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## Gay Rights, Religious Liberty, and the Misleading Racism Analogy

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# Gay Rights, Religious Liberty, and the Misleading Racism Analogy

*Andrew Koppelman\**

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Should religious people who conscientiously object to facilitating same-sex weddings, and who therefore decline to provide cakes, photography, or other services, be exempted from antidiscrimination laws? This issue has taken on an importance far beyond the tiny number of wedding vendors who have made such claims.

Each side’s position has become more unyielding. The most sophisticated scholars are as rigid as the politicians and partisan commentators.

They don’t agree on much, but all think that their disagreement concerns a matter of deep principle. Religious liberty and nondiscrimination are each understood as moral absolutes. Compromise is perceived as an existential threat. Both sides feel victimized. Gay rights advocates fear that exempting even a few religious dissenters

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would unleash a devastating wave of discrimination. Conservative Christians fear that the law will treat them like racists and drive them to the margins of American society.

Both sides are mistaken. Principles are a distraction, which make each side's claims seem more uncompromisable than they are. Each invokes interests of a kind that can and should be balanced against others.

Many compromises are possible: an exemption for very small businesses, or for religiously oriented businesses, or expressive enterprises such as photographers. The specifics would have to be negotiated, and the negotiation would be different in different places.

In earlier work, I have proposed to exempt only those who post warnings about their religious objections, so that no customer would have the personal experience of being turned away.<sup>1</sup> The harm of discrimination that is most salient here is the wounding experience of personal rejection—or its anticipation, which is often a source of chronic stress—during what one reasonably expects to be the happy occasion of planning one's wedding.<sup>2</sup> That can be avoided if the vendors are required, as a precondition for exemption, to make their objections to same-sex marriages clear to the public in advance. Such announcements have obvious commercial costs, and so they are likely to be rare and to come only from those with the most intense religious compunctions. A few dissenters, whom one can easily avoid ever meeting, are unlikely to undermine the equality of gay people.

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1. Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015).

2. The expectation of possible discrimination is itself exhausting. It "results in a state of heightened vigilance and changes in behavior, which in itself can trigger stress responses—that is, even the anticipation of discrimination is sufficient to cause people to become stressed." AMERICAN PSYCHOLOGICAL ASS'N, *STRESS IN AMERICA: THE IMPACT OF DISCRIMINATION* 8 (2016). Apprehension about probable future threats can produce an increase in physical pain, and in fact perceived discrimination is correlated with chronic pain. The mechanisms are understood. Anxiety is "negative affect based on apprehension about anticipated future threats that have uncertain outcomes." This produces "hypervigilance" that "can result in neuro-biological changes that can result in hyperalgesia (increased sensitivity to pain)." This may be evolutionarily adaptive, because "heightened pain sensitivity allows potential threats to be detected more readily." Timothy T. Brown et al., *Discrimination Hurts: The Effect of Discrimination on the Development of Chronic Pain*, 204 SOC. SCI. & MED. 1, 2 (2018). Other evidence of the individualized harm of discrimination, with evidence particularly pertinent to gay people, is compiled in Brief of Amici Curiae Ilan H. Meyer et al. Supporting Respondents, *Masterpiece Cakeshop v. Colorado*, 138 S. Ct. 1719 (2017), 2007 WL 5036301, at \*3–6.

A common response to proposals like this one is that conservative condemnation of gay sex and marriage is as evil as racism, and those who hold that view should likewise be disqualified from religious accommodations. Even if they can be accommodated without defeating the purposes of antidiscrimination law, it would be wrong to do so.

The racism analogy is actually several different analogies. They need to be distinguished before we even know what we are arguing about. One might be comparing their effects, their moral errors, the evil intentions of those who hold them, or their status as views that are appropriately stigmatized. These are the ones that are usually invoked to block any accommodation. Some of them are sound, but together they are misleading. The most important mistake that the analogy elicits is the notion that everyone who endorses the traditional religious condemnation of homosexuality is evil. That wasn't true even of many white racists during the Jim Crow era, and it isn't true of the millions of Americans today who hold conservative views about sexuality.

There are also important differences. Religious heterosexism is generally nonviolent. Our experience with racism in the past fifty years, protected by freedom of speech, has shown that we can endure the open display of such repellent views. Unlike racism in 1964, when the Civil Rights Act was passed, the law may be able to accommodate religious conservatives without defeating the point of the law. Establishing a legitimate place for dissenters, in a gay-friendly legal regime, could actually be helpful in addressing some of the most pressing contemporary gay rights issues, notably gay youth homelessness.<sup>3</sup>

### I. AS EVIL AS RACISM

In 2015, there was a bitter controversy over the passage of the Indiana Religious Freedom Restoration Act (RFRA), a statute that would make religious accommodations available unless the state can show a compelling justification for denying them. There are now twenty-one state RFRA's.<sup>4</sup> Most of them were enacted soon after the

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3. See *infra* notes 78–90 and accompanying text.

4. *State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

Supreme Court declared in 1990 that such accommodations were not constitutionally required.<sup>5</sup> They were not especially controversial. Barack Obama, as a state senator, voted for one of the earliest ones in Illinois in 1998.<sup>6</sup> But with the emergence of the wedding vendor cases, they took on a different valence.

As the Indiana law was being debated, *The New York Times* ran an editorial with this title: “In Indiana, Using Religion as a Cover for Bigotry.”<sup>7</sup> The implicit assumption is that the objection to facilitating same-sex marriage isn’t really religious at all, that it is a “cover” for something else. Something nasty.

That allegation wounds conservatives. The majority opinion in the Supreme Court decision recognizing same-sex marriage, *Obergefell v. Hodges*, was careful to declare that “[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”<sup>8</sup> The dissenters were not mollified. Chief Justice Roberts argued that Justice Kennedy’s opinion portrays all who disagree with it as “bigoted.”<sup>9</sup> Justice Scalia read Kennedy as saying that those who oppose same-sex marriage “cannot possibly be supported by anything other than ignorance or bigotry.”<sup>10</sup> Justice Alito warned that, despite the majority’s “reassurances,” the analogy to interracial marriage “will be used to vilify Americans who are unwilling to assent to the new orthodoxy.”<sup>11</sup> They will “risk being labeled as bigots and treated as such by governments, employers, and schools.”<sup>12</sup>

The labeling and vilification are the most influential reason for refusing any religious exemption from antidiscrimination law. “Some views are truly bad enough that they deserve repudiation

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5. *Emp’t Div. v. Smith*, 494 U.S. 872 (1990).

6. Katie Sanders, *Did Barack Obama Vote for Religious Freedom Restoration Act with ‘Very Same’ Wording as Indiana’s?*, POLITIFACT (Mar. 29, 2015), <https://www.politifact.com/truth-o-meter/statements/2015/mar/29/mike-pence/did-barack-obama-vote-religious-freedom-restoratio/>.

7. Editorial, *In Indiana, Using Religion as a Cover for Bigotry*, N.Y. TIMES (Mar. 31, 2015), <http://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html>.

8. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

9. *Id.* at 2626 (Roberts, C.J., dissenting).

10. *Id.* at 2630 (Scalia, J., dissenting).

11. *Id.* at 2642 (Alito, J., dissenting).

12. *Id.* at 2643.

rather than accommodation,” declares John Corvino.<sup>13</sup> Maggie Gallagher observes, “we do not draft legislative accommodations for irrational hatred.”<sup>14</sup>

It is a long-settled custom in the United States to accommodate religious (and lately also nonreligious) conscientious objectors when this can be done without undermining the law’s purposes. But when religious objections to antidiscrimination laws are offered, they collide with another, equally powerful principle: zero tolerance for racism and similar malign ideologies. Religious accommodation is often made available, but not for religious racists.

It is a truth universally acknowledged that there could not and should not have been religious exemptions from the Civil Rights Act of 1964. From this one might infer – many do infer – that views like those of religious racists are not entitled to even the mild, defeasible presumption of accommodation that is generally extended to conscientious objectors.<sup>15</sup> A zero tolerance rule will defeat proposals for accommodation at the outset.

The racism analogy is a conversation-stopper, not only on the left, but also on the right. When people who resist same-sex marriage hear the analogy, Jonathan Rauch observes, they “snap into a defensive crouch and shut down.”<sup>16</sup> He thinks we just shouldn’t go there. But we are there. The analogy is ubiquitous, and it makes negotiation impossible, makes the very idea of negotiating repugnant.

Here I propose to address the analogy, clarify what its claims are, show how they can mislead, and argue that it should not shut down the possibility of accommodation.

There is a growing consensus on the left that heterosexism is as evil as racism, and that it should be treated with comparable disdain.

Consider the contrast between the invocations at President Barack Obama’s two inaugurals. For his first inaugural, Obama

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13. JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 212 (2017).

14. Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 *NW. J.L. & SOC. POL’Y* 260, 263 (2010).

15. The crucial question of what counts as “views like those of religious racists” has not been theorized by anyone, so far as I can tell.

16. Jonathan Rauch, *Opposing Gay Marriage Doesn’t Make You a Crypto-Racist*, *DAILY BEAST* (Apr. 24, 2014), <https://www.thedailybeast.com/opposing-gay-marriage-doesnt-make-you-a-crypto-racist?ref=scroll>.

chose evangelical leader Rick Warren, despite their disagreement about a California referendum banning same-sex marriage in the state. Warren's choice was controversial, but Obama was firm: "we're not going to agree on every single issue, [we need] to create an atmosphere where we can disagree without being disagreeable and then focus on those things that we hold in common as Americans."<sup>17</sup> Four years later, Louie Giglio, a pastor who had led the fight against human trafficking, was selected. A 1994 speech in which he described homosexuality as a "sin in the eyes of God" immediately surfaced. Giglio hadn't even expressed a view about gays' civil rights, as Warren had. It was a purely religious view. The White House came under enormous pressure to revoke the invitation, and Giglio withdrew. The inaugural committee then stated: "We were not aware of Pastor Giglio's past comments at the time of his selection and they don't reflect our desire to celebrate the strength and diversity of our country at this Inaugural."<sup>18</sup> Michael Wear, who was in charge of the administration's evangelical outreach, nearly resigned over the episode. "In 2009, our diversity demanded we accept that there will be voices we disagree with in public spaces. In 2013, diversity required us to expel dissent."<sup>19</sup>

I happen to believe that there is no moral difference between heterosexual and homosexual sex, that Giglio is wrong to think that there is such a moral difference, and that this falsehood has been the cause of enormous harm. It would be a better world if no one believed this stuff.

If you disagree—and I'm aware that I'm at Brigham Young University, the epicenter of a world view that is radically at odds with mine—I will not here try to convince you. I will, however, explain why my opinions about sexuality and morality do not necessarily entail that you must be treated the way Giglio was treated. Or even that you must be denied exemption from antidiscrimination law.

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17. MICHAEL WEAR, RECLAIMING HOPE: LESSONS LEARNED IN THE OBAMA WHITE HOUSE ABOUT THE FUTURE OF FAITH IN AMERICA 179 (2018).

18. *Id.* at 187.

19. *Id.* at 188.

## II. SEVEN ANALOGIES

What, precisely, does it mean to say that objections to homosexual conduct are the moral equivalent of racism? It can mean more than one thing. I count seven different analogies packed into this claim. Let's consider the various possibilities.

*A. Destructive Effects*

The first comparison focuses solely on the effects of discrimination upon its victims. There are sometimes patterns of mistreatment based on socially salient traits, such as race. When that mistreatment—of which discrimination is one instance—occurs, it is destructive whatever the discriminator's motives, indeed even if the discriminator's reasons are sound. In a society in which racial segregation has led black people, in aggregate, to have less access to quality education than whites, it may be rational for employers to rely on that generalization to discriminate. Those individually rational decisions would then perpetuate a self-reinforcing pattern of subordination. That is good reason to prohibit them.

Antigay prejudice produces the same kind of cumulative destructive effects as racism, ranging from employment discrimination to homicidal violence. That, however, does not tell us whether religious accommodations can be permitted without defeating the purposes of antidiscrimination laws. Those laws will remedy those aggregate effects even if a few people are permitted to discriminate.<sup>20</sup>

*B. Falsehood*

A second analogy is that both treat people unjustly, on the basis of irrelevant characteristics. The soundness of this analogy depends on the premise that there is no valid reason for treating gay sex as inferior to heterosexual sex.

Those who hold traditional views of sexuality think there are such reasons. Justice Alito explains why they reject same-sex marriage: they believe "marriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so."<sup>21</sup>

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20. See *infra* Section II.E.

21. *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

Whatever the merits of this notion,<sup>22</sup> it is not about gay people. It is focused on the value of a certain kind of heterosexual union.<sup>23</sup> The existence of gay people is a side issue.<sup>24</sup> The function of marriage, on this view, is to sanctify a human good that gay people happen to be unable to realize: their exclusion does not discriminate against them any more than art museums discriminate against blind people. The idea that homosexual sex is always wrong is harder to justify on nonreligious grounds, but it purports to be a reason why refraining from sex is in the deepest interests of gay people themselves.<sup>25</sup>

I think that these ideas are obviously wrong. But that is what I think of an enormous range of beliefs, religious and other. Most Americans agree that some religious beliefs are contemptible lies. They disagree about which ones. This is nothing new. It is the chronic condition of the United States, probably the most religiously diverse nation in the history of the world.

The way we have coped with this diversity is to treat religion—understood at such an abstract level as to ignore all doctrinal differences—as a good, and to accommodate it where this is possible. We address the chronic human problems of suffering, guilt, and death in many different ways, and we treat one another's resolutions of those problems with respect even when they make no sense to us.

Accommodation from generally applicable laws always involves minorities—which means, in the context of religion, people who believe things that we in the majority regard as false. If they were the majority, the legal obligation they question wouldn't be there in the first place. Catholic countries don't ban sacramental wine. Falsity doesn't defeat the case for exemptions.

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22. For critique, see Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431 [hereinafter Koppelman, *Judging the Case*]; Andrew Koppelman, *More Intuition than Argument*, COMMONWEAL, May 3, 2013, at 23 (reviewing SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012)).

23. See, e.g., Rod Dreher, *Sex After Christianity*, AM. CONSERVATIVE (Apr. 11, 2013, 12:00 AM), <https://www.theamericanconservative.com/articles/sex-after-christianity/>.

24. See SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* 10–12, 86–93 (2012).

25. See Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997) [hereinafter Koppelman, *Is Marriage Inherently Heterosexual?*].

*C. Evil*

This brings us to a third analogy, the one that is probably doing most of the work.<sup>26</sup> Racists are evil! And those who oppose gay equality would not claim to believe this garbage if they were not, in the words of the *New York Times*, using religion as a cover for bigotry.<sup>27</sup> The *Times* isn't alone. A majority of the U.S. Commission on Civil Rights declared that proposals for religious accommodations "represent an orchestrated, nationwide effort by extremists to promote bigotry, cloaked in the mantle of 'religious freedom,'" and "are pretextual attempts to justify naked animus against lesbian, gay, bisexual, and transgender people."<sup>28</sup> The same views underlay the declaration of the commissioner in *Masterpiece Cakeshop v. Colorado*, the one wedding-vendor case that the Supreme Court has heard to date, that "to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others."<sup>29</sup> The Court observed that this disparaged the baker's "religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere."<sup>30</sup> The Court might also have looked more closely at the phrase "use their religion," a locution that also appeared in that *New York Times* headline. The implication is that the baker was not really motivated by his religion. He is using religion as a phony excuse for his malicious desire to harm. One uses a tool, and is not used by it.

Not only do such people not deserve accommodation: we don't mind if they are unhappy. Their unhappiness even gives us some satisfaction. It serves them right. Either they have it coming, or their pain could teach them to change their ways, or both.

The word "bigot" elicits an image of pure viciousness, sometimes hiding behind a mask of piety. It is reminiscent of what Coleridge wrote about Shakespeare's Iago, that whatever justifications he

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26. Because it is doing so much work, this section is much longer than the others.

27. See *supra* note 7 and accompanying text.

28. U.S. COMM'N ON CIVIL RIGHTS, PEACEFUL COEXISTENCE: RECONCILING NONDISCRIMINATION PRINCIPLES WITH CIVIL LIBERTIES 160-61 (2016), <https://www.usccr.gov/pubs/docs/Peaceful-Coexistence-09-07-16.PDF> (statement of Commissioners Achtenberg, Castro, Kladney, Narasaki, and Yaki).

29. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

30. *Id.*

offered for his actions were “the motive-hunting of motiveless Malignity.”<sup>31</sup> Or Milton’s Satan: “Evil, be thou my good.”<sup>32</sup>

But it’s not true. In the most prominent cases, conservative Christians have been willing to endure huge fines, and sometimes the destruction of their businesses, rather than facilitate what they believe to be sinful conduct. In some of the cases, they had previously been friendly with the gay complainants. They’re idealists.

That doesn’t mean, however, that they’re different from racists. There are racist idealists, too. Lester Maddox, who thought that segregation was mandated by the Bible, closed his restaurant in 1965 rather than integrate it.<sup>33</sup> (After his resistance made him famous, he was elected governor of Georgia.)<sup>34</sup>

The picture of racists as hate-filled demons isn’t fair to them. It also supports a false distinction between racism and the rejection of homosexuality. Both views have been held by many otherwise decent people. That fact does not make the views less destructive and repugnant. But regarding the people themselves as vicious is its own form of vicious stereotype.

Ryan Anderson, resisting the analogy, argues that opposition to interracial marriage “is an outlier from the historic understanding and practice of marriage, founded not on decent and honorable premises but on bigotry.”<sup>35</sup> So he infers that the racists had bad intentions. “Given the irrelevance of race to almost any transaction, and given the widespread and flagrant racial animus of the time, no claims of benign motives are plausible.”<sup>36</sup> The intolerable character of these views explain why they could not have been accommodated.

An exemption to a law prohibiting racial discrimination in public accommodations could undermine the purpose of that law by sending the message that intentional racism is protected conduct.

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31. SAMUEL TAYLOR COLERIDGE, *COLERIDGE’S LECTURES ON SHAKESPEARE AND OTHER POETS AND DRAMATISTS* 172 (Ernest Rhys ed., Everyman’s Library 1907) (1849).

32. JOHN MILTON, *PARADISE LOST* 96 (Charles Tilt 1838) (1667).

33. Richard Severo, *Lester Maddox, Whites-Only Restaurateur and Georgia Governor, Dies at 87*, N.Y. TIMES, June 25, 2003, at B11, <https://www.nytimes.com/2003/06/25/us/lester-maddox-whites-only-restaurateur-and-georgia-governor-dies-at-87.html>.

34. *Id.*

35. Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J. L. & PUB. POL’Y 123, 125 (2018).

36. *Id.* at 131.

In sending that message, such an exemption would amplify existing messages that say African Americans count for less, are subhuman, and may be treated as such. In doing so, it increases the odds that people engage in deplorable acts based on notions of white supremacy.<sup>37</sup>

Michael Perry embraces similar reasoning:

[T]he claim that same-sex sexual conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings, any more than the claim that theft is immoral asserts, implies, or presupposes that those who steal are morally inferior human beings. By contrast, “the very point” of laws that criminalized interracial marriage was “to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites.”<sup>38</sup>

This is bad history. Many whites in the deep South accepted racial segregation because that was the natural and familiar order of things, the world they grew up in, or because they sincerely believed an interpretation of Christianity that mandated it. Their daily experience taught them that black people were happy with their lot. (The black people had learned to act contented whenever whites were watching, because any hint of dissent could place one in mortal danger.) Contra Perry, they believed that the racial hierarchy of their society was consistent with the Christian idea of the equality of souls before God. Racism, when it is conscious and pursued as a project, has a different face today, because it no longer consists in insouciant acceptance of the status quo. One must have a positive desire to lower the status of black people, and such desire is almost always accompanied by resentment and hatred. That is conspicuous in the contemporary alt-right movement. It was not ever thus.

Racial segregation rested on an elaborate racist theology. (So did slavery.) The Bible declares that God “separated the sons of Adam,”<sup>39</sup> and “hath determined . . . the bounds of their

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37. *Id.* at 136.

38. Michael J. Perry, *Obergefell v. Hodges: An Imagined Opinion, Concurring in the Judgment* 6 (Emory Univ. Sch. of Law Legal Studies Research Paper No. 15-356, 2015) (quoting John Corvino, *Homosexuality and the PIB Argument*, 115 *ETHICS* 501, 509 (2005)), [https://ssrn.com/abstract\\_id=2624022](https://ssrn.com/abstract_id=2624022).

39. *Deuteronomy* 32:8 (King James).

habitation.”<sup>40</sup> From these and other verses, the racist theologians inferred that it was not His intention that the races mix. Any effort to end racial distinctions defied God’s plan and was evil. The most extreme form of that evil was interracial sex and marriage.<sup>41</sup>

Many examples of this racist religion can be offered. A prominent Virginia minister, Rev. James F. Burks of Bayview Baptist Church, declared that “when man . . . disregards the boundary lines God Himself has drawn, man assumes a prerogative that belongs to God alone.”<sup>42</sup> The sermon was reprinted in many newspapers and circulated as a pamphlet. Mississippi Senator Theodore G. Bilbo explained that “miscegenation and amalgamation are sins of man in direct defiance with the will of God.”<sup>43</sup> Georgia Governor Herman E. Talmadge argued that “God himself segregated the races.”<sup>44</sup> The trial judge in *Loving v. Virginia*, the case in which the Supreme Court ultimately struck down laws against interracial marriage, was merely echoing conventional theology when he declared:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.<sup>45</sup>

Racist theology became more articulate in response to Martin Luther King Jr.’s invocation of Christianity against segregation. But it wasn’t a new idea. “[T]he theology of separate races constituted a kind of cultural religion that permeated the hearts and minds of

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40. Acts 17:26 (King James).

41. See generally FAY BOTHAM, *ALMIGHTY GOD CREATED THE RACES: CHRISTIANITY, INTERRACIAL MARRIAGE, AND AMERICAN LAW* (2009).

42. Jane Dailey, *Sex, Segregation, and the Sacred After Brown*, 91 J. AM. HIST. 119, 121 (2004) [hereinafter Dailey, *After Brown*] (quoting Rev. James F. Burks, *Integration or Segregation?* (May 30, 1954), typescript, folder 1, box 100, General Correspondence, Executive Papers, Gov. Thomas B. Stanley (1954-1958) (Library of Virginia, Richmond)); see also Jane Dailey, *The Theology of Massive Resistance*, in *MASSIVE RESISTANCE* 151, 153 (Clive Webb ed., 2005) (quoting Rev. James F. Burks, *Integration or Segregation?* (May 30, 1954), typescript, folder 1, box 100, General Correspondence, Executive Papers, Gov. Thomas B. Stanley (1954-1958) (Library of Virginia, Richmond)).

43. Dailey, *After Brown*, *supra* note 42, at 125.

44. *Id.* at 129 (citing STEPHEN G. N. TUCK, *BEYOND ATLANTA: THE STRUGGLE FOR RACIAL EQUALITY IN GEORGIA, 1940-1980*, at 77 (2001)).

45. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

attorneys and judges throughout the courts of the South for a hundred years after the Civil War.”<sup>46</sup>

You may be inclined to dismiss this theology as a rationalization for an unjust social structure. And, of course, these beliefs would not have been adopted if the underlying racial hierarchies had not already been in place. But most religion has a legitimating function, bestowing an ultimate ontological status on always-precarious social institutions.<sup>47</sup> The fact that a religious belief has social causes does not necessarily mean that it is false or insincere. All beliefs have social causes.

The struggle over racial equality was a struggle of theologies, each often sincerely held. King’s triumph was to reshape Christianity so that almost no one any longer takes its racist forms seriously.

One may, of course, plunge into theological controversy and say that there is a crucial disanalogy: one religious belief is sounder than the other. Damon Linker writes that the difference between the two theologies is that strictures against homosexuality are rooted far more deeply in the Judeo-Christian tradition than racism ever was.<sup>48</sup> Yes, slavery is found throughout the Scriptures and comes in for criticism only, at best, by implication. But race-based slavery – and the racism that made it possible and continues to infect ideas and institutions throughout the West to this day – receives no explicit endorsement from the Bible.

Which isn’t to say that those seeking to justify race-based slavery or racism couldn’t, and didn’t, twist biblical passages to make them provide such justification.<sup>49</sup> If, however, the Establishment Clause means anything, it means that the state is not to adjudicate such controversies.<sup>50</sup> If the state started rejecting claims because of their bad theological bona fides, that would be the end of religious freedom.

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46. BOTHAM, *supra* note 41, at 156.

47. PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (1967).

48. Damon Linker, *Is Opposing Gay Marriage the Same As Being A Racist?*, WEEK (Feb. 13, 2014), <https://theweek.com/articles/451016/opposing-gay-marriage-same-being-racist>. In fairness to Linker, he may be expressing no theological view, and simply offering reasons why religious heterosexism is less likely to disappear than religious racism.

49. *Id.*

50. This point is well developed in CARLOS A. BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY* 271–73 (2017).

You might regard this racist biblical exegesis as so daffy no one could possibly believe it. But that's not only true of racist theology. It is the problem of religious diversity. Nothing is more manifestly implausible than other people's religions.

The recognition that many racists were sincere believers disrupts settled narratives on both right and left. It makes it impossible for conservatives to say that, because *we* are nice people, it follows that we are nothing at all like the racists. It makes it impossible for gay rights advocates to say that, because you believe horrible things, it follows that you are horrible people.

I once showed John Rawls, the late Harvard philosopher who is the patron saint of modern liberals, the following passage by the conservative Christian theorist David Smolin: "The problem, from a Christian perspective, is not that the non-Christian *cannot* sufficiently understand Christian doctrines, but rather that the non-Christian *will not* accept them. The barrier to becoming Christian is primarily ethical and stems from the sinful human nature, which refuses to submit to God."<sup>51</sup>

Rawls remarked that this was the attitude that most irritated him: the notion that if people disagree with us, they must be evil.

The left does it too. *The problem is not that the conservative Christian cannot sufficiently understand the value of same-sex relationships, but rather that the Christian will not accept them. The barrier to recognizing the value of same-sex relationships is primarily ethical . . .* Here, once more, the gay rights/religion controversy is an example of deeper currents in political polarization. Increasingly, across multiple political issues, honest disagreement is taken as evidence of bad character. That tendency is particularly salient here.

Racism is often regarded as if it were uniquely evil, sharply distinct from all the other misperceptions that lead people to mistreat one another. Heterosexism is then alleged to be similarly extraordinary. But there's nothing unique here. Our understandings of other human beings are routinely delusional. We constantly rely on stereotypes and snap judgments. And we often do this sincerely, trying our best to do what is right.

Justice Kennedy writes: "Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may

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51. David M. Smolin, *Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry*, 76 IOWA L. REV. 1067, 1086 n.87 (1991).

result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.”<sup>52</sup>

Prejudice “can stem from indifference or insecurity as well as from malicious ill will.”<sup>53</sup> These passages were repeatedly quoted with approval by the Obama Administration in its briefs in the Supreme Court same-sex marriage cases.<sup>54</sup> Here, prejudice begins to be indistinguishable from ordinary error.

Iris Murdoch argues that the chief enemy of morality is “personal fantasy: the tissue of self-aggrandizing and consoling wishes and dreams which prevents one from seeing what is there outside one.”<sup>55</sup> Liberalism is the enemy of this kind of fantasy. It demands sympathetic identification with the other. (As in its own way does liberalism’s Siamese twin, capitalism, which requires that one know one’s market.)<sup>56</sup> The gay rights movement’s principal enemy is the once-ubiquitous bizarre fantasy of what gay people must be like.

The racism analogy is malign and destructive insofar as it leads Americans to regard their fellow citizens as hateful demons. Demons are, of course, mythical creatures, and the very notion of them raises logical puzzles: How could any being with free will be unchangeably evil? But, Samuel Fleischacker observes, when we designate others as demons, we license whatever mistreatment is necessary to defend ourselves against them, and so “become ourselves as close as human beings can to being demons.”<sup>57</sup>

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52. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (Kennedy, J., concurring).

53. *Id.* at 375.

54. See Brief for the United States on the Merits Question at 39, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307), 2013 WL 683048; Brief for the United States as Amicus Curiae Supporting Respondents at 32, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 769326; Brief for the United States as Amicus Curiae Supporting Petitioners at 35, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556), 2015 WL 1004710. Selective sympathy and indifference may indeed constitute an equal protection violation, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 28–31, 40–43 (1996) [hereinafter KOPPELMAN, *ANTIDISCRIMINATION LAW*], but it does not necessarily show that the actor is a bad person.

55. IRIS MURDOCH, *THE SOVEREIGNTY OF GOOD* 59 (1971).

56. DEIRDRE N. MCCLOSKEY, *THE BOURGEOIS VIRTUES: ETHICS FOR AN AGE OF COMMERCE* (2006).

57. SAMUEL FLEISCHACKER, *BEING ME BEING YOU: ADAM SMITH AND EMPATHY* 159 (2019).

This kind of crude Manicheanism has its political uses. But when it reaches the point that large numbers of citizens look at one another as irredeemable fiends, it has gotten out of hand. We are going to have to live together.

The polarization of American politics rests on similar abuses of fantasy.

Sometimes, of course, our misjudgments are reprehensible. They originate in culpable self-indulgence and intellectual laziness. That's Kennedy's point. We have an obligation to reflect on our insensitivity and try to overcome it.

A prime example is the conservative condemnation of transgender people. "Bathroom bills" require them to use the sex-segregated toilet of their genetic sex, placing them at risk of physical assault on the basis of imaginary fears.<sup>58</sup> This Article is written in a forgiving mood, but this is the movement on the religious right that is hardest to forgive. Although conservative Christians continue to make unreasonable demands that gay people be celibate, they no longer seem to want them to leave the planet. Many of them remain unreconciled to the very existence of transgender people.

Some racists accept their culture's racism so unquestioningly that their moral culpability is uncertain. Others guiltily weave an elaborate tissue of self-justifying rationalizations. And some—the ones to whom the label "bigot" properly refers—are motivated by pure malignity. Similarly with heterosexism. It is hard for people who do not know us to tell whether we are wicked, culpably negligent, or invincibly ignorant. We often don't see the truth about ourselves.<sup>59</sup>

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58. North Carolina is the most prominent example. See Paul Blest, *How Much Damage Has North Carolina's Bathroom Bill Done in 1 Year?*, NATION (Mar. 23, 2017), <https://www.thenation.com/article/archive/how-much-damage-has-north-carolinas-bathroom-bill-done-in-1-year/>.

59. A different and more manageable question is whether a statute on its face reflects animus against an unpopular group. That is a familiar question of statutory purpose, so the Court has managed to address it without attempting to search anyone's heart. When the Court has attributed a bare desire to harm gay people, it has been reviewing unusual statutes that, on their face, lashed out wildly and indiscriminately. See Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm,"* 64 CASE W. RES. L. REV. 1045 (2014); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89 (1997).

There has been a lot of philosophical work on the Problem of Evil. It isn't noticed often enough that its close sibling is the Problem of Stupid. It can be hard to tell them apart.

#### *D. Disgust*

A final analogy is that, just like racists, heterosexists are disgusting. This is not an argument so much as a visceral reason for denying their claims. It regards their views as so repellent as to be the object of a kind of taboo. This kind of reaction can be seen in the inaugural committee's comment on Giglio: one 1994 statement that homosexuality is sinful rendered him unfit to give Obama's invocation in 2012.

A similar taboo has developed for racism. It was not always the case that "racist" was one of the worst things one could call a person. That ethic was deliberately constructed. It has done a lot of good. Pervasive prejudice has to be combated with equally strong cultural forces.

Liberal theorists are uncomfortable with the invocation of such primitive impulses, but they appear to be an ineradicable part of humanity's moral vocabulary.<sup>60</sup> Ideas of purity had been powerfully deployed on behalf of racism. The left captured purity and turned it against the enemy. Racism itself has come to be stigmatized as contaminating. A similar cultural reversal has been directed at "homophobia."<sup>61</sup> As with racism, the stigmatization of gays is so deeply rooted in American culture that it is probably necessary to rely on this kind of counter-taboo in order to respond to it. In each case, the aim is to induce citizens to regard the relevant prejudice as itself ritually unclean.

That's why it is such a conversation stopper to ask, "would you exempt religiously based discrimination against interracial couples?" The reaction is instantaneous. Yuck. That would be gross, even if

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60. See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 170-77 (2012). The concern with sanctity and pollution is however not only found among conservatives. It is reflected on the left in the moral impetus for the environmental movement, the market for products that purge the body of "toxins," and the aversion to genetically modified foods. *Id.* at 15.

61. The term was originally coined by George Weinberg in an effort to invert the then-conventional notion that homosexuality was a mental illness, by arguing that the aversion to homosexuality was itself pathological. GEORGE WEINBERG, *SOCIETY AND THE HEALTHY HOMOSEXUAL* (1972).

there were only one such discriminator in the world.<sup>62</sup> But disgust is an unreliable basis for political action.<sup>63</sup> The question raises a deep problem if there is some principle that covers both cases and demands that both be treated similarly. Legislation is not thus constrained: one can accommodate selectively.

The left's sense of contamination goes beyond discrimination. It can extend even to those who comply with the law, if they think the wrong thoughts. A Canadian jeweler willingly custom-made a pair of engagement rings for a same-sex couple. When they discovered that the jeweler had publicly posted a sign saying, "The sanctity of marriage is under attack. Let's keep marriage between a man and a woman[,]” the couple demanded their money back. After being inundated with hateful emails, phone calls, and threats, the jeweler gave in.<sup>64</sup> It appears that he would be wrong whether he discriminated or not.

### *E. Floodgates*

In many ways, then, the analogy to racism is sound. It's harmful, it's based on error, some (but not all) of its proponents have bad motives, and it's appropriately treated with disgust. The analogy is however misleading to the extent that it ignores the fact that even some racists were foolish rather than evil. There are also important disanalogies.

In 1964, when the Civil Rights Act was enacted, religious objections to integration were so common among Southern whites that any accommodation would inevitably have defeated the aims of the statute. Most of them would have pounced upon the

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62. The 1968 Fair Housing Act includes the so-called Mrs. Murphy exemption, excusing dwellings with four or fewer units if the owner lives in one of the units. 42 U.S.C. § 3603(b) 2018. It has had no discernible effect on the availability of housing. Yet it has been attacked, because its persistence “announces that our nation still tolerates discrimination.” James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 607 (1999).

63. See MARIHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 71-171 (2004); Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. 177 (2010).

64. Rod Dreher, *Heads LGBTs Win, Tails Christians Lose*, AM. CONSERVATIVE (May 21, 2015, 5:15 PM), <http://www.theamericanconservative.com/dreher/heads-lgbt-win-tails-christians-lose/>; *Jewelry Store Sign Prompts Same-Sex Couple to Ask for Refund*, CBC (May 16, 2015, 7:30 PM), <http://www.cbc.ca/news/canada/newfoundland-labrador/jewelry-store-sign-prompts-same-sex-couple-to-ask-for-refund-1.3077192>.

opportunity.<sup>65</sup> That's why it was so obvious that those claims—even if they were sincere and made by good-willed people with innocently mistaken views—had to be rejected. Racism remains a powerful force in American culture and politics.<sup>66</sup> A zero tolerance response is appropriate.

It's sometimes thought that, if objections to same-sex marriage are accommodated, then logically so must objections to interracial marriage. But the cases are not the same. The state interest is stronger in the latter case. More generally, it is not necessary for the tension between gay rights and rights of religious liberty to be addressed at the level of high principle.

In order to rebut the notion that rights cannot be compromised, it will be helpful to clarify what a rights claim consists in.

Joseph Raz has argued that a right should be understood as an aspect of human well-being that "is a sufficient reason for holding some other person(s) to be under a duty."<sup>67</sup> If Raz is right, then rights are parasitic on interests. "The specific role of rights in practical thinking is . . . the grounding of duties in the interests of other beings."<sup>68</sup> Some interests are so important that others should help to realize them. That is what we are saying when we say there are rights.

The principles at issue here—religious liberty and nondiscrimination—may seem irreconcilable. *But they are themselves parasitic on interests.* The way to think clearly about the conflict is to look past the principles to the underlying interests. Discrimination harms its victims' urgent interest in equal treatment in public spaces. Religious liberty protects what many people regard as their deepest concerns. The legal rights in question are tools for protecting those interests.

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65. I am only aware of one case raising such a defense, but had it succeeded there obviously would have been others. See *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd per curiam*, 390 U.S. 400 (1968). No commentators suggested at the time that such views be accommodated. See James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99 (2015).

66. It played an important role in the election of Trump in 2016. ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP* (2018).

67. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166 (1986).

68. *Id.* at 180.

Lawyers are trained to think about conflict resolution by devising abstract principles that should cover all future cases, and which incidentally entail that their side wins. But this is not the only way to think about conflict. Sometimes, the right thing to do is not to follow a principle, but to accurately discern the interests at stake and cobble together an approach that gives some weight to each of those interests. Ethics is not only about principles. There is a tradition in moral philosophy, going back to Aristotle, that holds that a good person does not necessarily rely on any abstract ideal, but rather makes sound judgments about the right thing to do in particular situations. Sometimes principles are overbroad generalizations from experience, and distract us from the moral imperatives of the situation at hand.<sup>69</sup>

Arguments about the gay rights/religious liberty conflict often talk past each other, because they often focus on one of the interests in question and ignore the other. The principles are in unresolvable tension. The interests are not. There are ways to ensure that all the relevant interests are accommodated. This may require some modification of the principles. But what ultimately matters is not the principles but the people. We only care about the principles because we care about the people.

I have argued that it is unlikely that there will be a flood of exemption claims, even in the parts of the country that are most opposed to same-sex marriage.<sup>70</sup> Your judgment of likelihood may reasonably differ from mine. And such slippery-slope concerns could be a sound basis for opposing any exemptions. But notice how this response shifts the conversation.

The same kind of uncertain guess must be made whenever religious accommodations are proposed. One must always ask whether there will be such a flood of claims that the law's purpose will be thwarted—whether the exemption of the Catholic Mass from the 1919 Volstead Act's prohibition of alcohol would lead huge numbers to convert to Catholicism just so they can imbibe (it didn't), or whether exempting all pacifists would hamstring the

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69. "[T]he situations we encounter differ from each other in subtle ways that no panoply of principles could ever manage to capture. Principles deal in samenesses, and there just aren't enough samenesses to go round." JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 2 (2004).

70. Koppelman, *supra* note 1.

military draft (at the end of the Vietnam war, it did).<sup>71</sup> It is no longer about evil people, or contamination by bigotry. It does not rule out accommodations as a matter of principle.

#### *F. Violence and Cruelty*

I suspect that many gay people misperceive the situation for the following reason. Discrimination and violence – open, unapologetic, hateful – have been part of their daily experience since adolescence. If you’re subjected to enough of that stuff, you’re going to see the danger of it everywhere. It’s hard to get your mind around the fact that the vicious monster who abused you is now in hospice care.

My proposed accommodation, in an earlier article,<sup>72</sup> elicited an angry response from Shannon Gilreath and Arley Ward. That response deserves to be addressed in detail. They answered the preceding paragraph (which first appeared in that article) by pointing out that the monster is still pretty vicious:

[G]ay youth are disproportionately homeless – put out or driven out by religiously-motivated cruelty. Also, “28% of homosexual youth were dropping out of secondary school because of discomfort and fear.” Gay youth are disproportionately addicted to alcohol and drugs. And gay youth have a suicide rate nearly five times that of their straight counterparts. . . . The most recently-available FBI hate crime statistics show that 20% of all hate crimes committed in the United States are perpetrated on gay people. This, despite the fact that we account for around 4% of the overall population. Within this class of already heinous, bias-motivated crimes, we also fare horribly when it comes to the most vicious crimes against the person. Gay men are the victims of 40% of all bias-related murders. That equals two in every five. Lesbians comprise 66% of rapes. And this despite the fact that we know FBI statistics are dramatically underreported.<sup>73</sup>

All this is true. I was wrong to write that “[t]he gay rights movement has won.”<sup>74</sup> They are right to call me out for it. Like

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71. See Andrew Koppelman, *The Story of Welsh v. United States: Elliott Welsh’s Two Religious Tests*, in *FIRST AMENDMENT STORIES* 293 (Richard W. Garnett & Andrew Koppelman, eds., 2012).

72. Koppelman, *supra* note 1.

73. Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 *VT. L. REV.* 237, 256–57 (2016) (footnotes omitted).

74. Koppelman, *supra* note 1, at 628.

many gay rights advocates, I was too focused on the then-recent marriage victory.

But I stand by my next sentences: “It will not be stopped by a few exemptions. It should be magnanimous in victory.”<sup>75</sup> The victory is not complete, but it is major. Denying exemptions is not necessary in order to address the atrocities Gilreath and Ward enumerate. Those atrocities will not be prevented by shutting down a few Christian bakeries and florists.

Gilreath and Ward write that any exemption from anti-discrimination law would make gay people into “a legal underclass that can be deprived of all manner of services and accommodations under the imprimatur of the state.”<sup>76</sup> Antidiscrimination law in most states is an exception to the normal rule of contract at will. All citizens thus are already in this “underclass,” unless the deprivation is based on a forbidden category of discrimination. Merchants can even turn away African-Americans, so long as they don’t do so on the basis of race. They can, for example, demand identification and then reject anyone, black or white, who was born in August.

Gilreath dismisses the idea that market incentives will do any good: “But any system of subordination exists and subsists by rendering the inferior dependent upon the superior. In a tortured paradox, subordinated people are asked to depend upon the people who subordinate them to protect them from subordination.”<sup>77</sup> Those same market forces protect everyone, not just gay people.

Gilreath and Ward go on:

“Thugs who randomly attack gay people on city streets,” Koppelman writes, “are not motivated by moral objections to [gay people’s] conduct.” I would like to know exactly which thugs he asked. When religious ethos brands gays as untouchable, unnatural, and abominable, the fact that they can be harmed with impunity should be no surprise.<sup>78</sup>

The logic is depressingly familiar: Some members of group X hurt me, therefore every member of X is malevolent and dangerous. Violence against gays is “more often than not born of religious

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75. *Id.*

76. Gilreath & Ward, *supra* note 73, at 277.

77. Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 220 (book review).

78. Gilreath & Ward, *supra* note 73, at 257 (quoting Koppelman, *supra* note 1, at 653).

prejudice.”<sup>79</sup> Measures to accommodate the occasional baker or florist “are really proposals for the institutionalization of violence against Gays, with impunity for it, in law.”<sup>80</sup> Religion is the enemy and must be fought at every turn. This kind of thinking happens a lot. Many Americans are profoundly ignorant of Islam. After the September 11, 2001, attacks, Muslims were ripe for paranoid libels, culminating in the incomparable Trump’s declaration that “Islam hates us.”<sup>81</sup>

The notion that all religious conservatives yearn to beat up gay people has been an effective rhetorical trope, but it unfairly stereotypes those it purports to describe—much like the vicious old notion of gay men as misogynistic, amoral sociopaths. (It also overstates the role of religion, and understates the role of masculine gender anxiety, in the violence that does take place.)<sup>82</sup> Among people who believe that homosexual conduct is intrinsically wrong, the vast majority repudiate violence, and many even support anti-discrimination protections for gays. In Alabama, for example, a majority oppose same-sex marriage, but 58% support an anti-discrimination law. A similar phenomenon exists in Utah, where this journal is published. “[D]espite the fact that only 54% of Utahans favor same-sex marriage, fully 80% say they would support laws to protect LGBT people from discrimination.”<sup>83</sup>

Violence was integral to the system that religious racists sought to defend. Consider again Senator Bilbo, whose theology we quoted earlier. He understood what it took to deny black citizens the franchise:

“[W]hite people will be justified in going to any extreme to keep the nigger from voting. You and I know what’s the best way to keep the nigger from voting. You do it the night before the

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79. SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* 252 (2011).

80. *Id.*

81. Jenna Johnson & Abigail Hauslohner, *I Think Islam Hates Us’: A Timeline of Trump’s Comments About Islam and Muslims*, WASH. POST (May 20, 2017, 1:16 PM), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/>.

82. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994) [hereinafter Koppelman, *Why Discrimination*].

83. ROBERT P. JONES ET AL., PUB. RELIGION RESEARCH INST., *EMERGING CONSENSUS ON LGBT ISSUES: FINDINGS FROM THE 2017 AMERICAN VALUES ATLAS 21* (2018), <https://www.ppri.org/wp-content/uploads/2018/05/AVA-2017-FINAL.pdf>.

election. I don't have to tell you any more than that. Red-blooded men know what I mean."<sup>84</sup>

He vigorously opposed a proposed federal prohibition of lynching: "[U]pon your garments and the garments of those who are responsible for this measure will be the blood of the raped and outraged daughters of Dixie, as well as the blood of the perpetrators of these crimes that the red-blooded Anglo-Saxon white southern men will not tolerate."<sup>85</sup> (Yet even he wasn't self-consciously evil. He was unusual among Mississippi politicians in avoiding racist appeals for most of his career, although he went far in the other direction in his last years, when there was a real possibility that civil rights legislation would be enacted. He declared in a 1947 deathbed interview: "I am honestly against the social intermingling of negroes and whites. But, I hold nothing personal against negroes as a race. God made them as they are and they should be proud of that God-given heritage as I am of mine."<sup>86</sup> Morally judging even Bilbo is a complex matter.)

America has a long tradition of accommodating religious dissenters. As a general matter, the law should not strive to stamp out any subculture and make its members outcasts. Racism has been so pervasive and destructive that these two principles are appropriately overridden. The civil rights struggle demanded coercive cultural reconstruction, especially but not only in the states of the former Confederacy.

The question is not simply whether people are acting on the basis of repugnant ideas. There are a lot of repugnant ideas around. It is whether there should be cultural war. That question depends on the same kind of assessment of likely consequences as any decision to go to war. In the case of race, there has been progress, but the war isn't over. Zero tolerance remains necessary. In the case of sexual orientation, war is unnecessary and unlikely to improve matters. The most promising strategies for addressing the most urgent contemporary gay rights issues, random violence and youth

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84. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 90 (2013).

85. *Id.* at 180.

86. CHESTER M. MORGAN, *REDNECK LIBERAL: THEODORE G. BILBO AND THE NEW DEAL* 250 (1985).

homelessness, demand collaboration, not confrontation, between gay activists and conservative Christians.

Bilbo rejected, as a matter of principle, a politics based on mutual respect. The condition of his soul has no political relevance. He urged his followers to physically attack black people who asserted a right to such respect. There is no place in a free society for such views.

The conservative Christian wedding vendors, on the other hand, just want to be left alone. It is possible to live with them. They can even be helpful against the worst abuses that gay people suffer.

Homelessness is one of the cruelties that Gilreath and Ward enumerate. It is worse than discrimination. Gay adolescents are disproportionately likely to be homeless, usually because their parents abuse or evict them for being gay. At least 20% of homeless youth identify as LGBT, even though LGBT people are only 3 to 5% of the general population. On the most conservative estimate, there are more than 100,000 homeless LGBT youth in the U.S.<sup>87</sup> They are vulnerable to depression, substance abuse, and crime. Lacking marketable skills, they are likely to engage in “survival sex,” exchanging sex for money, food, clothing, shelter, or drugs.<sup>88</sup>

What do Gilreath and Ward propose to do about that? How will shutting down wedding vendors help?

Legal coercion is the wrong tool for the job. Family conflict is the source of most youth homelessness, gay or straight. Parents need to be persuaded to change their treatment of their LGBT children. Who are they likely to listen to? Not Gilreath, or Ward, or me.

On the other hand, consider Russell Moore, president of the Southern Baptist Convention’s Ethics & Religious Liberty Commission. He promotes the religious ideas that Gilreath and Ward blame for violence and homelessness. He calls on those attracted to persons of the same sex “to cease such sexual activity

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87. The U.S. Department of Health and Human Services estimates between 575,000 and 1.6 million homeless and runaway youth annually. Available research suggests that between 20 and 40% of these are LGBT. NICHOLAS RAY, NAT’L GAY & LESBIAN TASK FORCE POLICY INST., LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006).

88. *Id.* at 3.

in obedience to Christ.”<sup>89</sup> Homosexual conduct is categorically wrong: “There are no circumstances in which a man and a man or a woman and a woman can be morally involved in a sexual union . . . .”<sup>90</sup> He opposes any antidiscrimination protection for gay people,<sup>91</sup> explaining that, while he doesn’t want them “treated spitefully or unfairly[,]” any legal protection “aids and abets the cultural forces that would render historic Christian beliefs on sexuality (and even marriage) suspect and eventually out of bounds.”<sup>92</sup> If you are waiting for these views to disappear, you will wait a long time.

Moore also acknowledges, however, that “gay and lesbian homelessness is an issue that the Christian church ought to care about.”<sup>93</sup> He is admirably emphatic about this issue:

“I had someone tell me not long ago, who works with homeless teenagers, about how many homeless gay and lesbian and transgender teenagers he comes across who are thrown out on the street by Christian parents. Brothers and sisters that ought to be a scandal to us. The scripture does not call us to throw our children out on the streets.”<sup>94</sup>

And:

“[W]e have a situation in American culture where gay and lesbian people have often been treated really really badly. That’s one of

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89. *Should the Church View Homosexuality Like Divorce?*, RUSSELL MOORE (Aug. 16, 2016), <https://www.russellmoore.com/2016/08/16/church-view-homosexuality-like-divorce/>; see also *What if Your Child is Gay?*, RUSSELL MOORE (June 6, 2014), <https://www.russellmoore.com/2014/06/06/what-if-your-child-is-gay/>.

90. *On Weddings and Conscience: Are Christians Hypocrites?*, RUSSELL MOORE (February 23, 2014), <https://www.russellmoore.com/2014/02/23/are-christians-hypocritical-on-weddings-and-conscience-protection/>.

91. He is a signatory on a statement, signed by more than 75 religious leaders, opposing such protection because of its impact on religious liberty. *Leaders Take Stand Against Government Coercion Through Sexual Orientation, Gender Identity Laws*, NRB (Dec. 15, 2016), <http://nrb.org/news-room/articles/nrbt/religious-leaders-take-stand-against-govt-coercion-through-sexual-orientation-gender-identity-laws/>.

92. Andrew T. Walker & Russell Moore, *Is Utah’s LGBT-Religious Liberty Bill Good Policy?*, ETHICS & RELIGIOUS LIBERTY COMMISSION (Mar. 6, 2015), <https://erlc.com/resource-library/articles/is-utahs-lgbt-religious-liberty-bill-good-policy>.

93. Sharon Groves, *Is the Southern Baptist Church Having an Identity Crisis, or Am I?*, HUFFPOST (Oct. 31, 2014, 7:50 PM), [https://www.huffpost.com/entry/is-the-southern-baptist-c\\_b\\_6078108](https://www.huffpost.com/entry/is-the-southern-baptist-c_b_6078108).

94. Rob Howard, *The Great Divide*, GAYLY, May 2015 at 32, [https://issuu.com/rdtmedia/docs/the\\_gayly\\_may\\_2015\\_issue\\_reduced](https://issuu.com/rdtmedia/docs/the_gayly_may_2015_issue_reduced).

the reasons why we've spent a lot of time trying to work specifically with parents of gay and lesbian kids to say, "How do you respond when your child announces, 'I'm gay or I'm lesbian?'" And the answer to that is not rejection, the answer to that is not shunning, the answer to that is certainly not putting someone out of the house. The answer to that is loving your child and bearing with your child and if you disagree with your child, you disagree with your child."<sup>95</sup>

He has also repudiated "ex-gay" therapy as the fraud that it is.<sup>96</sup> He is not alone. There are movements within conservative Christianity to support LGBT youth and their families without abandoning their traditional sexual ethics. They get almost no support from gay rights organizations. Opportunities for collaboration are being neglected. Both sides have an interest in making those communities better places for gay youth to live, and the young people themselves often are looking for ways to reconcile their sexuality with their religious beliefs.<sup>97</sup>

Moore denounced Trump's racism and nativism during the 2016 election, and struggled unsuccessfully to persuade his fellow evangelicals that they would betray their principles if they supported Trump. Moore's opposition to Trump almost cost him his job.<sup>98</sup>

Is Moore really the enemy?

When Churchill was asked whether, in helping Stalin resist Hitler's invasion, he was compromising his anticommunist principles, he responded: "Not at all. I have only one purpose; the destruction of Hitler, and my life is much simplified thereby. If Hitler invaded Hell, I would make at least a favorable reference to the Devil in the House of Commons."<sup>99</sup> Our purpose should be

95. Zack Ford, *Inside the Southern Baptists' New, Media-Savvy Approach To Homosexuality*, THINKPROGRESS (Oct. 31, 2014, 2:24 PM), <https://thinkprogress.org/inside-the-southern-baptists-new-media-savvy-approach-to-homosexuality-a44d7eb3e143/>.

96. RELIGION NEWS SERV., *Evangelical Leader Russell Moore Denounces 'Ex-Gay Therapy'*, HUFFPOST (Oct 28, 2014, 2:28 PM), [https://www.huffpost.com/entry/russell-moore-ex-gay-therapy\\_n\\_6062474](https://www.huffpost.com/entry/russell-moore-ex-gay-therapy_n_6062474).

97. Shannon Price Minter, *Belief and Belonging: Reconciling Legal Protections for Religious Liberty and LGBT Youth*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND 38, 38 (William N. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).

98. Chris Moody, *The Survival of a Southern Baptist Who Dared to Oppose Trump*, CNN POLITICS: STATE (July 2017), <https://www.cnn.com/interactive/2017/politics/state/russell-moore-donald-trump-southern-baptists/>.

99. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 178 (2010).

preventing parents from making their gay children homeless. Our life should be much simplified thereby.

*G. Insult*

It is pernicious to say or imply that gay people are intrinsically defective and irredeemable; that because of their unchosen desires, they deserve eternal punishment. Can one live with people who think and say that? We already do. That's what Calvinists think and say about everyone. Only the unmerited grace of God saves (some of) us. They inflict dignitary harm on the entire human race. We can live with it.

Both gay people and religious conservatives seek space in society wherein they can live out their beliefs, values, and identities. As with the old religious differences that begot the Establishment Clause of the First Amendment, each side's most basic commitments entail that the other is in error about moral fundamentals, that the other's entire way of life is predicated on that error and ought not to exist.

I feel that way about my conservative friends who believe that no one should ever engage in homosexual sex. They are gravely and tragically wrong. It is deplorable that they believe what they believe. It would be a better world if no one held these particular religious views. They should be ashamed of themselves and repent that they ever believed these things. It is good that their view is (slowly!) disappearing. "Their children's children shall say they have lied."<sup>100</sup>

But of course they feel the same way about me. So what are we supposed to do?

Disagreement about moral fundamentals is nothing new. It is the chronic human condition. The point of freedom of speech and religion is not to end these conflicts, but to redirect them to non-violent channels. Their nonviolence does not mean that they will be pleasant. There are also potential alliances that shouldn't be neglected. Conservative Christianity has something to say about today's most pressing gay rights issues: violence and homelessness.

Here's the last analogy with racism. It's an awful, hurtful idea, and it's distressing to encounter it. So is heterosexism. That

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100. W. B. YEATS, *He Thinks of Those Who Have Spoken Evil of His Beloved*, in THE COLLECTED POEMS OF W. B. YEATS 65, 65 (definitive ed. 1956).

analogy, however, points in the direction of toleration. We tolerate racist speech.

There is one harm that the state mustn't protect you from: the specific offense of discovering that some of your fellow citizens despise what you hold sacred. The harm here is of the same kind as the harm caused by blasphemous or heretical speech.

Free speech welcomes, what many people will find painful, the open collision of moral views. When John Stuart Mill's classic defense of free speech balances liberty against harm, Jeremy Waldron has observed, that balancing cannot count as harm the moral distress of having your most cherished views denounced, or of contemplating ways of life antithetical to your own.<sup>101</sup> A core value of free speech is that it will and must induce such distress. Mill, and liberalism more generally, places great value on "*ethical confrontation*—the open clash between earnestly held ideals and opinions about the nature and basis of the good life."<sup>102</sup> Moral distress, "far from being a legitimate ground for interference, . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."<sup>103</sup> Part of the reason for protecting illiberal ideas is that they promise to induce that distress.<sup>104</sup> This valorization of moral distress is not peculiar to Mill. It is a central part of the free speech tradition.<sup>105</sup>

The gay rights movement was permitted, by free speech law, to disseminate views that were almost universally regarded as so offensive to religious sensibilities as to be intolerable.<sup>106</sup> Freedom of speech permitted gay people to escape that societal institution of

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101. See JEREMY WALDRON, *Mill and the Value of Moral Distress*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 115, 117 (1993).

102. *Id.* at 120.

103. *Id.* at 125. Waldron's more recent call for restriction of hate speech is in tension with this argument. See Andrew Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L.J. 1201, 1215-21 (2011).

104. This is one reason why the protection of dissent is so central to the free speech tradition. See STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990).

105. JOHN DURHAM PETERS, *COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION* (2005); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647 (2013).

106. See BALL, *supra* note 50; WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 93-96, 116-23 (1999).

solitary confinement familiarly called “the closet.”<sup>107</sup> The movement was allowed with impunity to provoke enormous moral distress in its adversaries.

Robert Frost famously said: “A liberal is a man too broad-minded to take his own side in a quarrel.”<sup>108</sup> But liberalism is in fact a demanding creed.<sup>109</sup>

Often there’s no joy in discovering what others really think of the gods we worship. It is more comfortable to fantasize that everyone basically agrees with us about fundamentals. The suppression of blasphemy and heresy thus encourages a kind of solipsism.<sup>110</sup> If we are going to have transparency, if we are to escape the solitary confinement of our own minds,<sup>111</sup> then we are going to have to learn to live with moral confrontation.

America tolerates racism. It lets racist citizens think for themselves and pursue their ideals, as long as they do so non-violently. They can even cause dignitary harm by preaching their loathsome views. Americans have managed to resist Communism and Naziism without the state hectoring us about them.<sup>112</sup> The enemy is heterosexism. It is not the occasional merchant who dissents from antidiscrimination laws. We can work to eliminate his ideas without eliminating him.

### III. I’M NOT GOING TO HURT YOU

I’ve been a gay rights advocate for more than thirty years.<sup>113</sup> I’ve worked very hard to create a regime in which it’s safe to be gay. I’d

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107. See ESKRIDGE, *supra* note 106, at 18.

108. The quote may have not been original with Frost. See Barry Popik, “A Liberal Is a Man Too Broad-Minded to Take His Own Side in a Quarrel,” BIG APPLE (Dec. 6, 2009), [http://www.barrypopik.com/index.php/new\\_york\\_city/entry/a\\_liberal\\_is\\_a\\_man\\_too\\_broad\\_minded\\_to\\_take\\_his\\_own\\_side\\_in\\_a\\_quarrel/](http://www.barrypopik.com/index.php/new_york_city/entry/a_liberal_is_a_man_too_broad_minded_to_take_his_own_side_in_a_quarrel/) [https://perma.cc/R3MF-X3EE].

109. See Andrew Koppelman, *Unparadoxical Liberalism*, 54 SAN DIEGO L. REV. 257 (2017).

110. On the relation of censorship and solipsism, see Andrew Koppelman, *Another Solipsism: Rae Langton on Sexual Fantasy*, 5 WASH. U. JURIS. REV. 163 (2013).

111. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 88–91 (2014).

112. For more discussion on racism and free speech, see Andrew Koppelman, *You’re All Individuals: Brettschneider on Free Speech*, 79 BROOK. L. REV. 1023, 1030 (2014).

113. See, e.g., KOPPELMAN, *ANTIDISCRIMINATION LAW*, *supra* note 54, at 146–76; Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001), reprinted in 1 DUKEMINIER AWARDS: BEST SEXUAL

also like that regime to be one that's safe for religious dissenters. The notions that gay people are obligated to lifelong celibacy, or that marriage is inherently heterosexual, are grave moral errors. (I can't argue that here, though I have done so elsewhere.) But that does not mean that state power must unrelentingly be used to eradicate these ideas.

In the relatively bland religious environment we inhabit, we have forgotten what real religious diversity is. It was once widely agreed that there was only one true path to salvation, and that other people's beliefs were leading them to Hell. Toleration became the rule not because people no longer believed this, but because they became persuaded that the coercive use of state power wouldn't help; state religion is likely to be corrupted religion.<sup>114</sup> Religious liberty is fundamentally about tolerating ideas we regard as odious.

I would very much like to banish to the margins of society the notion that homosexual sex is inferior to heterosexual sex. I want gay people to suffer no disadvantage or humiliation whatsoever because there are other people who believe that nonsense. (Again, with acknowledgement of those of you in the audience who do believe that nonsense.) But I also believe that the margins of society should be a safe place, where those who do not conform to

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ORIENTATION L. REV. 49 (2001); Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923 (2010); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Koppelman, *Is Marriage Inherently Heterosexual?*, *supra* note 25; Koppelman, *Judging the Case*, *supra* note 22; Andrew Koppelman, *Response: Sexual Disorientation*, 100 GEO. L.J. 1083 (2012); Koppelman, *Why Discrimination*, *supra* note 82; Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131 (2013); Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988). I coauthored amicus briefs in *Lawrence v. Texas* (the Supreme Court case that invalidated laws against homosexual sex), and *Hollingsworth v. Perry* and *Obergefell v. Hodges* (both of which considered a right to same-sex marriage). See Brief of Amici Curiae Constitutional Law Professors Bruce A. Ackerman et al. in Support of Petitioners, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139; Brief of Amici Curiae William N. Eskridge Jr., et al. in Support of Respondents, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144), 2013 WL 840011; Brief Amicus Curiae of Legal Scholars Stephen Clark et al., *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556), 2015 WL 1048436. The argument that I developed in 1994—that antigay discrimination is a form of sex discrimination—has been adopted by two federal courts of appeals. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017). I coauthored a Supreme Court amicus brief defending that result. Brief of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618), 2019 WL 2915046.

114. I document the history of this idea in detail in Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831 (2009).

majoritarian norms, and whose views I regard as disastrously misguided, can live their lives in peace and security.

I take as my model the boxer Sugar Ray Robinson.

My father, George Koppelman, grew up near New York City. He told me the following story. A friend of his entered the city's amateur boxing competition, the Golden Gloves. He unexpectedly found himself matched against Robinson.

Robinson is regarded by many sportswriters as the greatest fighter of all time. He held the welterweight title from 1946 to 1951 and won the middleweight championship five times between 1951 and 1960. During his amateur career, in which he won Golden Gloves titles in 1939 and 1940, he was undefeated, 85-0, with 69 knockouts, 40 of them in the first round.<sup>115</sup>

My father's friend (I don't remember his name) was terrified, and evidently it showed. As they touched gloves before the fight began, Robinson leaned toward him and whispered, "Don't worry. I'm not going to hurt you. I'm just going to win."

Robinson easily beat him on points and never hit him very hard.

The gay rights movement should emulate Robinson's strategy. We shouldn't want to hurt them. We should just want to win.

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115. TOM DONELSON, VIEWING BOXING FROM RINGSIDE 141-42 (2002).