

## ENDA and Liberty of Conscience

Gabriel Hudson

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### Introduction

The debate over gay rights has settled into a false dichotomy pitting religious liberty against equal treatment. This political reality challenges the optimism of gay rights proponents and antagonizes religious traditionalists. Policy makers receptive to arguments in favor of equal rights are afraid of legislation perceived as negating religious liberty. The framework of the debate is detrimental because it impedes any hope of progress or consensus. Conflict over gay rights threatens to become intractable with elite activists in a no-win “culture war” for decades. The best hope to move controversy toward consensus is to reconceptualize the discourse in a way that recognizes mutual self-interest over mutual exclusion.

A productive reconceptualization of the gay rights debate is possible. Such a rethinking would be based on a broad interpretation of liberty of conscience that respects core identity characteristics including faith practice and sexual orientation. Because the desire to live out one’s core identity is shared by advocates and opponents alike, a productive reconceptualization would recast opposing groups as essentially pursuing the same thing. This enables advocates interested in reaching sound policy to pursue more than mere victory. It adjusts the rhetorical framing of the issues in a way that mutually respects both sides’ right to self-definition and offers hope for consensus.

### Political Discourse Over Gay Rights has Degenerated to a Zero-Sum Rhetorical Stalemate

We are witnessing a cultural turning point in the acceptance of gay individuals. The passage of the Matthew

Sheppard Hate Crimes Act<sup>1</sup> on October 23, 2008 marked the first time the Federal Government recognized sexual orientation as a protected category. The Act added sexual orientation to the list of categories already protected in existing hate crimes laws since 1968. Prior to October 23, all federal legislation, such as the Defense of Marriage Act and Don’t Ask Don’t Tell policy, reflected discriminatory attitudes. With the election of Barack Obama and the super majority of Democrats in the Senate, gay rights advocates see this as a critical moment to advance civil equality.

In spite of this progress, advancements in gay rights are quickly becoming a new generation’s *Roe v. Wade*. The swift generational shift in social mores offers a positive political outlook for those in favor of equal treatment. Often gay rights advocates operate from an assumption of inevitability while not recognizing the legitimate fears of their opposition. For many who oppose civil rights for gay Americans the narrative is not one of a previously disenfranchised minority incrementally gaining equality. Rather, it signals an unacceptable change in culture resulting in a loss of religious liberty. Political consensus between activists and opponents may never be fully attainable. But, addressing the different conceptualizations of both parties with mutual respect offers the best hope for moving toward some governable consensus.

The gay rights debate has settled into a state of perpetual stalemate much like abortion a generation ago. For nearly four decades abortion has been an intractable social issue in American politics. Thirty-six years after *Roe v. Wade*, Pew Research’s *Mapping the Political Landscape*<sup>2</sup> shows a near even split on the central question of the legality of abortion. Fifty-five percent of

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<sup>1</sup> Officially titled The Local Law Enforcement Hate Crimes Prevention Act of 2009

<sup>2</sup> [Mapping the Political Landscape: Issues and Shifting Coalitions](#). Pew Research Center, Washington, DC.

Released November 1, 2005

survey respondents, both Democratic and Republican, opposed greater legal restrictions on abortion. The number was only slightly higher when reflecting only Republican responses. This is not new information. What is disquieting about the survey is the lack of movement year after year. The portion of the report dealing with abortion notes that polling data has remained stagnant for decades saying, “[abortion] remains a contentious issue with nearly all groups in the typology divided to some extent.”<sup>3</sup> Unlike other issues that reflect change in opinion over time, abortion appears stuck. One theoretical assumption about liberal democracy is that uninhibited discourse eventually resolves political controversy without bloodshed. Although the general populace has moved closer to a social consensus, the debate among policy makers and activists remains frozen in bitter divisiveness.

The question of why abortion has become an intractable political conflict is worth examining if for no other reason than preventing a similar stalemate within subsequent controversial social issues. In *Life's Dominion*, Robert Dworkin describes abortion as “tearing America apart. It is distorting politics and confounding constitutional law.”<sup>4</sup> He goes on to say, “The war between anti-abortion groups and their opponents is America’s new version of the terrible seventeenth-century European civil wars of religion.”<sup>5</sup> Arguably, the abortion issue represents a failure of our system to reach political resolution through discourse and compromise. That failure does not have to be repeated. Many gay rights political struggles mirror the abortion conflict and hold the same potential to become as irreconcilable for decades. For this reason, the political competition between

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<sup>3</sup> Pew *Landscape* at 35

<sup>4</sup> Dworkin *Dominion* at 4

<sup>5</sup> Dworkin, R. *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*.

Vintage Books – A Division of Random House, Inc. New York, NY. 1993 at 6 “*Dominion*”

two camps might equally qualify for Dworkin’s description of a contemporary religious war.

In both issues the particulars of policy are expanded to incompatible worldviews and an epic struggle between good and evil. Both issues have sides that have settled into rhetorical patterns that not only repeat the same arguments, but also talk past each other and refuse to agree on the subject of debate. Pro-choice advocates argue the issue at stake is individual choice. Pro-life advocates say the issue is the state’s responsibility to protect life, particularly children. Opponents of gay rights focus on sexual behavior and lifestyles. Advocates of gay rights argue for civil equality among immutable traits. In both abortion and gay rights debates one side roots their arguments in historical religious heritage while the other emphasizes American principles such as equal protection and personal autonomy. Like abortion rights, gay rights have largely been advanced through judicial decisions undermining their political legitimacy including *Romer v. Evans*<sup>6</sup> and *Lawrence v. Texas*.<sup>7</sup>

In *Morality Politics vs. Identity Politics: Framing Processes and Competition Among Christian Right and Gay Social Movements*,<sup>8</sup> Melinda S. Miceli describes how both Christian-right and gay activists have pitted themselves against each other in a winner-takes-all, no compromise rhetorical war. One argues in favor of the social contract and the other argues in favor of religious foundationalism. Both arguments have merit but no middle ground or true solution that respects both religious liberties and minority rights is possible within this rhetorical framework.

Additionally, there are institutional incentives to avoiding compromise. It is more politically powerful and lucrative to depict gay rights advocates as threatening the essential character

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<sup>6</sup> *Romer v. Evans* 116 S.C.T. 1620 (1996)

<sup>7</sup> *Lawrence et al. v. Texas* 539 US 558 (2003)

<sup>8</sup> Melinda S. Miceli. (2006) *Morality Politics vs. Identity Politics: Framing Processes and Competition Among Christian Right and Gay Social Movement Organizations*. *Sociological Forum* 20:4, 589-612

of the country. Any recognition of their rights in law automatically qualifies as a loss of religious freedom and a subversion of our system or heritage. It benefits gay rights advocates to characterize all opponents as hateful and ignorant. Any success for their enemies automatically qualifies as a theocracy. Advocating legislation that adequately defends religious liberties, honors traditions, and offers equal treatment under the law is impossible because one side is incapable of acknowledging a legitimate civil rights struggle and the other side refuses to acknowledge the cultural salience of faith.

Demonizing opponents and expanding policy to comprehensive worldviews is an effective political strategy. In *Religion and Public Opinion about Same-Sex Marriage*, Laura Olson describes why framing debate as competition between religious and secular heritages is successful. Using the presidential and congressional elections of 2004 Olson details how describing gay marriage in terms of religious liberty was effective for Republicans even if the case was disingenuous. The question put before voters was not whether the state had a valid interest in preventing the legal recognition of same-sex couples but whether religion was important in public life and worth protecting. A mailing produced by the RNC showed a man kneeling in front of another man with the word “allowed” and a picture of the Bible with the word “banned”. Although no one presented examples of laws that made the Bible illegal or explained how that related to the relationship between two men, the general implication that gay rights equaled a negation of religious liberty was effective in the absence of specifics.

Like all gay rights issues, these patterns are reiterated in the debate over the Employment Non-Discrimination Act (ENDA). One side claims recognition of sexual orientation in federal law automatically limits religious liberty by stigmatizing those that oppose gay sexual behavior. In penalizes traditionalists for living out their beliefs in the workplace. Gay rights advocates

argue that it is unfair for anyone to fear losing her job based on an innate identity trait and frame the debate as a matter of civil rights. This discursive impasse is why ENDA has repeatedly been introduced in Congress for 15 years but is no closer to passage now than it was in 1994.

Excluding interest group fundraising appeals there is little conceivable benefit from the current rhetorical framework. A greater social benefit can result from disregarding activists’ particulars and searching for a conceptualization that adequately addresses the concerns of both sides. Such a solution would be firmly rooted in the democratic tradition of individual liberty, respect for religious freedom, and expansion of the social contract. Of all the issues under the umbrella of gay rights, a rethinking of ENDA offers the best opportunity to capitalize on current cultural changes and move debate closer to consensus.

### **Background on ENDA**

The first version of ENDA was introduced to the 103<sup>rd</sup> Congress in 1994. Since then it has been reintroduced every year except the 109<sup>th</sup> in 2006. Its current incarnation, H.R. 2981, includes protections for perceived or actual sexual orientation and gender identity. This protects employees that self-identify as gay or lesbian and it also protects employees that fail to conform to gender norms. A woman that is judged as inadequately feminine could not be denied a promotion if the bill passes. Similarly, a transgendered person whose gender expression does not match his or her sex at birth cannot face discrimination.<sup>9</sup> The addition of gender expression expands the scope of the bill compared to earlier versions. It also provides opponents with a meaningful criticism. Perception may be too subjective criteria for enforcement and may portend endless future litigation.

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<sup>9</sup> The Library of Congress, Text of H.R. 2981 <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2981>:

Section 2 of the bill lays out four purposes:

- (1) to address the history and widespread pattern of irrational discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal government employers;
- (2) to provide a comprehensive Federal prohibition of employment discrimination on the basis of sexual orientation or gender identity;
- (3) to provide meaningful and effective remedies for employment discrimination on the basis of sexual orientation or gender identity; and
- (4) to invoke congressional powers, including the powers to enforce the 14th amendment to the Constitution, and to regulate interstate commerce and provide for the general welfare pursuant to section 8 of article I of the Constitution, in order to prohibit employment discrimination on the basis of sexual orientation or gender identity.<sup>10</sup>

Section 6 details the religious exemption:

This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Acts of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2)).<sup>11</sup>

ENDA's chances of passing in this session of Congress are elevated because of strong Democratic majorities in both houses and a sympathetic president. However, social issues have generated little interest in the 111<sup>th</sup> Congress and are tertiary to the economy and healthcare.

## Opposition to ENDA

Since the passage of the Hate Crimes Act the attention of gay rights opponents and proponents has shifted to two primary foci at the federal level, ending the military's ban on openly gay service members and passing ENDA. Same-sex union conflicts are still contested at the state level and no one in Congress has pushed a serious challenge to DOMA. Although ENDA contains explicit language stating it does not apply to the military, the two policy goals are related and pursued in tandem.

Organized opposition to ENDA is religious in nature. To assert otherwise is intellectually dishonest. While there are likely individuals of every faith and no faith that support and oppose ENDA, all organized interest groups campaigning, fundraising, and lobbying against ENDA exclusively self-identify as Christian. This characteristic of the opposition is important to note because much of the rhetoric from ENDA opponents is decidedly secular sounding. This is no accident. Wordsmiths and message crafters have carefully parsed out the political from the explicitly religious. When religion is mentioned in opposition to ENDA it is usually within the context of a predicted reduction in religious liberty.

The supposed threat to religious freedom takes two forms. One is an actual, legal discrimination against the beliefs of religious individuals. The other is an informal, socially coercive removal of religious speech from respectable political discourse. While both threats are represented in anti-ENDA campaigns, the informal exclusion has been more successfully demonstrated. Traditional religionists worry that if the Federal Government continues to recognize sexual orientation as worthy of legal protection their ability to condemn same-sex sexual behavior will be pushed to the fringes of society. By strategically removing any vaguely religious arguments from their messaging in the interest of salience, Christian political advocacy groups implicitly demonstrate this concern.

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<sup>10</sup> [http://thomas.loc.gov/cgi-bin/query/F?c111:1:/temp/~c111czKSzS:e1325:](http://thomas.loc.gov/cgi-bin/query/F?c111:1:/temp/~c111czKSzS:e1325)

<sup>11</sup> [http://thomas.loc.gov/cgi-bin/query/F?c111:1:/temp/~c111czKSzS:e11096:](http://thomas.loc.gov/cgi-bin/query/F?c111:1:/temp/~c111czKSzS:e11096)

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The online Catholic publication *That Catholic Thing* recently posted an article drawing attention to this new strategy by profiling an example of the “new” practitioner of anti-gay politics, Maggie Gallagher. The author, Robert Royal, retells the advent of Gallagher as a political consultant for conservative Christian political forces:

A few years ago a highly visible and influential member of the Christian Right appeared on one of the cable news shows talking about homosexual marriage. He said that homosexuality was harmful to society and to the individuals who practiced it. A week later this same man appeared again on the same topic only this time he said opposition to homosexual marriage was not about condemning homosexuals but about protecting children who need moms and dads, something homosexual couples can never provide. Sometime between his first appearance and his second, he was visited by one of the wisest social analysts in the country, Maggie Gallagher of the National Movement for Marriage.

Christian conservatives – as in the story above – have traditionally spoken about homosexuality in language that could be construed as judgmental. But this approach does not resonate in a culture where homosexuals have been mainstreamed in television, in movies, and around your neighborhood.<sup>12</sup>

Gallagher’s advice to gay opposition is simple. Present a secular sounding argument whenever possible. Appeal to universalities such as protecting children, honoring tradition, and upholding ideals. Avoid any religious condemnation of behavior.

If religion is mentioned, it is in the context of protecting religious liberty rather than belief as a justification for law.

The newly adopted political strategy of removing religion from religiously motivated policy goals has caused a sharp divide among anti-gay advocates. A statement released by the Maine Family Policy Council, a Christian political advocacy group, on the eve of election day predicting the defeat of Referendum 1, overturning gay marriage in Maine, contained sharp criticism of the official Yes on 1 campaign.

The leaders of the pro-family movement shied away from quoting the Bible in public for fear of being perceived as 'haters' by their neighbors. For this reason, the public failed to see the profound evil, which lurks behind the homosexual rights movement. We should not be surprised if many of us are called to pay a price for our lack of fidelity to our deepest principles.<sup>13</sup>

Criticism of the new secular packaging for anti-gay campaigns has come from conservative advocates displeased with the perceived shaming of faith. In a stinging critique of the decision by Maine activists to leave biblical messages out of its campaign to overturn same-sex marriage titled, *When PR Flacks Take Over Moral Messaging*, syndicated columnist and conservative Christian, Linda Harvey, writes,

This paves the way for the pseudo-marriage of "domestic partnerships." The big question is: Why did "conservatives" do this? Pardon my cynicism, but my background includes two decades in the wonderful world of advertising and public relations, where truth is a sometimes-disposable commodity and almost any position or product can be sold if you have enough media and research dollars. Opponents would easily be able to see through the apparent hypocrisy:

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<sup>12</sup> Austen Ruse, September 25, 2009 Maggie Rules, *That Catholic Thing* <http://www.thecatholicthing.org/content/view/2245/2/>

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<sup>13</sup> *The Coming Defeat of Gay Marriage* [http://mainefamilypolicycouncil.com/artman/publish/Opinion\\_5/The\\_Coming\\_Defeat\\_of\\_Gay\\_Marriage.shtml](http://mainefamilypolicycouncil.com/artman/publish/Opinion_5/The_Coming_Defeat_of_Gay_Marriage.shtml)

Why should parents worry about their children being indoctrinated into homosexual acceptance, if "gays" ought to be tolerated? If we ought to respect their "rights"? This sudden shift had a desperation tinge to it and leaves pro-family forces vulnerable in the future to accusations of lying through our teeth. Christians do not do well with hypocrisy. We need to tell the truth.<sup>14</sup>

For advocates like Harvey the battle against gay rights means nothing outside the context of advocating Christianity. Equal treatment for those who do not follow their religion and religious liberty cannot coexist in their minds. Adopting secular arguments to oppose gay rights misses the point of anti-gay opposition.

In instances of opposing gay marriage the strategy of using secular sounding arguments is easy. Protect an institution or protect children who need a mom and dad. Likewise, in opposing the abolition of Don't Ask Don't Tell the secular argument endorses unit cohesion and military readiness. No one needs to bring religion into the debate. However, when it comes to ENDA, the carefully choreographed dance of stimulating religious voters while sounding secular is harder to pull off. What is the secular argument in favor of workplace discrimination?

Opponents to ENDA have divided into two distinct camps. Those that deliberately omit any reference to religion and those that forfeit the attempts at secularism altogether and openly advocate sectarian law. Among those omitting religion the opposition typically takes two forms, opposition to protected status for mutable characteristics and opposition to special rights in law not provided universally.

In a recent press release, House Minority Leader John Boehner explained his opposition to federal recognition of sexual orientation in law. His spokesperson, Kevin Smith, later contacted CBS News to clarify the Minority Leader's position

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<sup>14</sup> <http://www.wnd.com/index.php?fa=PAGE.view&pageId=115148>

that he "supports existing federal protections based on immutable characteristics."<sup>15</sup> The implication is that sexual orientation is not immutable like race. Gay rights advocates argue relentlessly that it is. Furthermore, the debate on both sides hinges on each team's ontological understanding of homosexuality prevailing in law. But this outcome in which one must win so another must lose is unnecessary. Neither side mentions that religion enjoys federal protections from employment discrimination. Religion is not immutable.

In a recent letter to constituents, Arkansan Senator Blanche Lincoln warned against "equal rights becoming special rights."<sup>16</sup> News coverage of the Senators letter was harshly critical because of its gap in logic. Reporting for the Arkansas Times, Max Brantley writes, "Apparently Sen. Blanche Lincoln is indicating to constituents that she opposes legislation to bar discrimination in employment practices on account of sexual orientation and gender identity. In a letter to constituents, she indicates this would amount to a 'special right'."<sup>17</sup>

Senator's Lincoln's argues that federal workplace protections constitute a right that others do not enjoy. But again, religion is a protected class in federal anti-discrimination law. By arguing in favor of workplace discrimination based on mutability and supposed special protection, secular sounding politicians in favor of a religious policy objective inadvertently argue against religious freedom.

It is unlikely they really want employers to have the legal right to discriminate against mutable traits, like religious

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<sup>15</sup> Brian Montopoli Why GOP Leader Opposes Hate Crimes Protections for Gays <http://www.cbsnews.com/blogs/2009/10/13/politics/politicalhotshot/entry5381671.shtml>

<sup>16</sup> Max Brantley Lincoln OK on discrimination against gays, Arkansas Times [http://www.arktimes.com/blogs/arkansasblog/2009/10/lincoln\\_ok\\_on\\_discrimination\\_a.aspx](http://www.arktimes.com/blogs/arkansasblog/2009/10/lincoln_ok_on_discrimination_a.aspx)

<sup>17</sup> [http://www.arktimes.com/blogs/arkansasblog/2009/10/lincoln\\_ok\\_on\\_discrimination\\_a.aspx](http://www.arktimes.com/blogs/arkansasblog/2009/10/lincoln_ok_on_discrimination_a.aspx)

affiliation. It is more unlikely they really believe that prohibiting discrimination based on a mutable trait constitutes unequal “special rights” for the protected class. Whenever those trying to sound secular in their intentions oppose ENDA, religion disappears completely even from the description of existing law. When mentioning protected classes it is common to list race, disability, and national origin. The omission of religion is not an accident.

In speaking against the recently passed Hate Crimes Bill, Rep. Steve King of Iowa said, “Under this legislation, justice will no longer be equal. Instead, justice will depend on the race, gender, sexual orientation or protected status of the victim, setting up different penalties for the same crime. This 'thought crimes' bill shatters the American tradition of equal justice under the law.”<sup>18</sup> He conspicuously leaves out that religion has been a protected category for 40 years, opting for the ambiguous “protected status”, avoiding the discussion of whether those protections are similarly unjust.

In an interview with Citizen Link, Kelly Shackelford, president of the Texas Free Market Foundation criticizes the bill, “The hate-crimes law is really not about any so-called hate crimes. It’s really about putting race on the same level as sexual orientation.”<sup>19</sup> He does not mention whether religion is also on par with race in its immutability. Similarly, Rep. Lamar Smith from Texas condemned the bill saying, “Justice will now depend on the race, gender, sexual orientation, disability or other protected status of the victim. It will allow different penalties to be imposed for the same crime.”<sup>20</sup> He also leaves religion out of

the list and uses the vague “other protected status”. These omissions are not an accident. If critics of gay rights admit that the laws they oppose have already covered religion they cannot base their opposition on immutability. A similar punditry pattern is developing in opposition to ENDA. Conservative activist do not mention religious belief in their criticism and they neglect to reference religion as protected against workplace discrimination.

Other opponents to ENDA take the opposite approach and remain explicitly religious. In an article for the Christian conservative publication World Net Daily titled *The Undeclared War to ENDA Our Liberty*, Robert Knight writes,

On Aug. 5, the GOP's Maine kleptocrats, Susan Collins and Olympia Snowe, joined Oregon Sen. Jeff Merkley and longtime sponsor Ted Kennedy in reintroducing the Employment Non-Discrimination Act (ENDA), which we'll call the "gay quota bill" for short. ENDA is profoundly dangerous. It turns private sin into a public right and brings the force of government against morality itself. Any such law is a violation of our unalienable rights as proclaimed in the Declaration of Independence. To put it more simply, a statute that directly contradicts God's moral law is illegitimate. Laws embody and reflect morality, or they are not laws. They are tyranny.<sup>21</sup>

Dismissing that ENDA contains text that “does not allow for quotas or preferential treatment based on sexual orientation or gender identity” Knight’s argument is that the law should be defeated precisely because it contradicts his moral beliefs. It is described as not just bad policy but “dangerous” and a “violation of our unalienable rights.” Protecting those that do not follow Knight’s religious prescriptions from workplace discrimination is somehow a violation of religious people’s rights. Muslims do not conform to Knight’s conservative Christianity. Neither do

<sup>18</sup> Stewart Shepard Oct. 9, 2009 House Republican Speak Out Against Hate Crimes Amendment <http://www.citizenlink.org/content/A000011187.cfm>

<sup>19</sup> Kim Trobee, Feb. 6, 2009 Friday 5 – Kelly Shakelford Citizen Link <http://www.citizenlink.org/content/A000009293.cfm>

<sup>20</sup> Jillian Bandes, Apr. 30, 2009 Hate Crimes Law May Have Loop Holes, Town Hall [http://townhall.com/columnists/JillianBandes/2009/04/30/hate\\_crimes\\_law\\_may\\_have\\_loopholes](http://townhall.com/columnists/JillianBandes/2009/04/30/hate_crimes_law_may_have_loopholes)

<sup>21</sup> Robert Knight, August 11, 2009 The Undeclared War to ENDA our Liberty, World Net Daily <http://www.wnd.com/?pageId=106530>

divorced people or unwed mothers. Knight does not argue that federal workplace protections based on religion and marital status also violate his religious liberties? It is unlikely any opponent of ENDA would make such an argument.

This repeated assertion that ENDA represents a curtailing of religious liberty is worth examining. The exact infringement is unspecified. Vagueness is useful because it utilizes the assumption that gay rights diminish religious liberty without providing specific examples. ENDA exempts religious organizations and businesses with fewer than 15 employees. A pastor would not be required to hire a gay choir director and a conservative Christian family would not be compelled to have a gay nanny or housekeeper. Under ENDA employers simply cannot use sexual orientation in a criteria for hiring, firing, or promoting. This raises important questions. If a Christian business owner cannot fire someone for being gay, are her religious liberties violated because she cannot live out her faith? If the state reflects a conceptualization of homosexuality as an innocuous identity trait, does that automatically reduce religious liberty for those that conceptualize homosexuality as changeable sexual behavior?

For Charles J. Chaput, the Archbishop of Denver, the answer to the latter is an unambiguous “Yes!” In *A Charitable Endeavor*, the Archbishop addresses a critical type of organization, groups that are not defined solely as ministries but do have a religious affiliation or mission? Should the government allow “faith-based” businesses and charities to use religious teachings to justify discrimination in employment, prohibit such discrimination regardless of religious affiliation, or allow discrimination only in the absence public funding? The text of ENDA states that it does not apply to religious organizations based on their tax-filing status. It is worthwhile to question what qualifies for that description. Surely churches are exempt. Are Methodist hospitals?

Chaput argues that not allowing organizations with a religious mission to discriminate in employment decisions violates equal protection because it does not afford these entities the same right to self-define as secular groups. However, what he qualifies as disallowing is the denial of public funds. Chaput argues that charities should take taxpayer money but refuse to employ or serve certain taxpayers.

His primary example is the story of Catholic adoption agencies that were “forced” to shut down after same-sex marriage became legal in Massachusetts. The tale of the closed adoption agencies is a popular narrative in anti-gay campaigns. Recently it has been used in publications in support of Proposition 8 in California, against Referendum 71 in Washington, and in favor of Referendum 1 in Maine. The story is simple. When gay people achieve a political objective, religious people inevitably suffer. Gay activists won something therefore religious groups lost something.

It is easy to see why one would worry about a loss of religious liberty from this story. But, Massachusetts did not shut down charities that failed to serve or employ gay people. Catholic adoption agencies in Massachusetts were faced with a dilemma; employ gay people in customer service positions and place children in same-sex led households or lose public funding. They chose to shut down rather than compete in the free-market without government support on March 10, 2006.<sup>22</sup>

Other religious affiliated adoption agencies in Massachusetts remained in business and either changed their prohibition against same-sex couples or forfeited taxpayer dollars. The Catholic Church in Massachusetts advocated for a voter referendum that would overturn same-sex marriage. When that measure failed to make it on the ballot they closed their adoption agencies. Arguably they could have tried to remain in business.

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<sup>22</sup> Banned in Boston, The coming conflict between same-sex marriage and religious liberty. by Maggie Gallagher 05/15/2006, The Weekly Standard Volume 011, Issue 33

The timing of their decision to close their agencies suggests the decision was based, at least in part, on the desire to manufacture a political narrative in which gay rights are equated with shutting down religious charities. Mormon charities, such as the LDS Social Services of Massachusetts, Inc. in the town of Nashua, discriminate against gay couples but remain in business after forfeiting some of their public money.

When these critical details are included in the story of adoption agencies in Massachusetts, it becomes difficult to sustain the argument that gay rights groups force religious groups to close their doors. It is a useful argument politically but the facts are not so simple. Following the legalization of same-sex marriage in Massachusetts no church was required to marry same-sex couples or preach that such unions are equivalent to their opposite-sex counterparts. At a personal level, no one was compelled to change his or her beliefs. Private belief was not the issue. It was the distribution of public funds to a private entity with a public function.

Criticism of the Catholic charities by pro-gay activists has largely been anti-religious. Devout Catholics are expected to divide themselves in two and keep their secular public side wholly separate from their private religious practice. This is unreasonable and unfair and lends credence to arguments that claim the advancement of gay rights creates an *informal* reduction of religious liberty. Many traditional religionists worry they will be the ones shamed into the closet not by the government but by culture. This outcome should trouble anyone who takes the plight of gay Americans seriously. The solution is not to reverse roles. While the fear over religious liberty may be seem inflated at times, the pro-gay side suffers from of its own myopia.

### **Support for ENDA**

Chai Feldblum is a professor at Georgetown University School of Law, prolific author, and recently nominated by

President Obama to the position of commissioner of the Equal Employment Opportunity Commission. She is a staunch gay rights advocate and has written extensively on the implications of legislation addressing sexual orientation. Her legal scholarship succeeds in making a clear case for equal protection for LGBT American. But some of her reasoning is counter productive to the task of consensus building.

In *Moral Conflict and Liberty: Gay Rights and Religion*, Feldblum directly engages the central conflict between gay rights advocates and traditionally religious people. To the former she acknowledges an identity liberty worthy of equal protection and to the latter she ascribes a belief-action liberty normatively protected from government intervention. At the heart of this conflict between liberties is an ontological disagreement. The two sides do not agree on the nature of what they are debating. Gay rights advocates describe an immutable orientation that is a component of one's sense of self. Traditional religionists oppose what they describe as an intrinsically immoral behavior so incompatible with their faith that no law should force them to accommodate it.

The mistake many pro-gay writers make, including Feldblum, is the assertion that one conceptualization of homosexuality must prevail in law. The gay rights ontological claims regarding the nature of sexual orientation must be the basis for all legislation dealing with homosexuality to achieve equal protection. Consequently, they argue, those in opposition to gay rights must accept a reduction in their abilities to live out their beliefs to make room for a new suspect class.

Arguments that gay rights advancements necessitate curtailing religious expression are useful to activists on both sides of the debate but fail to provide a basis for sound policy. Both sides often reduce the debate to a conflict between new mores and religious heritage. One can imagine an alternative framework that treats people equally under the law while respecting religious

expression. Such a solution does not require the state to positively affirm either conceptualization of homosexuality or declare a winner between the false dichotomy of faith and equality.

In *Moral Conflict and Liberty* Feldblum makes the case for a zero-sum outcome in which one side “wins” and the other “loses”. Among her illustrations is a hypothetical Christian couple running a bed and breakfast that does not want to rent rooms to gay people. Gay patrons may seek service at another inn but that inconvenience burdens their identity liberty in public accommodations. If the law requires service then the Christian couple’s religious freedom is compromised. According to Feldblum the “belief interest” liberty is negated by “the existence of a law that prohibits you from discriminating on the basis of sexual orientation or marital status.”<sup>23</sup> One retains his freedom to believe in his head whatever he wants about sexual practices but to act on that belief is prohibited. In this way the hypothetical couple’s religious liberties are unjustly burdened because their beliefs must remain internalized and inactive.

Feldblum acknowledges that many gay rights advocates trivialize the importance of belief-action in people’s lives by chastising “those who blithely assume a religious person can easily disengage her religious belief and self-identity from her religious practice and religious behavior. What do they think being religious *means*?”<sup>24</sup> She goes on to characterize the legal protection of beliefs without a corresponding protection for acting on those beliefs as empty saying, “for many religious people across many religious denominations, the day-to-day *practice* of one’s religion is an essential way of bringing meaning to such beliefs.”<sup>25</sup>

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<sup>23</sup> Feldblum 2

<sup>24</sup> Feldblum 34

<sup>25</sup> Feldblum 35

In Feldblum’s scenario, either gay people must accept unequal treatment in public accommodations or traditional religionists must accept the silencing of their belief liberty. The civil rights of some must take precedence over the religious liberties of others. Feldblum’s suggestion for achieving this zero-sum solution in which gay civil rights ultimately prevail is to call for a “judicial and legislative acknowledgment of a ‘belief liberty’”.<sup>26</sup> Court opinions and acts of Congress must acknowledge the stifling of some belief-action. She defends her solution as “middle ground” against arguably more pro-gay scholars who advocate no such acknowledgement beyond the right to believe and keep it to one’s self. But her middle ground solution does not qualify for that description if the other side views it as a total loss. Her comfort for the perceived loss of rights is recognition of the loss.

It is unlikely mere recognition will move the debate to any real consensus and may propel legal outcomes that fulfill the worst predictions of religious liberty advocates. Under Feldblum’s ideal, the ability of the state to stifle religious expression has no limits as long as the reduction in freedom is duly noted. Feldblum’s mere acknowledgement of the other side’s concern is equivalent to sending condolence cards to millions of traditionally religious people expressing sympathy for the loss of their ability to act on their faith.

Other pro-gay scholars similarly fail in the task of offering a real solution by advocating a form of open-ended tolerance that disallows anyone to condemn any behavior lest they be guilty of suppressing identity. In *Beliefs, Persons, and Practices: Beyond Tolerance*, Wibren Van Der Burg designates tolerance of others’ identity traits as a necessary ingredient for modernity and liberal democracy. However, as we progress into post-modernity mere tolerance of identity is passé. “In the older positions defending

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<sup>26</sup> Feldblum 54

some form of religious pluralism, an appeal was often made to a principle of tolerance. A similar appeal to tolerance is now made with respect to cultural pluralism.”<sup>27</sup> “Cultural pluralism” is a catchall term encompassing any conceivable belief and subsequent expression of that belief. In this multicultural utopia the only thing not tolerated is intolerance and intolerance is indicated by disapproval of anything. It is easy to see why such an argument might be attractive to gay rights proponents. People who hold traditional religious beliefs have used their personal disapproval to justify laws that stigmatize and exclude gay people. The enemy appears to be stigmatization and exclusion in any form so the legal solution is to remove any trace of those devils. But, the problem is not stigmatization and exclusion *per se* but their specifically sectarian justifications. One does not need to remove all discernment from law to reduce cultural or religious hegemony.

“The principle of tolerance can still be useful in those contexts where the Protestant biases are not problematic because they do not lead to significant distortions in structuring or solving a problem.”<sup>28</sup> However, “attitudes or practices can thus be valuable and justifiable without an explicit appeal to a moral principle.”<sup>29</sup> “We can legitimately express the liberal value of equality and try to convince others of this value, while being reluctant to directly interfere with practice. This attitude of tolerance may be the only way to prevent divisive strife between the minority and the liberal majority.”<sup>30</sup>

Considering sentiments such as these it is easy to see why many opponents to civil equality paint a colorful picture of the state suppressing religious expression. Van Der Berg perpetuates the zero-sum scenario in an unhelpful way by confirming

traditionalists’ worst fears of excluding all faith considerations from the public square. To achieve equal protection the law must be so secular and so tolerant that it cannot reflect any moral assumption whatsoever. What this new expanded form of tolerance would look like in practical terms is insufficiently described. And, unlike Feldblum, Van Der Berg does not see any need to acknowledge the concerns of the faithful. Faith as a consideration in policy making is dismissed as quaintly modern at best and antithetical to the contemporary execution of democracy at worst.

To most gay rights advocates, progress includes leaving religion and tradition behind. Religion has served its purpose but now it just gets in the way. To people who take their faith seriously and do not relegate belief to some imagined past this notion of progress is very scary. While most will not admit it publicly, many traditional religionists fear that anti-discrimination laws codify a more nefarious agenda to discriminate against them. Considering the rhetoric of many gay rights proponents, their fears are not unfounded.

Proponents and opponents of ENDA agree on one thing, only one side can “win”. The law will reflect traditional moral teaching or disregard it in the name of civil rights. Homosexuality will be conceptualized as behavior to be discouraged by the state or an intrinsic component of one’s identity. The triumph of one understanding automatically means the other side is second-class.

A more useful conceptualization of the debate would include reasons *why* protecting religious belief is an essential ingredient to liberal democracy. But, it would not limit liberty to organized religion. It would reframe the debate over employment law in the context of a broad historical understanding of liberty of conscience. This is preferable to the zero-sum competition between belief practice and identity

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<sup>27</sup> Van Der Burg 227

<sup>28</sup> Van Der Berg 251

<sup>29</sup> Van Der Berg 252

<sup>30</sup> Van Der Berg 252

because it prevents gay rights issues from becoming politically intractable like abortion.

### **Liberty of Conscience Broadly Understood**

The beneficial reconceptualization of gay rights is based on a broad understanding of liberty of conscience. This understanding protects all the ways individuals self-create identities and meaning beyond the limits of specifically religious labels. This understanding acknowledges the sacredness of faith in one's understanding of the world. It also accommodates components of identity equally necessary for an individual's definition of self. Admittedly, liberty of conscience has not always enjoyed the broad application utilized in this argument. But the historical justification for liberty of conscience, respect for core identity and sacredness of self, is better suited for a contemporary debate.

The contrast in how liberty of conscience has been applied historically can be seen in examples such as the founding of Rhode Island and Pennsylvania. When liberty of conscience was used it was limited to one's choice of religious affiliation over the imposition of an established church. Liberty of conscience was likewise understood as a selection among recognized religious affiliations after the English Civil War. Oliver Cromwell in 1654 advocated in favor of the right for a state church to exist while protecting the rights of others to follow other faiths. "Again, is not *liberty of conscience* in religion, a fundamental? So long as there is *liberty of conscience* for the supreme magistrate to exercise his *conscience* in erecting what form of Church government he is satisfied he should set up, why should he not give the like *liberty* to others? *Liberty of conscience* is a natural right."<sup>31</sup>

However, political advocacy surrounding the issue of liberty of conscience should not conclude that freedom was confined to religious affiliation. Thomas Hobbes' *Leviathan* described an individualized nature of belief that only warranted regulation when it threatened civil tranquility. Hobbes is useful to understanding a broader application of liberty of conscience that reflects an internal and external debate about the role of religion in public life beyond Cromwell's advocacy of religious options. At times, Hobbes is extremely critical of religion allowing some of his words to be used by contemporary atheist authors. At other times, he sees religion, and Christianity in particular, as both necessary to guide public life and a potential catalyst for violent conflict. The sovereign in *The Leviathan* has the power to dictate what publications are suitable for moral guidance, casting doubt on Hobbes' loyalty to liberty of conscience. But the purpose of this power is to fulfill the sovereign's obligation to maintain peace. Private belief is of little concern to Hobbes' sovereign. It is only when belief is organized into warring factions that it merits suppression.

Among these applications it is necessary to acknowledge the range of scholarly debate on the correct understanding of Hobbes. Asserting only one correct interpretation of Hobbes and then manipulating that interpretation to fit a contemporary viewpoint is hubristic. Rather, the writings of Hobbes should be examined for general understanding of philosophical debate in the latter half of the 17<sup>th</sup> Century and how that debate contributed to the development of liberal democracy. John W. Seaman provides a useful examination of the various schools of thought surrounding Hobbes' contributions to liberal theory. In *Hobbes and the Liberalization of Christianity*, Seaman explains popular views on Hobbes' writings on religion. The "liberalization" of Christianity is really a progressive personalization of faith in general. A chronological comparison of Hobbes works reveals a pattern of favoring personal faith as the only "safe" faith.

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<sup>31</sup> <http://books.google.com/books?id=Ts8CAAAAQAAJ&pg=PA314&sig=J5F2Wv7IUSRRj-6PNG8R2CdWoKY&hl=en#v=onepage&q=&f=false>

Faith introduced at the group or nation-state level contributes to civil unrest for Hobbes. His conclusions react to the previous millennium of European history. They also provide an Enlightenment view of religion that combines skepticism toward the veracity of Christian narratives with the importance of keeping religion personal and sacred. Hobbsian preference for personalized religion and skepticism was later reflected in the founding American colonies and the design of the United States government.

When Rhode Island was founded in 1663 its original charter specifically listed protections for liberty of conscience. Later, William Penn, English Quaker and founder of Pennsylvania, wrote *The Great Cause of Liberty of Conscience* after being acquitted on charges of conspiracy for advocating freedom of conscience. When the Quakers first came to Boston in 1656 they advocated an extreme (for that time) individualism in which the “inner light of God” shown in every man’s soul. As such, liberty of conscience was still only applied to religious practice but an *individualized* understanding of religious practice that did not see the need for external human guidance.

An important shift that indicated an expansion of liberty of conscience beyond religious affiliation occurred in 1689 when the Baptist Church in London claimed, “God alone is Lord of the *conscience*, and hath left it free from the doctrines and commandments of men which are in any thing contrary to his word, or not contained in it. So that to believe such doctrines, or obey such commands out of *conscience*, is to betray true *liberty of conscience*; and the requiring of an implicit faith, an absolute and blind obedience, is to destroy *liberty of conscience* and reason.”<sup>32</sup>

The statement is significant because it marks the point when liberty of conscience was applied to religious *practice*, rather than mere affiliation, and the justification for it was internalized.

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<sup>32</sup> 1698 London Confession of Baptist Faith available at <http://www.pb.org/articles/lcf1689.html>

Conscience was deemed more sacred than civil and understood as a component of one’s individual identity rather than a group signifier or political affiliation. Thomas Jefferson later echoed this understanding in his Virginia Statute of Religious Freedom, saying,

Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord, both of body and mind yet chose not to propagate it by coercions on either, as was in his Almighty power to do, that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time.<sup>33</sup>

Within Jefferson’s scathing criticism of organized religion we see Hobbes skepticism and the personalized, individualized version of freedom of conscience that accompanied America’s founding. Jefferson was not describing a simple freedom to choose which church to attend. He was describing the freedom of self-definition and non-coerced moral parameters. It derives from a faith tradition but is applicable beyond religious identity. The faith component uses a Protestant understanding of each person’s responsibility to seek God and moral truth independent of a formalized church hierarchy. Because God designed human conscience to be internally and individually guided by truth, it is not the role of the state to assume the duties of moral guidance.

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<sup>33</sup> Jefferson, Virginia Statute of Religious Freedom available at <http://www.vahistorical.org/sva2003/vsrf.htm>

This idea of self-determination can be expanded beyond religious practice to all matters of conscience necessary to the formation of identity.

Within this timeline one can see both the development of Christianity as a social innovator and a tradition of personal responsibility for metaphysical understanding. It is unnecessary then in political debate to choose between arguing in favor of America's Christian heritage versus a tradition of individualism because both are present and interrelated. Social movements throughout America's history demonstrate the duality of this tradition. In his examination of these social movements, Rhys H. Williams<sup>34</sup> correctly points out that religious signifiers have always been a "primary cultural resource to justify policy change." According to Williams the success of using religious signifiers in social movements is based on both a ubiquitous public assumption that faith is inherently American and tied to a personal responsibility to advocate justice. He contrasts this to the European tradition of state churches in which religion is historically seen as a matter of political coercion. Because religion has always been understood as present yet individual in America it has been useful as a tool to endorse civil equality. The danger for a social justice movement comes when it depicts itself as seeking civil equality in conflict with a religious tradition.

When a political debate is reduced to competing visions of "the good", the side that wins is the side that most effectively attaches itself to America's religious heritage. But, this religious heritage is not merely Christian signifiers. It includes the tradition of individualism and personal responsibility. This insight provides clues into what is wrong with the current advocacy of ENDA. If the debate over ENDA continues to be framed as Christian vs. secular or heritage vs. contemporary mores, ENDA

loses. However, if ENDA can somehow also root itself in an American religious tradition it has a better chance of gaining public support.

This approach should not be confused with arguments that conveniently interpret scripture. Efforts by the HRC and likeminded groups to provide new interpretations of sacred texts have been met with derision by the devout. They convince no one except those already inclined to support gay rights. Instead, proponents should tap into the uniquely American idea of individuality as it connects with one's personal responsibility to discover and interpret moral guidance. It is not the job of gay rights advocates to convince others that homosexuality comports with Christian teachings. Rather they should emphasize one's personal right to come to moral conclusions without state coercion.

It is neither productive nor necessary to try to convince someone that something they view as sinful is somehow as sacred as their faith practice. It is useful, however, to remind someone of the sacredness of having the right to define for one's self what is and is not moral, and the importance of extending that right to others even if an opposing moral conclusion results. The right to come to opposing moral conclusions is part of self-definition. It allows one's construction of self and the self's place within reality. Self-definition also includes with whom a person seeks companionship. Liberty of conscience is the right to live out a core understanding of self. This is true whether that core understanding involves a faith affiliation or an innate sense of sexual orientation.

### **Separating the Self from the Sacred**

Gay rights advocates too often characterize sexual orientation as somehow less essential to self-definition than faith practice. They tacitly approve of the socially conservative argument that religion is essential to a person's identity while

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<sup>34</sup> Williams, R.H. (1999). "Visions of the Good Society and the Religious Roots of American Political Culture."

*Sociology of Religion*. *Sociology of Religion*, 60(Spring), 1-34

sexual orientation is merely who someone happens to be sleeping with at any given time. The person one seeks as a complement to her identity can provide as much meaning and significance as what religious tradition guides her life. It is possible then – rather, essential – that policy addressing religious freedom and gay rights respect both the faith practice and the sexual orientation that best align with a person’s core understanding of self.

Ron Replogle articulates these flawed assumptions by dividing personhood into a hierarchy of goods; constitutive, differentiating, and elective (c, d, and e-goods respectively).<sup>35</sup> According to Replogle, c-goods are necessary for existence. D-goods are matters of self-definition necessary for a particular existence. And e-goods are personal preferences not essential to the definition of self. He argues that “sexual preference” is an e-good, possibly a d-good, but definitely not a c-good. He later claims that religion is definitely a legitimate, high d-good. He uses a historical justification for why religion is a d-good in liberal democracy but does not expand that to a freedom of conscience outside of recognized religions.

By characterizing sexual orientation as merely an e-good, he frames the debate in terms of d-goods-based rights being infringed by the invalid elevation of an e-good. He literally describes a zero-sum game between d-goods and “elevated” e-goods. By doing this, he demonstrates both the problem and its most useful solution. The problem is that sexual orientation is reduced in debate to merely an e-good. This is a misunderstanding of both sexual orientation and the reason religion has historically enjoyed protected status. Sexual orientation is not some externalized component of preference like one’s style of dress. And religious liberty has not and *should* not be limited to a choice of affiliation. These misunderstandings

form the basis for Replogle’s skewed hierarchy. Unfortunately, they are more common in political discourse than accurate understandings of sexual orientation and faith.

These misunderstandings about the freedom to self define are the reason gay rights are often equated with a reduction in religious liberty. Conservative columnist Penna Dexter provides a useful example of this misunderstanding when she echoes the familiar alarm over the “loss” of religious liberties.

Congress is considering another piece of legislation that will cost employers not just their money, but also their freedom, to hire and fire based upon their own moral convictions. It's called ENDA, the Employment Non-Discrimination Act. If passed and signed into law, ENDA will extend special civil rights protections to homosexuals and transgenders. These privileges will be bestowed on people based solely upon their sexual preferences and inclinations. ENDA severely limits the ability of employers to intentionally hire people who share their values. It's to be enforced by the Equal Opportunity Employment Commission whose latest nominee is Chai Feldblum, who is an open lesbian and currently a Georgetown law professor. When asked about the rights of employers to follow their religious beliefs in hiring people, she replied, "Gays win; Christians lose." Many companies court homosexuals for hiring. The government does not force those companies to hire Christians. Neither should it require religious and moral people to bring into their organizations workers who openly flout God's standards.<sup>36</sup>

Dexter demonstrates these common misconceptions about employee protections for gay people on both sides of the debate. Typically, a gay rights supporter would take issue with

<sup>35</sup> Replogle, R. (1988). *Sex, God, and liberalism*. Journal of Politics 50 (November): 937-959

<sup>36</sup> <http://www.bpnews.net/BPFirstPerson.asp?ID=31729>

her claims that ENDA protects preferences and proclivities. But, as referenced before, this is an ontological claim about the correct characterization of sexual orientation that does not need to be advocated or denounced in law. When she says, “The government does not force those companies to hire Christians,” she is incorrect. A private employer cannot base a hiring decision on anyone’s religion. But beyond being factually incorrect, Dexter reduces the sacredness of religious identity, sexual orientation, and any other component of identity.

By framing the debate as Christianity is right and non-Christian things are wrong, Dexter fails to recognize the liberty of conscience that undergirds what she thinks is religious liberty. The unfortunate and out-of-context quote by Chai Feldblum, “Gays win; Christians lose” similarly reduces a universal liberty of self-definition to a civic competition among competing teams.

Religious freedom and equality for gay people can both be advocated simultaneously when debating ENDA. It is illegal to hire, fire, or refuse to promote someone based on her faith practice because faith is an essential component of identity. Arguments in favor of ENDA should acknowledge that liberty. Then activities should apply the same reasoning to sexual orientation. Furthermore, it should be advocated that shielding sexual orientation from employment discrimination also protects religious liberty by codifying this mutual right in law.

Such a reconceptualization of the gay rights debate is neither impossible nor all that unfamiliar. When *Sensation*, a controversial art exhibit, came to the Brooklyn Museum of Art in 1999, it provoked outcries of defamation from many religious leaders. One work singled out for harsh criticism was Chris Ofili’s portrait of the Virgin Mary. It was created with pieces of nude photos and decorated with elephant dung. The Archbishop of New York and William Donohue, president of the Catholic League for Religious and Civil Rights, called the portrait an attack on religion itself. However, when Mayor Gulliani threatened to

cut millions of dollars worth of public funding from the museum, which would likely result in the museum’s closing, many religious leaders recoiled at the overt government curtailing of expression.

It is one thing for a religious person to find a piece of art disgusting. It is another issue entirely to support the state’s ability to regulate appropriate and inappropriate speech. Among the myriad of issues advocated by the Christian right one that is conspicuously uncommon is the banning of controversial art. Briefly in the mid-nineties many religious conservative groups supported a reduction in funding for the National Endowment for the Arts. They have since backed off of that advocacy because of the potential implications for religious speech. If the government is empowered to restrict expression based on public outcries of offense, then the political rhetoric of the Christian right is in danger of similar regulation.

Even the most hardened ideologue can respect the right of others to produce speech he finds deplorable in the interest of protecting his equal right to offend. It is not a leap in logic to apply the same understanding of liberty to faith practice and sexual orientation. In the same way many religious conservative groups respect the right of speech they oppose they can alter their conceptualization of gay rights. They can substitute a broad understanding of liberty of conscience that respects an equal right to self-definition and the ability to live out one’s understanding of self.

This reconceptualization is not impossibly optimistic. In fact, when signs of this novel way of understanding gay rights have been introduced into popular discourse, traditional conservatives are the ones who forward the idea. In a commentary for the *New York Times*, conservative David Brodie argues in favor of gay marriage from the standpoint of recognizing and protecting the sacred. Although his particular focus is same-sex unions, his reasoning is applicable to other manifestations of the debate.

Every human being in the United States has the chance to move from the path of contingency to the path of marital fidelity — except homosexuals. Gays and lesbians are banned from marriage and forbidden to enter into this powerful and ennobling institution. A gay or lesbian couple may love each other as deeply as any two people, but when you meet a member of such a couple at a party, he or she then introduces you to a “partner,” a word that reeks of contingency.

Some conservatives may have latched onto biological determinism (men are savages who need women to tame them) as a convenient way to oppose gay marriage. But in fact we are not animals whose lives are bounded by our flesh and by our gender. We’re moral creatures with souls, endowed with the ability to make covenants.

We shouldn’t just allow gay marriage. We should insist on gay marriage. We should regard it as scandalous that two people could claim to love each other and not want to sanctify their love with marriage and fidelity.

When liberals argue for gay marriage, they make it sound like a really good employee benefits plan. Or they frame it as a civil rights issue, like extending the right to vote. Marriage is not voting. It’s going to be up to conservatives to make the important, moral case for marriage, including gay marriage. Not making it means drifting further into the culture of contingency, which, when it comes to intimate and sacred relations, is an abomination.<sup>37</sup>

His criticism of the traditional liberal stance is correct. Liberal defenders of gay rights often reduce identities to matters of legal status. They dilute the sacred by speaking of it in terms of purely civil law. There is, of course, a critical element of civil law inherent in gay rights. But gay people do a disservice to themselves and to any movement based on rights when they refer to their legally wedded spouses as ‘partner’ instead of husband or wife. They argue against religious considerations in the public square when they should elevate their own loves and sacred selves to the same level of significance. The key to “winning” (or simply resolving) the problem of unequal treatment for gay Americans is not to argue that religion is unimportant. It is not to argue that the sacred should be forgotten or hidden in public. The key is to unapologetically proclaim a right to live out the sacred self, religious and irreligious alike.

### Respecting all Components of Identity as Equally Sacred

Freedom of religion is meaningless without a complimentary negative right to not practice another person’s religious teachings. Justice Kennedy, in writing the majority opinion in *Lawrence v. Texas*, the U.S. Supreme Court case that overturned Texas’ sodomy laws, cogently captured this understanding of liberty of conscience by saying,

Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent decisions.<sup>38</sup>

Later, Kennedy quoted *Casey*<sup>39</sup> writing,

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<sup>37</sup> Brooks, David. *The Power of Marriage*. New York Times, November 22, 2003 available at <http://www.nytimes.com/2003/11/22/opinion/the-power-of-marriage.html>

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<sup>38</sup> *Lawrence et al. v. Texas* 539 US 558 (2003) 3

<sup>39</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 1993

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>40</sup>

The Court recognized that the liberty in question was not based on a banal, immutable attribute, purely the domain of civil law. Nor did it conform to the historically protected status of recognized religions. It was a generalized notion of self and identity. The best way to advocate for religious liberty is the converse endorsement of non-practice. The opposite is often seen from religious conservatives through the advent of ex-gay programs.

Ex-gay “ministries” or “reparative therapy” are umbrella terms for efforts to “change” a person’s sexual orientation to conform to a religious teaching. Many practitioners readily admit that the programs do not try to alter one’s sexual orientation. Rather they provide methods for those with a same-sex orientation to suppress their desires and live celibate lives in compliance with faith. These programs have been roundly condemned as ineffective and harmful by the American Academy of Pediatrics, the American Counseling Association, the American Federation of Teachers, the American Medical Association, the American Psychiatric Association, the American Psychological Association, The Interfaith Alliance, The National Association of School Psychologists, The National Association of Social Workers, The National Association of Secondary School

Principals, and The National Education Association.<sup>41</sup> More important than the number of health groups that oppose these programs is the reasons they uniformly provide for their opposition.

Most of these above groups have come together specifically to counter the harmful effects of reparative therapy in a coalition called the, Just the Facts Coalition. Their primer for educators says,

The most important fact about 'reparative therapy,' also sometimes known as 'conversion' therapy, is that it is based on an understanding of homosexuality that has been rejected by all the major health and mental health professions. The American Academy of Pediatrics, the American Counseling Association, the American Psychiatric Association, the American Psychological Association, the National Association of School Psychologists, and the National Association of Social Workers, together representing more than 477,000 health and mental health professionals, have all taken the position that homosexuality is not a mental disorder and thus there is no need for a 'cure'.

Health and mental health professional organizations do not support efforts to change young people's sexual orientation through 'reparative therapy' and have raised serious concerns about its potential to do harm.<sup>42</sup>

Jack Drescher, chairperson of the American Psychiatric Association's committee on gay, lesbian and bisexual issues, has treated about a dozen men who have undergone conversion therapy, saying,

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<sup>41</sup> "American Counseling Association Passes Resolution to Oppose Reparative Therapy," NARTH, at: <http://www.narth.com/docs/acaresolution.html>

<sup>42</sup> APA Online: Public Interest: Just the facts about sexual orientation and youth: A primer for principals, educators and school personnel See: <http://www.apa.org/pi/lgbcp/publications/justthefacts.html>

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<sup>40</sup> *Casey* at 850

Reparative therapy is the laetrile of mental health. (Laetrile was the quack cancer cure banned in the United States in the 1970s.) Many people who try this treatment tend to be desperate, very unhappy and don't know other gay people. I see people who've been very hurt by this. They spend years trying to change and are told they aren't trying hard enough.<sup>43</sup>

The harm of these programs is the parsing of internal self from external living. The “successful” graduate of an ex-gay “ministry” is forced into a state of numbed self-awareness. He is simply skilled at suppressing a human longing for intimacy and companionship. The products of these programs are expected to move through life in a partially functional state of extreme mental and emotional denial. A person should not have to suspend such an integral component of self to be accepted by family and society.

Critics of reparative therapy unknowingly endorse a similar parsing of identity when they advocate that the devoutly religious suppress their understanding of the universe and self in order to interact publicly. This parsing of identity between the public and private, the sacred and the civil, is a very contemporary and untenable approach to religious liberty. In writings referencing liberty of conscience over time, philosophers never describe a person divided in two with the sacred reserved for the confines of one's home.

To resolve the false “culture war” between secular civil equality and religious heritage it is necessary to resist the urge to declare a winner. We must reaffirm a historical and philosophical understanding of the liberty of conscience. This includes the sacred self, the right to self-define, and core components of one's identity. It does not require that identity traits be immutable, as is

expected in purely civil considerations. Nor does it require that the sacred be universally recognized as sacred, as the traditionally religious would hope. It only requires that these general principles guide the advocates of religious liberty and equal treatment alike.

Supporters of true religious liberty should never argue that it is okay to fire someone based on conformity with religious teachings. An alternate approach would neither legally inhibit nor socially stigmatize one's religious beliefs. And it would recognize that who one loves and how one adds meaning to life through intimacy is just as sacred as religious practice. It is an example of internalized homophobia and diminished expectations when gay people themselves reduce their relationships to the crude significance of power-of-attorney agreements and wills. Like David Brodie says, “marriage is not voting.” Identities are more than their civil legal status. It is unnecessary and counterproductive to claim one side's civil rights win and another side's civil rights lose when the unit of analysis is more sacred than civil. A real solution would include dissuading religious people from closeting their faith and dissuading gay people from closeting their sexuality.

In his review of David Novak's *In Defense of Religious Freedom*, Richard Garrett highlights the insistence on the part of gay rights activists for religious people to hide their beliefs<sup>44</sup>. He claims, like Chai Feldblum, that such an expectation denies a religious group the right to make a moral claim. This should be as unacceptable an outcome as second-class status for gay Americans. But, there is a difference between “making a moral claim” and insisting the law reflect your religious teachings exclusively. There is a difference between neutrality toward identity in the law and a reduction in religious liberty. Religious people should not feel coercion, from the state or polite society,

<sup>43</sup> Sandra G. Boodman, "Vowing to Set the World Straight: Proponents of Reparative Therapy Say They Can Help Gay Patients Become Heterosexual. Experts Call That a Prescription for Harm," Washington Post, 2005-AUG-16, at: <http://www.washingtonpost.com/>

<sup>44</sup> <http://www.firstthings.com/article/2009/11/freedom-for-faith-freedom-for-all>

to suppress a belief that homosexuality is unacceptable in the eyes of god. However, religious people should also reject laws that punish others for not following their religion. Legal punishments include the denial of employment. Insisting that the law not reflect a sectarian preference is different from disallowing religious people to speak about their faith. Characterizing the battle for gay rights as an effort to deny others' belief liberties should be inaccurate rhetorically *and* actually.

### **Conclusion**

The debate over gay rights has settled into a repetitive stalemate between one side arguing for religious liberty and the other side arguing for civil equality. This stalemate threatens to mirror the political intractability of other social issues like abortion. The discourse has been mischaracterized as a zero-sum game between faith practice and sexual orientation. This is unnecessary and ultimately detrimental to the hope of ever finding governable consensus.

Devoutly religious people want to live out their faith because it is as an essential component of themselves that should not be suppressed in public. Their religion gives them an identity, meaning, and a sense of purpose. Gay people oppose legal discrimination against their sexual orientation because it penalizes an aspect of their core selves. The relationships in their lives contribute to their identity and provide them with meaning. Both parties want a core component of their selves protected in law.

The realization that two mutually exclusive and diametrically opposed views may actually seek the same thing offers a refreshing reinterpretation of a stale debate. When each argument is removed from its particulars it becomes apparent that they are both advocating for the ability to live life with full, unparsed identities and for the right of self-definition. A broad understanding of liberty of conscience can encompass all these

rights. The best way to protect that liberty of conscience is to apply it to an identity characteristic one sees as in opposition. The political debate over gay rights has a chance to reach a consensus point if both sides recognize and respect a mutual desire for a liberty of conscience.