

## Moral Conflict: (Some) Religions and Marriage Equality Chai R. Feldblum<sup>1</sup>

Over the coming decades, we are likely to move into an era of marriage equality—an era in which governments permit same-sex couples to solidify, acknowledge, and honor their life-long commitments to each other through equal access to civil marriage. The question this chapter addresses is what effect such an era of marriage equality will have on the rights of those employers, landlords and others whose religion teaches them that same-sex sexual conduct is sinful for the individual and harmful to society.

I believe marriage equality for gay couples is long overdue.<sup>2</sup> I also believe it is a worthwhile enterprise to explore the impact that the achievement of such equality will have on some religious people. Too often, from my perspective, the LGBT (lesbian, gay, bisexual and transgender) political and legal movement has focused exclusively on *how* to achieve liberty and equality for LGBT people. LGBT movement leaders debate how to use federal and state constitutional law and federal and state statutory enactments to advance LGBT equality. They spend time talking about how to convey to the American public that the “American way of life” requires that the government enact anti-discrimination laws on the basis of sexual orientation or grant gay couples the right to marry.

I obviously think this aspect of the struggle for LGBT equality is important given that I have spent a fair portion of the last twenty years of my professional life engaged in that struggle. I have written innumerable drafts of federal bills to establish non-discrimination on the basis of sexual orientation; I have negotiated with groups to bring them on to support such bills; I have written a number of amicus briefs in constitutional cases seeking to establish equality for gay people, and it is probably fair to say that I am part of an inner group of public intellectual movement leaders committed to advancing LGBT equality in this country.<sup>3</sup>

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<sup>1</sup> A version of this paper was delivered in September 2005 at Brooklyn Law School as part of the Justice Blackmun and Judicial Biography Symposium. That paper is published as Chai R. Feldblum, *Justice Harry A. Blackmun, Gay Rights and Religion*, 72 BROOKLYN L. REV. xx (2006). A subsequent version of the paper was presented during a meeting hosted by the Beckett Foundation in December 2005 and appears as this chapter.

<sup>2</sup> Many of us who believe gay couples should have access to civil marriage try to use the phrases “marriage for same-sex couples” or “marriage equality for gay couples,” rather than the phrase “same-sex marriage.” That is because we do not believe there is one entity that is “marriage” and then a separate entity that is “same-sex marriage.” Rather, we believe there is *one* entity -- “civil marriage” -- and that entity remains the same whether it is made up of two people who are of the same race or of different races, the same sex or of different sexes, the same height or different heights.

<sup>3</sup> For examples of articles, see *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996) (hereinafter *Devlin Revisited*); *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992, 1007 (1997); *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMPLE CIVIL AND POLITICAL LIBERTIES REVIEW 485 (1998); *The Federal Gay Civil Rights Bill: From Bella to ENDA* in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS, ed. U. Vaid, J. D’Emilio

Nevertheless (and here I do not pretend to speak for a majority of the LGBT public intellectuals in that circle), I believe there is an additional aspect to the struggle to achieve LGBT equality that movement leaders should pay attention to. I do not believe they need to pay *equal* attention to this aspect of the struggle, but I believe they should pay *some* attention.

Let us assume that legislatures and courts finally grant LGBT people the civil rights that have been unjustly denied to us for years. Some legislatures and courts have already begun to do so, although they are certainly not in the majority yet in this country. But let us postulate, for the moment, that in some number of years an overwhelming majority of jurisdictions in this country will have changed their laws so that LGBT people will have full equality in society, including access to civil marriage. Or, indeed, let us postulate that the entire country is governed – as a matter of federal statutory and constitutional law – on the basis of full equality for LGBT people.

This postulation is not, to my mind, purely hypothetical. Indeed, I believe it is simply a matter of time before it becomes true. I don't know what the "some number of years" will be – it might be twenty years or thirty years or sixty years. But, ultimately, I believe that truth and justice (as I envision the content of those components) will ultimately win out.

One reason I believe this is that it is simply hard to put the genie back in the bottle. More and more people in this country have come to believe that homosexual orientation and homosexual conduct are simply not "that big a deal." They do not, by and large, particularly like homosexuality, most do not believe homosexuality is morally equivalent to heterosexuality, and they certainly don't want to hear that *their* son or daughter is gay or lesbian.<sup>4</sup> But they also no longer

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& W. Turner (2000); and *Gay is Good: The Case for Marriage Equality and More*, 17 YALE J. L. & FEMINISM 139, 140 (2005). I have filed amicus briefs on behalf of civil rights organizations, religious organizations, and gay rights organizations in the Supreme Courts cases of *Romer v. Evans* and *Lawrence v. Texas*, and in several lower court cases challenging the military's ban on gay servicemembers. From 1988 to 1990, I was a staff attorney with the ACLU AIDS Project and the ACLU Lesbian & Gay Rights Project. In 1993, I worked as the Legal Director of the Campaign for Military Service, an enterprise to help lift the ban on the service of gay people in the military. From 1993 to 1998, I worked as a consultant to the Human Rights Campaign, a political organization dedicated to advancing gay rights, and from 1999 to the present, I have been an advisor and consultant to the National Gay & Lesbian Task Force. Obviously, the positions in this chapter are my own.

<sup>4</sup> American Enterprise Institute Studies in Public Opinion, *Attitudes About Homosexuality and Gay Marriage*, 2005. The AEI document, by our count, includes information from over 260 different polls, ranging from 1972 to 2005. Based on these polls, many Americans believe homosexuality is immoral. In 2002, the most recent year in which Gallup asked the question in a nationwide survey, a majority (55%) of Americans believed that sexual relations between two adults of the same sex are "always wrong." *Id.* at 2. This figure is somewhat heartening in light of the fact that 73% of respondents felt this way just two decades earlier. *Id.* But only 33% of Americans were willing to state unequivocally that gay sex is not wrong. *Id.* In Gallup's most recent poll on "homosexual behavior," taken in May 2004, 54% of respondents called such behavior "morally

believe that if they do get such news from a child, they must desperately seek out professional “help” for their children. The large number of well-adjusted, happy, and successful gay people openly living in society clearly reinforces the medical profession’s current judgment that there is nothing wrong with homosexuality.<sup>5</sup> And more and more people are beginning to accept that individuals do not “choose” homosexuality, but rather that some individuals are simply emotionally and physically happier with a partner of the same sex.<sup>6</sup> And I believe the horror value of discovering one’s child is gay has also subsided a bit. A majority of parents today may not want their children to be gay, but they are probably not as horrified to find out their child is gay as they would be if they discovered their child was having sex with a sibling, sex with a child, or sex in public.

And, at bottom, these parents do not want their children discriminated against “just because they’re gay.” They may not like the fact that their child is gay, but they also do not want American society to penalize their children unduly for that fact.<sup>7</sup>

Assume for the moment that these beliefs ultimately translate into the passage of laws that prohibit discrimination based on sexual orientation and that provide same-sex couples the same societal supports currently available to opposite-sex

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wrong,” while 42% called it “morally acceptable.” *Id.* at 4. (It probably goes without saying that “morally good” wasn’t and never has been a choice in these polls – something that needs to change.)

<sup>5</sup> See, e.g., American Psychological Association, “Being Gay is Just as Healthy as Being Straight,” *available at* <http://www.psychologymatters.org/sexuality.html>; American Psychiatric Association (1992 statement indicating that “Whereas homosexuality per se implies no impairment in judgement, stability, reliability, or general social or vocational capabilities, the American Psychiatric Association calls on all international health organizations and individual psychiatrists in other countries, to urge the repeal in their own country of legislation that penalized homosexual acts by consenting adults in private. And further the APA calls on these organizations and individuals to do all that is possible to decrease the stigma related to homosexuality wherever and whenever it may occur”), *available at* <http://healthyminds.org/glbissues.cfm>; Child Welfare League of America (stating that “The Child Welfare League of America (CWLA) affirms that gay, lesbian, and bisexual parents are as well suited to raise children as their heterosexual counterparts” and its “full support for all young people, regardless of sexual orientation”), *available at* <http://www.cwla.org/programs/culture/glbqtq.htm>.

<sup>6</sup> See, e.g., CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (1996) (summarizing research); AEI Report, *supra* note 4, at 19 (including relevant polls and concluding that “One of the most dramatic changes in attitudes about homosexuality appears to be about its cause. More people than in the past say that people are born homosexual or that it is an orientation that they cannot change. In a Gallup question from 1977, 12 percent said homosexuality was something a person was born with; in 2003, 38 percent gave that response.”).

<sup>7</sup> For example, a significant majority of Americans believe that gay people should be treated fairly in employment. Since 1996, sixteen polls by five different public opinion monitors find that more than 80% of Americans believe “homosexuals should have equal rights in terms of job opportunities.” AEI Report, *supra* n. 4 at 11.

couples, including access to civil marriage.<sup>8</sup> How should the LGBT movement think about the fact that granting this *justified* liberty and equality to gay people will likely put a burden on those religious people who believe acting on one's same-sex sexual orientation is a sin and who may feel they are aiding and abetting sin if they rent an apartment to a gay couple, allow a gay couple to eat at their restaurant, or provide health benefits to a same-sex spouse?

Obviously, one way to deal with that reality is simply to ignore it. Or, as a variation on that theme, simply to tell those religious people to "get over it," without any acknowledgment that one does not exactly "get over" religious beliefs in the way that one "gets over," for example, not having chocolate ice cream when one wants it.

Another way to deal with this reality, therefore, is to acknowledge it, address it and justify it. This is what I call the "stop, think and justify" requirement that I believe should be placed on the government (as a constitutional matter) and on all of us as human beings (as an ethical, moral matter) whenever someone's liberty in society is curtailed by a societal choice.

Let me be very clear. As I hope to explain in this chapter, in almost all the situations (not perhaps in every one, but in almost every one), I believe the burden on religious people that will be caused by granting gay people full equality will be *justified* after the "stop, think and justify" requirement has been applied. That is because I believe granting liberty to gay people advances a compelling government interest, that such an interest cannot be adequately advanced if "pockets of resistance" to a societal statement of equality are permitted to flourish, and hence that a law that permits no individual exceptions based on religious beliefs will be the least restrictive means of achieving the goal of liberty for gay people.

But deciding that a government burden on religion is justified is very different from acting as if the burden does not exist in the first place. And the manner by which some courts, legislators, and any number of gay people and gay allies manage to ignore the burden is quite fascinating. These individuals and entities appear to believe that forcing religious people to *act* in a certain way is simply qualitatively and uniquely different from forcing them to *think* in a certain way. This assumption must be challenged.

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<sup>8</sup> Obviously, this translation will take time given the current high public support for non-discrimination based on sexual orientation in employment and the current low support for marriage equality for gay couples. See, e.g., AEI Report, *supra* n. 4, at 11 and 28. Nevertheless, as I note in the text, I believe this will be primarily a matter of time – that is, a matter of "when" not "if." Indeed, a project I began in 2005, The Moral Values Project, is designed specifically to engage those who currently display moral cognitive dissonance on issues of gay equality (e.g., they state that homosexuality is immoral, but also that gay people shouldn't be discriminated against in employment) to move to a more coherent moral understanding: i.e., there is nothing morally wrong with homosexuality, and therefore gay people should be treated equally in all spheres, from employment to civil marriage. See [www.moralvaluesproject.org](http://www.moralvaluesproject.org).

Obviously, *conduct* by religious people must be regulated in a complex society in a way that *belief* on the part of such religious people need not be.<sup>9</sup> That is a truism. But it does not follow from that truism that conduct on the part of religious people can legitimately be viewed as inherently apart and distinct from their religious beliefs. Policymakers seem to have no difficulty loudly proclaiming their commitment to letting people *believe* whatever they may want to as a matter of personal religion. But those same policymakers often fail to acknowledge that passing a law that requires a person to *act* in a manner that a particular person believes is inconsistent with her or his religion might also place *some* burden on religious beliefs. For many religious people, their religion commands that their conduct conform to, and fully reflect, their religious beliefs, with no distinction or demarcation made between the two.

Failure to acknowledge such a burden on religious beliefs seems, to me, to be deeply disrespectful of religious people. Whether the disrespect stems from simple obtuseness of what it means to be religious, or simple indifference to what it means to be religious, matters not as much to me as the fact of the disrespect. If the disrespect stems from a lack of knowledge and understanding about religion, then it behooves policymakers to learn and understand. If the disrespect stems from deliberate indifference, then policymakers should be called to task for that even more.

Indeed, I would argue that gay people – of all individuals – should recognize the injustice of such an approach to a religious person’s identity and being. For years, gay people have been told by some entities that they should be able to separate their status from their conduct. In the religious arena, this has been framed as “hating the sin and loving the sinner.” That is, gay people have been told that their *status* as someone with a homosexual orientation is not inherently sinful – but that if they *act* in a way consistent with that orientation, then they are engaging in sin.<sup>10</sup> In the legal arena, this approach to a gay person’s identity and being has been framed as the “status/conduct” distinction. Particularly as a means of dealing with the holding in *Bowers v. Hardwick*, some legal advocates argued for the right of their clients not to be discriminated against for the *status* of being gay, even while they deliberately failed to claim equal non-discrimination rights for their clients’ rights to engage in gay *conduct*.<sup>11</sup> From the moment I

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<sup>9</sup> The Supreme Court has often observed that while there is an absolute right to hold religious beliefs, see e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214, 219 (1972); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), religiously grounded conduct is not absolutely protected. See, e.g., *Bowen v. Roy*, 476 U.S. 693, 699 (1986); *Yoder*, 406 U.S. at 220; *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

<sup>10</sup> Cite from *Love the Sin* book.

<sup>11</sup> See Feldblum, *Devlin Revisited*, *supra* note 3, at 290- 296 (detailing cases in which the “status-conduct” distinction has been used.) As I noted in that article: “Instead of countering the ramifications of *Hardwick* by decoupling sodomy and homosexual conduct, many gay rights attorneys have implicitly accepted the equivalence between homosexual conduct and homosexual sodomy and have instead sought to decouple homosexual orientation from

became aware of this legal approach, I have detested it and argued against it.<sup>12</sup> It seemed to me the height of disingenuousness, absurdity, and indeed disrespect, to tell someone it is OK to “be” gay, but not necessarily OK to engage in gay sex. What do they think being gay *means*?

I have the same reaction to courts and legislatures that blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious *means*? Of course, at some basic level, religion is about a set of beliefs. But for many religious people, across many religious denominations (Catholic, Protestant, Jewish and Muslim – to note just the ones I have some personal understanding of), the day-to-day *practice* of one’s religion is one of the essential ways of bringing meaning to such beliefs. And sometimes, complying with a law designed to establish non-discrimination for one group of people may force a religious person to act in a way contrary to those beliefs. When that happens, the religious person’s practice of religion is necessarily burdened.

The premise of my argument in this chapter, therefore, is the following: with regard to either religious identity or sexual identity, it is disrespectful of the dignity of the full person to assume that behavior can be easily disaggregated from identity. Therefore, when the dictates of a complex society necessarily require – as they often will -- that behavior must be regulated in a way that will impact on the identity of an individual (be it a religious or a sexual identity), the harms of that regulation should be explicitly *acknowledged* by society and then should be *justified* by society based upon a commonly agreed formulation.

For purposes of this chapter, I am going to assume that the formulation we should agree on is that the government should be put to the test of demonstrating that its regulation of behavior is designed to achieve a compelling government purpose, and that the manner in which the government has regulated the behavior is narrowly tailored to that compelling government interest.

I am aware, of course, that the Supreme Court has rejected this formulation for purposes of judging – under the federal constitution -- neutral laws of general applicability that have a secondary effect of burdening religion.<sup>13</sup> But for purposes of this paper, I think it is worth presuming that this standard will, nonetheless, be applied by numerous courts – either because they will conclude

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homosexual conduct. This approach has produced victories in court for a few individual gay and lesbian plaintiffs, but at a cost to equal protection for gay people generally, and at a potential cost to the development of a more effective paradigm for equal rights for gay people.” *Id.* at 290.

<sup>12</sup> See Devlin Revisited, *supra* note 3; Legal Times article; Harvard Gay Rights Review.

<sup>13</sup> See *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (“the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”(quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in the judgment)).

that their state constitutions offer greater protection for religious liberty than does the federal constitution or because they will find some hybrid-right in the case that justifies a strict scrutiny standard.<sup>14</sup>

Similarly, I am well aware that the Supreme Court has yet to recognize explicitly that government's regulation of same-sex sexual behavior requires strict scrutiny by the courts – either under a fundamental rights analysis (as would be the case for the rights of religion or speech) or under an equal protection analysis. The Supreme Court has managed to invalidate certain classifications based on sexual orientation and certain regulation of sexual behavior without invoking the requirement that the government prove that its actions have been narrowly tailored to a compelling government interest.<sup>15</sup> Nevertheless, as I have argued at length elsewhere, I believe that strict scrutiny of such governmental action is required under our federal constitution.<sup>16</sup> Indeed, with the invalidation of sodomy laws by the Supreme Court's decision in *Lawrence v. Texas*, a resurgence of interest and attention to the *liberty* interests of individuals may prove to be a powerful avenue to force the government to “stop, think and justify” when it infringes the liberty interests of an individual – be it a sexual liberty interest or a religious liberty interest.<sup>17</sup>

For this chapter, therefore, I am going to assume that when the regulation of either religious behavior or sexual behavior by the government burdens an individual's ability to **be** religious (in the manner that person would like to be religious) or to **be** sexual (in the manner that person would like to be sexual), the government should be put to the test of proving that its regulation is narrowly tailored to a compelling government interest. And then -- what I am most interested in is -- how do we address the situation when the interests of some

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<sup>14</sup> *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994) (state constitution); *Attorney General v. Desilets*, 636 N.E.2d 233 (MA 1994) (state constitution); *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9<sup>th</sup> Cir 1999) (hybrid right).

<sup>15</sup> See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>16</sup> See *Devlin Revisited*, supra note 3.

<sup>17</sup> See Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. ON GENDER & L. 115, xx-xx (2006) (describing liberty analysis in *Lawrence*). Indeed, one might hope that a focus on liberty interests will highlight the logical incoherence of existing liberty jurisprudence, with the result that the Supreme Court may move to the approach articulated by Justice Souter in his concurrence in *Washington v. Glucksberg*, 521 U.S. 702, 752-89 (1997). See also Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1121 (2004) (arguing that the Court in *Lawrence* essentially has begun to consolidate and accept the approach set forth by Justice Souter in his *Glucksberg* concurrence). At the moment, that logical incoherence is marked by the fact that heightened scrutiny is applied when some liberty interests are burdened (e.g., how one raises a child or whether one can marry), not applied when other liberty interests are burdened (e.g., how one wishes to die or how one conducts one's religious practices under the application of neutral laws), or is applied in a manner that is either not quite strict scrutiny (e.g., the choice to abort a fetus) or is not explicitly stated as one of strict scrutiny (e.g., gay sexual intimacy). See generally comments of Chai Feldblum at *From Griswold to Lawrence and Beyond: The Battle over Personal Privacy and the New Supreme Court* (March 2006) Transcript available at: <http://pewforum.org/events/index.php?EventID=95>.

religious people and some gay people will necessarily *conflict* – for example, when the ability of a gay person to be sexual in the manner he or she wishes may require a regulation of a religious person’s ability to be religious in the manner he or she wishes?<sup>18</sup>

#### A. The State & Morality

The first step in this analysis is to acknowledge that when the state passes a law that prohibits nondiscrimination on the basis of sexual orientation, or that permits gay couples to gain equal access to civil marriage, the state has taken a position on a *moral* question. Such laws logically rest on the premise that sexual orientation, including homosexual and bisexual orientation, is morally *neutral*. And that is as much of a stance on morality as the premise that a homosexual or bisexual orientation is morally problematic when acted upon.

Of course, some supporters of gay rights legislation will go to great lengths to argue that they are not taking a position on the morality of homosexuality or bisexuality.<sup>19</sup> But that position must be disingenuous at some level. The only way to justify prohibiting private employers, landlords, and business owners from discriminating against gay people is to make the prior moral assessment that homosexual orientation is morally neutral – and *therefore*, that acting on one’s homosexual orientation is not so morally problematic as to justify discrimination against such individuals in the public domain.

For example, we do not have laws protecting those who engage in domestic violence or pedophilia from employment, housing or public accommodation discrimination, precisely because society (as reflected in its government’s public policy) has determined that those actions *are* morally problematic and thus may legitimately be used by private actors as grounds for discrimination. While one can perhaps claim, with a straight face, that voting for a gay rights bill does not connote moral “approval” of homosexuality, it is certainly not possible to claim that such a vote connotes *no* moral assessment at all.

Conversely, this analysis similarly requires an acknowledgment that when government *fails* to pass a law prohibiting nondiscrimination on the basis of sexual orientation, or *fails* to allow same-sex couples to gain access to civil marriage, is it similarly taking a position on a *moral* question. In this case, the state has decided that a homosexual or bisexual orientation is not morally neutral, but rather is morally problematic. It is precisely that determination -- that homosexuality or bisexuality is morally problematic -- that permits legislators to

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<sup>18</sup> This is the issue I first began to explore in *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation and Transgender*, 54 MAINE LAW REV. 159 (2003) and now wish to continue in greater depth here.

<sup>19</sup> See, e.g., Feldblum, *Moral Rhetoric of Legislation*, supra note 3 at 998-1004 (deconstructing moral bracketing done by various Members of Congress supporting the Employment Non-Discrimination Act).

believe it is legitimate to continue denying full equality to those who act on a homosexual or bisexual orientation.

In either case, the choice of a government to enact, or not to enact, legislation entails the government taking a position on a question of equality. But let us be clear: the fact that this is a question of equality should not obscure the fact that this is *also* a question of morality, for moral beliefs necessarily underlie the assessment of whether equality should be granted or denied.

Once we acknowledge this reality about moral assessments, it becomes easier to understand that we are in a zero-sum game in terms of moral values when it comes to LGBT equality and some (albeit, not all) religious believers. That is, for those who believe that a homosexual or bisexual orientation is not morally neutral, and that an individual who *acts* on his or her homosexual sexual orientation acts in a sinful or harmful manner, it is morally problematic when the government passes a law that gives such individuals equal access to all societal institutions because such a law rests on a moral assessment of homosexuality different than their own. Such a law presumes the moral neutrality of homosexuality, while those subject to the law believe homosexuality is morally problematic. Conversely, for those who believe that any sexual orientation, including a homosexual or bisexual orientation is morally neutral, and that an individual who acts on his or her homosexual sexual orientation acts in an honest and good manner, the government's *failure* to pass laws providing equality to such individuals is morally problematic because such failure rests on a moral assessment of homosexuality different than their own. The failure to pass such a law presumes that homosexuality is morally problematic, while those who desire the law believe homosexuality is morally neutral. Given this reality, we are in a zero-sum game: a gain for one side necessarily entails a corresponding loss for the other side.

This is why then-Professor (now Judge) Michael McConnell is correct to observe that disputes surrounding sexual orientation “feature a seemingly irreconcilable clash between those who believe that homosexual conduct is immoral and those who believe that it is a natural and morally unobjectionable manifestation of human sexuality.”<sup>20</sup> McConnell believes that the debate over sexual orientation is best approached by extending respect to both of these positions, but without having the government take sides on either position. Thus, using an analogy to the respect people seek from government for their religious beliefs, he urges the following:

The starting point would be to extend respect to both sides in the conflict of opinion, to treat both the view that homosexuality is a healthy and normal manifestation of human sexuality and the view that homosexuality is unnatural and immoral as conscientious positions, worthy of respect,

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<sup>20</sup> Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL LAW REV. 1, 43-44 (2000).

much as we treat both atheism and faith as worthy of respect. In using the term "respect," I do not mean agreement. Rather, I mean the civil toleration we extend to fellow citizens and fellow human beings even when we disagree with their views. We should recognize that the "Civil Magistrate" is no more "competent a Judge" of the "Truth" about human sexuality than about religion.<sup>21</sup>

But what McConnell fails to appreciate is the zero-sum nature of the game. That is, he fails to recognize that the government is *necessarily* taking a stance on the moral question every time it *fails* to affirmatively ensure that gay people can safely, honestly and fully experience a unity between their behavior and identity – something any human being would desire, for either religious identity or sexual identity.

Note, for example, how McConnell characterizes possible actions (and inactions) on the part of government under his recommended approach:

Under this approach, the state should not impose a penalty on practices associated with or compelled by any of the various views of homosexuality, and should refrain from using its power to favor, promote, or advance one position over the other. The difference between a "gay rights" position and a "First Amendment" approach is that the former adopts as its governing principle the idea that homosexuality is normal, natural, and morally unobjectionable, *while the latter takes the view that the moral issue is not for the government to decide*. Thus, the government would not punish sexual acts by consenting gay individuals, nor would it use sexual orientation as a basis for classification or discrimination, without powerful reasons, not grounded in moral objections, for taking such action. On the other hand, the *government* would not attempt to *project this posture of moral neutrality onto the private sphere*, but would allow private forces in the culture to determine the ultimate social response.<sup>22</sup>

It seems apparent from McConnell's writing (although, for some reason, he fails to state so explicitly) that the "gay rights" position is one that would call for government intervention in the private sector through laws that make discrimination on the basis of sexual orientation illegal or that make civil marriage available to same-sex couples. I gather that is what McConnell is referring to by the government "project[ing] this posture of moral neutrality onto the private

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<sup>21</sup> *Id.* at 44.

<sup>22</sup> *Id.* (emphasis added.) As McConnell concludes: "Such an approach would produce many of the same advantages for this cultural conflict that the First Amendment produces for religious conflict. This approach would provide the basis for civic peace on an issue where the nation is dangerously divided, it would provide maximum respect for individual conscience, it would depoliticize an issue that many of us believe is private and not political in character, and it would help to restore the public-private distinction." *Id.* at 44-45.

sphere.” But if that is the case, McConnell is simply wrong to assume that the failure of a government to pass such laws rests on the view “that the moral issue is not for the government to decide.” It is precisely because some people hold the view that homosexuality is immoral (a view McConnell correctly identifies) that gay people have been *denied* equal protection under the law up until this point. Government has not been sitting on the sidelines of this moral question during all the time that it has failed to pass laws that enable gay people to live a full and complete unity between their behavior and their identity. It has quite clearly been taking sides – and it has not been on the side that helps gay people.

That is why if laws mandating equality for gay people were to be passed, government will have necessarily shifted sides on the moral question. At that point, individuals who believe homosexuality is immoral will face conflicts trying to operate in a society in which homosexuality is (for matters of public policy) morally neutral. But that is simply another way of saying that we are operating in a zero-sum game.

So I believe McConnell has correctly diagnosed the opposing moral viewpoints. But McConnell’s proposed solution is no more satisfying than that indulged in by gay rights leaders who characterize gay civil rights laws as simple “neutral” proscriptions of equality that will have no impact on a person’s religious or moral beliefs. Both McConnell and these gay rights leaders are trying to deal with the conflict by simply wishing it away. That is neither possible nor intellectually honest.

## B. The Burden on Religious Liberty

To understand the burden on religious liberty that application of a neutral civil rights law may have, it is not sufficient to acknowledge that the State has taken a position of moral neutrality on sexual orientation when it passes such a law. It is also necessary to explicate and acknowledge the logical intertwining that many religious people experience between their religious conduct and their religious belief.

Thus, for example, it makes sense to me that three born-again Christians who run a chain of sports and health clubs would feel that their “fundamentalist religious convictions require them to act in accordance with the teachings of Jesus Christ and the will of God in their business as well as in their personal lives,” and hence mandate them to hire only employees who conform to their views about proper sexual behavior.<sup>23</sup> It also makes sense to me that these same owners would feel their religion compels them to have these employees talk to “homosexuals about their religious views and sexual preference and [tell] them homosexuality [is] wrong.”<sup>24</sup> And I can well understand the elderly

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<sup>23</sup> *McClure v. Sports & Health Club*, 370 N.W.2d 844, 846 (Minn. 1985) (*en banc*)

<sup>24</sup> *Blanding v. Sports & Health Club*, 787. The owners also placed somewhat bizarre restrictions on how homosexuals “congregated” at the facility. *Id.* at xx.

Christian woman who believes “God will judge her if she permits people to engage in sex outside of marriage in her rental units and that if she does so, she will be prevented from meeting her deceased husband in the hereafter.”<sup>25</sup>

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Whether such conduct should legitimately be *permitted* in a workplace or public accommodation, despite its religious genesis, is the appropriate subject of the “justify” analysis – the third step in the “stop, think and justify” analysis that I believe our society to adopt. But, at this step, I believe it is appropriate to err on the side of accepting a religious person’s statement that engaging in certain conduct will burden his or her religious beliefs – even if we might not intuitively understand that ourselves. To borrow the formulation from Justice O’Connor in *xx* for determining Establishment Clause violation, we should analyze the claim from the perspective of the minority group – to see whether they would feel that the government was endorsing religion. (FN -- even tho O’C failed to apply it appropriately herself in that case) In the same way, we should be wary of second-guessing a religious person’s statement.

In the examples notes above, the religious people had mixed results. Yes in McClure; no in Blanding; and sort of no in Smith. (Same type of approach taken by dissent in French.)

Ironically, the result and reasoning in *Rumsfeld v. FAIR* is the worse possible outcome for religious people trying to get protection for their religious conduct. (Explain implications of this case.)

That is, I would like to see the two following acknowledgments in the *same* judicial opinion. (What follows, instead, are two legitimate quotes – from two different opinions.)

### C. The Legitimacy of the Burden on Religious Liberty (“Justify”)

May be cold comfort to religious folks – since in most cases – believe the burden is justified. So, I have equal difficulty with cases that find a burden – and then give short shrift to the compelling government interest.

When you enter the commercial arena, or interact in society generally, your religious beliefs and practices will sometimes *justifiably* be burdened – because it’s the only way to ensure full justice in society. See, e.g.:

“[T]o permit Smith (the religious person) to discriminate would sacrifice the rights of her prospective tenants to have equal access to public accommodations and their legal and dignity interests in freedom from discrimination based on personal characteristics.”

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<sup>25</sup> *Smith v. FEHC*, 1151 (CA Supreme Court 1996).

To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others in the rental market. To say they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere.

Based on my review of the cases and legal scholarship, it seems to me that the judges and scholars who understand the reality of the religious burden often fail to acknowledge the compelling interest on the part of the government to enforce its civil rights law. And, conversely, those judges and scholars who seem to understand the need for a civil rights law not to include exceptions for religious beliefs are often blind to the reality of the religious burden.

I don't think it has to be that way. I think we should acknowledge that complying with some civil rights laws will place a burden on some individuals' religious beliefs. But the answer is not for the government *not* to place that burden. If the government does that, it *will have taken a position on the moral question* – in a manner *adverse* to LGBT people. That is, government will have decided that the personal dignity of LGBT people who may suffer discrimination is less important than the personal beliefs of religious people.

I don't think that's the correct outcome. As I've said before, at a certain point this necessarily becomes a zero-sum game between the religious free exercise rights of some individuals and the equal protection rights of other individuals. Deciding on who wins out in this game depends on whether the decision *not* to provide an exemption to a civil rights law is the most *narrowly tailored manner* of achieving a *compelling government interest*.

I think, without a doubt, that eradicating discrimination on the basis of sexual orientation and gender identity is a compelling government interest. The emotional and practical harms suffered by those who experience discrimination on those bases are real and deep. I believe it is simply *wrong* for an LGBT person to be refused an apartment, a job, a space in a bed or breakfast, or a table in a restaurant because he or she is gay, lesbian, bisexual, or transgendered. I believe it is simply, basically, deeply *wrong* for society to allow such discrimination to occur. (Obviously, people may disagree with me on this belief. But this is a decision about right and wrong that *society* needs to make.)

And, in most cases, *not* allowing an exemption to individual religious people will be necessary to achieving this compelling goal of non-discrimination. That is, if the goal of an equality law is to respect and protect the personal dignity of each LGBT person (which I believe it is) – then permitting that person to experience discrimination at the hands of even one religious person necessarily undermines that goal. It does not help that LGBT person if he or she can go down the block

and not experience discrimination there. The simple act of experiencing discrimination will be the affront to the gay person's personal dignity.

As a personal matter, I can tell you – it will not make me feel ok if a Christian-run restaurant is permitted to throw me and my girlfriend out because we are holding hands at the table – just because we can go down the block to another restaurant. I believe society has an obligation to protect my right to eat at any restaurant regardless of what my sexual orientation may be.

And here is where I do think it's relevant that the religious person has chosen to enter the commercial arena. Given that it *is* a zero-sum game with regard to moral values, when *society's* view of morality shifts in a way that is a *good* shift – e.g., we no longer believe that it is immoral for the races to mix or we no longer believe it is immoral to love someone of the same sex – then people still operating on the former moral plane will necessarily be disadvantaged in general, commercial society. That's the reality of a society changing its views of morality. Permitting an exception for those holding the former moral belief validates and supports that belief in a way that necessarily undermines the personal dignity of LGBT people and that is inconsistent with the moral belief held by society.

So, let's be honest about the moral conflict – and then let's debate the merits of the free exercise claim and the equal protection claim.