gay man. Rather, more typically, they said children were better off with a gay man as a parent, than no parent at all. As Matthew Coles, Director of the ACLU's Lesbian and Gay Rights Project and attorney representing the plaintiff's in Florida's gay adoption case, told the New York Times in 2001, "I wouldn't argue that married parents are

I am walking through these anecdotes and incidents not to try to set up a contest in which the comparatively modest legal pressures currently aimed at religious believers are set against the history of gay people in this country. This Article is not a complaint; it is an honest attempt to contribute to this discourse by making visible to gay marriage advocates why so many who oppose gay marriage are convinced that gay marriage is going to have serious consequences down the road for themselves, their families, and their faith communities, including religious schools, charities, and ministries.

These consequences are not something we see happening in the remote and uncertain future. They are visibly happening now. We now live in an America in which to speak (and especially to act) for the idea that "to make a marriage you need a husband and wife" will in itself provoke charges of hatred, bigotry, and discrimination. The end—if we do not stand our ground—is not at all clear to us.

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Those who publicly note these concerns are not scaremongering. They are scared by the logical implications of reframing the marriage debate to cast those who believe marriage requires a man and a woman as hateful bigots whose beliefs must be suppressed by operation of law.

Why does gay marriage now pose a credible threat to religious liberty in the minds of opponents? First, marriage represents the "hardest case" for gay rights advocates. If the idea that there is no difference between same-sex and opposite-sex couplings can be used to overturn our marriage traditions, then there is clearly no place in American society where drawing any distinctions can be appropriate. If "children need moms and dads" is bigotry, any objection to homosexual conduct, or preference for the natural family, is bigotry.

Moreover, marriage is a public act, so it makes latent conflicts in orientation discrimination laws manifest. This is what happened in the Massachusetts Catholic Charities situation, where the local Catholic Church realized its previous "don't ask, don't tell" fudging around the lines would no longer work.³⁷ Publicly married gay couples would show up and ask for children. The Church would either be forced to place these children with gay married couples in public opposition to its principles on a nondiscriminatory basis, or face criminal and civil penalties.³⁸

not in a child's best interest But that's not the choice for these kids. With 3,400 kids in foster care in Florida waiting for adoption, the choice for these kids is a home with gay people or no real home at all." Tamar Lewin, *Court Backs Florida Ban on Adoption By Gays*, N. Y. TIMES, Aug. 31, 2001, at A14.

Only once gay adoption was institutionalized by law was it used in court to suggest that the ancient deeply embedded idea in our legal history that marriage was about bringing together the child's natural parents where possible was, well, no longer operative or sustainable. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (looking to Massachusetts law on same-sex adoption in concluding that because "the Commonwealth affirmatively facilitates bringing children into a family regardless of whether . . . the parent or her partner is heterosexual, homosexual or bisexual," "[r]estricting marriage to opposite-sex couples . . . cannot plausibly further [the State's interest in protecting the welfare of children].")

³⁶ Some of these consequences are noted throughout this Article, such as incursions on religious liberty and the endorsement of a message that children do not need a mother and father.

³⁷ See Daniel Avila, Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals, 27 CHILD. LEGAL RTS. J. 1 (2007).

³⁸ See Roger Severino, Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty, 30 HARV. J. L. & PUB. POL'Y 939, 975 (2007); Garvey, supra note 25.

In Washington D.C., the Catholic Church asked the D.C. City Council for religious liberty protections that would permit Catholic Charities (a highly-regarded adoption and foster care social service in a locale where, unfortunately, corruption and incompetence are all too common in the provision of government services³⁹) to continue to help abandoned and abused children. The response of the D.C. City Council was once again telling: "They don't represent, in my mind, an indispensable component of our social services infrastructure."

Orientation laws, including gay marriage laws, are posing a new threat to religious liberty, and liberty of conscience generally, because they are being dramatically reinterpreted from the time of their original inception to include both an equality right to be and a liberty right to do, as Chai Feldblum put it.⁴²

This new conception is an equality right on steroids; the right being asserted is not only to live as one chooses, but to be protected from knowledge of civil and moral disagreement with the choices one has made in everyday life, in the interests of advancing equality.

Liberty arguments lead to pluralism, which requires us to tolerate those with whom we disagree and affirm their core rights. Equality arguments lead to the expansion of state power to repress and marginalize anti-equality bigots. The fusion of liberty and equality rights in the gay rights debates represents the biggest intellectual and conceptual challenge to finding a path to pluralism.

This is a problem for traditional faith communities, but it is also at the heart of the difficulties gay marriage advocates have had in endorsing religious liberty protections.

In the medium term, overcoming the threat posed to religious liberty will require not only substantive accommodation but at least some modest conceptual disentanglement of the equality and the liberty interest implicit in the idea of gay rights.

Traditional religious believers will have to accept that they live among people who view gay sex (and gay marriage) as a good—and should be required to respect the rights of those who disagree, including basic norms of civility. But they should not be asked to endorse that belief themselves as a condition of good citizenship as individuals or in and through their associations and organizations.

Let me be clear: I am not saying that gay rights include the right to be but not the right to do. I believe that gay rights are a liberty interest and that they include the right to

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³⁹ See Vernon Loeb, *Barry Brings Halt to Turbulent D.C. Saga*, WASH. POST, May 22, 1998, at A1, *available at* http://www.washingtonpost.com/wp-srv/local/longterm/library/dc/barry/barryyears0522a.htm. ⁴⁰ Tim Craig, Michelle Boorstein, & Carol Morello, *D.C. Council Digs in on Same-Sex Nuptials*, WASH. POST, Nov. 13, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/12/AR2009111210789.html.

⁴¹ Tim Craig & Michelle Boorstein, *Catholic Church Gives D.C. Ultimatum*, WASH. POST, Nov. 12, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/11/AR2009111116943.html (quoting Councilmember David Catania).

⁴² Feldblum, *supra* note 20, at 104 ("In the legal arena, this approach to a gay person's identity and being has been framed as the 'status/conduct' distinction. . . . From the moment I became aware of this legal approach, I have detested it and argued against it. It seemed to me the height of disingenuousness, absurdity and indeed disrespect, to tell someone it is permissible to 'be' gay, but not permissible to engage in gay sex. What do they think being gay means?"); *see also id.* at 120 ("Just as we do not tolerate private racial beliefs that adversely affect African-Americans in the commercial arena, even if such beliefs are based on religious views, we should similarly not tolerate private beliefs about sexual orientation and gender identity that adversely affect LGBT people.").

do: the right of gay people to live as they choose, to express affection, to be who they are in public unmolested by harassment, to visit each other in hospital rooms, etc.

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The law in my view must intervene to protect the legitimate liberty interests of gay people. But if gay rights are understood as a liberty interest, rather than an equality interest, then gay people do not have the right to be protected from the knowledge that many people have a different way of organizing, understanding, conceptualizing, and therefore acting upon their sexual impulses, both gay, straight, in between, or something else. 44

I understand that it is quite possible that most people, in the postmodern context, may well conclude upon reflection that a persistent sexual desire between consenting adults that hurts no third party is either a moral good, or at least a morally neutral act. But there are other ways of thinking about, conceptualizing, and enacting the meaning of human bodies and human desires, of defining the sexual good that ought to be protected and respected legally and culturally.⁴⁵

Why? The gap between desire and action is a gap that demands reflection, which means and includes the possibility of moral critique and moral disagreement. Here is another way in which sexual liberty and religious liberty share certain common premises.

American civic culture insists on the full citizenship of all religions, but it never requires the religious believer to surrender his or her truth claims about other religions as the price of gaining that liberty. If respect for conscience drives our respect for religious difference, that very respect presumptively includes the right and duty to critique each other's consciences, not to be free from painful or upsetting controversy about the nature of God, the purpose of life, or the content of the moral good.

At the same time, religious liberty has spawned a civic culture and etiquette that includes recognizing that the time, place, and manner of such critiques should be restrained and channeled by civic respect for our mutual rights as citizens. This etiquette is not primarily a matter of law but of the culture of mutual civic respect that religious liberty has fostered in the public square. We are free to criticize the truth claims of each other's religions, but not in a context that calls each other's rights, liberties, or good citizenship into question.

I would go further: each one of us (including gay people) has a human right to live in a society that not only grudgingly permits but encourages moral reflection about sexual behavior. A sexual desire cannot be its own justification. To take the alternative "equality" position (that a desire should not be open to critique, because too much of one's personhood is at stake) is to dehumanize all of us as nothing more than sexual beings. To take the position that one was born with sexual desire, cannot control sexual desire, and therefore must have this desire treated as akin to skin color or gender, is

⁴³ The question of gay marriage, in my view, cannot be settled on that ground, for reasons I will not go into here, but see Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. St. Thomas L.J. 33 (2004).

⁴⁴ See David France, *The Science of Gaydar*, N.Y. MAG., June 17, 2007, http://nymag.com/news/features/33520/ (describing the variety of understanding of sexuality). ⁴⁵ See Germain Grisez, The Way of the Lord Jesus, Volume 2: Living a Christian Life ch. 9 (1993); David Greenberg, The Construction of Homosexuality (1990); Stanley James Grenz, Sexual Ethics: An Evangelical Perspective (1990); Catechism of the Catholic Church: The Sacrament of Matrimony, http://www.vatican.va/archive/catechism/p2s2c3a7.htm (last visited Aug. 9, 2010); Southern Baptist Convention, The Baptist Faith and Message § XVIII, http://www.sbc.net/BFM/bfm2000.asp (last visited Aug. 9, 2010).

ultimately dehumanizing, for all people, including gay people. Free adults should not ask to be protected from the knowledge that rational people disagree about appropriate sexual behavior, no matter how painful they may find it.

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To repeat myself: many, perhaps most, Americans may adopt the view that unchosen sexual desires (a.k.a., "orientations") that do not hurt third parties are morally justified. But that latter additional step—sexual desire is unchosen and therefore sexual behavior is justified—must still be taken in a way that respects, permits, and encourages moral reflection about sexual acts. The race analogy conceptually fails in sexual behavior discussions. Skin color does not give rise to a morality. Sexual behavior—because it is behavior—necessarily does.

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And so some others—perhaps few or perhaps many—will remain attached, for religious and other reasons, to the great enduring principles that animated and undergirded our civilization for generations. These principles produced, for better and for worse, not only our law, but our art, our history, and our ethical reflections including these moral truths (no longer self-evident but still compelling): the bodies of human beings, male and female, are not mere instruments to be bent to our personal desires and wills. They have an objective meaning and purpose that is larger than satisfying our desires and appetites.

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Many of us will hold these truths, even when they are no longer self-evident: men and women are made for each other, and sexual desire is intended by nature as well as by nature's God to pull men and women together into families in which the co-creators of the child will love and care for the child. Sexual desire is morally intended therefore to pull the sexes into service not only to each other but to the great cause of cooperating in the creation of life.⁴⁷

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I submit the resistance of the American people to the idea of gay marriage is grounded, as Stanford Law Professor Richard Thompson Ford wrote in 2006, in an understanding of gender and its part in the experience of the meaning of our embodiment:

How to reconcile the growing support for equal rights for gay Americans with the seemingly hardening opposition to gay marriage? It certainly suggests that homophobia is only part of the explanation for the widespread resistance to same-sex marriage. A lot of the resistance is less about sexual orientation than about sex difference. In other words, it's not about the difference between gay and straight; it's about the difference between male and female. By this logic, conventional marriage doesn't exclude gay couples from a special status reserved for straights; it excludes women from a special status reserved for men—that of

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⁴⁶ No one would argue, for instance, that having a certain color of skin is right or wrong. Many people, however, believe, and act on the belief, that certain choices are right or wrong. Almost everyone would agree if the subject were non-consensual sexual relations. Would a discussion of non-consensual skin color even make sense?

even make sense?

47 For example, "'God is love and in himself he lives a mystery of personal loving communion. Creating the human race in his own image, God inscribed in the humanity of man and woman the vocation, and thus the capacity and responsibility, of love and communion.' 'God created man in his own image . . . male and female he created them;' He blessed them and said "Be fruitful and multiply." . . . Physical, moral and spiritual *difference* and *complementarity* are oriented toward the good of marriage and the flourishing of family life." CATECHISM OF THE CATHOLIC CHURCH 560 (2d ed. 2009). See BLANKENHORN, *supra* note 3, for a discussion of cross-cultural evidence of the prevalence of similar basic beliefs about marriage.

husband—and excludes men from a status reserved for women—that of wife 48

Even people who do not enter into a conventional marriage, who never produce children with their acts of love, who may not even have sex, or who are not even attracted to the opposite sex, may decide, upon reflection, to commit their life to principles of organizing human sexuality upon other principles than those espoused by gay marriage advocates. I know this because I have met these people. Our philosophy and jurisprudence must be big enough to include these human possibilities, if we are to do justice.

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A free society cannot be frozen by today. We have to hold out for possibilities yet undreamt of in our contemporary essentialist philosophizing about orientation. Even if those of us who believe in the conclusion that gay sex is good or morally neutral, cannot therefore deny the reality of the process of moral reflection, which includes the necessity of considering possible critiques.

Here is the strongest form of my argument: disagreement about the nature, meaning, and purpose of human sexuality cannot be redefined as bigotry without doing a profound injustice to all our human rights, including to advocates of gay rights. Understanding gay rights as an equality right collapses this key distinction between bigotry and good faith disagreement, in a way that will make it easier to use the law to protect gay people from a daily awareness of the reality that many people in society morally disapprove of sexual acts between two men or two women. ⁵⁰

Gay people who have concluded that gay sex is good deserve to live in a society where that decision is respected and understood as the result of a moral reflection, not policed by government and law as if it were a characteristic over which human beings have no control.⁵¹ Conscience protections to same-sex marriage and orientation discrimination laws ultimately serve the human rights of all.

But this will happen only if—and this is a great "if"—we can recognize the case for opposition to gay sexuality and to gay marriage as having roots in something other than mere hatred. That is our task, however improbable. That is the pathway to an American solution.

⁴⁸ Richard Thompson Ford, *Hate and Marriage: Same-Sex Marriage Setbacks May Not Be All Bad News for Gay Rights*, SLATE, July 12, 2006, http://www.slate.com/id/2145620/.

⁴⁹ See Mark Oppenheimer, A Gay Catholic Voice Against Same-Sex Marriage, N.Y. TIMES, June 5, 2010, at A14, available at http://www.nytimes.com/2010/06/05/us/05beliefs.html. David Benkof, an openly gay Orthodox Jew, is another such example. See David Benkof, http://en.wikipedia.org/wiki/David_Benkof (last visited Sept. 14, 2010).

⁵⁰ Lydia Saad, Americans Evenly Divided on Morality of Homosexuality, GALLUP, June 18, 2008,

Lydia Saad, *Americans Evenly Divided on Morality of Homosexuality*, GALLUP, June 18, 2008, http://www.gallup.com/poll/108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx.

For an example of the latter argument, see Dean Hamer & Michael Rosbash, *Genetics and Proposition 8*, L.A. TIMES, Feb. 23, 2010, http://articles.latimes.com/2010/feb/23/opinion/la-oe-rosbash23-2010feb23. There are also biological explanations of many human choices and characteristics, including religion, as Dr. Hamer's work suggests. *See* DEAN HAMER, THE GOD GENE: HOW FAITH IS HARDWIRED INTO OUR GENES 7 (2004). There is undoubtedly a biological substrata to many sexual inclinations, as well as to other inclinations, from owning dogs to consuming alcohol. We live in bodies, our bodies influence our minds, but this isn't an answer to the need for moral reflection about acts to which we are strongly genetically predisposed.