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Anti-Gay Discrimination,
“Conscience Exemptions,” and the Racism Analogy:
A Reply to Professor Koppelman

Shannon Gilreath*

Nothing short of everything will really do.
– Aldous Huxley¹

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INTRODUCTION

In 2016, I published an article, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy* (hereinafter *Race Analogy*),² in which I painstakingly explained the “racism analogy” at which Professor Koppelman directs his lecture. Our approaches to the subject differ in critical ways, some of which Professor Koppelman highlights in his response to my work.³ The primary purpose of my earlier *Race Analogy* piece was to debunk the myth perpetrated by

* © 2019, Shannon Gilreath. Professor of Law and Professor of Women’s, Gender, and Sexuality Studies, Wake Forest University. I sincerely thank Professor Andrew Koppelman and the BYU Law Review for this invitation.

1. ALDOUS HUXLEY, ISLAND 160 (1962).

2. Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237 (2016).

3. See Andrew Koppelman, Lecture at the Brigham Young University Law School Annual Law and Religion Symposium: *Gay Rights, Religious Liberty, and the Misleading Racism Analogy* (Sept. 18, 2019), in 2020 BYU L. REV. 1, 21 [hereinafter Koppelman Lecture].

some scholars that religious opposition to same-sex marriage was somehow unique in our history and, therefore, that the law was bound to respond to a unique problem in unique ways.⁴ Since even a cursory familiarity with civil rights history proves this untrue, I felt it was necessary to provide some facts.

But it was an article I resisted writing for a very long time. I don't like the analogy of sexuality discrimination to race discrimination. I don't like appropriating the pain and struggle of others to make a point. And I shouldn't have to. Why should my discrimination have to be like some other discrimination in order to be seen as real and really injurious? Can't gay people matter simply for who we are and what we face? Why should any marginalized people be forced to play the oppression sweepstakes in order to make any progress? Similarly, the reverse argument—the “homophobia is wrong, but it's not as bad racism” argument—is little more than an evasion. At its worst, it's a direct guilt ploy. “If you haven't had it as bad as *they* did,” the argument goes, “what's the fuss about? Be grateful.” Professor Koppelman gives us a bit of this argument in his lecture.

Thus, being aware of the gamut, my point in *Race Analogy* was never to suggest that race discrimination and sexuality discrimination are exactly the same, but merely that, in a legal system that proceeds by analogy, history and precedent cannot be ignored simply because they are inconvenient for the pro-conscience exemption advocates. Professor Koppelman is one of the scholars whose work I criticized sharply in that article, particularly his scholarship on a Title II defense of anti-gay discrimination⁵ in the form of so-called conscience exemptions. To my great surprise, he wrote me a friendly letter about the piece, not agreeing with all, of course, but acknowledging the importance of the work just the

4. Gilreath & Ward, *supra* note 2, at 244–48.

5. *Id.* at 256–47 (critiquing Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619 (2015)). I realize Professor Koppelman has been “a gay rights advocate for thirty years.” Koppelman Lecture, *supra* note 3, at 30. I do not dispute his bona fides in this regard. However, what he is defending in the context of antidiscrimination exemptions is *discrimination*. It is simply a form of discrimination that he finds tolerable. From his perspective, it is, I suppose, only “tepidly” anti-gay, to use Judge Richard Posner's miserable coinage. See *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668, 676 (7th Cir. 2008). There is and will be no real equality for gay Americans until straight people no longer find it excusable to ask gay people to bear forms of discrimination straight people find tolerable. There is and will be no equality if it is not substantive and, dare I say, total in this way. That is the goal of my gay rights advocacy.

same.⁶ In fact, as a matter of full disclosure, I have seen some of Professor Koppelman's ideas presented in this Special Issue before, since he asked me to review them in an earlier draft form as part of a larger project. While I still cannot say that I agree with his perspective, I greatly admire his magnanimity in the face of pointed criticism. In an area of scholarship and activism where the players are notoriously thin-skinned, his response was fresh and welcome.

I must say, however, that I was surprised to see that the draft of his lecture provided to me does not really engage the legal argument presented by my *Race Analogy* piece to any appreciable degree. Unfortunately, Professor Koppelman's lecture reads instead as a string of hitched-together non sequiturs comprising a meandering essay on philosophical questions of "evil" and what he sees as malicious religious intolerance and poor sportsmanship on the part of gay people. The lecture does not read as a serious rejoinder to arguments about the purposes for and operation of antidiscrimination law.

The race analogy that has always concerned me is the legal analogy – the one I carefully researched and developed in my *Race Analogy* piece, focusing on the historical and legal anti-equality consequences of race-based and sexuality-based discrimination and the antidiscrimination law responses that have been developed and are still developing. Consequently, for the most thorough rebuttal I know of to Professor Koppelman's argument here, I can do no better than to direct readers of this Special Issue to my earlier *Race Analogy* article.⁷

I will confine my succeeding comments, in what was supposed to be a short piece, primarily to Professor Koppelman's direct engagement with my earlier work. I will first address the appropriate framing of the issue at hand, then move on to the purposes of antidiscrimination law, and, finally, offer some thoughts on what appears to be Professor Koppelman's overriding concern—namely, his fear that religionists will be unfairly

6. Email from Andrew Koppelman, Professor of Law and Professor of Political Science, Department of Philosophy Affiliated Faculty, at Northwestern University, to Shannon Gilreath (Dec. 6, 2018) (on file with author).

7. In *Race Analogy*, I also outline the powerful legal argument that the kind of opt-outs Koppelman supports are unconstitutional as a matter of both equal protection and substantive due process. That is a critical piece of the debate that should not be missed. See Gilreath & Ward, *supra* note 2, at 268–78.

stereotyped as bigoted or “evil” if they refuse goods and services to gay people.

I. DEFINITIONS AND FRAMING

First, I must say a word on language and definition. Language can be deployed in ways that unfairly inflate stakes and obfuscate intentions. We live in a cultural and political moment when language has become even more Orwellian than Orwell could have imagined. Language is co-opted, often disingenuously and cynically, for political advantage. Anti-reproductive rights forces are now marshalled under the banner of “pro-life.” Illegal immigrants are now merely “undocumented persons.” The list gets longer, and inscrutably, for me anyhow, the public seems to roll over to this capture, accepting without much resistance other people’s labels and framing.

I have this problem with the way Professor Koppelman frames the subject. Professor Koppelman asks: “Should religious people who conscientiously object to *facilitating* same-sex weddings, and who therefore decline to provide cakes . . . or other services, be exempted from antidiscrimination laws?”⁸ “Facilitating” is vocabulary loaded to the point of breakage. Now, even though Professor Koppelman later elides (without convincing argument) analogy between interracial marriage and same-sex marriage, let’s look at the same moment of discrimination through this lens. Let’s imagine that an interracial couple, black and white, shows up to the same bakery for a wedding cake. Let’s imagine that the baker says, “I refuse your patronage not for any racist motive [i.e., not exactly on the basis of your race as an individual customer], but rather because I view selling you a cake to be ‘facilitating’ the separate sin of your interracial marriage.” It isn’t hard to see the race-based discrimination at work, even though we are asked to ignore the fact that this separate “sin” of interracial marriage is itself predicated on the race of those involved, such that race is acting in exactly the invidious role we have agreed as a society (either nationally or at a more local level) that the law ought to prohibit. In other words, but for the race of those presented, the service would not be denied.⁹ That is race-

8. Koppelman Lecture, *supra* note 3, at 1 (emphasis added).

9. It must be noted at this juncture that the absurd distinction between individuals subjected to obvious discrimination and the defense of that discrimination as merely against

based discrimination simpliciter. The substitution of sexuality for race in this scenario raises no respectable difference grounded in legal principle. The only difference is one insisted on by Professor Koppelman for reasons reducible to, "Because I say so."¹⁰

Now, let's drill down a bit further. Can we take "facilitating" seriously at all in the context of the provision of a general commercial service? For example, let's imagine that Professor Koppelman and I continue to be friendly acquaintances even after a continued airing of our disagreements. (I hope so.) Let's imagine that I decide to buy a cake for him on his next birthday. I go down to my local bakery and ask Marge behind the counter to sell me a cake and write "Happy Birthday, Andy!" on it. I present the cake to Professor Koppelman. Do any of us really expect Professor Koppelman to rush down to the bakery and thank Marge for the birthday wishes? Of course not. And that is because we recognize immediately that Marge has nothing whatever to do with the cake's message or the celebration of which it is a part.

In this light, the "facilitation" happens exclusively in the head of the offended service provider. It is far less serious than the conscience objection claimed by clerks who do not want to issue marriage licenses. A clerk offended by the "sinful" actions of those who present for a license can at least claim with a straight face that his signature on that license effectively facilitates (i.e. permits or enables) the marriage. But I have argued that an exemption even as narrow as this is misguided policy and unconstitutional law. Professor Koppelman argues for exemptions far wider than this, encompassing even the general stream of commerce.

In the system advocated for by Koppelman, the law is supposed to accept the discriminator's definition of facilitation, ignoring that the same commercial act only becomes "facilitation" when the provider realizes the sexual orientation of the customer. In other words, the discrimination is propagandized as only tepid, somehow less discriminatory, because it is focused on the act of the

the *actions* of those targeted is supremely ridiculous. After all, this was the distinction upon which all of Jim Crow was predicated. See Gilreath & Ward, *supra* note 2, at 245-51.

10. Professor Koppelman truly makes no case. His lecture is full of non sequiturs like this: "Racism remains a powerful force in American culture and politics. A zero tolerance response is appropriate . . . [but] it is not necessary for the tension between gay rights and the rights of religious liberty to be addressed at the level of high principle." Koppelman Lecture, *supra* note 3, at 19 (footnote omitted).

marriage, not, so it is argued, on the identity of the customer. But that is plainly not the case, since the discrimination is predicated on the individual reality of the customer and perpetrated against individuals.

It must be noted at this juncture that the distinction between individuals subjected to obvious discrimination and the defense of that discrimination as merely against the actions of those targeted is supremely ridiculous. After all, this was the distinction upon which all of Jim Crow was predicated. It was the *act* of integration—the act of dining together, attending school together, being transported together, and so on—that the laws prohibited. Nowhere is this plainer than in the state of Virginia’s defense of its anti-miscegenation law, which was declared unconstitutional in *Loving v. Virginia*.¹¹ In *Loving*, the state argued that no prohibited racial discrimination was occurring, since the law focused only on the prevention of the act of interracial marriage equally for everyone—the prevention of which was actually good for the integrity of all races.¹² The fact that echoes of this logic persist in gay rights scholarship in the twenty-first century does give one a shiver. Mercifully, the Court saw through it. The Court ultimately did not share Professor Koppelman’s fixation on good or bad motives for discrimination.¹³

These observations lead me to consider Professor Koppelman’s primary frame, that of “religious liberty.” His is a conception of religious liberty that I cannot endorse. Religious liberty is about the safeguarding of religious belief and its attendant religious celebration. Any man may worship the god he chooses in any religious ceremony he chooses. The government may not punish him for that, nor by extension should non-governmental employers, landlords, etc., punish him. But the view of religious liberty Professor Koppelman endorses is an extreme version. It insists that religionists must not only go unmolested for their beliefs but that they are also entitled to molest others through invocation of their religion—all while shielded by the law. What

11. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

12. There are those who would argue that the state was insincere. That’s probably true. But I am no more prepared to take religionists claiming exemptions at their word than the Court was to take the state of Virginia at its word. I am not qualified to assess the operation of any man’s mind in this way. Far better to let antidiscrimination law do its job.

13. Koppelman Lecture, *supra* note 3, at 12-13.

could possibly go wrong in this scenario? In context, “religious liberty” is deployed to mask a call for special rights for religionists. They must be allowed to violate the law as their conscience guides them. This is certainly not a view of religious liberty endorsed by the Court.¹⁴ And even though the Court left open the possibility of the grant of exemptions in certain situations, those exemptions must still – must always – pass constitutional muster.¹⁵ As I have argued earlier, the kind of special discrimination rights Koppelman endorses as “conscience exemptions” cannot survive constitutional challenge.¹⁶

II. DISCRIMINATION: THE REAL AND THE UNREAL

I must admit that I found Koppelman’s description (implicitly so, at the least) of anti-gay religion as “fantasy” rather delicious.¹⁷ But a fantasy and discrimination on account of it are two fundamentally different things. A fantasy stops in your head. I’m not interested in policing people’s thoughts or beliefs. I’m not interested in “evil” as a philosophical concept in the way Koppelman presents it. I’ll leave that to the philosophers and preachers.

I’m a lawyer. I’m interested in rights and discrimination in the context of the Fourteenth Amendment’s commitment to equality. I don’t care at all what people believe, what they think of gay people, or, certainly, whether they like me. I only care when they attempt to diminish the equal citizenship to which I am entitled by the Fourteenth Amendment’s constitutional commitment to equality, which is every bit as real as the First Amendment’s commitment to free exercise of religion, and which also may be safeguarded by state and local laws created in that same spirit.

But the injury religious people claim they face by having to engage abstractly in commerce with the concept of same-sex marriage really is a fantasy – an injury that stops in their heads and does not take from them any material benefit or opportunity. The injury they claim is the equivalent of someone saying, “I believe I am Batman, and I refuse to engage with anyone who might challenge my belief that I am Batman.” They have experienced no material

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

15. See Gilreath & Ward, *supra* note 2, at 268–78.

16. *Id.*

17. Koppelman Lecture, *supra* note 3, at 15.

costs—no lost services or opportunities. What separates discrimination in the real world from the delusions in one man’s head is the presence of these costs. Once invidious prejudice is allowed to operate in reality and someone else is made to pay for the prejudicial fantasies of another, whatever the origins or sincerity of those prejudices, material discrimination is at work. This is the concern of antidiscrimination law.

To this basic and unavoidable legal reality, Professor Koppelman has an answer that itself can only be described as fantastical. To my earlier argument that refusing to cover a historically marginalized group like gay people from commercial discrimination would make gay people “a legal underclass that can be deprived of all manner of services and accommodations under the imprimatur of the state,”¹⁸ Koppelman responds that “[a]ll citizens . . . are already in this ‘underclass,’ unless the deprivation is based on a forbidden category of discrimination.”¹⁹ Setting aside for a moment the obvious, which is that the kind of special discrimination exemptions Koppelman advocates would be needed only in a jurisdiction that *has forbidden* discrimination on account of sexual orientation, the statement is still fanciful—made only more so by the explanation he provides. “Merchants,” he writes, “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.”²⁰ This is a law school hypothetical worthy of Lewis Carroll. What’s little is big; what’s short is tall; what’s unreal is real. But anti-discrimination law must operate in reality, not fiction. To say that all citizens are already in the underclass is entirely hyperbolic in the context of a serious discussion of discrimination. The argument about “at will” employment, in which Professor Koppelman claims everyone is already in an underclass,²¹ may make sense in a world where the risks to people born in August or people who refuse to indulge their delusional neighbors in their belief that they are Batman are diffused—spread across a huge population of people. But that is not what’s happening. Nobody is turning away African Americans from potential employment because they

18. Gilreath & Ward, *supra* note 2, at 277.

19. Koppelman Lecture, *supra* note 3, at 22.

20. *Id.*

21. *Id.*

happen to be born in August. They are, however, turning away gays from employment, from goods and services, from housing, and from medical care (and many would turn away blacks, too, if the law didn't prohibit it). Transforming real discrimination into fiction doesn't help reduce the real opportunity costs that gay Americans face for no other reason than that they are gay.²²

As for Koppelman's belief that "market incentives" are workable alternatives to antidiscrimination law in most, if not all, situations²³ – what one might call the "trickle-down theory" of civil rights – I must say that it proceeds from a certain privileged vantage point. The irony is not lost on me that legal antidiscrimination protections for gays most often exist in places where they are, relatively speaking, least needed. But in the South, where I grew up and still live, the possibility that all or nearly all providers of a good or service in a particular locale would refuse to provide the good or service to gays is not hypothetical. It is real. The "occasional" discriminatory baker or florist is every, or nearly every, baker or florist. For me, gays and their constitutional right to equality matter everywhere. James Baldwin understood that environment is of paramount importance. It is why he felt he had to go the belly of the beast – the South – in order really to understand segregation.²⁴ This is reality for gay people, not merely a convenient rhetorical device on my part. Moreover, as I have said, "any system of subordination exists and subsists by rendering the inferior dependent upon the superior."²⁵ In other words, as long as gay people must negotiate something less than a constitutional entitlement to equality (and must do so on straight people's terms) there will be no real equality. After all, if the people now demanding the right to affirmatively discriminate against gays and lesbians in the general stream of commerce had any intention of adhering to the Great

22. Professor Koppelman here acknowledges that there are some forbidden categories of discrimination, including race. He does not go far at all in explaining why discrimination on account of an innate characteristic like sexual orientation is, in his view, more like birth-date discrimination than it is race-based discrimination.

23. Koppelman Lecture, *supra* note 3, at 22.

24. JAMES BALDWIN, *No Name in the Street*, in *THE PRICE OF THE TICKET: COLLECTED NONFICTION 1948-1985*, at 449, 476-81 (1985).

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

Commandment²⁶ without the force of law, there would be no reason for us to be having this debate.

Professor Koppelman's and my root disagreement comes from a fundamental difference in opinion about what's really at stake. He sees antidiscrimination laws as correcting or ameliorating individual episodes of discrimination. On the other hand, I see them as guarding against the systematic oppression of people, in ways large and small, based on their assignment to an othered caste that always makes of them an experimentation ground for new forms of oppressive conduct that render them materially (not merely theoretically) unequal. The fact that some gays might escape the caste makes it no less real, no less oppressive, and, yes, in circumstances far more numerous than are ever admitted, no less lethal. Of course, I do not believe, and have never suggested, that religion should never be accommodated. For example, I've always thought the Catholic adoption agency cases²⁷ were wrongly decided. Where churches themselves (or their other non-profit iterations) are performing a service, I think they should be able to do so in complete adherence to their stated religious preferences.²⁸ But extending this license to any *individual* in the general stream of commerce (or representative of the state, which I discuss in my *Race Analogy* article) makes religious exercise a constitutional super value,

26. See *Mark* 12:28–34. This commandment is often paraphrased in English with the “Golden Rule” of “Do unto others as you would have them do unto you.”

27. See, e.g., *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019).

28. A student editor from this law review asked me a very perceptive question about this statement. Why, he wanted to know, would allowing churches to discriminate not also produce the kinds of aggregate effects I am concerned with in this essay? Is it because there are too few churches, too few services being performed, or just that services outside the stream of commerce are less problematic? All of his observations on the point are correct. There would be aggregate inequality. It would be tempered in scale. But, beyond this, I also believe that a balance must be struck where churches are concerned because it is simply inconceivable to me that a church performing a charitable function that is not-for-profit in any real sense is not exercising religion in a way that must be covered by the First Amendment's free exercise commitment. Gore Vidal once told me he thought the Framers had wanted “God thrown out the window” in Philadelphia. I don't share his certainty on that point, but I don't mind saying that I think the country may have been better off ultimately if he were right. Nevertheless, the First Amendment does protect free exercise of religion. While I think it is an unsupportable stretch to say that the Founding concern over religious persecution would cover such quotidian commercial transactions as the sale of a cake, I can't see my way to a position that would deny a church the ability to do charity work on its own doctrinal terms (however uncharitable I might find the behavior personally).

which my reading of the Constitution, particularly its commitment to equal protection, does not permit.

III. THE BANALITY OF KOPPELMAN'S "EVIL" (WITH APOLOGIES TO ARENDT²⁹)

Professor Koppelman is concerned with "evil," especially with the idea that those who mistreat (or worse?) gay people may be labeled evil. A chief complaint he lodges against me is one to which I will not accede, namely that I think "[r]eligion is the enemy and must be fought at every turn."³⁰ A fair portion of my youth was spent as a Southern Baptist. In my teens, I converted to Roman Catholicism. I have loved people of many faiths and experienced their love of their neighbor reflected in many kindnesses to me. I certainly do not see all religious people as "hateful demons"³¹ or "unchangeably evil."³² For one thing, it is not my right nor my expertise to make such pronouncements. For another, you don't do the work I have done for nearly two decades without an abiding and optimistic belief that people can change.

Now, admittedly, a religion of exclusion may be far from my idea of what makes an ethical spirituality or an ethical life; after all, the sacred requirements to feed the hungry, clothe the naked, and visit those in prison must seem monumentally difficult, if not impossible, for those whose faith can be punctured by the *sale* of a cake. In the event, "as ye have done it unto one of the least of these my brethren, ye have done it to me,"³³ must prove the equivalent of a spiritual interrogation light under which to make that call. But the spiritual dimension of that choice is between them and their god, and I am content to leave it there. I am not interested in making moralistic judgments about the good or ill of their motives, as Koppelman is.³⁴ Such a judgment is unfair, for it calls for an understanding of the operation of another man's mind in a way

29. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963).

30. Koppelman Lecture, *supra* note 3, at 23.

31. *Id.* at 15.

32. *Id.*

33. *Matthew* 25:40.

34. Koppelman Lecture, *supra* note 3, at 9-17.

that I (nor anyone) is qualified to make.³⁵ Rather, I am interested in material outcomes in the real world—the business of the law. Countee Cullen wrote that, “My conversion came high-priced / I belong to Jesus Christ.”³⁶ I may not always sing the “Amen,” but the only thing I’m interested in resisting is when the converted demand that others pay the high price for their faith. On that demand have history’s injustices, too innumerable to be named, too often been predicated.

Relatedly, Professor Koppelman seems to think that I have said that all religious people mean to do gay people violence.³⁷ I never said that. I took issue with the fact that Professor Koppelman has said that people who perpetrate physical violence against gay people “are not motivated by moral objections to [gay people’s] conduct.”³⁸ To this wholly unsupported claim, I simply inquired as to exactly how many such perpetrators he’s interviewed. How would he know?

While I could cite many examples of anti-gay abuse in which perpetrators have directly invoked religious inspiration, this is still far from a claim that all religious people mean to do me harm or support it. Koppelman is attacking an argument I have never made. What I said was much more realistic (and, perhaps, therefore, necessary to elide): “When religious ethos brands gays as untouchable, unnatural, and abominable, the fact that they can be harmed with impunity should be no surprise.”³⁹ Like any monster (Koppelman’s verbiage, not mine⁴⁰), the monster of homophobia cannot necessarily be contained by its creator—it takes on a life of its own. But surely no one is naïve or dishonest enough to claim that homophobia as we know it now would exist without religion’s “thou shalt not.”⁴¹ This connection might be easier to miss for

35. I am, moreover, indifferent to the question. Relatedly, I don’t care, as Koppelman seems to, whether anti-gay religious believers are using their religion as a “cover” for something else—“something nasty.” Koppelman lecture, *supra* note 3, at 4. I am by no measure politically correct. I have no problem condemning an abusive religious practice as nasty in itself. I don’t need a proxy. Be that as it may, I also firmly believe that people have a right in this country to hold whatever odious and indefensible beliefs they like, and they can call them whatever they like. My objection as a lawyer and legal scholar comes when they insist that the rest of us pay public prices for those beliefs.

36. Countee Cullen, *Heritage*, THE SURVEY (Mar. 1, 1925), at 674–75.

37. Koppelman Lecture, *supra* note 3, at 22–23.

38. *Id.* at 22 (quoting Gilreath & Ward, *supra* note 2, at 257).

39. Gilreath & Ward, *supra* note 2, at 257.

40. Koppelman Lecture, *supra* note 3, at 21.

41. *Leviticus* 18:22.

someone who can write that my argument “overstates the role of religion, and understates the role of masculine gender anxiety, in the violence that does take place,”⁴² obviously failing to notice that said religion is patriarchal to the core and gendered to the ground. Real life simply isn’t divisible into religion in one box and all consequences in another box. Nor is it possible to pretend that a “few dissenters” who are “conservative Christian wedding vendors” “just want to be left alone.”⁴³ Even if they do aspire only to that, they do not exist in a vacuum. Discrimination is not merely arithmetic. Every “thug” who beats up gay people may not do so for consciously religious reasons, but the act is never truly divorced from its social context. Antigay acts don’t happen in a vacuum.

A cultural context in which gays can successfully be branded “other,” inarguably usually as a result of a root religious ethos, creates the environment that cossets killers. This simply is true, whether or not any particular killer kills in God’s name. So, if there is a trope that all religious conservatives yearn to do physical violence against gays, it certainly isn’t my trope. But it’s also a delusion—a uniquely American delusion—that antigay rhetoric and propaganda, usually couched as defensible religious morality, isn’t related to the ultimately very real physical perils still faced in this country by gays and lesbians. Such a supposition is no more believable for me than was the ACLU’s position that the ethos created by preachers claiming that abortion doctors are murderers killing God’s precious babies and, therefore, that these doctors do not deserve life themselves wasn’t related—in a causal way—to the abortion clinic bombings that plagued the nation not so long ago.⁴⁴ Context matters.

Quite obvious to anyone who studies the history of marginalized people and the links between social obloquy and violence is that a public campaign of systematic stigma and dehumanization of a targeted minority enables killers.⁴⁵ Such a social reality must be fought at every turn. It must be opposed. If Koppelman sees that as

42. Koppelman Lecture, *supra* note 3, at 23.

43. *Id.* at 2, 25.

44. *Trial to Decide if Anti-Choice Site, Posters Constitute Threat to Doctors*, ACLU (Jan. 8, 1999), <https://www.aclu.org/press-releases/trial-decide-if-anti-choice-site-posters-constitute-threat-doctors>.

45. I have examined this stigma and its effects at length elsewhere. See SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* 111–68 (2011).

coterminous with a condemnation of all religion, that's on him. It doesn't matter, as Koppelman seems to think it does, that most religious people who believe homosexuality is sinful won't answer a survey saying they also believe gay people should be killed because of it.⁴⁶ Returning to the race analogy at hand, it's unfathomable to believe that all whites (if they had been) surveyed during Jim Crow would have said blacks should have been subjected to violence with impunity (at least, if they stayed in line), but the system of social apartheid and inhumanity enshrined in a legal system that allowed unequal treatment certainly made the violence possible and real. That's indisputable.⁴⁷

Again, I understand that this all may be hard to see for someone like Koppelman, who can write:

Discrimination and violence – open, unapologetic, hateful – have been part of their [gay] experience since adolescence. If you are subjected to enough of that stuff, you are going to see the danger of it everywhere. It is hard to get your mind around the fact that the vicious monster who abused you is now in hospice care.⁴⁸

Would that it were. But as I showed in response to that 2015 statement by Professor Koppelman,⁴⁹ which appears in his Brigham Young lecture unaltered,⁵⁰ material reality gives the lie to his conclusion. At the time Koppelman first made the statement, gay people were – in that moment – accounting for two in every five bias-related murders in the United States.⁵¹ Think about that. Gay people are, by the way, only about four percent of the population. Twenty percent of all hate crimes committed in the United States had us as the target.⁵² That number hasn't changed much from last reporting according to the FBI's most recently released report for 2018.⁵³ And, yet, somehow, Koppelman can write, apropos of

46. Koppelman Lecture, *supra* note 3, at 23.

47. Koppelman admits this. "Violence was integral to the system that religious racists sought to defend." *Id.*

48. See Koppelman, *supra* note 5, at 648–49. I objected to this gross overstatement vigorously with evidence of its fallacy. See Gilreath & Ward, *supra* note 2, at 256–58.

49. See Gilreath & Ward, *supra* note 2, at 256–58.

50. Koppelman Lecture, *supra* note 3, at 21.

51. Gilreath & Ward, *supra* note 2, at 257.

52. *Id.*

53. See *Hate Crimes Statistics for 2018*, FBI, <https://www.fbi.gov/investigate/civil-rights/hate-crimes> (last visited Mar. 20, 2020).

nothing at all, that “Religious heterosexism is generally nonviolent.”⁵⁴ I joked to a friend that this Paper may mark the first time I have had to type a “sigh” into an academic paper. Somehow, as I write these words, it no longer feels even remotely like a joking matter.

Gay youth are disproportionately homeless, addicted, and truant or drop-out, and less likely to pursue higher education than their straight counterparts.⁵⁵ The effects of a society in which gay people have long been and remain branded with a second-class status, recognized in law, are real—and the costs are not marginal. Too many allies, academic and otherwise, have the nasty habit of measuring progress by counting noses (there are more gays—visibly—in places where we had never been before than ever before) without noticing whether the bodies to which those noses belong happen to be living or dead.⁵⁶ The stigma we have borne as a legal underclass in this country has made the reality that I document here possible; it has provided the artificial nutrition and hydration to the monster that would, in fact, be better off dead. Koppelman seems determined to perpetuate that second-class standing in ways he considers insignificant because he is incapable of perceiving the risk. I have an existential duty to object.

In what I have described as a meandering lecture, there is one bizarre meander that stands out for me—that “haunts” me may be a more accurate description. Professor Koppelman quotes a fundamentalist preacher named Russell Moore, who, according to Koppelman, has a nuanced and virtuous perspective on homosexuality.⁵⁷ After committing to paper that Moore “opposes any antidiscrimination protection for gay people,”⁵⁸ Koppelman then asks me—and any gay reader of his lecture—whether Moore is my enemy.⁵⁹ I have admired Professor Koppelman’s scholarship and pro-gay commitments many times over more than two decades. But, if I am to be frank, this may be one of the most bewildering questions I’ve ever been asked to answer by an ally. Koppelman effectively wants to know whether a man who is vociferously committed to my second-class status (and to the

54. Koppelman Lecture, *supra* note 3, at 3.

55. See Gilreath & Ward, *supra* note 2, at 256–57.

56. GILREATH, *supra* note 45, at 28.

57. Koppelman Lecture, *supra* note 3, at 25–27.

58. *Id.* at 26.

59. *Id.* at 27.

second-class status of a gay community who generally do not have my advantages and protections of education, wealth, and position to shield them from harm), but who still possesses the most basic, meanest humanity as to not believe that gay children should be homeless or dead on account of their gayness is “really the enemy.”⁶⁰ Really?

CONCLUSION

I grew up in the Bible belt of the rural South in an era when there was no same-sex marriage and in a state where same-sex sex between consenting adults in private was a felony carrying a lengthy prison term. Certainly, there were no state or local protections of any kind for gays and lesbians. My whole career has been spent in the representation and counsel of the LGBT community. Those I have represented and counseled have been abused, locked up, lighted on fire, even killed. This is the real world – the, to borrow from Andrea Dworkin, “real shit”⁶¹ – where law professor hypotheticals do not come to play. These experiences don’t allow me the rhetorical luxury of questioning whether homophobic religion is a root cause of this misery nor the patience to be grateful when one of its spokesmen is not as absolutely cruel as he otherwise could be. Naturally, I do not believe that any individual baker or florist is to blame for these miseries. But I am certainly not deluded enough to believe that individual acts do not have aggregate effects. A cultural context in which gays can successfully be branded “other,” often as a result of a root religious ethos, creates the environment that makes what I have documented possible. Everything in life is part of it. Anti-gay stigma, usually couched as defensible religious morality, is unquestionably related to the very real physical perils still faced in this country by gays and lesbians.

Everything has a context. And everything that goes into the making of that context is part of it, regardless of how insignificant it may seem to some people in isolation. And in this context, I can’t help but wonder what “safe” means to Koppelman when he writes that in addition to a world where it is safe to be gay, he’d “also like that regime to be one that’s safe for religious dissenters.”⁶² I can

60. *Id.*

61. ANDREA DWORKIN, LETTERS FROM A WAR ZONE 133 (1988).

62. Koppelman Lecture, *supra* note 3, at 31.

only say that “safe” must have a vastly different substantive meaning for the two of us.

I believe Professor Koppelman when he says he would “very much like to banish to the margins of society the notion that homosexual sex is inferior to heterosexual sex” and that he wants “gay people to suffer no disadvantage or humiliation whatsoever because there are other people who believe that nonsense.”⁶³ I am glad he is an ally in this. But I can’t help wondering after reading this lecture whether his quotation of Churchill about the latter’s embrace of Stalin doesn’t put a fine point on the limitations of his advocacy. He quotes Churchill as saying, “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.”⁶⁴ Perhaps, Churchill’s alliance with Stalin was unavoidably necessary to achieve the salvation of Europe. Perhaps. But Koppelman’s advocacy of special discrimination rights for homophobic religionists is not nearly so necessary. In any event, Churchill failed to grasp the whole story. He had not read Solzhenitsyn.⁶⁵ Alas, Professor Koppelman seems to be missing a lot of the story, too.

63. *Id.* at 31.

64. *Id.* at 27.

65. ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO: AN EXPERIMENT IN LITERARY INVESTIGATION* (Thomas P. Whitney trans., 1975) (exposing the horrors of life under Stalin).

