

# Religious Freedom Project

## BERKLEY CENTER

for Religion, Peace & World Affairs

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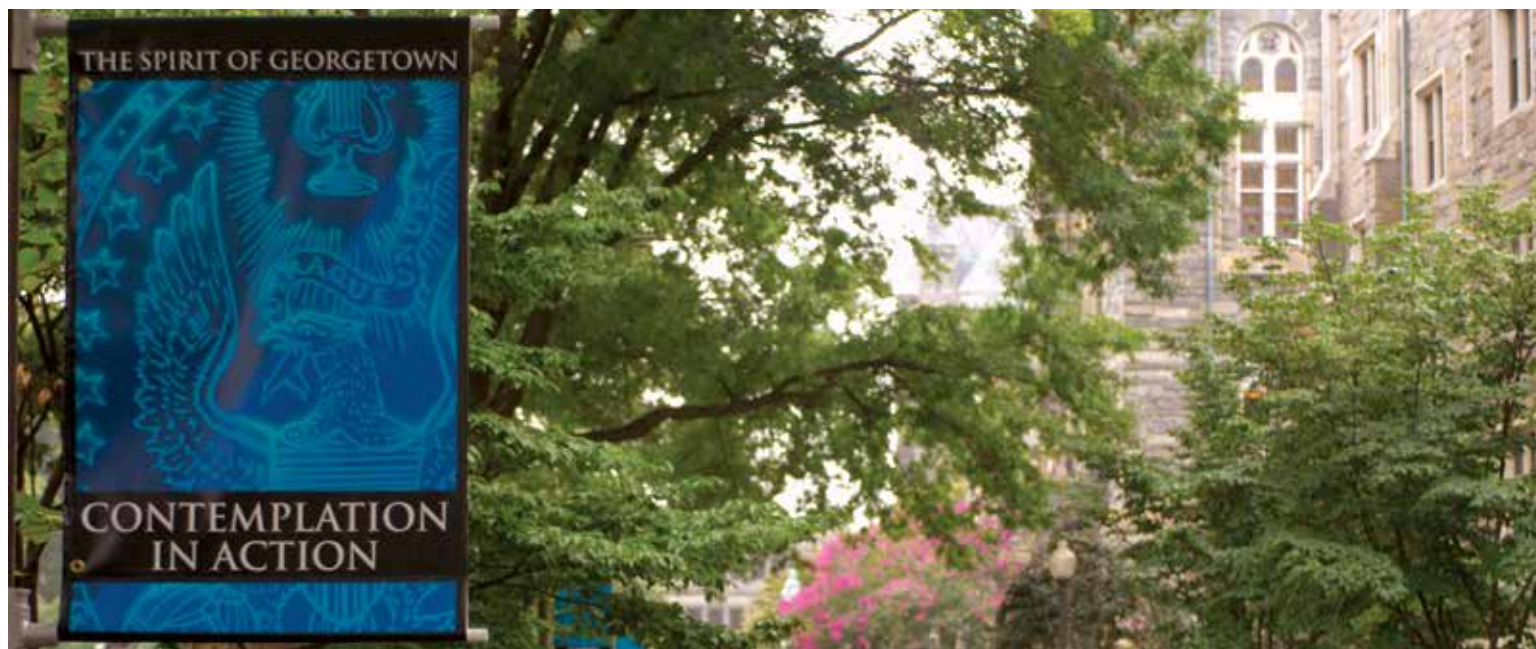
GEORGETOWN UNIVERSITY

### Report of the Georgetown Symposium on

# Religious Freedom and Equality: Emerging Conflicts in North America and Europe

April 11-12, 2012





### About the Religious Freedom Project

The Religious Freedom Project (RFP) at Georgetown University's Berkley Center for Religion, Peace, and World Affairs began in January 2011 with the generous support of the John Templeton Foundation. The RFP is the nation's only university-based program devoted exclusively to the analysis of religious freedom, a basic human right restricted in many parts of the world. Our team of interdisciplinary scholars examines different understandings of religious liberty as it relates to other fundamental freedoms; its importance for democracy; and its role in social and economic development, international diplomacy, and the struggle against violent religious extremism. Our target audiences are the academy, the media, policymakers, and the general public, both here and abroad. For more information about the RFP's research, teaching, publications, conferences, and workshops, visit <http://berkleycenter.georgetown.edu/rfp>.

### About the Berkley Center for Religion, Peace & World Affairs

The Berkley Center for Religion, Peace, and World Affairs at Georgetown University, created within the Office of the President in 2006, is dedicated to the interdisciplinary study of religion, ethics, and public life. Through research, teaching, and service, the center explores global challenges of democracy and human rights; economic and social development; international diplomacy; and interreligious understanding. Two premises guide the center's work: that a deep examination of faith and values is critical to address these challenges, and that the open engagement of religious and cultural traditions with one another can promote peace.

### About the Centre for the Study of Religion and Public Life

The Centre for the Study of Religion and Public Life is an interdisciplinary research centre of the University of Oxford, at present based in Kellogg College. It is concerned with the academic study of issues concerning the place of religion in a liberal and pluralist society. It is particularly interested in questions concerning law and religion, as they impact on religious freedom. The centre also conducts research into the problems raised by increasing religious diversity, especially in parts of Europe, and welcomes scholars visiting Oxford from across the world to research these issues.



# INTRODUCTION

On April 11 and 12, 2012, the Religious Freedom Project held a probing international conference on an intensely controversial, but manifestly important subject—the rising tensions in Europe and the United States between traditional understandings of religious freedom and emerging claims of equality, especially those made by homosexuals.

Held on the grounds of one of Oxford University’s most ancient and beautiful institutions—Magdalen College—the conference was entitled “Religious Freedom and Equality: Emerging Conflicts in Europe and North America.”

We began on the evening of April 11 with a keynote address by Philip Tartaglia, Roman Catholic bishop of Paisley, Scotland. Bishop Tartaglia gave an address, “Religious Freedom: An Unexpected Issue for our Times?” and engaged in a spirited but respectful discussion with the international audience that had gathered. (Just a few months after our conference, on September 8, 2012, Tartaglia was installed as Archbishop of Glasgow.)

During a day-long symposium on April 12, three panels addressed the emerging conflict in their respective homelands. First came a panel of scholars from the United Kingdom. Then came panels from continental Europe and North America, respectively.

What follows is an edited transcript of scholars’ presentations, as well as their highly enlightening engagement with the invitation-only audience. This report records Bishop Tartaglia’s keynote address and discussion, followed by panels and conversations about the United Kingdom and Ireland, Continental Europe, and North America. The report concludes with discussion from the final wrap-up session.



## Program

—— WEDNESDAY, April 11 ——

### **Keynote Discussion: Religious Freedom: An Unexpected Issue for Our Times?**

Introduction: Right Reverend John Perry, Anglican Bishop of Chelmsford (retired)

Keynote Speaker: Bishop Philip Tartaglia, Roman Catholic Bishop of Paisley, Scotland

—— THURSDAY, April 12 ——

### **United Kingdom and Ireland**

Panelists: John Finnis, *Biolchini Family Professor of Law, Notre Dame University and Professor of Law and Legal Philosophy, Oxford University*

Stephen Law, *Philosopher and Senior Lecturer, Heythrop College, University of London*

Christopher McCrudden, *Professor of Human Rights and Equality Law at Queen's University, Belfast*

Moderator: Roger Trigg, *Senior Research Fellow, Kellogg College, Oxford University*

### **Continental Europe**

Panelists: Rocco Buttiglione, *Professor of Political Science, Saint Pius V University, Rome*

Maarit Jänterä-Jareborg, *Professor of Law, Uppsala University*

Andrea Pin, *Assistant Professor of Constitutional Law, University of Padua*

Moderator: Peter Petkoff, *Research Fellow, Center for Christianity and Culture, Regent's Park College, Oxford University*

### **North America**

Panelists: Rick Garnett, *Associate Dean for Faculty Research and Professor of Law and Concurrent Professor of Political Science, University of Notre Dame Law School*

Linda McClain, *Professor of Law and the Paul M. Siskind Research Scholar, Boston University School of Law*

Robin Wilson, *Professor of Law and a Law Alumni Faculty Fellow, Washington and Lee University School of Law*

Moderator: Michael Gerson, *Columnist, Washington Post*

### **Wrap-Up Discussion**

Moderator: Roger Trigg, *Senior Research Fellow, Kellogg College, Oxford University*



## RELIGIOUS FREEDOM: AN UNEXPECTED ISSUE FOR OUR TIMES?

**BISHOP JOHN PERRY:** Bishop Tartaglia was born in Glasgow, Scotland. He was educated in his early years in Glasgow, and later in Aberdeen. His studies took him to Rome, preparing for the Roman Catholic priesthood, where he earned a Doctorate in Sacred Theology. He also took up a number of responsible positions within the religious Roman Catholic educational colleges in Rome. He served as a parish priest in Glasgow for nine years and he was consecrated a bishop in 2005. Since then, he has not been slow to speak out on issues on which he believes the church's voice needs to be heard. We look forward with great expectation to his address, entitled "Religious Freedom: An Unexpected Issue for Our Times."

**BISHOP PHILIP TARTAGLIA:** I will begin with a story, which may set the tone of our conversation. A few weeks ago, there was a News Night program on the topic of same-sex marriage. I did not see it, but a young priest in the diocese saw the program and when I met him a day or two later, and he said to me, "I found that program scary." He was not

fearful because all of the panel and most of the studio audience were in favor of same-sex marriage. What made him afraid was the reaction of the studio audience to the question 'If same-sex marriage is legalized, do you think anyone who speaks against it should be criminalized?' The audience all answered "yes." I tell this story to set the context of our discussion. We can intellectualize these issues a lot and consider them in a very scholarly fashion, but we have to realize the real social impact of what is going on now. I think we are now in a particularly important cultural moment that will present various issues, vis-à-vis religious liberty, which we will need to address.

When I was consecrated a bishop in November 2005, I was not fretting about religious freedom in Scotland or in the United Kingdom. Yet, after only six years in office as a bishop, I think I can say that the question of religious freedom or the fear of the loss of religious freedom is now perhaps the most serious threat which the Catholic Church is facing. I speak especially for the Catholic Church, but in many ways

this is also applicable for all people of faith. The way this unfolds will determine how the Catholic Church will present itself to society for the foreseeable future. Will society continue to afford the Catholic Church and other religious bodies and groups the oxygen and the vital space to be themselves and to express themselves in the public square? Or, will my church be forced to conform to a publicly acceptable form of religiosity, a kind of patriotic church, if you like? Or worse, will the Church be driven to the margins of society, and perhaps denied a legal right to carry out its mission and to express its faith in public? These questions may sound dramatic, but I do not think that they are completely unrealistic.

How have we gotten to this point so quickly? Secondly, what is at stake for religious freedom? And thirdly, what do we need to do to move forward in a creative manner? I think the threats to religious freedom have risen in this country both stealthily and rapidly. Scholars of the history of ideas may be able to trace the remote origins of such threats to the philosophy of the nineteenth century or maybe even the eighteenth century, but I confess that in 2005 when I was consecrated a bishop, I did not see any problems facing religious freedom. However, by February 2007, I was warning the people of my diocese in a pastoral letter that religious liberty was under attack. I never really thought I would ever have to make such a statement as the one with which I opened that pastoral letter. “My dear people,” I said, “it is with growing concern I raise with you the issue of the religious freedom of the Catholic Church in the United Kingdom.”

The occasion of this concern was the introduction into Parliament of new regulations that aimed to outlaw discrimination on the grounds of sexual orientation in the provision of goods and services. These new regulations were based on the Equality Act of 2006. It was evident that they would force Catholic adoption agencies to place children with same-sex couples, thereby forcing such agencies to violate the teachings of the Church. As a result, some agencies complied with this legislation and renounced their Catholic character. One such example was St. Andrews Adoption Agency, formerly of the archdiocese of St. Andrews in Edinburgh. It has now separated itself from the Church. There are others in England that have closed down. Others like St. Margaret of Scotland, a Catholic agency based in the city of Glasgow, have stood firm and continued to operate as a Catholic agency facilitating adoption by a suitable husband and wife, although such organizations are under pressure from the statutory agencies.

It was then that I began to realize that the advance of the homosexual agenda, in concert with equality legislation, was beginning to have a problematic effect on the freedom of the Catholic Church to operate in the public sphere. Subsequently, the courts in England in two significant, if not exactly landmark, cases ruled against the owners of a bed and breakfast facility who did not wish to accommodate homosexual couples under their roof, and then disallowed a Christian couple from fostering because they could not guarantee that they would recommend homosexuality as a positive life choice for children in their care. I think the later case is especially alarming. It was becoming clear that, with the power of the courts and of the political establishment, religious freedom and freedom of conscience could be set aside in favor of the advance of the homosexual agenda. Thus, conflicts have emerged between religious freedom and the right to sexual autonomy in all cases.

There was also the clamorous case of the Englishman who mentioned on a social networking site that he was not personally in favor of same-sex marriage. He was subsequently demoted in his place of employment and had his salary slashed by almost half. That incident occurred even before any consultation in England on same-sex marriage and before any law had been passed. I think that really shows the near-hysterical nature of the intolerance, which is currently justified in our society towards people who question the homosexual agenda from any point of view, but especially from a Christian standpoint. This helps to explain why the Scottish bishops responded so emphatically at the end of last year to the Scottish government’s consultation on same-sex marriage, which was prefaced by the government’s own admission that they were inclined to legalize same-sex marriage. It is bad enough that the government is prepared to change the nature of marriage to include what marriage had never before been in any civilization or culture, namely a union of persons of the same-sex, and to recast the nature of parenting in such a way that children would no longer have the natural right to have a mother and a father. But the legalization of same-sex marriage would also be thought to bring with it a lessening of religious freedom.

In October 2011, I promulgated a pastoral letter in defense of marriage to my own diocese, as a response to the Scottish government’s consultation on same-sex marriage. In this letter, I wrote, “Redefinition of marriage to include same-sex unions will bring with it state-sponsored discrimination and penalties in the courts and in the workplace against anyone

who dares to question the rightness of same-sex marriage, thereby riding roughshod over freedom of speech, freedom of religion and freedom of conscience.” It is always risky to argue from likely consequences because consequences cannot always be exactly foreseen, but the concerns I have raised about the threat to religious freedom in the wake of the legalization of same-sex marriage are justifiable, because religious freedom has already been set aside, both formally by the courts and informally by others in the promotion of the homosexual agenda. The Scottish bishops are in no doubt that if the government legalizes same-sex marriage, we will have a fight on our hands to preach and teach the true nature of marriage, both from the pulpit and in Catholic schools, and we fear that Catholic men and women will be discriminated against in the workplace and in society. How we have arrived so swiftly at the point where religious freedom is a live issue for the Catholic Church? The answer lies in the effect of the alliance of equality legislation with the furtherance of the homosexual agenda. That is something we need to think about and I will return to that in my conclusion.

It is instructive to broaden our perspective here. Across the Atlantic in the United States, the question of religious freedom is becoming a very public and very high profile issue, largely for the same reasons as it was here in the United Kingdom. In the face of the intrusion of the Obama Administration on religious freedom, hitherto enjoyed by the American Catholic community and by other religious bodies and groups, the United States Conference of Catholic Bishops has seen fit to take the largely unprecedented step of establishing an ad hoc committee for religious liberty. The American bishops decided set up a new committee because they thought religious freedom was in danger, in America, of all places, the land of the free. That committee is under the chairmanship of Bishop William Lori, formerly of Bridgeport, now Archbishop of Baltimore. In testimony he gave on October 26, 2011, before the Judiciary Committee of the United States House of Representatives Subcommittee on the Constitution, Bishop Lori spoke of infringements on religious freedom which parallel our own recent experience in the United Kingdom in regard

to both same-sex marriage and adoption.

Here is an excerpt from his testimony, which offers a glimpse into the current state of religious liberty. “At the state level,” he said, “religious liberty protections associated with the re-definition of marriage have fallen short of what is necessary. In New York, county clerks face legal action for refusing to participate in same-sex unions, and gay rights advocates boast how little religious freedom protection individuals and groups will enjoy under the new law. In Illinois, Catholic Charities has been driven out of the adoption and foster care business because it recognizes the unique value of man/woman marriage for the wellbeing of children.” More recently, the Archbishop of Philadelphia, Charles Chaput, spoke to the heart of the culture war, which the Obama Administration is

waging on the Catholic Church in the United States, when he said, “At its heart is a seemingly deep distrust of the formative role religious faith has on personal and social conduct and a deep distaste for religion’s moral influence on public affairs.” If you think that “culture war” is too dramatic a term, let me refer you to a piece in the *Telegraph* online, by Tim Stanley from the ninth of February 2012, which had the title “Obama’s War on the Catholic Church in America Isn’t Just Insensitive, It’s Un-American.” This was because the Obama health-care policies were, in the view of the writer, infringing freedom of

conscience and freedom religion.

Both here and in the United States, and indeed across the globe, it seems clear that religious freedom is the new key issue in church-state relations. This matter is well summarized in a report produced at the beginning of March 2012 by the Vatican’s representative at the United Nations headquarters in Geneva, Archbishop Silvio Tomasi. Speaking to the United Nations Human Rights Council he said, “Rising restrictions on religion affect more than 2.2 billion people around the world and that while virtually all nations claim to respect religious freedom, the gap is growing between widely accepted stated principles and their daily application on the ground.”

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*RFP Director Thomas Farr*

The issues at stake are the notion of religious freedom itself and the idea of the modern democratic state. In October 2011, I took the opportunity to write directly and personally to Scotland's First Minister, Mr. Alex Salmond, about government policies, which impinged on the freedom and good of the Catholic community. This provoked an immediate reaction and I was invited to urgent discussions in Edinburgh with the first minister. One of the issues I had raised was the question of same-sex marriage, and in our conversation that day, I raised concerns about the likely impact of the legalization of same-sex marriage on religious freedom. I felt that such a step would limit the Church's freedom to preach and teach about the nature of marriage as a union solely of a man and a woman. In his response to me, he assured me that a law introducing same-sex marriage would not restrict the freedom of Catholics to practice their faith. I am not sure if he understood the difference between freedom of worship and freedom of religion, or if he understood it only too well, and was hedging his bets, knowing full well that once legislation permitting same-sex marriage was on the statute books, equality activists and officers would be calling for sanctions

against people who publicly expressed dissent from the new orthodoxy. As I have suggested already, I was worried, not so much for myself but for Catholic teachers, for example, who have to make their living and who would be delivering a religious education program in Catholic primary and secondary schools in Scotland in which marriage is clearly defined as explicitly as a union between a man and a woman.

It is doubtful if any government would enact legislation and regulations that restrict the freedom of worship, but we are already at the point where a broader and fuller notion of freedom of religion is under duress. If same-sex marriage is legalized, I have no doubt that we will need to have some kind of plan B, and I think that plan B will be about safeguarding the freedom to dissent in public and in private, in religious worship and preaching, in the Church's public declarations, in education and in teaching, and in the upbringing of children. Given the way things are moving in the United Kingdom presently, I have no confidence that any such guarantees will be forthcoming, or if they are forthcoming, I doubt if they would hold in the present atmosphere.

In December 2011, British Prime Minister David Cameron gave an address here in Oxford, which commemorated the King James Bible. In that address, he confirmed the place of Christianity in British history and life. I had once written to the prime minister in critical vein, when he had favorably hypothesized the legalization of same-sex marriage, even before the same matter had been raised by the Scottish government. That letter provoked a disapproving rebuke from one of their prime minister's equality guardians. Nonetheless, I thought it was only fair to write a letter approving of his Oxford comments on the essential place of Christianity in British life and culture, comments that were surprising to me. In that letter, I said, "I was pleased to read news reports of a speech you gave recently in Oxford, marking the four-hundredth anniversary of the King James Bible, in which you acknowledged the fundamental contribution of Christianity to British society, called for a revival of Christian values and acknowledged the importance of the Christian faith and of other religious faiths, to the majority of people in Britain today. I welcome your words at a time when many of us are concerned that freedom of religion, understood not simply as freedom to worship but also as freedom to express and teach our faith, is in danger of being eroded in the United Kingdom by illiberal limitations being placed on what Christians can say and do. I hope that your wise words will be reflected in the decisions reached by parliaments and assemblies, by the courts and by

regulatory bodies up and down the land.”

In that letter, I described religious freedom not simply as freedom of worship but also as freedom to express and teach the faith. I am not sure how significant it is that this time I received no reply to my letter to the prime minister, either from him or from one of his departments or aides. But my recent experience of dealing with government on both sides of the border tells me that while freedom of worship may not be in question, freedom of religion in its full sense is something they are not prepared explicitly and publicly to underwrite.

I will briefly quote from a homily from November 2011 that I gave at a parish anniversary in my diocese. This was an ecumenical event and people from the other churches came to me afterwards and said how much they agreed with this particular comment: “We need to be aware that we are living now in a particular and uncertain cultural moment, and I sense that religious freedom, the freedom to practice, express, and spread our faith, is becoming a significant matter of concern for the future of Catholic and Christian communities, here in our own country and throughout the world. The future in this parish and elsewhere will be marked by the extent to which religious freedom continues to be recognized in our country as a primary and inalienable human right.” The first thing at stake is the meaning of religious freedom in a fuller sense, more than just freedom to worship.

The second matter at stake here is the notion of the liberal democratic state. In February of this year, the Baroness Warsi, the Conservative Party vice chairman, led a UK ministerial delegation to the Vatican to have talks with representatives of the Holy See on matters of mutual concern, as a follow-up to Pope Benedict’s 2010 visit to Britain. The baroness, herself a Muslim, had been quoted in the media as expressing concerns that religion in Britain was being squeezed and edged out. One response, which achieved prominence, came from the Equality and Human Rights Commission Chief Trevor Phil-

lips, who said that religious beliefs and rules end at the door of the temple. This appeared to apply as much to those who seek the application of Sharia law in the United Kingdom as to Christians who declined to give a child for adoption to same-sex partners.

It is worth noting the striking incoherence between the prime minister’s praise of Christianity and its positive role in public life and the view expressed by the Equality and Human Rights Commission Chair, Trevor Phillips, with his marked tendency towards restricting, diminishing, and even banishing religious discourse from providing any inspira-

tion or guidance or rule in the formation of public policy. How can Christianity, one wonders, have a positive role in public life, as the prime minister seems to wish, if it begins and ends at the door of the temple? If religious freedom is limited to the doors of the temple, effectively freedom of worship, how much different will that be from the situation in somewhere like Saudi Arabia, where there is freedom of worship within closed doors? Is that the reality which Trevor Phillips is advocating on behalf of his commission?

The modern theory of religious freedom forged by progressive Catholic thinkers around and

during the Second Vatican Council advocates the compatibility of the values of the Judeo-Christian tradition with democracy. This doctrine, while asserting the supremacy of God, has no problem giving to Caesar what is rightfully Caesar’s, and there is no chance of this kind of religious freedom trying to replace the law of the land with a religious code that recognizes no difference between the secular and the sacred. The secular autonomy of the state is safe with this Christian theory of religious freedom because it works on the basis of a legitimate separation of church and state, such that the virtues which are generated by religious freedom will underpin and encourage democracy, while the democratic system will support and protect religious freedom.

While some may think themselves enlightened if they hold the view expressed by Trevor Phillips, such an approach in

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banishing the religious from public discourses raises huge questions about the nature of the state. In his comments, Trevor Phillips appears to endorse a notion of a state which fills all civic space and reaches out to control and regulate other institutions which are present within the state. It is a notion of the state with a rather limited understanding of subsidiarity. If that is big government, it is big government at its scariest. It appears to have no respect for institutions such as the family and the church, which preexist the state, which straddle the private-public domain, and which have their own internal constitutions. This is a state that is overreaching itself and is moving towards a kind of soft totalitarianism. The combination of an unlimited state and limited religious freedom adds up to big problems, as we have seen in the past and indeed in the present, around the world. It is instructive to point out that the robust assertion of religious freedom was what helped liberate Poland and other eastern European countries from Communism and put them on the road to becoming viable democracies.

A state with a healthy understanding of subsidiarity will recognize and encourage free associations and institutions, especially the family, churches, and religious groups. The state should recognize these groups as goods in themselves, because they normally encourage the kind of friendship and discipline which is important for human flourishing and for the development of the virtues which are vital for a healthy democracy. A state that recognizes human associations that exist prior to the state, not just chronologically but in terms of the truths of the human condition, and recognizes the legitimate prerogatives of the free associations found within the civic space, has recognized the limits of its own competence and the boundaries of its authority. Let me make this concrete. According to this theory of the nature of the state and its relationship to the family and the church, the state would have no business changing the nature of marriage to accommodate same-sex unions and no business regulating Catholic adoption agencies, both of which have happened or are likely to happen here in the United Kingdom.

This is the fundamental understanding of the state that lies behind the relationship of church and state in Catholic social doctrine. Speaking to a group of bishops from the United States in January of this year, Pope Benedict XVI offered his understanding of the Church's role in a modern democratic state: "The Church's witness, then, is of its nature, public. She seeks to convince by proposing rational arguments in the public square. The legitimate separation of church and

state cannot be taken to mean that the Church must be silent on certain issues, nor that the state may choose not to engage or be engaged by the voices of committed believers in determining the values that will shape the future of the nation." How can this vision of church-state relations be accommodated or respected if the dominant ideology is one that decrees that the Church's faith and values must be left at the door of the temple? I submit that this is a huge emerg-

*"[...] if the present culture or trajectory towards radical secularism goes unchecked, I would say that there is a good chance that sometime in the next few years I will be appearing before a judge in a courtroom, charged with something like not accepting the indispensable presuppositions of contemporary modernity."*

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ing question for church-state relations, and it will not be addressed or resolved by the quintessentially British virtues of decency, fairness, and bumbling along. I sense that the Christian roots of these national virtues have been eradicated. The anti-religious agenda has a hard edge and is in no mood to compromise.

What are some things we can do going forward? First of all, I think there is an urgent need to deepen public understanding of the importance and nature of religious freedom. It is more than the freedom to worship; it is also the freedom to express and teach religious truths. Thus, religious freedom must include the freedom to evangelize, catechize, and serve the needy according to our religious community's own precepts. Religious freedom is also intertwined with other important freedoms, such as the rights to freedom of expression, thought, and conscience. Believers should not be treated by the government and the courts as a tolerated and divisive minority whose rights must always yield to the secular agenda, especially when religious people and people of faith are part

of society in a substantial number. The opportunity to contribute to the community and to the public good is a right of all individuals and groups, including religious ones. The application of laws within democracies should facilitate the broadening of these opportunities, not their increasing restraint. I think much more work needs to be done on how religious freedom and freedoms of sexual expression can co-exist together.



*Bishop Philip Tartaglia*

In Britain, this emerging crisis and conflict has, in point of fact, come in relationship to the advancement of the homosexual agenda. Why is that? The Catholic Church has long protested abortion and other kinds of procedures and developments that impinge on the sacredness of unborn life, and yet its religious freedom was not called into question as a result of such teachings. But religious freedom has been called into question here in the United Kingdom, especially in relationship to homosexuality. I now hear voices more or less suggesting that the Church's voice on other matters similarly

disqualifies it from respect in polite society. Why should homosexuality be the issue that has caused an increasing anger towards the Church and towards what Christian people and people of faith stand for?

I wonder if we need to lay bare, as Cardinal Pell has said in his own inimitable style, the real nature of modern liberalism. Modern liberalism has strong totalitarian tendencies. It tends to imply that institutions like the family, the church, and other associations exist only with the permission of the state, and to exist lawfully they must abide by the dictates and the norms of the state. It has been evident to me that this type of liberalism is quite different from traditional liberalism, which sees the individual, the family and the association as prior to the state, with the state existing only to fulfill functions that are beyond the means of individuals and families to function. I think we need to engage in dialogue with people who espouse this strong liberal tendency, which is moving towards a totalitarian type of liberalism, which is intolerant of anyone who questions it. Scholars and philosophers must do more work on this matter so as to ensure a more peaceful and harmonious society.

It has become accepted discourse now for activists to respond to any critique of homosexuality or the homosexual agenda by invoking the terms "homophobic" or "homophobic bigotry," which, of course, has the effect of intimidating the opposition and closing down the debate. After the promulgation of my pastoral letter, I got a number of angry emails from homosexual persons or activists, saying two things: I was a child abuser and a homophobic bigot. Now I tried to answer every one of those, and tried to explain that because I do not agree that there should be same-sex marriage does not mean that I hate homosexuals. Nor because I do not approve of homosexual acts, does it mean that the Church or I would tolerate injustice towards homosexual persons, even if it has happened in the past. There seems to be little awareness that classifying any critique of homosexuality as hate speech is itself illiberal intolerance. I read an article recently in which the author suggested that those who use this language of homophobic bigotry to intimidate the opposition and close down the discussion are actually acting against one of the cardinal tenets of modernity. Modernity holds that every creed or set of values is up for discussion and debate in the public square. There is no religion or creed that everyone accepts. Every religion, creed, and set of values can be questioned. That is the basis on which the homosexual agenda itself

gained ground in the modern Areopagus. How dissident is it for such a contemporary movement to use discredited tactics of the past, namely terror and intimidation to advance their cause and close down the discussion? I think absolute sexual freedom lies at the heart of the modern autonomy project. The message from the earliest days of the Sexual Revolution, always barely concealed by the talk of free love, live and let live, and creating space for different forms of loving, was that limits in sexual autonomy will not be tolerated. That is now generating pressure against religion in public life.

It is difficult for Christians to know how to respond to this situation. We are in the midst of something of a cultural revolution. Phenomena of this kind can be uncompromising and brutal. There is no room for reasonable accommodation of prior rights. Christians, I think, are riding the tiger at this time in history, and if the present culture or trajectory towards radical secularism goes unchecked, I would say that there is a good chance that sometime in the next few years I will be appearing before a judge in a courtroom, charged with something like not accepting the indispensable presuppositions of contemporary modernity.

I think that Christians, especially intellectuals and theologians, must engage in dialogue with secular liberalism. Of course, for a Christian, if there is a time of trial to come, this can also be purifying and freeing for the church, because while it wants to maintain good relations with public authorities, it should not be cozying up to government. Yet, Christians must always remain hopeful and patient and ready to engage in dialogue with people in society and especially with civic leaders.

To conclude, I think we have to show that robust religious freedom is a guarantor both of an authentic pluralism which recognizes the presence in modern society of what Fr. John Courtney Murray, the architect of the Decree on Religious Freedom of the Second Vatican Council, called creeds peacefully and intelligibly, rather than violently, in

conflict. Robust religious freedom is the guarantor of authentic pluralism and of an authentic democracy in which the sources, including religious sources, of peoples' most cherished convictions about human dignity, marriage, and the family are not ruled out of bounds in the public square but are welcomed as an essential contribution to the common good. Whatever happens in the next few years, speaking for my own church, and I am sure the same idea applies to many other Christian churches respectively, the Catholic Church has only one choice, which is to be herself by being true to Jesus Christ, whatever the cost. The question we must now confront is what kind of nation and what kind of democracy will we be.

#### QUESTIONS FROM THE AUDIENCE

DAVID QUINN (Iona Institute): You are quite correct to say that the main flashpoint between the churches and the state when it comes to religious freedom issues is the issue of homosexuality. However, in Scotland recently, there was a case involving two maternity nurses in a labor ward, who wanted to have no part in performing abortions, either before, during, or after the procedure. They lost their case. I bring this up as another point of contention. I believe in countries like Sweden, for example, there is effectively no conscience opt-out for healthcare professionals not to perform or take part in abortions. This too has to do with the whole idea of absolute sexual freedom and autonomy. While homosexuality is obviously the main flashpoint, abortion rights is increasingly a flashpoint as well.

BISHOP PHILIP TARTAGLIA: You are absolutely right. When reading the judge's opinion on that case, I could not help thinking that perhaps she was being influenced by the general cultural pressure not to allow religious matters to come to the fore in public services. I would add though that while the Church has protested abortion, it has not brought upon the Church the kind of opprobrium that the issues surrounding homosexuality have.

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*Bishop Philip Tartaglia*

STEVEN LAW (Heythrop College, University of London): You asked why it is homosexuality that has become the big issue causing increasing anger towards the Church. What is your answer to that question?

BISHOP PHILIP TARTAGLIA: I think it probably has to do with the fact that the Catholic Church disapproves of homosexual acts, and is definitely unlikely to change that teaching. Furthermore, I think the whole development of homosexual rights in recent times has been very, very cleverly played by the activists, and I think they have been extremely effective in their lobbying and in their campaigns. They have managed to present this as simply a justice issue, though it is not just a justice issue. I am not absolutely sure that that is the entire answer, but I think it is along those lines.

REVEREND LYNDA ROSE (Anglican Mainstream): What do you see as the tie between the secularist campaign and homosexuality? Do you see them as part of the same movement or as essentially different? Or perhaps do you even see the homosexual agenda as being driven by the secularist agenda, posing a threat to religious freedom? Do you see different strategies needed to combat the potential threat?

BISHOP PHILIP TARTAGLIA: I think they are movements that draw on each other.

I see the secularist tendency as being easier to deal with. It is straight philosophy. You either think Richard Dawkins is great or he is not. The homosexual agenda is much more emotive and has, for some reason, touched the popular imagination to a great extent. The polling on homosexuality and gay marriage, at least superficially, looks very favorable for those on that side of the issue. Although, we conducted some polls ourselves and we found if you ask a different question, you get a different answer. Very few people will say no to a question like “Do you think gay people who love each other should get married?” But if you ask, “Do you think you can maintain the traditional understanding of marriage without being unjust to homo-

sexuals?” many more people say yes to that. Also, if you ask, “Do you think children should have, in the best scenario, a mother and a father who are married to each other?” you get quite a large response in the affirmative, so it really depends on the question you ask. We found that anyway to be the case in Scotland. Nonetheless, the homosexual

movement is very, very strong, even among young people who have immediately caught on to the idea that they must not be thought of as homophobic at all costs. In some ways it is presented as cool. Many groups of girls have a homosexual male associated with them. There has been quite an alliance between young women and gay men, which has also been very interesting. Ultimately I think it is easier to deal with the secular movement, because the homosexual movement is so multilayered.

“Robust religious freedom is the guarantor of authentic pluralism and of an authentic democracy in which the sources [...] of peoples’ most cherished convictions about human dignity, marriage, and the family are not ruled out of bounds in the public square [...].”

*Bishop Philip Tartaglia*

LESLEY PILKINGTON (Psychotherapist): I am a psychotherapist and a Christian counselor and my story has been in the newspapers recently, so I just want to speak very briefly to why I think that the homosexual agenda has become so powerful. Now, I do believe it is important to have rational debates like we are having today, but at the end of the day, my experience has been that the gay agenda is fraught with intimidation, bullying, and fear. We have to stand against that with the truth. People are afraid of bullies so that they will accept what is being said by the homosexual activists, when in fact, there are a lot of lies. There was recently a prominent American author who had written a book about how good it is to be gay and getting older, but in fact he committed suicide because he said his life was based on lies. As Christians, we must address the truth in love.

BISHOP PHILIP TARTAGLIA: You bring an important perspective on the issue as a psychotherapist and I think you are right. If what I have heard about the poor state of the physical and mental health of gay men is true, then society has been very quiet about it.

ROBIN WILSON (Washington and Lee University School of Law): What we are seeing in the United States is a chipping away at conscience protections, so the difference between

that and the kind of implications that same-sex marriage has for religious freedom is the difference between a retail effect and a wholesale effect. Because when you have a sea change in the law, it will precipitate across a number of fields. One important point that we are missing on the marriage question, at least in the United States, and I understand perhaps also here, is that we have many same-sex couples who are parenting children, frequently at the invitation of the state itself. I believe in marriage as protective of the adults in the marriage and of the children themselves. What do you make of society's commitment to those children that it places in homosexual adoption?

BISHOP PHILIP TARTAGLIA: I think you are absolutely right. These things are happening, and it does create a problem because we want to hold up marriage as the institution which protects children and couples. People would say there are presuppositions that children are going to be better with a mother and father, who are married to each other. The statistics that are out there demonstrate that, but again, you are almost prohibited from saying it because of all kinds of pressures. I think it is too early to tell just how well children will do who are placed with same-sex couples. I suspect, in the long run, they will not do very well, and I think it will further damage sexual identity in the community at large, because these boys and girls maybe would not know who they are in terms of their relationship to their parents or to those who are acting as parents.

LINDA MCLAIN (Boston University School of Law): One of the things that is happening in the United States is that legislatures and courts have moved to a more functional approach to parenthood and to family definition, and in these battles over access to marriage, social science evidence plays a very important role. The church's role may be to promote ideas like gender complementarity or deeper truths about marriage. But right now, part of the reason things are changing is that the social science data is supporting the view the child outcomes do not hinge on the gender of the parent. That is what legislatures and the Department of Justice are citing in their actions on this issue. One example comes to mind in terms of religious liberty. In New York, when the Marriage Equality Act was passed, religious groups were on both sides of the issue. In California, religious groups were also on both sides of the issue. So I do want people to be mindful of the fact that this is not just a secular agenda. There are religious groups with genuine conscientious convictions that same-

sex couples should be allowed to have access to civil marriage, just as in their own tradition they can have their unions blessed.

BISHOP PHILIP TARTAGLIA: You are right about that, and I cannot speak for other Christian communities, but in the Catholic community we have Catholics who would support same-sex marriage, or at least not see any problem with it. However, the role of the bishops, the role of the Church, is to teach the truth of Jesus Christ. What you are saying about the social sciences is very interesting, though, and that is probably something we need to think about.

BISHOP JOHN PERRY: As we draw this opening evening to a close, allow me to make one or two reflections to connect to the last part of Bishop Philip's very fine address to us. One of the points he made was the need for an increased public understanding of the importance of religious freedom. As I was reflecting on how true that is, it is also important that our churches, whatever the group, whatever the denomination, whatever the tradition, are part of that increased understanding. I was conscious of that on Easter Sunday, talking with two of my sons-in-law, who belong to different churches, and talking about some of these issues that we have discussed this evening. Two things were clear: firstly, there does need to be a lot of work done on understanding the true nature of religious freedom in the context of these issues today; secondly, and this was a sobering part of our discussion, was that they felt that, within their churches and other churches that they knew of, they did not understand church members who were of a homosexual background and attitude. Often, homosexuals do not feel accepted or listened to within the life of many of our churches. I think that touches on the importance of a conference of this nature, that in our panels, discussions, and papers we are able to wrestle with these topics, as we have done this evening, with the courage in which Bishop Tartaglia offered his keynote address to us. He has given much for us to tackle, reflect on, and take away in the next 24 hours. One particularly poignant point he made was that there could well be testing ahead. Those who are part of the Christian church, in one way or another, can be soon facing testing on a number of these issues that relate to religious freedom. Viewing that in a positive light, Bishop Tartaglia noted that testing can be freeing and purifying. Christians must always be hopeful and ready for dialogue. Thank you, bishop, for your address this evening and for setting us off in our conference in a way that we will be enormously grateful for as our time together unfolds.



## THE UNITED KINGDOM AND IRELAND

THOMAS FARR (Georgetown University): Let me remind everyone that the subject of our conference is “Religious Freedom and Equality: Emerging Conflicts in North America and Europe.” Although there are many ways to articulate these conflicts, the issue which we tend to focus on most is the claims of equality on the part of homosexual persons and the implications of those claims for the right of religious liberty. Last night Bishop Tartaglia quoted the American Jesuit John Courtney Murray. Murray said much that is relevant to our subject, including this: when we talk about disagreement, what we often are really talking about is confusion. Confusion is to be avoided, but principled disagreement is an achievement. We need not fear it. Let us keep that in mind as we discuss the issues before us. If we can achieve a level of principled disagreement, I think we will have done what we set out to do.

ROGER TRIGG: What governs tensions between claims for homosexual equality and for religious freedom, how are those tensions illustrated in particular controversies and what is the proper balance between the new claims of equality before the law and existing claims for freedom of religious groups and individuals on the other? In other words, we want to look at the current situation, not just describe it, but think how in fact we can deal with it. And as we were reminded by one of the ques-

tions last night in fact, the whole clash between equality and religious freedom may seem particularly important at the moment with issues regarding sexual orientation, but actually it appears sometimes just as controversially in other areas. Abortion was one mentioned last night. But there are a lot of other areas. There are actually at the moment four key cases before the European Court of Human Rights from the United Kingdom. Two are about questions of homosexuality, but two are about symbols, the wearing of crosses and about the wearing of symbols as a proxy for the place of religion in public life and the ability of people to live by their religion generally.

Incidentally, I was very interested just a couple of weeks ago or so when a grave was dug up just outside Cambridge of an Anglo-Saxon-Welsh princess or high-ranking young female dating to about 680 A.D., and the interesting thing was that she was wearing a cross. Now, that is significant both because it shows how deeply rooted even at that early stage Christianity was amongst the Anglo-Saxons. Now English courts at the moment are saying wearing a cross is not a core part of Christian belief. It has nothing to do with Christian belief, it is just jewelry. And I think that instance went against that idea.

We heard last night from Bishop Tartaglia how in fact freedom

of religion can often get truncated, reduced to freedom of worship. I do not know how far this is just careless talk by politicians or how far it is a deliberate attempt to restrict the way that religious people do behave. I noticed that this occurs particularly in the English courts because so often at the moment, and this is one of our problems that we want to deal with today, questions of equality and discrimination always seem to trump questions of rights to manifestation of religion. And yet discrimination against religion is itself written into sections on discrimination in human rights charters. It is as much an inappropriate discrimination as discrimination on grounds of race or anything else. And yet it seems to be forgotten. It is put on one side. Other forms of discrimination trump it.

The courts tend to say when faced with this kind of case that you have freedom of religion because you are free to worship. This was in fact said in the case of the civil registrar in Islington. The authorities said that to have freedom of religion you do not have to worry about whether you can manifest a religion in your job. You are free to worship and that is freedom of religion. Another gambit of the courts is, and as I mentioned about wearing a cross, this is not a core part of Christianity. Wearing a cross is not a part of Christianity. That is highly contentious theologically and illustrates the dangers that courts particularly in this country seem to be getting into whereby you can be ruling on theological matters.

Another gambit is on the issue of employment: Of course you have freedom of religion because you have freedom of contract. So, and this is the European courts line, you are free to act in accordance of your beliefs because if you do not like your job, you can give it up. So you are free to be unemployed. Now in all of this, I think there are differences between the jurisdictions, and one particular difference I thought was illustrated just in the last few months between the United Kingdom and the United States. As many of you will be aware, there was a very crucial case about religious freedom at the beginning of the year about the so-called ministerial exception in front of the United States Supreme Court. And unanimously it was found that the First Amendment of the Constitution did protect religious institutions and enable them to appoint and discipline their own clergy as they wished.

This is a fairly obvious reading of the First Amendment, I would have thought. Yet in this country, just a couple of weeks before Christmas, there was another case which did not receive very much attention. The Court of Appeals in London ruled in a completely opposite way, saying that a Methodist minister is an employee, not as previously thought an office holder. This fol-

lowed a case about a Church of Scotland minister, a case which incidentally allowed state interference in the employment rights of members of the clergy in Scotland. That kind of interference split the Presbyterian Church in the nineteenth century. A third of them walked out and formed the Free Presbyterian Church. The issue that split the church was that the state must not be running the clergy and yet now it seems the judges in this country can say that churches have to employ people under normal employment law, subject to normal contracts which can be forced by the state with all kinds of possible repercussions. That is very different from the United States.

So one of the things we are going to talk about today is not just the general problems which face all countries, but how different jurisdictions are reacting differently to it. So I am very pleased to welcome our three panelists this morning. First we will start with Stephen Law who is a philosopher in London, senior lecturer at Heythrop College there. Second, Christopher McCrudden who is an academic formerly here at Oxford and perhaps very relevantly, he is going to appear in the European Court of Human Rights in the case I was just mentioning about the civil registrar being in fact told that she had to conduct civil partnership ceremonies. And finally, John Finnis. He is of course very well known for his many writings, especially those based on natural law. He has been based here in Oxford and also at Notre Dame.

STEPHEN LAW: I am going to read my statement entitled "Shifts in the Moral and Legal Landscape." The UK has seen a revolution in its moral and legal attitudes over the last couple of centuries, particularly with regard to discrimination. One of the earliest beneficiaries of changes to the law to protect minorities from unfair discrimination was the Roman Catholic community. The Catholic Relief Act in 1829 aimed to protect Roman Catholics from such discrimination. Legislation to protect Jews was soon to follow. Today our freedom to hold and espouse or reject and criticize different religious beliefs is protected by law.

Our moral attitudes towards women, black people, and gay people have also shifted dramatically and this too has been reflected in the law. Gone are the days when women could be refused employment or the vote because they are women. Gone are the days when hotel owners could put up signs saying no blacks. Gone too are the days when men having sex with men in private risked imprisonment. Today most of us subscribe to the principle that the state and the law ought to treat all citizens equally. It should not discriminate between citizens or groups of citizens, granting privileges to or penalizing one group but not another unless there is some difference that justifies that difference in treatment. Of

course it is not always wrong for the state or the law to discriminate. We suppose it is right that the state should withhold from children rights and privileges that it extends to adults and only progressively afford them those rights as they mature. But there is an obvious justification for that. Younger children are not sufficiently mature to exercise those rights and privileges responsibly. It may also be legitimate for the state to make breast cancer screening freely available to all women but not all men on the grounds that the risk to men is significantly lower. That would not be unfair discrimination.

However, almost all of us accept that such discriminatory practices are proper only where there exists a difference between the two groups that actually justifies treating them differently. So for example, we suppose it unacceptable for the state to withhold the right to vote from black people or from women. Racial and sexual differences may be relevant when it comes to whether people have a right to certain medical benefits. But it is irrelevant to whether they should have the vote. The British public has largely come round to the view that the state and the law should be neutral in this way. Most of us believe the state and law should treat all citizens equally, irrespective of their sex, race, religion, or sexual orientation. And our legal framework largely reflects this view.

What role did religion play in this moral and legal revolution? In fact, as we survey the history of these developments, we find religious and non-religious arguments being used both to defend the old discriminatory status quo and also to justify new anti-discriminatory laws. For example, we find religious ideas and arguments being used to defend slavery, keeping the races separate and withholding the vote from women. We find religious people arguing that God intended the races to be separate and also for women to take a subservient role. Yet we also find religious people in the vanguard of those fighting for equal rights for women, black people, and indeed for gay people. We find religious arguments and justifications being given here too such as that God made all of us in his image. We also find non-religious arguments given from both sides of the fence. For example, we find non-religious ideas and arguments used to justify withholding the vote from women and black people such as that women and black people lack the native wit and intelligence required to vote responsibly and when granting them such rights and freedoms

would therefore undermine the social fabric.

We have been asked to comment on the moral and legal frameworks that govern tensions between claims for equal treatment of gay people and for religious freedom. The point I am emphasizing here is that as we survey the history of equal rights legislation in this country, what we see in each case is not as is sometimes suggested, a clash between religious world views on one side and non-religious world views on the other. Rather, we find a wide variety of arguments and justifications both religious and non-religious on each side of the debate. This diversity of religious and non-religious arguments and positions on both sides of debates about equal rights continues today. We find non-religious people arguing on non-religious grounds, for example consequentialist grounds, that same-sex marriage should not be permitted and we also find religious people arguing on religious grounds that they should be permitted.

So we have been asked to consider gay rights. What is the current public attitude towards gay people and gay sex? The vast majority of British people see nothing morally wrong with same-sex relationships per se. Indeed, they support legislation giving people who have sex with people of the same sex, equal protection under the law. It seems that even among Christians such liberal attitudes are prevalent. A recent Ipsos MORI poll indicated that among those classifying themselves as Christian, which is just

*“The one concern that I have is with the idea that religious beliefs are the ones that should really be specially protected.”*

*Stephen Law*

54 percent of the population by the way, those who disapprove of sexual relations between two adults of the same-sex, 28 percent, are greatly outnumbered by those who do not, 46 percent. The same poll also found that 61 percent of Christian correspondents agreed that homosexuals should have the same legal rights in all aspects of their lives as heterosexuals. True, the Catholic Church continues to disapprove of same-sex relationships. The official Catholic position on gay sex is usually justified in terms of natural law, a justification that as usually developed also entails the sinfulness of masturbation and contraception. This is of course a justification that even many Catholics find unconvincing. A friend and colleague of mine, a Jesuit priest who is very knowledgeable about natural law theory tells me that he sees nothing morally wrong with same-sex relationships.

The law that currently protects gay and bisexual people from discrimination in the workplace in the provision of goods and



services and so on is unlikely to be repealed in the foreseeable future. Still, there remain religious and nonreligious people who believe they are entitled to discriminate against people having gay sex. In particular, some Christians who disapprove of same-sex relationships have argued that they ought to be exempt from equality legislation that applies to others. They maintain that such legislation restricts their own religious freedom to act in accordance with their religious conscience. It is on such claims of exemption to existing law that recent legal cases and media attention have tended to focus. Recent examples involve a case in which the religious owners of a hotel refused on religious grounds to give a gay couple a shared bedroom. And a case in which prospective foster parents who wanted to be able to teach children in their care their religious view on the wrongness of same-sex relationships, claimed their religious freedom would be unjustifiably curtailed were they not permitted to foster for that reason.

In both cases it was claimed that religious rights and freedoms were being trampled and that the rights of gay people were trumping the rights of the religious. Of course we do rightly allow for some exemptions to the law and to professional duties

on the basis of conscientious objection. We believe that pacifists profoundly committed to non-violence should not be forced to take up arms. We do not require National Health Service doctors who have a deep moral objection to abortion to perform abortions. Exactly when someone should be exempt on the basis of conscientious objection is however a hard question to answer.

On the one hand, we cannot allow that just any appeal to conscience provides grounds for exemption. For then the law becomes unworkable. I can break any law I like and claim immunity on the grounds that my conscience requires me to break it. On the other hand, we do not want to say that in no case can a claim of conscientious objection constitute good grounds for exemption. So we need to develop criteria that determine when it is right to exempt someone on the basis of conscientious objection and when it is not.

What sort of criteria ought we to apply? As I say, that is a hard and complex issue about which we can now discuss if you like. Many factors should probably be taken into account including is the objection deeply felt and can the objector give a coherent account of it? And two, if we allow for an objection or many

such objections, will we infringe on the rights of others and is allowing the objection likely to have a serious negative impact on the quality of the lives of others?

While many factors need to be taken into account when weighing up claims of conscientious objection, I am not persuaded that having a specifically religious objection should carry any additional weight. Yes, I believe a Roman Catholic doctor who has a deep religious objection to abortion ought not to be required to perform an abortion. But that is because I believe no doctor who has a very deeply held moral conviction that abortion is wrong should be required to perform one. Are we to say that a Roman Catholic doctor who morally objects to abortion should be exempted from such duties by another doctor with an equally firm and considered objection to abortion who happens not to be religious? If these two doctors have an equal claim to be exempt, then it is not the former doctor's religiosity that's doing the justificatory work.

On the other hand, if we exempt the Catholic doctor but not an atheist doctor, then what justifies us in treating them differently? Why should the conscientious objections of the religious carry more weight than those of the rest of us? Personally, I cannot see, at least not at this point, any justification for giving the religious consciences greater weight. If we are going to accept that religious hoteliers with deep seated religious objections to same-sex relationships thereby earn the right to refuse gay couples a room, then we will have to allow that *ceteris paribus*, other things being equal, religious hoteliers with deeply seated religious objections to the next race issue, thereby earn the right to refuse mixed race couples a room. Do we really want to accept that?

I cannot say that the addition of a religious dimension to the conscientious objection of hoteliers who object to making rooms available to gay couples or mixed race couples requires us to take their claims to be exempt from anti-discrimination laws any more seriously than if they objected on non-religious grounds. A hotelier who refuses a mixed race couple is a bigot. I am using the "B" word now. We will talk about that later if you like. They would rightly be a foul of the law, and it seems to me that if the hotelier should turn out to be not just a bigot but a religious bigot, a member of the Dutch Reformed Church in South Africa for example whose

views on race are underpinned by theology, that would not lend any further credence to the thought that the law should not apply to them.

There is clearly a perception among some Christians that the laws that prohibit discrimination against gay couples are anti-religious. Let me finish with an illustration. In the court case brought by the perspective foster parents wanting to be able to tell children in their care that homosexual relationships were morally wrong, their counsel, Mr. Diamond, opened his argument by saying this case raises profound issues on the question of religious freedom, whether Christians or Jews and Muslims can partake in the grant of benefits by the state or whether they have a second class status. Diamond identified the issue before the court as being whether a Christian couple are fit and proper persons to foster and by implication to adopt by reason of their faith and whether Christian and Jewish and Muslim views on sexual ethics are worthy of respect in a democratic society.

Diamond submitted his clients were in effect fighting "a blanket denial on all prospective Christian foster parents in the United Kingdom." Indeed, "a blanket ban against all persons of faith." And then an "irrefutable presumption that no Christian or faith adherent can provide a suitable home to a child in need of a temporary placement." The judges declared, and I quote, "it is hard to know where to start with this travesty of reality." They continued. "All we can do is to state with all the power

at our command that the view Mr. Diamond seeks to impute to others has no part in the thinking of either the defendant or the court. No one is asserting that Christians or for that matter Jews or Muslims are not fit and proper persons to foster or adopt. No one is contending for a blanket ban. No one is seeking to de-legitimize Christianity or any other faith or belief. No one is seeking to give Christians, Jews, Muslims, or people of any faith a second class status. On the contrary,

it is fundamental to our law, to our policy and to our way of life that everyone is equal, equal before the law, and equal as a human being endowed with reason and entitled to dignity and respect." Despite this, Christian Legal Center Spokesperson, Andrea Minichiello Williams, claimed afterward on the basis of the judge's ruling that "Britain is now leading Europe in intolerance to religious belief." And the Christian Legal Center claimed that

"So whenever you consider these individual cases, ask yourself, are we privileging religious belief? And you will find that in very many cases you are, though you did not realize it."

*Stephen Law*

“the high court has suggested that Christians with traditional views on sexual ethics are unsuitable as foster carers and that homosexual rights trump freedom of conscience in the UK.” So clearly they were very angry.

The Christian Simon Barrow from the Christian think tank, Ekklesia, commented on this legal case. “It is wrong to call this judgment a landmark ruling since it does not lay down any new principle but upholds and affirms the law. However, it does confirm what we at Ekklesia have been arguing for many years, which is that the era of Christendom when Christian institutions and beliefs might be given special privilege regarding an exemption denied to others is over. For many, including Christians who wish to recover the leveling call of the gospel message, that is good news, not a threat.”

The Christian Jonathan Bartley, also from Ekklesia, has said about this and similar legal cases, “people should be aware that behind many such cases, there are groups whose interests are served by stirring up feelings of discrimination and marginalization among Christians. What can appear to be a case of discrimination at first glance is often nothing of the sort. It is often more about Christians attempting to gain special privileges and exemptions.” This last statement concerning Christian opinion seems to me to be exactly right.

CHRISTOPHER McCRUDDEN: Thank you very much for inviting me. It’s a pleasure to be here. May I say right at the start that I’m not going to talk about the Ladele case except in the most general terms. I will not read out my paper but rather speak about some of the prior questions that the paper raises.

Bishop Tartaglia identified two fundamental questions last night. One was ‘why homosexuality’ and ‘why now’? To be more explicit: given the potential controversies that might have been raised over abortion or whatever, why does freedom of religion now seem to focus particularly at this moment in both the United States and in Britain on issues around homosexuality? And then

the second question broadly was what is to be done about it in terms of freedom of religion? So let me try and talk a little bit about the first question, about why homosexuality and why now. And the first point is that it is a mistake, both in terms of history and in terms of strategy, to assume that it is just about homosexuality. The current questions about homosexuality have to be put into a broader perspective, not only in terms of equality issues but of human rights issues generally. In other words, what I am sug-

gesting is that the tensions which there clearly are between specific religious beliefs and some issues arising in equality and in gay rights are to do with larger tensions between the current debates in human rights generally and debates within religious communities more generally.

Very broadly and extraordinarily simplistically we can say that in the nineteenth century there was an ambivalence within the Catholic Church about human rights developments, largely because they were seen to be growing out of Enlightenment thought and liberalism, views that were seen to be antagonistic to some Church approaches.

And there were hiccups and attempted reconciliations along the way but the major reconciliation, at least as I read it, came with the reforms of the Second Vatican Council where human rights are, I think embraced fairly fully.

Why did that happen? Part of the history has to do with the compatibility between the drafting of the Universal Declaration of Human Rights and approaches reflecting what I will call personalism, particularly in the form developed in France in the 1920s and 1930s, which were then adopted and translated into public discourse and in part fed into the drafting of the Universal Declaration of Human Rights. Personalist language is woven throughout the Universal Declaration. In particular, notions of human dignity and the adoption of the idea of the person rather than the individual are important examples. A person is there in order, as Maritain I think saw it, to emphasize that human rights, as indeed did personalism, rejects both individualism and totalitarian philosophies such as Nazism and Communism.



*Christopher McCrudden*

So, in currently fashionable terminology this was a third way between radical individualism, including market individualism, and totalitarian collectivism. That seemed to be the high point of coincidence between the approach that the Church adopted, at least as articulated by Maritain and to some extent subsequently adopted by Pope John Paul II, and the understanding of what human rights required. So the moment where they coincide is between 1945 and 1968, with the Second Vatican Council adopting human rights very centrally in terms of its understanding of the proper role of the state and of the proper role of the Church.

So what happened? We are now in a situation where there seems to be a deep antagonism between aspects of the human rights agenda and Catholic approaches to the individual and to the person, culminating in the most recent debates about homosexuality but by no means restricted to them. I suggest, very tentatively, that two things happened. First, the human rights agenda developed in significantly new directions, and second there was a significant debate within the Catholic Church reacting against some of the liberal implications of Vatican II.

In terms of the human rights agenda, several major developments occurred. I will initially concentrate on equality developments because that is mostly what we are dealing with today. In the equality policy context, gender equality happened. Gender equality is absolutely fundamental to this debate. It is interesting that the legal and particularly the human rights approach to gender equality happens largely after 1968. In addition, racial equality happened, effectively starting with South Africa and apartheid but then spreading to the United States and throughout the world.

Those two events, the development of gender equality and racial equality, are absolutely central to the debate today in several respects. One respect in which they are central is that the equality agenda on race and gender challenged essentialist thought. It challenged the notion that categories of race or gender were firm and settled. It is clear and probably universally agreed that that is the appropriate approach to take with regard to race. We recognize that race is a constructed

category, not an essential category.

With regard to gender, it is a lot more debated. Human rights has increasingly taken an approach that undermines essentialist approaches to gender as with race and adopts a constructivist approach with regard to the understanding of what we mean by gender, sex and these other categories. That is one development with regard to the human rights equality agenda.

Another development that is important in the European context, less so in some respects in the American, is the adoption of a more expressivist approach to equality. By that I mean the notion that harms are not only material harms, such as this person was denied employment, but also include harms that attack the essence of an individual's identity in a way which is not just offensive but deeply wounding. In the European context, strong legal provisions, which significantly depart from the American Constitutional tradition, target racial hate speech. And that approach has been applied increasingly not only in the context of race but also, in the context in Germany, of the denial of Holocaust. Those are examples of attempts to deal with this kind of expressivist harm. The last element in the equality agenda that occurred has been the increasing expansion of the grounds of protection, beginning with gender or race, and then growing to include religion, sexual orientation, age, disability, and so on. So the protection from discrimination on grounds of sexual orientation is part of a trend of decisionmaking which has particular attributes.

Turning from that to the discussion within the Catholic Church, there has also been change. One of the more important developments has been the resurgence of natural law. In particular I will mention two aspects of this debate. One aspect of this is the emphasis on sexual complementarity, which has become an essential part of this debate. And, in particular, some aspects of the complementarity argument emphasize biological aspects or physical aspects of complementarity and that is seen as posing particular tensions with the notion of constructed identities that we have seen appear as important elements in the legal and human rights agenda on equality. So the more that complementarity and natural law are interpreted

*“Ladele v Islington Council [...] involves a claim [...] that Ms. Ladele is being discriminated against on religious grounds. [...] The point is that in formulating the claim as an equality claim, the debate then becomes a debate within equality rather than debate between equality and freedom of religion.”*

*Christopher McCrudden*

as essentialist, the more it comes into tension with aspects of the human rights agenda. So that is one element.

The second element I think that happens in discussions of natural law is that the focus of attention shifts from France in the 1930s and 1940s to the United States. It would be a mistake to underestimate the importance of that shift of gravity from Europe to the United States, which means that, to some extent at least, the internal Church debates get caught up in American political debates.

One of the ways in which the United States is different from Europe is that there is a much closer connection between some of the religious debates and the political debates. The close involvement of religious issues in Obamacare, for example, is an illustration of this. There is a political agenda as well as a religious agenda. The last thing that we need in Europe is an Americanization of the debate between the state and religion. That is not what we need. I come from Northern Ireland, where we know the dangers of the politicization of religious debates.

So two things are happening: changes on the human rights side, and changes on the religious, or at least Catholic, side. We should not, however, overemphasize the homogeneity of the two 'sides'. In neither the human rights nor the religious contexts is there is a settled orthodoxy on many areas of the most significant tensions. In other words, there is as much debate within the Catholic Church on some of these issues, as there is within the human rights area on quite a lot of those issues as well. There is greater flexibility in these debate than may appear to be the case. We can assume too easily, for example, that there is a clear orthodoxy and un-changeability of church doctrine. So too, Church groups that I talk to often assume that there is a lack of flexibility in the human rights agenda. In other words, they are both in dialogue internally and externally.

So the answer I think to the first question, why is homosexuality the issue, is that it is because it is a significant part of a larger equality agenda. It is identified by those who are pursuing gay rights in entirely good faith is an equality issue. And equality is a part of the current Zeitgeist that is not going to go away anytime soon, nor do I think it should.

So the second question is what to do about all these tensions between religious developments and human rights developments. And there is an apparently irresolvable tension between those. Neither side if you want to call it is a side is going to give way on this, not least because both sides claim to be speaking the

truth. They do not frame it in those terms but they do claim to be speaking the truth. The old phrase about speaking truth to power is a well-known aphorism within the human rights community and certainly we see ourselves as having important insights into right conduct. The more each side speaks in terms of the truth, the more difficult it is to resolve the question because there is a potential for irresolvable conflict.

And now I come to my paper. And I come to the paper because the suggestion I make there is that we need to think seriously about what is sometimes called reasonable accommodation as a method of structuring these tensions and disagreements in ways that minimize the practical consequences of these differences.

Let me turn, briefly, to the *Ladele v. Islington Council* case to illustrate the point. *Ladele* involves a claim of a breach of Article 14. It is not a claim with regard to freedom of religion. It is a claim that Ms. *Ladele* is being discriminated against on religious grounds. The nature of the claim is important because it re-orientes the discussion. The point is that in formulating the claim as an equality claim, the debate then becomes a debate within equality rather than debate between equality and freedom of re-

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*Christopher McCrudden*

ligion. Reasonable accommodation comes in in the following way. Given that it is a conflict within equality, between equality on grounds of sexual orientation and equality on grounds of religion, then you have a problem within the notion of equality itself. Reasonable accommodation functions as a way of resolving that problem.

Reasonable accommodation means different things to different

people, of course. One difficulty with the term is that there is a potential problem because you then get all the baggage of American reasonable accommodation law which is not what I would suggest we adopt in Europe. What I suggest is that the Germans got it probably about right. What the German constitutional court says is that where there is a conflict within the equality dimension itself, then the concept of practical concordancy comes into play. Practical concordancy essentially means that each element of the equality right should be given as large a space as possible in which to operate. That involves an important compromise, in so far as it requires both sides to say that the other's basic argument

that it was seeking to intervene in four cases which, as we have heard, proceeded from the English appellate courts to the European Court of Human Rights. In all four cases, the commission would argue that the English courts were taking too narrow a view of the kinds of restrictions which engage the right to freedom of religion, by holding that the right is not engaged at all if the relevant individual's belief is one not required by that person's religion, or is one that others of that faith who are employed in the same business do not insist on being allowed to manifest, or is one that the individual could manifest without restriction by moving to another more accommodating place of employment or school or other relevant environment.



*John Finnis*

is one which is, if not acceptable, at least legitimate. No one gets to trump anybody else's position. That is a genuinely pluralistic argument; it does not give anybody total success. What it means is essentially a workable compromise, which allows people to live in a public space together, even if they fundamentally disagree. And that seems to me entirely the appropriate approach to take.

JOHN FINNIS: A couple of vignettes from current litigation involving England will take us to the heart of the matter.

In July 2011, the Equality and Human Rights Commission, a body established under the Equality Act, which in its self-description "enforces equality legislation on age, disability, gender-reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation and encourages compliance with the Human Rights Act", announced

And secondly, it would argue that where the right is engaged and the question of the restriction's justification is therefore the issue, the courts should adopt a principle that where practical there should be reasonable accommodation of manifestations of religious belief, wherever that can be managed with minimal disruption of the relevant operation, business, school or public service, etc. And no doubt if the commission had pursued that purpose, it would have framed its argument both in terms of the phrase "reasonable accommodation" and in terms of the German doctrine of practical concordancy or other equivalent legal dogmatic terms.

Now the four cases were first of all Eweida's case and secondly Chaplin's, which both involved a claim to be allowed to wear a small cross or crucifix on a necklace made visible by British Airways' change from high-neck to v-neck female uniform, a claim refused at the relevant time by British Airways and the employment tribunals and appeal courts, though later accepted without difficulty by British Airways under the pressure of newspaper campaigns.

And thirdly, Ladele and fourthly McFarlane, which both involved requirements imposed by employers pursuant to policies of prohibiting discrimination against same-sex couples. Lillian Ladele was a registrar employed in the Council's Registry of Marriages who was unwilling on Christian religious grounds to conduct civil partnership ceremonies (which are always with a view to or in recognition of same-sex sex acts), and it was not denied that it would have been easy for the council to use other registrars in its employment to conduct any and all such ceremonies instead of Ms. Ladele. And to do so without imposing disparate burdens on those other registrars or other unfairly lightening her load.

But the courts held (in the Equality Commission's accurate summary) that the legitimacy of the council's aim in imposing a policy

of equality for practicing homosexuals automatically means that its requirement that she conduct these ceremonies was “proportionate”—again, another dogmatic legal term, roughly meaning reasonable. No question of accommodation (in this view of the courts) could arise.

Gary McFarlane was employed as a relationship counselor for a charity and on Christian religious grounds was unwilling to provide psycho-sexual therapy advice to same-sex couples when that became required. Again, there was no suggestion that the charity could not have reached a reasonable accommodation with him by using others of its counselors for such couples. But the very senior and scholarly judge who disposed of the final appeal application concluded there is no more room here than there was in *Ladele* for any balancing exercise in the name of proportionality. To give effect to the applicant’s position would necessarily undermine the charity’s proper and legitimate anti-discrimination policy.

But within six weeks of the Equality and Human Rights Commission’s statement of its position favoring reasonable accommodation, the practical concordancy between religious beliefs and gay rights policies, that position was publicly reversed. The commission announced that its submissions to the European Court of Human Rights in the *Ladele* and *McFarlane* cases would now be in support of the English court’s decisions. When its submissions were published in September, 2011, they were found to argue—rightly and effectively in relation to all four cases—that the English courts have been far too restrictive when the right to religious freedom is engaged. But there was no plea for a doctrine of reasonable accommodation. While they did not explicitly reject, they did not quite endorse the position of the courts that (as the commission summarized it) the refusal to accommodate discriminatory religious beliefs will always be proportionate. The commission instead said that “in the commission’s view it will generally be proportionate to refuse to make an accommodation in cases where a public sector employee seeks to be exempted from providing a public service on discriminatory grounds. Very strong arguments and evidence are required to prove the employer has acted disproportionately in cases such as these. State services must be provided on an impartial basis and employees cannot expect their public functions to be shaped to accommodate their personal religious beliefs.” Whether these remarks apply to *McFarlane* is left in shadow.

The real ground of the commission’s position and of its reversal of position is indicated in the immediately preceding paragraph of the submission to the court. I quote: “In the words of Judge

Tulkens in *Sahin v. Turkey* in 2007 in the European Court of Human Rights, ‘it is necessary to seek to harmonize the principles of secularism, equality and liberty, not to weigh one against the other.’ Nonetheless, this court [the European Court of Human Rights] has recognized that interfering with some rights will require particularly strong justification. The right to equal treatment on the grounds of sexual orientation is one such right.” Thus, gay equality rights continued on their prioritized way, simply trumping religious and associational freedom.

To conclude this vignette, I need only add that in March 2012 it was reported in the newspapers that the United Kingdom government submissions in the *Eweida* and *Chaplin* cases would oppose the commission’s position on the first point and would maintain that “the employees wearing of a visible cross or crucifix was not a manifestation of their religion or belief within the meaning of Article 9 of the European Convention about the right to religious liberty, and the restriction on the applicant’s wearing of a visible cross or crucifix was not an interference within their rights protected by Article 9” (and thus did not need to be justified as a reasonable or proportionate restriction of those rights).

The government’s argument appears to be that wearing such symbols is not “a generally required form” of practicing the Christian faith and is not regarded, including by the applicants, as a requirement of the faith. To me, as to the commission, it seems that such considerations manifestly belong to the Article 9-2 issue of unjustified limitations or justified or unjustified limitations, not to the Article 9-1 issue of whether the right to manifest one’s religious belief is engaged. In relation to Article 9-1, the appropriate issue is simply whether the complainant’s religious belief is genuine, not tactical or factitious and is being manifested in the practice sought to be restricted. But the position of the English courts is no accident. They have been following a course of European Court of Human Rights jurisprudence strongly minimizing the Article 9 right, in part by minimizing quite implausibly the scope of Article 9-1. That is, in part, the position that Professor McCrudden articulated for us, that equality trumps religious liberty in law according to the structure of contemporary European jurisprudence.

The foregoing vignette happens to concern individuals confronting employers or analogous authorities but the impact of equality law on religious associations and associations with a religious ethos has been even more serious, far-reaching, and one-sided.

The negative impact of the UK equality law on freedom of re-

ligion and conscience overlaps here with its negative impact on other established constitutional rights, such as freedom of association and freedom of parents to educate their children, which in each case involves also a very substantial shrinking or invasion of private life by coercive law. Not to mention freedom of speech. The requirement that parents who wish to band together to employ teachers for their children must be fully willing and ready to employ as teachers qualified applicants who live openly unchaste lives, according to the conception of chastity accepted by those parents and desired for their children's education, is plainly an interference with their legitimate interest in associational freedom. And it is quite disproportionate, given that the only kind of unchastity protected by the equality law is one indulged in by persons sufficiently few to be able to find equally desirable employment in schools uninterested in promoting chastity or that conception of chastity.

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In some jurisdictions, anti-discrimination laws still exempts from its provisions about homosexuality the employment practices of private schools and the services provided by adoption agencies run by faith based organizations. But even in those places (and I mention New South Wales in Australia), people who agitate for repeal of this exemption wrongly call it (as the UK government called it) an arbitrary license to discriminate. The disproportionality or needlessness of the refusal to accommodate associational and religious liberties in the law against sexual orientation discrimination in the employment practices of schools was even more vividly manifested by the law prohibiting adoption agencies from continuing to give effect to their judgment—the judgment shared until the other day by everyone and quite unrefuted, but supported by the religious faith of the agencies and their sponsors—that both the unchastity and the lack of complementarity involved in adoption by same-sex sex partners should count as at least a negative factor, if not a disqualification in decisions about adoption. The law is clear that to count it even as a negative factor at all is unlawful. This coercion, resulting in some cases in the agency's withdrawal from providing adoption services at all, was imposed by the British enactment, even though would-be same-sex adopters had other suitable and vastly more numerous

adoption agencies willing to cater for them.

This legislative imposition is similar to the judicially approved administrative impositions in the vignette cases of conscientious objection by employees or would-be foster parents who are unwilling to cooperate with what they consider unchastity and injustice to children, and whose position could easily have been accommodated without material detriment to the public policies to which they reasonably

objected. In all these cases, the courts have proceeded straight from affirming the legitimacy of an anti-discriminatory aim and the efficacy of the anti-discrimination policies to concluding that the policy was justified and the conduct it prohibited was discrimination in the genuine sense, that is unjustified discrimination or differentiation. These courts neglected their duty to consider whether the policy was not only effective but propor-

tionate in the legal sense. That is: Did it affect people's legitimate interest in other recognized rights more than was needed by the legitimate aim?

The current discourse and consequent legal regime about discrimination, harassment and victimization effectively suppresses rational discourse and sensible judgment about the interests of children, and about the conditions of demographic and cultural sustainability (in which religions too have a keen interest). Thus, in England, the law has in two decades been transformed in ways affecting its most fundamental social relationships, the familial. In 1988, to maintain the historic judgments of its people, Parliament ruled that public authorities should not "promote the teaching of the acceptability of homosexuality as a pretended family relationship." This was repealed in 2000 and by 2007 statutory and judicial rulings had made it unlawful for any public person or body and for any private person or body employing anyone or offering any service to the public to use at all the philosophically sound and religiously endorsed criteria of chastity and marital and familial integrity in the course of assessing how employing openly unchaste homosexuals—or how providing a service promoting the acceptability of ho-

mosexual sex relationships—might affect the long term well being of children and their families and the parental and religious rights of those children's parents.

Innumerable bystanders and relationships in this revolution assumed that what was at stake was no more than the protection of a small minority with a certain inborn predisposition, perhaps against denials of employment or service unrelated to their competence, their conduct, or their proselytizing for an unchaste way of life. And that assumption was mistaken.

And as for religious association and conscientious freedom, the guarantee offered by the politicians to religious associations in enacting the Human Rights Act 1998 proved to be quite worthless. Section 13 of the act reads (with the side note or heading "Freedom of Thought, Conscience and Religion"): "If a court's determination of any question arising under this act might affect the exercise by a religious organization itself or its members collectively of the convention right to freedom of thought, conscience and religion, the court must have particular regard to the importance of that right." The courts soon declared that whilst there is a need to have specific regard to the rights protected by Article 9, Section 13 of the 1998 act does not give greater weight to those rights than they would otherwise enjoy under the convention. The provision has had no effect in any of the cases concerning associational religious liberty and the equality laws.

Well, since writing this, I have learned that other participants' papers have entered into the merits of the issues—that is, whether religious freedom or belief deserves any protection at all or special protection at all in law, and whether there are any rational grounds to object to the laws outlawing discrimination against people who publicly announce their practice of same-sex sex acts where the unfavorable treatment of them in employment or provision of services is motivated by concern to protect children from influential rationalization of unchastity or to give witness to truths about chastity and unchastity and the importance to the common good.

I have written a fair bit on these issues. On the first, the protec-

tion of religious liberty as such, you will find an essay at the beginning of Volume 5 of my collected essays and on the second, you will find three essays near the end of Volume 3.

The ground for treating religious conscience as especially important is that it is really of great importance that people should seek and form a responsible judgment about an issue of unsurpassed importance: the truth about the origin, significance and destiny of the entire universe and of human beings as the only beings within our experience who are capable of engaging with reality in this uniquely profound way. To treat a general religious objection to, say (the example Stephen Law took) the mixing of races as of no more weight than a quasi-aesthetic prejudice against people of different color is misguided. Even if and when we disqualify that objection, the religious objection in the field of provision of services, advertised sales, etc., is on the ground that it is religiously mistaken and contrary to an important public policy.

Of course the special weightiness of religious beliefs has a further consequence which is of great public importance but is not really on the table here amongst us today. If a significant number of citizens hold religious beliefs incompatible with our public order, including the right to religious liberty, we have a special problem which

may require extraordinary solutions. To treat the objections to same-sex marriage as discredited because the sky has not fallen, after nine years or a decade, seems to me about as misguided an approach to human and social reality as could be imagined. The sky would not fall if and when polygamy or marriage with domestic pets is introduced, any more than it fell when the Nazis entered Paris and a wonderful erotic four years began, recounted in two volumes by a recent French writer.

Telling married couples with the voice of the law—backed up by the intensive state propaganda that we see being imposed say, on the Catholic school system in Ontario—that marital acts are of the same moral quality as masturbation or sodomy and that their lifelong commitment to complimentary parenting is of no more value and importance to children than that of two men or two women purchasing a conception, a pregnancy, and a child whom they will in every case thereby deprive of the care of its



mother or father or both,—telling married couples that is really, even if married people do not now realize it, a trashing of the “natural and fundamental group unit of society” (as the Universal Declaration of Rights puts it), and beyond that, it is a demeaning of married couples and an insult to them of unparalleled depth and severity. Check back in 50 years to see how it panned out, both in accelerating the disintegration and collapse of societies already undergoing visibly rapid, unprecedented cultural and demographic decline, and in miseries for very many of the children who do get born thus.

Well those remarks are very summary. For the relevant philosophical arguments, pivoting on the meaningfulness of marital sex acts, see the three essays I mentioned which build on the insights of the best philosophers of all time, Plato, Aristotle and Aquinas, but offer argumentation to be assessed on the merits of the arguments and without appeal to philosophy or religion. The sophisms that have been deployed by the US courts (as we will hear later today) essentially take the form of converting the moral critique of acts (acts which tempt almost everybody) into a mere prejudice or animus against persons. The results include of course blatant discrimination in favor of same-sex couples, as compared to ordinary adulterers or fornicators, who have no legal grounds to complain when they are excluded from a hotel out of religious and moral concern to witness to the importance of marriage.

A final word, what we are considering today are essentially legislative questions. But that being so, the issue is generally miscast if it is presented in terms of exemptions to the law. The question is: What shape should the law take, given the rights and interests people have in equality, religious liberty, freedom of speech and association, education of their children and so forth? The Equality Act 2010 has 218 sections plus 28 schedules totaling in all several thousand distinct propositions needed to state what a hostile rhetoric might call exemptions to general propositions, propositions which when unqualified by these exceptions would be unjust and intolerable and contrary to many accepted public policies.

The true question is not about exemptions in favor of religious and similar interests, but the extent to which those interests should have been accommodated, amongst thousands of other allowances, qualifications, and reasonable differentiations.

ROGER TRIGG: Just before we open it to general discussion, you will notice this session is titled United Kingdom and Ireland and we have just been talking about the United Kingdom.

There are people here from Ireland and I ask David Quinn from Dublin just to talk a little bit about the position in the Republic of Ireland, which is of course itself raising big issues about religious freedom.

DAVID QUINN (Iona Institute): In Ireland, if the civil registrar will not officiate the ceremonies, that civil registrar could go to prison for up to six months. I believe that is even more drastic than the case in Britain. That is the only one I will mention on the homosexuality issue. Pharmacies, once upon a time in Ireland, could not sell the morning after pill at all on the grounds that it is an abortifacient. Then the law changed so the pharmacists could sell the morning after pill if they so wished. Now under the code of conduct for pharmacists in Ireland, every pharmacist in Ireland must sell the morning after pill. So you have gone from cannot sell it, to can sell it, to must sell it. And we had a case involving a doctor who runs a fertility treatment practice using something called natural technology and it ran along Catholic grounds and he would treat only married couples. A cohabiting heterosexual couple came to him wishing to use the surrogacy. He said look, I only see Catholic grounds, I treat only married couples. He was taken before a fitness and practice committee of the medical council and he was acquitted only on a technicality but eventually a case will be taken against him under the Equal Rights Act.

A further example occurred this week in respect to denominational schools. Now the vast majority of schools in Ireland are denominational Roman Catholic because Ireland has been historically and overwhelmingly Catholic. This week a government ordered report was published that said denominational schools must do the following: they must change their enrollment policy to a first-come, first-served enrollment policy so that for example the Church of Ireland School cannot, in cases where they are full, admit Church of Ireland children first. They must also teach all the world's religions. This report also seeks to place conditions on the display of religious symbols in denominational schools. Remember, not state schools, denominational schools. And that the cross for example cannot be displayed on its own, that the religious symbols of every child in the school must also be displayed alongside the cross for example.

If you are celebrating a Christian festival like Easter or Christmas, it would appear that you must also celebrate the festivals of every other child who is in the school, whatever their religion may be. Remember these are the Christian schools. And finally, prayers must not violate the human rights of the children in the schools. It is not at all clear exactly what this means but one interpretation

is that the Hail Mary for example might be deemed to be insufficiently inclusive because it is a Catholic prayer. This is not official policy yet; it is simply a list of recommendations. The state taking control of the enrollment policy, telling denominational schools how they must teach religion, setting conditions on how prayers are said setting conditions on how to celebrate festivals and how to display religious symbols and art. So these are simply some of the things happening. Ireland is trying its utmost in terms of official policy to repudiate to the greatest extent its scattered past. And these are some examples of that.

DERMOT O'CALLAGHAN: I am from Northern Ireland. I would like to come back to something that Stephen said but which also ran through the other papers, I think it was run right through today and that is the analogy that gay is the new black. Stephen said gone are the days when stores could put up signs saying no blacks. Now I was born in Dublin. I am old enough to remember coming on holiday to England as a little Irish boy and seeing those signs in the windows, "no coloreds and no Irish." But I want to argue that that is a category error. The bed and breakfast owner who in the old days, 60 years ago, refused a black man service, will not, as I understand it, refuse a gay man a night's accommodation. And the logic I think has come down to the difference between the analogical, which is black, and behavioral, which is gay. Now my second point is the skin color analogy is based on genetics versus non-genetics and homosexuality is genetically not determined whereas skin color is genetically determined.

LINDA McCLAIN (Boston University): Professor Law sort of paints a picture that the majority of British people are not that agitated about equality rights for homosexuals and in fact support it. Professor Finnis has said that it is deeply demeaning to married couples to be told somehow that their marriage is the same as the marriage of a gay couple. So I see a little bit of a divide between your two positions on the impact of same-sex marriage on heterosexuals and public opinion about it.

RICK GARNETT (University of Notre Dame): At one point in your discussion you said that whether or not accommodation or an exemption for religion would be appropriate might depend on whether the religious belief in question was deeply felt and whether the person could give a coherent account of that belief

and that belief's place within the larger structure. I'm surprised by that. Why should it matter whether we can really give a coherent account of every aspect of a religious tradition and an integrated web of religious practices? And I think it is also a reality that for most religious believers again, this side of heaven we do not always feel as deeply convicted as we ought to. So I am hesitant to have religious exemptions depend on whether a particular believer is able to give a theologically rich account for their belief.

"That is, in part, the position that Professor McCrudden articulated for us, that equality trumps religious liberty in law according to the structure of contemporary European jurisprudence."

*John Finnis*

CHRIS SUGDEN (Anglican Mainstream): Two observations and questions. Number one, could you please comment a little bit more about the internal discussion on the identification of human rights? Because we are discussing human rights as some sort of commodity. That is, to divorce human rights from the Christian notion of the common good and common order. And secondly, I would ask if we could link the discussion particularly with the issue of the common good. Religious rights or

religious freedom on its own seems to be treated as equivalent to a Mormon's refusing to have blood transfusions, which is rejected on the basis of the common good and the suffering of people who would be disadvantaged.

ROBIN WILSON (Washington and Lee University School of Law): I just want to follow on this gentlemen's remark and ask not only what the discussion of the common good is, but at least in the United States, the idea that the state has a say or interest in adoption, whether it is by homosexual couples or heterosexual couples. Does the state have an interest in this sphere, and if so, what is that interest?

ELIZABETH HUNTER (Theos): It would be very helpful if the panel would comment on this issue around requirements and manifestation in Article 9, because a lot of the public discourse around this issue in the British mind in particular has been about what is a "requirement of faith." And that obviously is a very complex thing within different faiths themselves. Is there any attempt to define those terms or is that just being left to individual cases? And how do you think that might proceed better?

JOHN FINNIS: It is a very ad hoc sort of category in the jurisprudence. It is used with a good deal of spontaneity by the

tribunals that deal with it in relation to claims by Christians, where the courts are inclined to say “Well, this is not a requirement of the Christian faith.” In the case of claims by Muslims or Sikhs, the courts are much readier to find that it is a requirement, such as wearing a certain sort of head scarf, which may or may not in fact be a requirement of Islam. So I do not think there is any deep learning to be had here.

As to the other matters, it is of central importance that the idea of human rights is in no sense an invention of the twentieth century. It is not to be attributed to French personalism. Maritain was a good Thomist and the roots of human rights thought go back to Aquinas and far beyond him to Aristotle, and people have written decent books about that. The lingo or jargon of human rights has a certain sort of novelty, but the conception of justice as giving each person his or her due, his or her entitlement, that is, his or her right, is one that Aquinas very clearly articulates, as the Roman lawyers had already articulated—and not just the Christian Roman lawyers of the sixth century but even the pagan Roman lawyers of the second century, who very clearly articulated the idea of a right that pertains to each person, which the institution of slavery contradicts. In many cases those lawyers were not about to do anything about the contradiction between the law of slavery and the rights of human persons but they clearly put it in their law books that there is a contradiction between the rights. So the twentieth century did not invent rights.

And if we think about it as an issue of justice, we realize that we cannot just look at one end of the two party relationship. At one end is someone with a right. The other end is someone with a duty. There is no right without the duty and in truth there is no duty without the right. To say that you have a duty to this person is something that can only be justified in terms of the whole conception of what we call the common good, that is to say of human flourishing as individuals, as families, as neighborhoods, as states and as members of the human family. Without a reference to that all-embracing conception of human well being, you have no justification for asserting a duty and therefore you have no justification for asserting a right.

CHRISTOPHER McCRUDDEN: Just picking up John’s point,

I obviously did not make myself clear. I did not say that Maritain invented human rights. I said that his role was crucial in enabling a bridge to be built between the notion of human rights that were emerging at the international level and the Catholic debates, which enabled a degree of consensus over the language which was used in the Universal Declaration. It would be obviously ridiculous to say that Maritain or indeed anyone else invented human rights in the twentieth century.

Second point in terms of the manifestation issue you raised. I agree with John in that I do not think it is a particularly fruitful area for further analysis but I think there is a larger question at play here which is the issue about article 9(1), and more generally about the current courts’ approach to that. And it seems to me the more critical question is actually the notion of ‘interference’. And it is this term that gives rise to most of the problems in it being applied: if you are able to practice your religion even though you may, for example, lose your job by practicing your religion, then the current case law seems to indicate that this may not be contrary to Article 9. In other words, it says you can do what you want but the state can also discipline you in any way that it wants as a result of that.

There is a parallel here which I suspect many in the audience will not like. There is a parallel here about the question that has been raised about the status distinction with regard to homosexuality. There is, as John rightly pointed out, a strong argument within human rights cases that rejects the distinction between status and act. That is essentially the same argument that is being made in terms of rejecting the approach that the Court of Human Rights is taking in Article 9 with regard to the notion of interference. But you cannot have it both ways. That is, if you are going to argue that religious persons should

not be, as it were, divided up in terms of their beliefs and their actions in the religion context, then why should this argument be made in the context of homosexuality.

My third point is about how one characterizes human rights as a commodity or, as O’Donovan addresses them, as property rights. And there is one word that I think that I have mentioned that has not been picked up in this discussion about the nature of the rights in play here. There has been a lot of discussion about the common

“The current discourse and consequent legal regime [...] effectively suppresses rational discourse and sensible judgment about [...] the conditions of demographic and cultural sustainability.”

*John Finnis*

good but there has been no discussion about the notion of dignity. And dignity is crucial to this discussion in a way which, if we do not focus on it, will mislead and not enable a genuine debate and discussion to take place of the type that you are advocating. So if we want a dialogue, rather than simply an occasion in which to be didactic, we should engage in the notion that both communities share the notion of dignity. It is central to the question of human rights, it is central to Catholic social teaching, and it is a bridge therefore that potentially allows a dialogue to take place. The common good does not resonate in terms of debates within human rights. Dignity does. That was Maritain's contribution. My point here is if we want to have an understanding of the notion of human rights as understood in the human rights context, then we need to understand it not as a property right, but is essentially underpinned by a notion of dignity. I am suggesting a common understanding between religious conceptions of rights and human rights understandings of right. On this I disagree with John. Neither of them have a current understanding of rights as property rights. That is not the way it is understood in Catholic social teaching, nor is it the way it is understood in human rights discourse, more generally. Engaging with it as a question of dignity enables a real dialogue to take place.

STEPHEN LAW: Well I just wanted to take the opportunity to say that I was very sympathetic with Bishop Tartaglia's concern that he might be arrested in the next couple of years and prosecuted for expressing his views on homosexuality and so on. But I do not think that is very likely to happen. In fact, one of the cases that you mentioned yesterday involved a man, Adrian Smith, who was demoted and lost a lot of pay because he had expressed a view about homosexuality online. Now you should be aware that one of the leading campaigners for Smith is Britain's leading gay rights activist, Peter Tatchell. Peter Tatchell is fully aware that this was a terrible thing that happened to Adrian Smith and he said "in a democratic society Adrian Smith and others have a right to express their point of view, even if some people think it is misguided and wrong. Freedom of speech should only be penalized in extreme circumstances, such as when a person incites violence against others. Smith's words did not cross this threshold. So now that is my view, too. Smith did nothing wrong. Of course his freedom to express himself in that way should be guaranteed. He should not have been demoted." I sign up to secularism in the sense that I think we should have a society in which there's a level playing field so far as religious and non-religious belief is concerned. We should not penalize religious belief, but neither should we privilege religious belief. We should be even-

handed. We should protect the freedoms of the religious people to say what they want and the non-religious people to say what they want.

I agree that there have been cases where people have been treated unfairly and their religious freedom has been unjustly curtailed. I think when you look at other cases it is not nearly so clear that we are dealing with a genuine unjust limitation of religious freedom. So we need to look at these cases case by case. If you are going to make exceptions or exemptions or whatever you want to call them, we need criteria which we can apply which are clear and just and we all understand what those criteria are. And I made some suggestions. The gentleman over here suggested that perhaps one of the criteria that I suggested might be too strong and maybe it is. We can argue about precisely what criteria should be applied. It is going to be a hard job figuring out what they are. The one concern that I have is with the idea that religious beliefs are the ones that should really be specially protected. I do not see any good reason for that. I cannot see any adequate justification for giving that special protection to only religious beliefs. They should have the same status so when a British Airways (BA) employee has a little necklace with a crucifix on it, should the law step in and protect her right to have the little crucifix because it is a crucifix and not a political symbol? Sorry. I am not sure that the law should step in. I think that BA probably should just let her wear the symbol. I think it is a rather trivial case. But I am not sure that the law should be stepping in and saying no, because it is a religious symbol, well that deserves special protection. So whenever you consider these individual cases, ask yourself, are we privileging religious belief? And you will find that in very many cases you are, though you did not realize it. It is just habitual in certain religious circles. You do not even realize that you are doing it because it seems so obvious that that is just the way things should be. Just take a step back and think about it. Are you privileging religious belief? And if you are, then you either have to come up with some good reason for doing so or you should stop doing it and that is the question of many Christians such as the people from Ekklesia that I quoted earlier. So that is my position. I just want an even, level playing field. I agree with what was said at the beginning [when it was suggested religious and non-religious beliefs should be treated equally] and I disagree when Jonathan apparently suggested that religious beliefs have a "special weightiness. What does that mean? Because that seems to contradict what we said at the beginning of the conference that actually no, they have the same status, they should have the same status as non-religious beliefs. So which is it there? Argue if you like that they should have a special status but you will need to provide some justification.



## CONTINENTAL EUROPE

PETER PETKOFF: On this panel, we have three speakers: Andrea Pin is an assistant professor of constitutional law at the University of Padua, Italy. And he also lectures on comparative public law in that university. He has lectured on inter-ethnic law in the Catholic University of Milan and has collaborated on various projects in Italy and internationally. Maarit Jänterä-Jareborg is a professor of law at Uppsala University in Sweden, where she was deemed Faculty of Law from 2004 to 2008. She has research interests in private international law and international civil procedure, and her paper today provides a comparative overview of the way same-sex unions have been developed within the legal framework of the Scandinavian countries. Finally, Rocco Buttiglione is professor of political science in St. Pius V University in Rome. He is also a member of the Pontifical Academy of Social Sciences. Professor Buttiglione will provide an overarching, theoretical perspective on the current debates regarding tension between religious freedom and equality.

To pick up on something that Christopher McCrudden addressed in his paper, the need for internal equality debates, rather than the religious freedom vis-à-vis equality challenge, is a very important aspect of the conversation. This was echoed a few years ago by Oliver O'Donovan, in a book called, "The Way Forward—Christian Voices on Homosexuality and the Church". In his text, O'Donovan suggests that debate occurs when people take up the arguments that others have raised against them and try to give serious answers. To

do this, they must think their opponent mistaken, but not wholly foolish or malicious. The debate about equality, and the tension between equality and religious freedom, cannot happen while there is still a struggle for rhetorical dominance, which is the attempt to take over the other side's perspectives, rather than listening and trying to participate in an engaging conversation through which we could find a common denominator for agreement and disagreement.

ANDREA PIN: I would like to sketch what is going on in the south in Europe, in terms of the clash between same-sex couples, rights claims, and religious freedom claims. I would say that the environment is very diverse. There are countries that have clearly introduced same-sex marriage, whereas other countries have introduced more moderate regulations for same-sex couples. Some countries accord such couples some official recognition or some specific rights. The environment is very heterogeneous. In particular, in 2009 the Italian Constitutional Court clearly stated that there is no room for same-sex marriage, according to the Italian Constitution. The text of the constitution does not explicitly say marriage is for a man and a woman, but we have a proposition that says marriage entails moral and legal equality of the spouses, within legally defined limits, to protect the unity of the family. Therefore, the court deduced that moral equality of the spouses implicitly recognizes that they are sexually different. While there is no room for same-sex marriage, the code stated that there is room for same-sex couple rights. Moreover,

according to the court, same-sex couples should be recognized by some sort of legal protection: this is because our constitutional text gives rights to any social relationships, and same-sex partnerships are undoubtedly a kind of social relationship. But the court didn't specify which rights should be accorded to such couples. And the problem we have is the same problem that other countries have.

I would not say that the right way to assess the balance between same-sex marriage claims and religious freedom claims is the objection of conscience, or some sort of accommodation in this respect. What I think parallels Professor McCrudden's insight that this is a case for equality, rather than for religious freedom. To echo Bishop Tartaglia, if we take the "religious freedom vis-à-vis same-sex rights" perspective, there are good reasons to prevent Catholic families from giving their children an education that contemplates same-sex couples as unnatural. Furthermore, there is room for preventing Catholic families from adopting children, since they do not agree with same-sex couples adopting. I am not interested in take a stand in this, but I am saying there is a constitutional ground for that. I will show this aspect later.

Now I address the role that equality plays in the debate about same-sex couples rights. It seems to me that once one claims equality protection, he must show which rights and interests are involved in the claim he is making. The vast majority of southern European countries that introduced some sort of legal protection for same-sex couples, regardless of the kind of protection, did not explain why they did so. They did not give any real reason for endowing same-sex couples with the same rights of heterosexual marriage, or endowing them with other, different rights. The outcome of this new wave of rights for same-sex couples is doubly delusive: there has been virtually no debate about the ends of marriage and about the reasons for limiting it to a man and a woman or for extending it to same-sex partnerships. Therefore, sometimes what we have is a marriage with no apparent reasons, other than textual reasons, and a second class pact for same-sex couples, with no reasons that can explain why they have a different set of rights. Conversely, sometimes we have the same rights for both, and it is hard to find a reason for which they accord the same right to both classes of couples.

There is a reason for having such a thin debate about such issues.

This is because the principles of equality and self-determination tend to trump the debate. If you have a constitutional text that is open for a broad interpretation of marriage, equality and self-determination will probably lead to the extension of marriage to same-sex couples. Conversely, if the text says that there is no room for same-sex marriage, it will trump the debate about the same-sex marriage. At the same time, it will pave the way for same-sex couples' rights.

I would say that in both cases, there is no room for any argumentations other than equality and self-determination. They play such a pivotal role in the debate, that if there is room for introducing same-sex marriage, there is a sort of presumption that equality commands

it. The debate on same-sex marriage becomes a debate on the reasons for banning same-sex marriage. It is now the case that people who oppose same-sex marriage must explain themselves, rather than people endorsing same-sex marriage being forced to explain why they want to expand the definition of marriage to include same-sex couples.

Here are three important but seldom-made arguments, which I think should play a role in framing the

debate about the introduction of same-sex marriage. The first is tradition. This is especially used around the issue of polygamy. It is very common to find scholars referring to the longstanding Western tradition of marriage, as opposed to polygamy. But tradition does not work in the same way when one comes to same-sex marriage. Thus there will be many people saying, "We have gone a long way; we have realized that there is no room for polygamy. But things are different for same-sex marriage. Tradition is now a limitation." We should explain why tradition plays a role in a contest, while it is perceived as an obstacle in another contest: there may be good reasons for this, but they should be highlighted.

The second argument is feminism. A part of the feminist thinking has stressed the idea that women have a special role in society and in law. A huge part of the debate around same-sex marriage holds that the difference of genders is irrelevant. It seems to me that this leaves a part of feminism thinking in the penumbra.

"...We cannot simply use the arguments against introducing same-sex marriage and same-sex couples' rights as arguments for conscience protections. Conscientious objections have a totally different status and cannot replace the debate about same-sex couples' rights."

*Andrea Pin*

The third argument is morality. This is not because morality has something to do with the shaping of law, but conversely, because rights are usually believed to be morally good. There is an extensive debate about exceptions in Spain, Italy, Germany, and Austria, especially about what can be accorded to Catholic families, since they do not agree with these new rights claims. There is a large opinion that says that there is no room for exceptions, because same-sex marriage rights are good. So Catholics can object in the sense that they are not requested to perform a right, but they can be expected to teach their children that that right is good. That is why there is room for denying Catholic families a special education to their children, because when you enforce a right, that right is treated as morally good.

There is a second reason to believe that same-sex marriage rights prevail over religious objections. The objection of conscience basically states that you can restrain from doing something that you should do, as long as this does not impair the rights of others. We have similar rules in Italy regarding abortion, so physicians can object and not perform an abortion, but now up to 70 percent of physicians do not want to perform an abortion. We have an increasing number of scholars who say that there is a right to have an abortion performed. So in case there is a conflict and the right cannot be granted, equality and human rights win over exceptions and objections of conscience. If a country is predominantly against same-sex couples rights, but such rights are however enforced, same-sex couples' rights will probably affect the lifestyle and the duties of the majority.

In conclusion, I would say that we cannot simply use the arguments against introducing same-sex marriage and same-sex couples' rights as arguments for conscience protections. Conscientious objections have a totally different status and cannot replace the debate about same-sex couples' rights. I agree with Professor McCrudden when he said that equality and new rights win out over religious liberty. The introduction of new rights deserves more debate, because it is not true that such rights

come at no expense. There is a new balance among rights, once you have same-sex marriage or any other new rights.

Finally, I would add that these issues are not in themselves divisive. What is divisive is a long list of decisions that have occurred without considering all the debates and arguments that can be brought about. What is really divisive is having thin decisions for thick issues.

**MAARIT JÄNTERÄ-JAREBORG:** My paper gives a panorama of the development of homosexual rights in the five Scandinavian states: Denmark, Iceland, Finland, Norway, and Sweden. I understand that for many of you, the Scandinavian developments are the worst case scenario for religious freedom. But I claim that nothing is really black and white, and that, in my view, there is also some degree of accommodation taking place in the Scandinavian countries.



*Maarit Jänterä-Jareborg*

Prior to this conference, I had never really thought of this issue in terms of clashing rights. I notice how very much one is the product of one's own legal and religious environment. All five Scandinavian states are Evangelical Lutheran states, where the churches have very special ties with the state. Only in Sweden has the state-church separation been carried out, but still the Church of Sweden enjoys special privileges in relation to the other faith communities in Sweden. The other Nordic states still have the state-church combination.

Second, it is important to mention that the great majority of the Scandinavians belong to their national church, and that is not some sort of ethical belonging. To be a member, you pay a rather considerable church fee, based on your income level.

In the Scandinavian debate on homosexuality, the focus has really been on the discriminatory concerns. The outlook is that homosexuals as a group are highly exposed and vulnerable with risks of being discriminated against and being subjected to expressions of hate. We have not really linked too much protection of homosexuals to religious concerns. This means that

the religious dimension in the Scandinavian debates on this issue is absolutely present, but it has not been regarded as a true legal concern. The emphasis at this conference on religious rights has been a very refreshing novelty to me.

In terms of legal recognition, the movement of recognizing same-sex couples as such starts in Scandinavia. The first country to introduce legislation on registered partnerships is Denmark in 1989. In the following years, all the other Scandinavian states simply joined, and all introduced the institution of registered partnership. In the Scandinavian legal landscape, registered partnership was and still is only aimed at same-sex couples that cannot marry, or could not marry. It was kept distinct from marriage. There were quite a lot of differences between marriage and partnership because the move to marriage was a radical one with numerous objections, dominated by religious concerns. This is why we were not talking about same-sex marriage in the early days, but only of registered partnerships. Of course as these debates and discussions unfolded, we got same-sex marriages. That happens first in the Netherlands, Spain, and Belgium, and then in the Nordic countries. Before the introduction of the same-sex marriage concept, we had the gradual introduction of full parental rights to same-sex couples.

In the Nordic countries one sees a lot of accommodation in that we have a state funded system of faith communities, based on the idea that religious activities are good for the society. But we also have very interesting cases testing the extent of freedom of expression and freedom of religion when very strong negative statements are made against homosexuals. Recently, there was a judgment on the ninth of February from the European Court of Human Rights, on the freedom of expression and what are you permitted to say about homosexuality.

At Uppsala, my home university, I am the other director of our Religious Center of Excellence, a multi-disciplinary center focused on the connections between law and religion. We have had a lot of discussions on freedom of religion, and what is it that qualifies for protection, in the European national constitutions and according to the European Convention on Human Rights. I would say that there is enormous confusion among all of us—lawyers, theologians, and the like. The issue is really, whose freedom of religion? Who decides what religion is to be protected?—the believers, the faith commu-

nities, the state? How and why are such decisions made? Another pressing question is why we emphasize a positive freedom of religion as opposed to the negative aspect that is also protected by constitutions and the European Convention, namely, the freedom not to have any religion at all.

If equal rights and religious rights clash, equal rights in the Scandinavian discourse are very much, in this context, linked with the equal dignity of all human beings, and no discrimination may take place on the basis of a person's sexual orientation. Of course everything is vague, and we can legitimately have different opinions. For example, Sweden had registered partnerships for homosexuals and had removed all exceptions as regards rights to parenthood. Why did homosexuals and others then claim the right to same-sex marriage? On the level of rights, there was simply nothing that differentiated the one from the other.

Regarding the concerns of religion in this respect, every time the law is amended, there are numerous discussions and preparations. I noticed that the concerns raised in our discussion have been labeled in the Law Commission reports as moral panic concerns, which do not qualify as religion to be protected. Such concerns include

the alleged devaluation of marriage and traditional family life, seduction of youth, societal decadence and so on. This has really been discussed, but it has always been dismissed. On the other hand, there is the emphasis that faith communities remain in charge of the content of faith. And faith communities cannot be obliged to embrace anything contradictory. Of course, there is a weighing of interests.

In my fellow panelists' papers, civil servants' religious objections are giv-

en quite a lot of concern. I have never seen that in the Scandinavian debate. We focus, in fact, on the faith communities' freedom of religion, and their officials' freedom of religion. In a Scandinavian kind of legal setting, there are the majority (national) churches and the minority churches. These churches are completely different in terms of societal positions, and their members have, I believe, totally different expectations about the content of faith. So even if all of the churches, including the majority churches, have initially been strongly opposed to registered partnerships and also naturally, to same-sex marriages, they have been overrun. After that loss in the debate, they have been, to a certain extent, willing to accommo-

*"I would say that there is enormous confusion among all of us—lawyers, theologians, and the like. The issue is really, whose freedom of religion? Who decides what religion is to be protected?"*

*Maarit Jänterä-Jareborg*

date. The most far-reaching examples here are the Church of Iceland and the Church of Sweden, which both simply have made the decision that same-sex marriage is okay from the church's point of view. Both of these national churches also changed their marriage liturgies once the decision was made, to introduce a same-sex marriage concept. In Sweden and in all the Scandinavian countries, it is openly admitted that you can have two different notions of marriage—one for the faith communities, one for the state.

Lastly I will address the case of Pentecostal pastor Åke Green, which has received quite a lot of international publicity. In 2003, Green delivered a sermon on homosexuality for which he was prosecuted under Sweden's hate speech laws. Green held that in the Scandinavian discourse on homosexuality, the emphasis is purely on anti-discrimination, and that aspects of faith are missing. But if you read his sermon, you notice also that the language he uses is vulgar. He talks about cancer growths on society, about sexual intercourse with children and animals, and so on. I think that offended the general public very much. Yet in the end, Pastor Green was acquitted of all charges, and I think on good grounds, because of the jurisprudence of European law protecting religious freedom and freedom of expression.

There was another case in Sweden involving young men going into a Swedish high school, distributing pamphlets containing a message similar to Pastor Green's sermon. They were charged for agitation against homosexuals, and now the European Court of Human Rights has said that there was no violation of the freedom of expression on behalf of Sweden. While these cases are different, I believe that the European Court of Human Rights and the Convention is extremely important in Europe, to achieve a balance.

**ROCCO BUTTIGLIONE:** The first question posed was, "What are the moral and legal frameworks that govern tensions between claims for homosexual equality and for religious freedom?" Before I answer, I wish to make a meta-critique of the question. It seems to me that in the current discussion on homosexuality and also on rights in general, there are many points that need to be clarified, starting with the question of what is homosexuality. Shall we say that homosexuality is natural? Or that homosexuality is cultural? There have been some who have claimed that a particular gene has been discovered that regulates homosexuality in human devel-

opment. This argument of the natural ground of homosexuality has been repeated in the media very often. Very few people have taken the time to consider whether it is true or not. If you consult scientific literature, you will see that this claim has been disputed.

*"The idea of discrimination goes back to the principle of equality, or of justice, as stated by Aristotle. If we do not pass judgment, we lose the ability of making use of moral reason or perhaps of reason itself."*

*Rocco Buttiglione*

Why is this important? Because it seems to me that the most plausible interpretation of the data that we possess now is that, as with most human phenomena, homosexuality is the result of an interaction of natural and cultural elements. There are, perhaps, some biological predispositions, but cultural environment and an individual's life experiences matter greatly. In this sense, I think we can categorize homosexuality as a lifestyle. In ancient Greece, homosexual behavior was widely accepted.

However, the Greek conception of homosexuality was quite different from our modern conception because most Greek people thought that homosexuality was convenient at a certain stage in human development, and less convenient at a further stage. Ancient Greek homosexuality might also be called pedophilia, to a certain extent. They thought it was good up to a certain age and under certain conditions, and it could become bad later, and they never thought of homosexual marriage. Was this because of some animus against homosexuals? No. They had an idea of marriage that was common among us until a few years ago. Plato says that homosexuals should get married to people of the other sex, in order to have children, to have somebody who takes care of them when they grow old, in order to perpetuate the family, and in order to perpetuate the city. Marriage is a social institution that has a special function. This function is the generation and education of children and an alliance between men and women that produces an alliance between generations. This was the way in which Plato and many of the Greeks saw the problem of homosexuality.

The Romans had still a different idea. A part of the Roman world shares the same vision as the Greeks. For some, homosexual behavior was considered positive for those who have an active role in the sexual act, and negative for those who have a passive role. Those who have a passive role are effeminated, and that is something associated with slaves, not free men. A free man can indulge in homosexual behavior, but only on the active side. This is a similar evaluation found in most mature cultures.

I raise these examples to support the affirmation that homosexuality is a lifestyle. If it is a lifestyle, it can be the object of a legitimate moral judgment. It is not akin to the fact of being born black or white. It is a behavior, and all human behavior may be the object of a legitimate moral judgment. Drawing a distinction between a person and his actions, this, of course, does not mean that homosexuals are bad people. As a lifestyle, homosexuality may be the subject of a societal debate on whether it is right or wrong, undertaken with respect for the dignity of the other, which is toleration. The necessary limit of toleration is violence against the other, or the devaluation not of the behavior, but of the person.

Let us now consider the idea of discrimination. Etymologically, it means to distinguish, to make distinctions. To discriminate is to pass judgment. We pass judgments at every moment of our lives. There are justified and unjustified discriminations. Whenever an issue of discrimination arises, we should ask the question of what is the peculiarity that is being discriminated against. The idea of discrimination goes back to the principle of equality, or of justice, as stated by Aristotle. If we do not pass judgment, we lose the ability of making use of moral reason or perhaps of reason itself.

PETER PETKOFF: To follow up on Maarit's presentation, what I find particularly fascinating about the Scandinavian accommodation laws is that they were in some ways, theologically driven. There was really a project where the Lutheran churches in various Scandinavian countries had to review their theology and to some extent, amend it. Could you tell us more about whether this was really a theologically driven project, or whether this was state driven theology? Did the initiative come through the Lutheran churches, or was there political pressure because of the inherent relationship between church and state?

MAARIT JÄNTERÄ-JAREBORG: If you are the national church of the country, you are something for the whole population. Such a church needs to accommodate what is going in society. To my knowledge, these first investigations carried out by the Church of Sweden in the early 1970s on the topic of homosexuality and Christianity were totally internal. The reason was simply that homosexuals felt that they were not included within the church community. It is quite radical that an internal Swedish church report in 1974 recommends that the church bless stable homosexual relationships.

Later developments closely mirror what is taking place in state law. The big issue here is that since the majority of the populations in the Scandinavian countries get married in the church, the churches have full power to officiate legal valid marriages. Thus, the churches



*Rocco Buttiglione*

must follow the developments in society. It was necessary, from the internal point of view of the churches, to carry on sincere, in depth analysis so as to combine the word of the Bible with these new societal trends and understandings. The love commandment is superior to everything else, which means that when we do the least harm to those closest to us, that is what Christ wants of us, and therefore, same-sex marriage is okay. This is a radical interpretation for many, but of course, none of the Scandinavian churches are united in this understanding. It is left to each minister to decide.

COLE DURHAM (Brigham Young University): If you take out the more inflammatory remarks from Pastor Green's sermon, you have mostly a collection of passages from the Bible. How much freedom is there or ought there be for a non-state church to define and preach its own theology?

MAARIT JÄNTERÄ-JAREBORG: The case went through three different court judgments. The Pentecostal Church wanted to have clarification on whether citing from the Bible is suddenly prohibited when it is critical of homosexuality. The judgments show that his statements exceeded what would be totally okay according to Swedish law. Yet, he is protected under the European Convention, which is part of Sweden's Constitution.

MICHAEL DAVIDSON (Core Issues): I am a trained psychotherapist. A month ago, my membership in my professional organiza-

tion was revoked, as was my trainee status, not because of a complaint from any client or any group. It arose out of the fact that I expressed the view that some people can move out of homosexuality and should be given the space to do that. That has been my journey for 30 years. The United Kingdom Council for Psychotherapy, the largest such professional body in the UK, says in its ethical guidelines that it is an ethical offense for any psychotherapist to reduce homosexual feelings. You may not ethically work with a client to reduce their homosexual view. I would just be interested to know how such a position would be treated in your countries.

ROCCO BUTTIGLIONE: In Italy and I think also in the United States, if anybody feels comfortable being a homosexual, it is supposed to be perfectly okay. But if he feels uncomfortable, and thinks that he is unhappy in his situation and he wants to change the situation, why should he not go to a psychotherapist? I think it is a very reasonable position, and I am disappointed to learn that that is not accepted in the United Kingdom.

PETER PETKOFF: Returning to Rocco Buttiglione's assertion that homosexuality is a lifestyle, it seems that this question is not settled even within the internal discourse of the homosexual community. There are contemporary authors who would not take the view that marriage is appropriate for a gay relationship, and they move more in the direction of a fellowship. How do you reconcile your assertion with this divided discourse?

ROCCO BUTTIGLIONE: I have just made the attempt to bring a sense of history into the discourse, as the homosexual lifestyle is a historical lifestyle, which has changed through the ages. Even before HIV, homosexuality was completely different from homosexuality today. Homosexuality was linked to the idea of the sexual revolution and it was a kind of sexual liberation. With the outbreak of HIV, there is a change in the mentality of the homosexual community, and many start trying to set up partnerships more or less based on faithful sexual behavior, which, from a moral point of view, should be considered as a positive evolution. In years past, nobody would have dreamed of asking for marriage for homosexuals. Yet this is not a demand that covers the entire homosexual community. When states have introduced homosexual marriage, how many homosexuals have

gotten married? I shall tell you—very few. These marriages did not last for long because marriage is an institution that is centered neither upon the husband nor upon the wife, but upon the child. It is an institution created in order to protect the child. We should be more attentive to the fact that the real problem is not homosexual marriage, but the idea of marriage itself. We are not begetting children any more. And of course, if we lose the idea that marriage is centered on children, then there is little difference between homosexual and heterosexual marriage. We can go this way, but this has consequences, namely that our so-called Western civilization would disappear, because we would not have children. This has already begun to happen.

As a lifestyle, homosexuality can propagate itself. If it is a natural fact, then the number of homosexuals will remain the same throughout history. If it is a lifestyle, it can grow, and its growth will have a consequence that our children may take to this lifestyle. I think the discussion on homosexual marriage is restricted to elements that do not grasp the real importance of the issue.

*“But until 50 years ago, more or less, everybody was convinced that the center of the marriage was the children. There has been a tremendous revolution also in the last 50 years. Perhaps the time has come to make an evaluation of the results of this revolution.”*

*Rocco Buttiglione*

PATRICIA MORGAN: Sweden, in structure, is a very authoritarian country. And for decades, there has been a movement there to empty marriage. Interdependence was wrong so the tax and welfare systems sought to eliminate that. The unwed birth rate is extremely high; the marriage rate is not very high. When marriage is offered to homosexuals, is there anything left to it?

MAARIT JÄNTERÄ-JAREBORG: Your view of Sweden is not totally uncommon, but very many people would not agree with the connotations that you are raising. One might point to the excellent childcare system, the high engagement of fathers in rearing children, and the sense of equality in marriage as counter examples to your point. But you have a point in saying that Sweden has had a tendency of emptying marriage of its content. Following the ideologies of the sexual liberation in the 1960s, legislation has been constructed such that the legislator should be neutral toward the choices of how an individual conducts his or her life, including when it comes to marriage. There are people today in Sweden who say that the claim by homosexuals to have the right to marry, and the granting of this highest recognition of their relationships, in fact, gives marriage content. It makes it into something desirable and it has strengthened marriage.

DERMOT O'CALLAGHAN: To Maarit, in respect to Denmark, you said that from 1989 there were civil partnerships, and now there is same-sex marriage in Denmark. There is now a huge population of people, heterosexual and homosexual, who were married. Research has been done on that population, and the extraordinary outcome of that research is that the way that children are reared can have a major determining affect on whether they will marry a man or a woman. My question is whether the reality of that has sunk into the legal framework and whether you accept it.

CHRISTOPHER McCRUDDEN (Queen's University): What is the relationship between the religious conception of marriage and the civil conception of marriage? Indeed, what even is the interest that religious communities, who have a very clear conception of religious marriage, have in the conception of marriage conducted by the state? Historically we know that the interest is close, because the state effectively attempted to take over the notion of religious marriage, and present an alternative. What is the current justification for the apparently close relationship between the two?

LINDA McCLAIN (Boston University): I was particularly struck by Professor Buttiglione's claim that the concept of marriage that was found in antiquity was common until 50 years ago. This reflects a historical, frozen-in-time picture of what marriage is that really misses the major evolution, at least in civil law, of the role and status of women within marriage. I would caution against the idea that if we just went back to what we had 50 years ago, we would have the same thing as the Greeks and Romans. At the same time, with Supreme Court cases in the United States protecting the right to use contraception, the right to get abortions, and state law moving toward more allowance for divorce and also protecting children outside of marriage, there is a kind of legal-cultural issue. Many Americans do not see marriage primarily as an institution for raising children. I am concerned whether these claims about the concept of marriage really reckon with the change in what marriage is, as a matter of civil law over time. On the question of gender, at least in the United States, there has been a major transformation of family law, which has been called the Gender Revolution, moving away from fixed roles and hierarchy, to equal partnership, both as spouses and parents.

ANDREA PIN: Why does civil marriage matter for religious purposes? The implications that civil marriage has for religious communities are clear, from what Bishop Tartaglia mentioned yesterday. These implications derive from the fact that marriage is believed to be a fundamental right, and therefore it should be concretely protected. If you modify the shape of marriage, you

will have several implications for marriage as a whole, regardless of whether it is civil or religious. If you change or expand the notion of marriage, you will have more or different rights arising. Furthermore, marriage is also a civil institution for Catholics. To illustrate this connection between civil and religious marriage, consider Belgium, where, in the nineteenth century, civil marriage was introduced. The state had to impose a law dictating that a couple must first be married by the state, before any religious ceremony, otherwise they would face penalties. This happened because people tended to celebrate their marriage only religiously. They were not interested in having two formal ceremonies. The social effects of marriage were culturally attached to the religious ceremony and there was no need for additional formalities. This is why the state had to impose the celebration of civil marriage over the population: because people simply got married religiously and perceived this as a civil act.

ROCCO BUTTIGLIONE: Regarding the question of civil and religious marriage, the real problem is which kind of civil marriage do we want? Of course there has been a tremendous revolution in marriage, from the time of Plato until our own time. But until 50 years ago, more or less, everybody was convinced that the center of the marriage was the children. There has been a tremendous revolution also in the last 50 years. Perhaps the time has come to make an evaluation of the results of this revolution. The disruption of the traditional family, with one father and one mother, is the main cause of poverty in the United States, and I regret to say, in Italy, too. This is also the main cause of criminality. Shall we say that there are no role differences within marriage? I give you one example from my personal experience as a father: a child does not know his father as he knows his mother. The mother must introduce the child to his father so that he can enter into the child's life. The mother, on the other hand, stands at the center of the child's entire world. Can we dismiss this? Can civil law completely refuse to consider this?

Finally, there is also a political problem, namely the West's demographic winter. It is a demographic path but it is also a cultural path, because demography affects culture.

MAARIT JÄNTERÄ-JAREBORG: Legal developments in Scandinavia are mainly justified with the aim of creating social inclusion for homosexuals, and an atmosphere of tolerance in society. If this is true that a child's choice of future partner would be affected by the family in which he is raised, this is not a problem at all, from a Scandinavian perspective because we are for social inclusion and tolerance, and we believe in equal worth. Yet all the studies I know that have been used in connection with the law reforms could not verify that this in any way affected the child's development.



## NORTH AMERICA

MICHAEL GERSON: Let me briefly introduce the three panelists. Professor Linda McClain is a professor of law at Boston University, fellow at the Theology School, an influential author, a family law expert, and has been a visiting professor all over the American academic world. Professor Robin Wilson is from Washington Lee University. She is a broadly published, widely recognized expert on family law and religious liberty. Finally, Professor Richard Garnett is the associate dean and professor of law at the University of Notre Dame, and the founding director of the law school's program in Church, State, and Society.

RICHARD GARNETT: The principle claim of my paper is that we could perhaps make some progress on the task of negotiating these conflicts between religious freedom and equality, assuming there are such conflicts, if we focus more precisely on the questions of when and why discrimination is wrong, and when and why the liberal state should or may regulate or discourage it.

At the outset, I want to be heard as signing up for secularism. I understand that word in the way that Pope Benedict has described it in recent statements—namely, in terms of a healthier, positive secularity, rather than its more Jacobin forms. It is not that religion and religious claims are absent from or excluded from civil society and public life, and it is not that the state is scrupulously blind to religion. It is instead that religious and political authorities

are distinct, and meaningfully independent, and they cooperate while they are also separate. I think this is all consistent with a very strong commitment in law to religious freedom, as being important for human flourishing.

The ongoing story on law and religion in American constitutional law includes several related but distinguishable plot lines, which surface and recede over time. Currently, our attention is increasingly drawn to the tension between the efforts of governments to combat discrimination on the one hand, and on the other hand, the constitutional and other limits on these governments' power to do so. I think we all believe that discrimination is wrong and therefore we believe that secular, liberal, constitutional governments like ours may and should take regulatory and other steps to prevent, discourage, and denounce discrimination. For example, the state of Virginia was wrong to prohibit and punish marriages on the basis of racial classifications, and the Supreme Court of the United States was right in 1967, when it ruled that this discrimination violated the fourteenth Amendment. The proposition that it is not only true, but “self-evidently true” that all human beings are created equal is, of course, foundational in the United States. The principle of equal citizenship holds near-universal appeal, even though we often disagree about that principle's particular applications. As Professor Kenneth Karst put it 35 years ago, “A society devoted to the idea of equal citizenship will repudiate those inequalities that

impose the stigma of caste, and thus belie the principle that people are of equal ultimate worth.” Our strong sense that discrimination is wrong reflects our attachment to this idea of equal citizenship, and non-discrimination norms and anti-discrimination laws are, among other things, efforts to respect it.

At the same time, as both Stephen Law and Rocco Buttiglione pointed out earlier, it is not true that discrimination is always or necessarily wrong. Nor is it the case that governments always, or necessarily, should or may regulate or discourage it, even when it is wrong. Discrimination, after all, is just another word for decision making, for choosing and acting with reference to particular criteria. We do, and should, discriminate. We draw lines, we identify limits, and we make judgments all the time. The practice is as ubiquitous as it is unremarkable. It is not discrimination that is wrong; it is wrongful discrimination that is wrong. It is tempting and common, but it is also misleading and distracting to attach the rhetorically and morally powerful label of “discrimination” to decisions and conduct whose wrongfulness has not yet been established. After all, there is no reason for constitutional governments to ban, or regulate, or disapprove discrimination generally, as opposed to discrimination that has been shown to be wrong.

Furthermore, we have good reasons for not believing that governments should or may correct or discourage every instance of wrongful discrimination. Some wrongs are beyond the authorized reach of government policy. Some wrongs are too costly or difficult to identify, let alone regulate. Some wrongs are, simply put, none of the government’s business. It is true that we are committed to equal justice under law; but the idea of a limited state in a free society is no less well pedigreed in our tradition. This idea, in Professor Michael McConnell’s words, “is among the most fundamental features of liberal democratic order. It is the core of the American constitutional enterprise.” “Constitutionalism,” I have written elsewhere, “is the enterprise of protecting human freedom and promoting the common good by categorizing, separating, structuring, and limiting government power in entrenched and enforceable ways.” Not all anti-discrimination efforts will fit well within this enterprise.

What is more, it is not only that over-enthusiastic campaigns against

discrimination in the name of equality can undermine the project of constitutional, and therefore limited, government; there is also a real need for an appropriate humility about our ability to confidently identify the content of this idea of social and political equality. One does not have to insist with Peter Weston, that the idea of equality is empty to admit that it and the non-discrimination norm are reasonably contested, and are sometimes easier to admire than to understand. When we affirm that governments should oppose discrimination, what we should mean is that governments should oppose it when it makes sense and when it is within the government’s constitutionally and morally limited powers to do so. To label a decision discrimination is to invite, but not to answer, the questions whether that decision or action is wrong, and whether

the public authority may or should forbid it. Answering these questions requires careful consideration of many factors and variables: Who is the decisionmaker? Who are the affected parties? What is the criterion for decision? How will the decision and others like it affect our ability to vindicate other goods? How costly would it be to try to regulate or prohibit such decisions? Is the social meaning of the particular decision in question such that, again quoting Ken Karst, “it belies the principle that people are of equal ultimate worth?” Or is the social meaning

something else? And is the decision one that a limited state in a free society has the authority to supervise? As usual, context matters. It is not enough to do what we so often do, namely, report the occurrence of discrimination; or invoke equality and assert its primacy; or declare particular decisions invidious or odious, or certain criteria suspect. These terms communicate something important and troubling about some instances of discrimination, but we have to remember that these terms add something to what they modify.

The important enterprise of respecting and protecting religious freedom through law is closely related to the important project of using public power to identify and regulate wrongful discrimination. We care about wrongful discrimination, and so we care about wrongful discrimination by religious actors, and for religious reasons, and along religious lines. For example, it is regularly and uncontroversially asserted by courts and commentators in the United States that the First Amendment does not permit governments to impose special disabilities, that is, to discriminate, on the basis of religious views or religious status. Such discrimination, the courts

“Understood in this way, church-state separation is not an anti-religious ideology, but an important component of any worthy account of religious freedom, under and through constitutional government.”

*Richard Garnett*

told us, is inconsistent with the constitutional promise of a right to free exercise of religion. It is just as true, though, that discrimination on religious or other grounds is a dimension of religious liberty that governments may, and sometimes perhaps even must, accommodate. Sometimes a government like ours will, may, and should regulate discrimination that targets religious status, that is engaged in by religious actors, or that is motivated by religious belief. Sometimes, however, a government like ours may, will, and should protect, or at least leave alone, such discrimination. Sometimes it is wrong for religious communities and actors to discriminate, such that it becomes the concern of a constitutional government. But sometimes it is not. In the former type of case, such a government will want to respond in some way, and probably should. But in the latter type, such a government should be unbothered.

To say this is not to be blasé about the ideal of equal citizenship, or about the threats that even non-state discrimination can pose to it. We are deeply committed to the anti-discrimination norm, and we believe that the coercive, expressive, and pedagogical functions of law should be deployed against wrongful discrimination. But we are also irrevocably, even if it increasingly seems less deeply, committed to limited government and religious liberty. And again, these commitments, it sometimes seems, are in tension and even in conflict, and it appears we cannot avoid tradeoffs, compromises, and prioritizing. However, my impression is that the rhetorical, moral, and legal power of the anti-discrimination norm can sometimes distort our thinking about how we should protect religious freedom through law. This is because the near universal, if sometimes unreflective, conviction that discrimination is wrong means that assertions of religious freedom are sometimes heard as requests that the political authorities tolerate a wrong—namely, discrimination—which they would otherwise prohibit or penalize. And these requests then raise the question whether tolerating such a wrong would undermine too greatly the government's own interests, or conflict too glaringly with its own values. When they are granted, accommodations are regarded as concessions. To be sure, we do and we should think about legal rights as involving the toleration of a liberty to do even the wrong thing, so long as the wrong thing is not too wrong. We should not forget, though, that one dimension of the freedom of religion is sometimes precisely the freedom to discriminate, and that this freedom should be protected not simply because such discrimination is, all things considered, a tolerable wrong, but because it is inextricably tied to a fundamental human right, and is beyond political authority's limited reach.

In my paper, I present an exhaustive description and analysis of several American cases and controversies. I also focus in a closer way on three prominent decisions by the Supreme Court: the Bob Jones

University case, the Christian Legal Society case, and the Hosanna Tabor decision. Each of these cases raises the question of when and why is discrimination wrong. Each involves, in similar but distinguishable ways, a government's response to discrimination by and because of religion. What I try to do in the paper is to evaluate these different responses, in light of what I think is a pluralistic account of religious freedom and constitutionalism.

These cases that I discuss confirm that there is a close connection between the important enterprise of protecting religious freedom through law and the important enterprise of using public power to regulate and discourage wrongful discrimination. They also con-



*Richard Garnett*

firm that whether discrimination is, in fact, wrong depends not on the mere fact that the word has been used, but instead on a number of factors, variables, and circumstances that help to shape the social meaning of that discrimination. Most importantly, these cases confirm that though a particular instance or a kind of discrimination is wrong, it does not necessarily mean that governments may or should regulate it.

I have danced around the question of when and why discrimination is wrong. However, and to be clear, I am confident that a non-consequentialist and non-contingent moral truth underlying the anti-discrimination norm is available. That truth is that every person is made in the image of God and loved by God, and therefore bears a dignity that should not be violated. This is as true for all of us as it is for some, and it shapes and constrains both how we may and may not treat each other, and how our governments ought and

ought not to treat us. Discrimination is wrong when it denies the equal dignity of every person. Sometimes discrimination does this and sometimes it does not.

With respect to the matter of the response and the power of governance, I propose an approach that is pluralistic in two ways. It accepts, as given, permanent, and unavoidable, the fact that reasonable people disagree reasonably about matters of importance. We and our governments should comfortably resign ourselves to the crooked timber of free society. Courts and officials should acknowledge their own limited competence and prerogative to resolve authoritatively these disagreements. There are many reasonable world views that are compatible with good citizenship, and it is neither necessary nor desirable to use state power to forge agreement.

My account is also pluralistic in another sense. About 60 years ago, the great American church-state scholar, Mark DeWolf Howe, drew on the work of English pluralists, like Frederic Maitland, John Figgis, and others. He identified what he called the heart of the pluralistic thesis in this way: “The conviction that government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence and authority so effective as to justify labeling it a sovereign authority. To make this assertion is to suggest that private groups have liberties similar to those of individuals, and that those liberties, as such, are to be secured by law from government infringement.”

I think our evaluation of the practices of non-state associations and institutions should be informed by this pluralistic thesis. These institutions transmit values and loyalties to us. They form us. They mediate between persons and the state. I think we are right to limit the government’s right or power to standardize beliefs, or impose orthodoxy by commandeering such transmission of values. Diverse non-state institutions can be seen as the hedgerows of civil society, as wrenches in the works of whatever hegemonic ambitions government might be tempted to undertake. The non-discrimination norm, then, should be operationalized. It should be enforced and the values of a liberal democracy should be expressed by government in a way that respects the constitutional role that non-state associations, even illiberal ones, play.

With respect to religious institutions, the point is arguably even stronger. At the end of the day, for reasons that go back centuries, churches are more than mediating institutions or “expressive associations,” to use the Supreme Court’s term. It is admittedly becoming more and more difficult to articulate, in acceptably secular terms, why they are and why they should be regarded as distinctive. Yet

the reality is that, if only as a result of our historical sentiment and a millennium-long story of Western constitutionalism, religious bodies are afforded a certain distinction.

This story of Western constitutionalism is about the enterprise of protecting and promoting human freedom through structural devices that allocate, separate, and limit political power. The healthy separation between church and state is such a device. It is true that in our contemporary debates, at least in America, separation is often regarded, even by religious believers, as an anti-religious policy that mandates a naked public square. Some think that church-state separation requires religious believers to keep their faith strictly private, or to wall off their religious commitments from their public lives and from arguments about how we ought to order society. However, there is another view that, in my opinion, presents a better model. In this view, which I associate with Pope Benedict XVI, John Courtney Murray, and the Second Vatican Council, the separation of church and state is an arrangement in which the institutions of religion are distinct from, and meaningfully independent from the institutions of government. It is a principle of pluralism, of multiple and overlapping authorities, of competing loyalties and demands. It is a rule that limits the state, and in doing so, clears out and protects a social space within which persons are formed and educated, and without which religious liberty is vulnerable. Understood in this way, church-state separation is not an anti-religious ideology, but an important component of any worthy account of religious freedom, under and through constitutional government. It will sometimes seem, in particular cases, to frustrate the vindication of the anti-discrimination norm, but in the end, it serves goals that are no less important.

LINDA MCCLAIN: I resist framing the question at hand as religious freedom versus homosexual equality, for a couple of reasons. First of all, within different religious congregations there are debates over these issues, and among different congregations and denominations, there are different stances on this issue. In many of these same-sex marriage litigations, there are religious groups filing amicus briefs on both sides of the issue. In my paper, I suggest that you could also frame this as an issue of liberties in conflict. Liberty in the sense of due process: the right to marry versus religious liberty. It is a very intriguing suggestion that we might regard this as a conflict between different types of equality at stake. Thus, there are several different ways of framing the question.

The frameworks that I suggest are congruence and conflict, the notion of mutual adjustment of equal basic liberties, borrowed from John Rawls, and finally, the relationship between civil law and religious law. Much of what I have heard here suggests a need for some

real clarity on what we mean when we talk about civil marriage, and why there would be threats to religious liberty from an evolving definition of civil marriage.

In terms of congruence and conflict, the only thing I would add to what Professor Garnett has said about pluralism is that, within the US constitutional order, there is an intriguing tension between two different ideas about the role of civil society, by which I mean the realm of institutions between the individual and the state—families, religious institutions, voluntary associations of various kinds. That leads to some of the tensions we see framed at this conference. On the one hand, many talk about families and religious institutions as seedbeds of the virtues and values that undergird constitutional democracy. Everyone loves to quote Tocqueville. Everyone loves to talk about the founders. Yet, as Professor Garnett has pointed out, these same institutions are independent locations of power and authority that guard against an overweening state, or a governmental orthodoxy, and they generate their own distinctive virtues and values. The first idea envisions a kind of comfortable congruence between these two realms. The other acknowledges that there could be areas of conflict and a lack of congruence. How do those ideas work together in this framework?

The first controversy I discuss in my paper is New York's recent enactment of the Marriage Equality Act, and the argument that it does not give generous enough religious exemptions, and more fundamentally, the argument by some that the law has deviated somehow from a correct understanding of marriage. Next I examine the Justice Department's announcement that it will no longer defend the Defense of Marriage Act (DOMA). Some religious leaders have said that the Justice Department claimed that DOMA was merely an act of bias and prejudice, akin to racism. Finally, I look at the ongoing federal litigation in California, which is quite complex. Religious leaders were quite upset at the way Judge Walker talked about Proposition 8 and then the Ninth Circuit affirmed Judge Walker recently.

In New York, the Court of Appeals had said that the New York

Constitution does not require extending civil marriage to same-sex couples. Of course, the legislature was free to take the matter up and so it did. One of the reasons that the law was passed was that Republicans who previously opposed the law now supported it. As they tried to explain why they voted for the law, they tried to talk about, on the one hand, their own religious backgrounds, and the understanding of marriage therein, as well as, on the other, their obligations as lawmakers. They came to the view that the right thing to do was to allow equal access to the institution of civil marriage. They also felt fortified in their vote by the fact that there would be religious exemptions. To quote from Senator Grisanti: "As a Catholic, I was raised to believe marriage is between a man and a woman. But I'm not here, however, just as a senator who's just Catholic. I'm also here with a background as an attorney, through which I look at things and I apply reason." (I know Catholics say, 'Well, we apply reason, too, that's not fair.') "But, I cannot legally come up with an argument against same-sex marriage." Finally he said, "Who am I to say that someone doesn't have the same rights I have with my wife, who I love?" I just want to mention the 1300-plus rights associated with marriage. There are a lot of practical, legal consequences of marriage that the civil state, not the Catholic Church or the Lutheran Church, bestows. That is part of the tangible, material side of marriage.

On the other hand, one of the most prominent opponents of the law, Representative Diaz, said, "God, not Albany, settled the definition of marriage a long time ago." The idea is that this departs from the true understanding of marriage.

The state is trying to define an institution that was settled a long time ago by God. He also said, "Same-sex marriage is a government takeover of an institution government didn't create and shouldn't define." In *Goodridge vs. Department of Human Services*, the Massachusetts same-sex marriage case, there was a statement the Massachusetts Supreme Judicial Court made that has enraged conservatives: "Broadly speaking, the state creates civil marriage." The state regulates who may enter marriage, how you exit marriage, and the legal consequences of the institution of civil marriage. There is recognition that people have conscientious disagreement over whether same-sex couples should be allowed access to marriage. But as a civil matter, the question is whether the state has



*Linda McCain*

reasons for excluding people from the civil institution of marriage. New York, in passing the Marriage Equality Act, has concluded that the government does not have good reasons for such exclusion; to the contrary, they believe the time has come to include same-sex couples in this institution.

The act tries to explain the relationship between civil and religious marriage. In explaining the religious exemptions that were included, the act says, “This bill grants equal access to the government-created, legal institution of civil marriage, while leaving the religious institution of marriage to its own separate and fully autonomous sphere.” There are some religious people who hold that same-sex couples cannot be married because they are not capable of the goods of marriage. The Manhattan declaration is a good example of this line of thought. However, this is an argument that appeals to certain theological understandings of marriage that are not reflected in contemporary family law. Similar arguments include that the fundamental purpose of marriage is procreative, that the purpose of marriage is to provide an optimal setting for rearing children. Other arguments emphasize the importance of certain gender complementarities that the institution of marriage recognizes. Certainly it is a legitimate state interest, even a compelling state interest, that children have an optimal setting for rearing. But the courts have said that this does not translate into a justification for excluding same-sex couples from marriage.

Here we are getting to the social science aspect of the question. The idea that same-sex couples are capable of rearing children has been pervasive in state court litigations, in legislative debates, and in Eric Holder’s letter at the Justice Department. The Justice Department cited social science, statements from the American Academy of Pediatrics and various professional associations that suggest that same-sex couples can rear children successfully, and that child outcomes do not hinge significantly on the gender of the parent. The next argument becomes about preserving traditional morality. In California, when the Federal District Court issued a lengthy opinion, with many findings of fact and conclusions of law, it basically concluded that the proponents of Proposition 8 did not really have much of an affirmative case for excluding same-sex couples

from marriage. California had an expansive domestic partnership law that gave same-sex couples in California virtually every tangible benefit and obligation of marriage, but under the guise of something called “domestic partnership.” California had already gone that far to say that same-sex couples deserve the same parental rights and responsibilities as married couples. Thus, the initial litigation in California was over the access to the name “marriage.” The California Supreme Court ruled that it violated the California Constitution to withhold the name because—and here we get into our key words—it was a denial of equal respect and dignity. The people of California, through this ballot initiative and campaign to protect marriage, got Proposition 8 enacted, which, in effect, overturns the California Supreme Court ruling and defines marriage as being between one man and one woman. Judge Vaughn Walker sought to find out what underlay the withholding of the name

“marriage” when the state already gives the same rights and responsibilities under the guise of domestic partnership. The court concluded that moral disapproval or a sense that homosexual relationships were inferior was what really underlay the ballot initiative.

The Ninth Circuit affirmed the Federal District Court. The opinion was written by one of the more liberal members of the court, Judge Reinhardt. The Ninth Circuit tried to focus on California, which had taken various steps toward equalizing the status of straight and homosexual people, and with respect to access to assisted reproductive technology, with respect to second

parent adoption, with respect to imposing child support on lesbian co-moms. Having taken all these steps, and having this judicial ruling by the California State Supreme Court that equal dignity and respect required access to marriage, why did Proposition 8 strip that away from same-sex couples? The Ninth Circuit concluded that the only reason is moral disapproval, if not outright animus or bias.

One of the curious things about the Proposition 8 litigation is that it was brought by very renowned lawyers, David Boies and Ted Olson. They put forward an incredible case: expert witnesses, documentary testimony, etc. The other side put up much less of a case, relying on the idea that it is self-evident that traditional marriage is good for society. There was an incredibly lopsided presentation. In

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*Linda McClain*

the decision, Judge Walker cited these findings and evidence from the record. In a world in which family law has taken steps toward equalizing the status of gays and lesbians with respect to their intimate relationships and their status as parents, and where gender is not a central defining feature of marriage, it is difficult to find a rational basis for maintaining a distinction between homosexual and heterosexual marriage.

ROBIN WILSON: I want to talk about the law on the ground, and specifically the law reform work that I have done with two groups of scholars, including Professor Garnett, to secure religious liberty exemptions in same-sex marriage laws in seven states in the United States, including New York.

Although our groups have had success, securing religious liberty protections in the United States has proven surprisingly difficult, because many legislators basically see things in black and white. Furthermore, they also do not want to be seen as selling out their gay constituents. Some legislators have expressed to me a set of reservations about the package of religious liberty exemptions that we propose. I think most of the objections to our proposed exemptions are easily overcome.

Religious objectors in the United States have been left to fend for themselves in the political process because they are not guaranteed insulation from neutral laws of general applicability, as the US Supreme Court said in the *Employment Division vs. Smith*. It remains to be seen whether the *Hosana Tabor* decision changes this. There may be additional protections under state constitutions, or the Religious Freedom Restoration Acts in many states or at the federal level, but generally, any accommodations that are likely to happen are going to have to come out of the legislative process. This brings me to the political calculations that opponents and supporters of same-sex marriage are both making, and whether those calculations, influence how and whether they fight for or oppose religious liberty accommodations.

In many ways, I believe both sides of this debate have been wrong about the strengths of the other side's position. For example, where gay marriage advocates have pushed for same-sex marriage in the United States without religious liberty accommodations for anyone other than the clergy—what I have called faux protections because the clergy do not need these protections—they have been unsuccessful. Such a winner-takes-all approach backfired, for example, in Maine, where, in 2009, voters vetoed Maine's "clergy only" legislation in a referendum by a narrow 52.9 percent to 47.1 percent margin. This means that if a mere 2.9 percent of voters could have been stripped off with "live and let live" exemptions, Maine would

have same-sex marriage today. As I show in a new article, every single legislative attempt in the United States to recognize same-sex marriage, while offering only protections for the clergy, has gone down in defeat.

On the other side I think there are miscalculations, too. Religious leaders and gay marriage opponents have a five to ten year window to secure religious liberty exemptions, after which, given the generational divide and increasingly favorable public opinion on same-sex marriage, legislation to legalize gay marriage will be possible without religious exemptions. I believe that the time to lock in these protections is now. In my view, if same-sex marriage opponents continue an aggressive campaign on the merits of same-sex marriage, instead of arguing for religious exemptions, they will ultimately lose out.

Before I describe the set of sticking points, let me talk about some moral clashes over same-sex marriage that have unfolded in the United States in the past few years. Exemptions are intended to allay these kinds of clashes. Such clashes range from lawsuits over refusals to serve same-sex couples, to cancelled social services contracts, to firings, and resignations. For example, on the heels of Massachusetts' same-sex marriage decision, the state's justices of the peace were told by counsel to then-governor Mitt Romney that they, "Have to follow the law, whether they agree with it or not." Anyone who turned away same-sex couples could be personally held liable for up to \$50,000. Iowa and New York gave similar directives to government officials, like town clerks. In New Jersey, a tax-exempt, church affiliated group was sued by two lesbian couples that wanted to hold their commitment ceremonies on the group's boardwalk pavilion. When the group refused, New Jersey charged it with a violation of New Jersey's law against discrimination, and earlier this year, an administrative law judge found that claim to have merit. Even more problematic in the same case, local taxing authorities yanked the group's exemption from property taxes on the pavilion itself, billing them for more than \$20,000 in back taxes, although I understand that they ultimately paid less.

In the commercial arena we have also seen clashes. In New Mexico, which neither recognizes same-sex marriage nor same-sex civil unions, the New Mexico Human Rights Commission fined a small photography shop over \$6,000 for refusing on religious grounds to photograph a same-sex commitment ceremony. Clearly, without specific protections, religious organizations and individuals that want to step aside from celebrating same-sex marriages may be subject to private lawsuit for sexual orientation discrimination or marital discrimination. These organizations are going to face stiff penalties, in many instances, from the

government. For example, San Francisco withdrew three and a half million dollars in social services contracts from the Salvation Army because it refused, on religious grounds, to provide benefits to its employees' same-sex partners. States that have recognized same-sex marriage through legislation in the United States have embraced the idea of exemptions, and included many of those that we propose. So these states uniformly allow religious organizations, including religious not-for-profits to step aside from providing, "services, accommodations, facilities or goods to an individual if the request is related to the celebration or solemnization of a marriage that violates the entity's religious beliefs." This language comes from one such state statute. Four states explicitly exempt religious counseling programs or marriage retreats. Some of them also exempt religiously affiliated fraternal organizations, like the Knights of Columbus. Three states say individual employees of these groups are protected. Two states allow religiously affiliated adoption and foster care services to refrain from placing children with same-sex couples, so long as the group receives no government funds. All of these states protect covered groups, however defined, from civil suit, and six of the seven states explicitly protect against government penalty. This last point is most important for religious organizations.

I think that this package of exemptions falls short in some ways, and there are additions that should be included. We

suggest that judges, justices of the peace, marriage license clerks, and individuals in ordinary commerce, like photographers and bakers, who prefer, for religious reasons, to step aside from same-sex marriage, should be allowed to do so, but only if no hardship would result for same-sex couples. If a hardship exemption protects the interests of both sides, as I believe it does, why are these exemptions difficult for some legislators and others to embrace? I have sensed a real struggle by some people to vindicate two competing values—both religious liberty and marriage equality—in the same piece of legislation. That tension breaks down along specific lines. There is tension around the idea that accommodations disguise bigotry. Some contend that they impose hardships

on the public.

I believe that religious accommodations qualified by hardship to same-sex couples can transform a zero sum proposition into one in which the freedom to marry and religious freedom can coexist. The first sticking point basically maintains that exemptions condone bigotry in disguise. In other words, how can we tell the sincere objection from the feigned one? This question of sincerity is common to all religious freedom protections. We have developed a series of tests, a long history, and experience in telling which beliefs are sincere and which are not. We separate the sincere from the insincere in various contexts like conscientious objection to military service or employment. We evaluate whether a stated reason is real or in fact pretextual, rather than say that no exemption is available at all.



*Robin Wilson*

A second sticking point basically says that objectors should be protected from solemnizing a relationship, and that alone is sufficient. Another way of saying this is that we should protect the clergy. John Corvino, a gay marriage advocate, put this very nicely in a column where he said that the fight about religious liberty protections is not about the clergy, but about the "not so strictly religious things that religious organizations often do, like renting out a banquet space". One premise of John's point is that the religious objector may legitimately object when asked directly to solemnize a relationship, but an objector's claim weakens significantly

when less direct actions are at stake. The law has not required direct participation in another deeply divisive area, abortion, in order to receive protection. There, conscience clauses insulate not just the physician who performs the abortion, but any person asked to assist with it. Some clauses in the United States reach outside those that most of us would consider core, performing the abortion, to encompass more peripheral activities like training and referral. Title 7's accommodations for an employee's religious beliefs are likewise expansive. It requires employers in the United States to provide reasonable accommodations for an employee's religious practice or belief, unless the employer or co-worker will experience an undue hardship. Now, as weakened as those protections have

been after some US Supreme Court decisions, they have still been extended to nurses who do not want to assist with abortion, clerks who do not want to process draft registration forms because they are a pacifist at the post office, and IRS agents who do not want to process applications for tax exemption for abortion clinics. As those cases show, while employers may in fact consider burdens to themselves and other co-workers when refusing an accommodation, nothing suggests that only those who are directly involved in the challenged activity can or should be exempted.

I do believe it is possible for a claim for an exemption to be so remote that it should be beyond society's willingness to protect it. For instance, in the health care context, an Iowa Attorney General opinion concluded that the state's abortion conscience clause would not extend to the pharmacist who is asked to make the saline solution used in that abortion. The exemption that my group proposes is limited to "providing goods or services that assist or promote the solemnization or celebration of any marriage." Kent Greenawalt asked me recently if this would cover the clerk signing the paperwork, the one who hands it to the customer, and the cashier, too. All of these services arguably facilitate the same-sex marriage because they directly involve the license. I think we can take a more expansive view of promotion, because the exemption is also limited by the sincerity of the believer and the hardship to the same-sex couple itself. For example, the exemption would not, in my view, cover the security officer who unlocks the building, because the building has to be unlocked for all the other work that the office does, too.

A third sticking point says that no one is being asked to do anything, so no one needs any protection. Here, I am drawing from the words of D.C. Councilman Jim Graham, who asked me in testimony at the D.C. Council for "concrete examples." Here is one of the three examples I gave: The idea that no government official or employee will be or is being asked to do anything overlooks a body of warnings issued to government employees. The Massachusetts justices of the peace, Iowa county recorders, magistrates and judges, and New York town clerks have all been told that refusing to serve same-sex couples will result in criminal prosecutions for misdemeanors or other sanctions, including firing. Government employees and officials, in fact, believe they are at risk and many have resigned in advance of collisions. I actually think that is the smart move, because every state recognizing same-sex marriage has a pre-existing non-discrimination law, and the penalties for violating those laws are sobering. In Massachusetts, as I mentioned, fines are up to \$50,000. In Connecticut, you can spend 30 days in jail. Because the anti-discrimination statutes provide a vehicle for these challenges, some people make a related claim, namely that

the bind that religious objectors find themselves in is like any other form of discrimination against lesbian and gays. Here, I just have to disagree. Laws prohibiting discrimination on the basis of race or other prohibited classifications date back to the 1960s and the 1970s, long before anyone envisioned same-sex marriage anywhere in the world. These laws address commercial services like hailing taxis, or leasing apartments, or ordering burgers, where it is hard to imagine that a refusal to serve another individual could reflect anything else than animus towards that individual or people with their kinds of characteristics. But refusals to assist with a same-sex marriage, I believe, have a different character. They can stem from something other than anti-gay animus. For many people, including some here, I am sure, marriage is a religious institution, and wedding ceremonies are a religious sacrament. For such people, assisting with marriage ceremonies has a religious significance that ordering a burger or driving a taxi simply does not. Many have no objection to serving lesbian and gays generally, but would object to directly facilitating a marriage. Yet, without explicit protection in either the anti-discrimination law or the new same-sex marriage statutes, many will be faced with a cruel choice: your livelihood, or your conscience. Moreover, if no one is seriously being asked to do anything, then it costs legislators nothing to allay the fears of people who are simply asking for a way both to honor their convictions and to live with same-sex couples together in peace.

A fourth sticking point says that same-sex couples should not have to bear the costs of somebody else's religious objection. The package of exemptions we propose would balance both the interests of same-sex couples with the religious concerns of others. Any time anyone asks a legislator or advocate on either side to balance interests, the natural response from everybody is, "Why should we do that?" Let me explain our proposal.

The exemptions we urge would give state officials and government employees like judges, justices of the peace, and marriage license clerks, as well as individuals in ordinary commerce, like bakers and photographers, the abilities to step off from facilitating any same-sex marriage for religious reasons, but only when no hardship would result to same-sex couples. In the case of government employees, an employee could step off if another willing employee is immediately available to do the service without delay or inconvenience. Under our proposal, commercial vendors would also be able to step off, but only if it does not substantially burden a same-sex couple, in which case religious liberty would have to yield. Now, these two different tests for exemptions are deliberate, because at least in my view, the contexts differ in important ways. With the justices of the peace and government clerks, the objection directly involves the access to the status of marriage, so that a refusing jus-

tice of the peace could potentially act as a chokepoint on the path to marriage. Because the state has a monopoly on marriage, and it will have just said that same-sex couples should be able to marry, I believe that it should not give couples the right to marry with one hand and potentially take it back with broad, unqualified exemptions on the other. Imagine a same-sex couple resides someplace very rural where there is only one town clerk that can help the couple complete their application for a marriage license. By refusing to assist that couple, the clerk could effectively bar them from the institution of marriage, or make it much, much harder to get into it. In this instance, the religious liberty of the objector would have to yield to the marriage equality of the same-sex couple. But outside this rare instance of a hardship, where there are other clerks who would gladly serve that couple, and no one would otherwise lose by honoring the religious convictions of the objector, I believe such convictions should be honored.

The proposed exemption that we advocate does involve some line drawing. I think that line drawing is best left to the legislative process, since different states might want to make different choices, depending on the facts on the ground in that state, i.e. how rural or urban it is; how many state offices process the necessary paperwork; and what is the requisite waiting period to marry in that state. Some will ask why same-sex couples should ever have to experience any dislocation, however slight or remote.

A common refrain in the United States has been that religious objectors in government service should do their entire job, or get out. As I argue in a recent paper, this stance conflates the work of the office with the work of any given employee. In other words, a citizen's right to obtain a marriage license is against the state, not a particular employee. Moreover, as the Title 7 cases that I just mentioned show, it is not only appropriate but also sometimes legally required that we allow employees to step aside from a part of their job, when they can reasonably be accommodated and there would be no undue hardship. More fundamentally, this idea that you do the whole job or get out vilifies people who could not have known when they took these positions, that they would be asked to facilitate a same-sex marriage. Many of these employees began working for the government long before same-sex marriage had been recognized anywhere in the world, as I demonstrate in a new paper. Many of them, in fact, are eligible already to retire, and their retirement

savings could be wiped out. A measured solution to balancing the dislocation to same-sex couples and religious objectors would be to grandfather in these long serving employees. Alternatively, legislators could sunset any individual level exemption allowing older workers simply to age out of the workforce.

I will say one more word about commercial vendors. Our proposal would give more room to religious objectors in the stream of commerce, unless a person could not get a service without substantial hardship. Because same-sex marriage remains a blue state phenomenon, there are going to be lots of businesses that want to serve same-sex couples and will actively seek them as clients. As Doug Laycock notes, same-sex couples will generally be far happier working with providers who contentedly desire to serve them, than with providers who believe them to be engaged in a mortal sin.

*“But outside this rare instance of a hardship, where there are other clerks who would gladly serve that couple, and no one would otherwise lose by honoring the religious convictions of the objector, I believe such convictions should be honored.”*

*Robin Wilson*

MICHAEL GERSON: I want to ask the other two panelists their reaction to the idea that there might be democratic accommodations on these issues that do not involve all-or-nothing decisions, which is the way democracies usually work. It fits my view of government service that often you are not weighing good and evil, but rather relative goods. You have to find practical accommodations to do that. We have an advantage in the American system of federalism, that states can try a variety of approaches.

I am curious to see your reaction on whether you think any states have taken creative approaches here and whether there are promising accommodations to be made.

LINDA MCCLAIN: I do know that in the New York debate, there was a lot of extra time spent on the accommodations. This was a big issue. I think people generally believe that the reason the law passed this time around, other than pressure from Governor Cuomo, was the accommodations. I think this clearly is important. I am still sorting out what I think about Robin's exception for public officials, because it troubles me for various reasons. I am troubled about the very senior clerks losing their pensions, but in general, the notion that public officials can pick and choose which people they want to service because of religious objections is troubling to me. I understand the point about the commercial market. What that means basically is in large urban markets, where people can readily find other service pro-

viders, the issue is probably not going to come up. But in smaller markets, it could come up in various ways.

**RICHARD GARNETT:** I have been cooperating with Robin on these proposals, so I am in favor of them. I am a little more pessimistic and worried than I think she is though. Exemptions that are limited to letting people step out of actual commitment ceremonies, or weddings, or solemnizations are well and good. But in order for these exemptions to be meaningful, they have to provide some protection against collateral punishments for not embracing same-sex marriage. I am thinking of situations where an entity will not recognize same-sex marriage for religious reasons. Might such an entity lose its tax exemption? In the case of a religious university, would that university be required to make married student housing available to a same-sex couple? One can think of a lot of instances where there will be clashes that are not directly connected to wedding ceremonies. For these exemptions to be meaningful, they also have to deal with such clashes.

A concern I have about the way the political debate is proceeding is actually exemplified by the California situation. If we leave it to the political process to sort out the definition of marriage, that is great, but in my view, you should not say that only non-religious believers can participate in the debate. Similarly, it should not be that only secular arguments are permitted in that debate, or that if secular arguments are made by religious people, they are deemed to be suspect or disingenuous. That is how I read Judge Walker's opinion, actually. It was a systematic process of deferring to the arguments made by the supporters of same-sex marriage, and a kind of systematic downgrading of the arguments made by opponents. There was an assumption that opponents are of course motivated by religious arguments. I am not so confident that the political process is actually going to be allowed to work in a kind of even-handed way, which makes me nervous.

**MICHAEL GERSON:** I think one of the things that concerns religious people most in this debate is the idea that religiously based moral views are an illegitimate basis for public policy. It is a tremendous social power to be able to declare what motives are acceptable and what motives are not and the courts usually wield this power. One's politics can be informed by John Rawls, but not by John Calvin or John Paul II. There is a privileged place for a certain type of political argumentation, which is based on a moral vision, while there is a disincentive for other views.

**LINDA MCCLAIN:** I think that the people supporting Proposition 8 did not litigate that case well. The reason Walker's opinion reads the way it does is because Ted Olson and David Boies

brought in a wide variety of witnesses. The other side did not think that they had to demonstrate their case in that way. I understand this impulse to read him as just systematically ruling religious arguments out of bounds. My own view on this is that people appeal to different types of arguments. One could make a religious case for civil rights, as was certainly done in the civil rights movement. In terms of what one can reasonably expect our co-legislators to understand, Rawls says that one can appeal to his or her religious convictions, but he or she also has to try to translate that argument into terms that other people who do not share that comprehensive world view can understand. The question I would put to Rick is if Representative Diaz stands up and says, "God settled the definition of marriage long ago," is that really supposed to persuade the other members of the New York Assembly?

**RICHARD GARNETT:** I agree entirely that it makes sense in politics, and indeed, it is consistent with civic friendship, to try to make arguments that can appeal to as many people as possible to try to resolve your dispute on some kind of common ground. For me, it is ineffective and unattractive to think you can just make political arguments by citing religious authority. It is a different question whether unelected federal judges should be able to overturn legislative enactments on the basis of those unelected judges' conclusion that they are merely efforts to impose religious values. As I see, the inputs in political conversation ought not to be curtailed, or regulated, or policed. People can make the arguments that move them. If they do not move others, they will lose. But if they do move others, the fact that they are made by religious believers ought not to count against them in any respect.

**ROBIN WILSON:** To Rick's point about housing and other forms of recognition of same-sex marriage, two states in the United States have given an exemption to the duty to provide housing to same-sex couples if it would violate the religious convictions. So there are some protections there. There have not been protections in the area of exemption from benefits. This is one of the places where the question is very difficult because, unlike the kinds of qualified hardship exemptions that I have been describing, where religious liberty almost always wins, there is a zero sum game. Either religious liberty wins and there are no benefits; or religious liberty loses, and there are benefits. Here, I think the argument for a religious accommodation shifts, not from the idea that we can affirm both values, but in fact, that if we give an exemption as to the duty to provide benefits, we avoid a much bigger dislocation for same-sex couples themselves. For example, when the District of Columbia recognized same-sex marriage, the Catholic Charities and the Archdiocese of Washington asked to be exempt from the duty to provide benefits to the same-sex partners of employees, something

that those groups felt that they could not do, consistent with their religious conviction. When they were not given an exemption, they took what I call the 'nuclear option', and they dropped coverage for everybody going forward, rather than to provide coverage that would violate their religious convictions. The same question, in fact, is now playing out around the Obama contraceptive and sterilization coverage mandate. As I argue in a new paper, there are in fact, many nuclear options left for very small employers. The penalties for an institution like Notre Dame are gargantuan. But for smaller groups, in fact, the nuclear option is available. And I think one of the reasons we have to thoughtfully engage exemptions on the question of benefits and housing, is that there can be much worse repercussions for same-sex couples if we do not actually think through what the costs are on both sides of the ledger.

MICHAEL GERSON: As a non-expert, I have been confused about what the precise role of social science is in this debate. If it turned out that child raising was neutral, would that change the rights of religious institutions? If it turned out that child raising was inferior, would that change the rights of individuals? I am not quite sure how this affects the debate when it comes to these issues.

RICHARD GARNETT: My intuition is that social science evidence is very relevant to the question of what understanding of marriage the law should embody and enforce. The challenge is actually getting data that we think are reliable, honest, relevant, and fair.

LINDA MCCLAIN: Professor Garnett is right, but I do think that there could be an argument that religious people could make, which would dismiss studies about child wellbeing and argue for deeper gender complementarities that are not easy to measure. Such arguments point to the need for a mother and a father; a female role model, a male role model, wherein the child learns to model all of these things through the dynamic of the male-female, heterosexual dyad.

RICHARD GARNETT: A lot of religious believers on the Catholic side would say that it is precisely because these claims about complementarities are true that there is no reason to fear social scientists studying the effects of these arrangements. It would be a rational argument.

LINDA MCCLAIN: In Florida, one of the few states in the United States that had an explicit ban on homosexuals adopting children, there was a lawsuit won by a would-be adoptive father. On this point, the court pointed out that the biggest group of adopters in Florida were single parents. Part of the problem is putting a state to

its own proof; if you really believe the optimal home for an adopted child is a mother and father, a married couple, why are you letting these single parents adopt children? If you want to make these arguments, you have to look at what family law is actually doing.

ROBIN WILSON: I understand that many people were afraid to testify in front of Judge Walker. I do not believe that on this question, we can actually trust the social science evidence, because I do not think the people who police social science evidence for integrity are necessarily using a legitimate screen. In fact, I think there would be some things that would be very difficult to get published in a peer review journal, because of certain viewpoints. I am not sure that social science data mean anything here, given the deep debate in society about it.

#### QUESTIONS FROM THE AUDIENCE:

WILL INBODEN (University of Texas, Austin): There are two sides to this question: the religious liberty side and also the definition of marriage side. Is there a way to think about this as a religious liberty question, as well as to expand the discussion on the normative definition of marriage, especially as it relates to the issue of polygamy?

LINDA MCCLAIN: In Canada, the British Columbian Supreme Court recently heard a huge trial about whether the criminal ban on polygamy violated the charter, and if so, was it justifiable. After a lengthy trial with a pretty voluminous record and a lot of expert testimony, the court concluded that there was reasonable apprehension of harm to children, women, the institution of marriage, and society that justified the continuing criminal ban on polygamy. In the American case *Reynolds vs. the United States*, they rely on the political theory of Francis Lieber about the relationship between marriage and the polity. Currently, Professor Jonathan Turley is bringing a lawsuit on behalf of one of the women from the TV show "Sister Wives," claiming a right to privacy, along the lines of *Lawrence vs. Texas*. They are not seeking civil recognition. They just want polygamy decriminalized. There is a spectrum of state responses—outright ban, formal recognition and approval, and a kind of gray area.

ROBIN WILSON: The great arm of family law in the United States has tended towards privatized notions of the family. You can tailor-make your marriage. The reason we do that is that we have lots of procedural protections along the way. My concern is that we do not have those procedural protections to ensure that the women, in fact, are making fully informed, voluntary choices. In polygamous communities, women do not think that they can

leave because there is a very high risk of ostracism. In a new paper I talk about the Sharia courts and Great Britain, and the outcomes for women in those courts, using some of the schools of Islamic law and how significantly they depart from the background understandings that would apply if British law were applied. This means we would go back on a hundred years of progress for many of these women. They would be left destitute at the end of that time. Now, I do think the state can be neutral on the question of who has a duty of support to the divorced wife. But there are some authorities that suggest, at least in the way that it is playing out in Great Britain, some of these families have gamed the system, and have realized that these women will fall in the social safety net. If that is true, I believe the state cannot afford to be neutral on this question, because those women will be left with nothing.

MICHAEL GERSON: The variant of this argument is that the operational change in attitudes toward marriage in America did not take place in the context of this debate, but rather it took place in the 1960s and 1970s, when marriage came to be viewed as a contract oriented towards individual fulfillment. One could make the argument that it is not homosexuals, but rather heterosexuals that destroyed marriage, in the traditional definition.

RICHARD GARNETT: Both Linda and Robin actually know more about the arc of American family law than I do. But my sense as a citizen is that the institution of marriage is in trouble and has been for a while. It is due a lot more to things like selfishness than it is to homosexuality. I do think there is one variation in the same-sex marriage debate, though, and that is that in the debate about no fault divorce, those who oppose no fault divorce are not framed as arguing against the dignity of those who support it. But in the context of same-sex marriage, those who are resisting this move to same-sex marriage are characterized, perhaps sometimes reasonably, as being hostile to those who they are trying to exclude from the institution. I do think that adds a different flavor to the debate now. I think Linda could tell a different story where this move in American family law has actually been one toward more equality, toward companionate marriage. But something is being lost if we think that marriage is just reducible to a kind of contract for mutual satisfaction.

TIMOTHY SHAH (Georgetown University): Further to Professor Wilson's proposal, consider the specific example of a same-sex couple that approaches a municipal office to get a marriage license. The clerk is unwilling to provide the license and so another clerk is summoned to take care of it. It is possible that the couple may be offended and want an explanation. An explanation is provided, in which case the couple perhaps has good rea-

son to be offended, perhaps because they feel a wound to their dignity and they feel disrespected because somehow this officer of the government was not willing to provide the service initially. What would prevent the couple from filing a lawsuit against the relevant political entity? What would happen in such a case? It is very imaginable that such a couple would win that case on the grounds of violation of dignity and equality. I would think that there are other aspects of the proposal that would be vulnerable to similar kinds of challenges and problems.

ROBIN WILSON: What I have been exploring recently in a new paper is the idea that we would have a Department of Motor Vehicles style approach where, there being multiple windows, one



*Paul Diamond*

would get a number and then be called up. The only person who is at the window doing intake is somebody that we know not to be a religious objector. This person would then direct people to the appropriate clerk. In such a case, nobody has any idea that there has been any accommodation made at all. We should strive for that. Title 7, in fact, allowed religious objectors to have these step-offs, as long as it did not unduly burden other people and they could be reasonably accommodated. There is a series of cases in the United States from the Seventh Circuit Court of Appeals that I call the "public protector" cases, involving religious exemptions for certain work undertaken by firefighters and police. For many of those same cases where the court rejected an accommodation for a government employee, there was in fact, a low level workaround. Title 7 has pushed down a norm of accommodation, even in those cases. And

the Seventh Circuit is alone in their rulings. Most of these other circuits say that we do have a duty to try to work around religious commitments. In the case of municipal clerks, objectionable activities account for two to three percent of the workload. It is not too much to ask for someone else to do the task in those few situations.

CHRISTOPHER McCRUDDEN (Queen's University): It seems that there are two analogies being used in the discussion: race and abortion. Why is one analogy more convincing than another?

ROBIN WILSON: Since I focus on health law, which includes the abortion issue, I chose to use that paradigm because it is what I know. The essential question is what is possible in terms of lowering the stakes in this debate. There has to be some way that we can all have live and let live exemptions. The track record of same-sex marriage laws in the United States shows that if supporters of such laws do not pony up some protections for people who have wildly different views of the good, then they are not going to get anything.

LINDA McCLAIN: In the various marriage litigations, there is a lot of argument about the relevance of anti-discrimination law on the basis of race, gender, and sexual orientation. I urge you to look at Eric Holder's letter from the Obama administration, because there are citations to path-breaking sex discrimination cases. The only thing I want to say about race is that I recently wrote a paper about the history of Title II, the public accommodations part of the Civil Rights Act of 1964. I looked at some of the legislative debates. It is interesting to look at the treatment of interracial marriages. It is very important to have some historical context with these issues.

JOHN FINNIS (Oxford University): In Colorado in 1992, there was a referendum on the inclusion of sexual orientation in non-discrimination clauses. The vast number of Colorado voters, in a state that had never had a law criminalizing homosexual conduct, reasoned like this: "I think sex is for marriage. I want to teach my children that sex is for marriage. I want my schools to teach that. I know that the main consequence of introducing laws protecting sexual orientation from discrimination is that it will no longer be possible for schools and other civic institutions to favor marriage

and sex within marriage. I have absolutely nothing against the homosexuals who are out there, but I would not want my children to engage in that lifestyle, which is, for me, an immoral kind of choice." Analogously, I am sure that many voting on Proposition 8 reasoned the same way. In 1992, the Colorado voters who reasoned like that were declared by Justice Kennedy and the leftists on the court to be motivated by animus against homosexuals. This was merely an evidence free declaration by those justices. Considering Judge Walker and Judge Reinhardt, Judge Walker's conclusion, which was hardly surprising as he is a practicing homosexual, is that the California voters are motivated either by animus (Justice Kennedy's reasoning) or—this is the interesting part—by a private moral view that same-

sex couples are inferior. I would like to know just what this private moral view is. I think this is an attempt to attach a meaningless category as a substitute for animus against a person. I do not think the reasoning is improved by someone inventing this fudge category of moral disapproval of couples, as distinct from disapproval of acts. Leaving that to one side, does the concern for how one's children are raised and educated lift this completely out of the category of discrimination against persons?

LINDA McCLAIN: My brief answer is that, if I were Walker, I would not have said "private moral view" because that is a very awkward term,

and I wish he had used a better term to explain his thinking. The Ninth Circuit talks more about moral judgments and moral disapproval. Regarding the concern about raising one's children, it is true that if same-sex marriage is legal, then inevitably there will be some talk about families formed by same-sex couples in the curriculum, as there has been in Massachusetts. As a constitutional matter, parents have the right to instruct their children at home, however they wish to. The state will not come into their home and make them talk about homosexuality. The question is curriculum. Parents can choose to send their children to private school, or to home school their kids, or to send them to Sunday School to supplement their moral education. But they cannot dictate the school curriculum, except if they are on the school board, of course. You certainly have a reason if you are concerned about what your children are going to be taught. But I still think that that basically constitutes moral disapproval, because you disapprove of this lifestyle and do not want it being taught to your children.

"[...] you should not say that only non-religious believers can participate in the debate. Similarly, it should not be that only secular arguments are permitted in that debate, or that if secular arguments are made by religious people, they are deemed to be suspect or disingenuous."

*Richard Garnett*



## WRAP-UP DISCUSSION

**ROGER TRIGG:** At the end of his presentation, Stephen Law quoted Jonathan Bartley from the think tank Ekklesia. Bartley says: “People should be aware that behind many such cases, there are groups whose interests are served by stirring up feelings of discrimination of marginalization amongst Christians. What can appear to be a case of discrimination at first glance is often nothing of the sort. It’s more about Christians attempting to gain special privileges and exemptions.” Stephen said that this opinion seems to be right. That quote was in the context of an attack on Mr. Paul Diamond, a barrister who works on many religious rights cases. I invite Paul to talk a bit about the issue of the strategy of dealing with these cases.

**PAUL DIAMOND (Barrister):** When I heard Linda McClain and Robin Wilson speak, I thought, “How quaint, how sweet, how entertaining. We have gone through that stage. We have run all these arguments in our domestic courts.” The courts have rejected arguments for exemptions and reasonable accommodation, and in fact, they have even rejected discrimination on grounds of religion when there is a clash

between religious and same-sex rights. Why is discrimination given such a primacy? Religion is important because it has special provision in Article 9 of the European Convention on Human Rights. Certainly discrimination is covered in Article 14. But today it seems that religion has to be justified against discrimination.

The evidential rules of courts, the procedure by which courts come to decisions, are really lacking. The executive very often can choose the cases, who to prosecute, who to bring up, which cases are important, and which forms of discrimination they take seriously. There is also the issue of a scale of resources. We are routinely denied legal aid. I worked on a case where the secretary of health declared the Pro-Life Alliance a potentially a violent organization. This was on the basis of no evidence. In this case, I found myself against 13 lawyers. In another case, the Human Rights Commission, which runs on a very large budget of taxpayers’ money, submitted that it was the duty of the state to protect vulnerable children from being “infected” by Judeo-Christian values of sexual morality.

The problem now is that Judeo-Christian values have been undermined. We lack boundaries. Human rights were adjudicated by their own human rights morality, which seems to be limitless. I anticipate a whole new set of litigations on quality denial or new forms of hate speech. Ultimately I feel that the situation is more political than legal. Fortunately, there are some strong areas in the United Kingdom, such as the autonomy of organizations, including religious organizations, and freedom of speech. In the European court, free speech is also still very strong. I do suspect that there are sociological changes afoot, changes in demographics, values, and movements.

ROGER TRIGG: Several people have raised the idea that if you change the definition of marriage to be a relationship between consenting adults or something like that, it might let in more than just same-sex marriage.

LISA NOLLAND (Anglican Mainstream): We hear a lot about orientation and the dignity and respect for each person's orientation, but now there are several orientations that are coming forward demanding rights as well. In terms of polygamy, Canada effectively closed the door but in Utah, a man named Cody Brown is pressing for decriminalization of polygamy and is doing very well.

One must also consider polyamorous people who believe in multiple partners, homosexual, bisexual, or heterosexual. According to a lawyer for polyamorous people, John Ince: "Gay history shows that liberation comes in steps. First, gay relationships had to be accepted as legitimate and non-criminal. Once that occurred, then gay marriage followed. I think our normalization will follow the same course." I would recommend "Polyamory As a Sexual Orientation" by Ann Tweedy, in the University of Cincinnati Law Review. Finally, if nothing else, the sexualization of young people is a disturbing trend.

ROGER TRIGG: I invite John Finnis to comment on the

issue of human dignity as it relates to these discussions. Is there a Christian grounding to the notion of dignity? If that grounding is done away with, what now grounds dignity?

JOHN FINNIS: I suggest that dignity is a key concept sociologically and philosophically. Its popularity in modern Europe can be dated back to the first article of the West German Constitution in 1949, which is a kind of Christian document arising out of the horrors of the previous 30 years in Germany. No one could blame them for putting this concept there. It is a sort of shorthand for what I was talking about human rights as acknowledged by Roman lawyers and Christian theologians and great philosophers.



*Lisa Nolland*

Dignity stands for the human as spiritual and therefore, as above animals. We are animals, but we are spiritual animals. Dignity points us to what gives us equality. I fear that the term "dignity" is in the process of being captured by the forces of constructivism like the denial of essence. The denial of essence sounds good; essentialism sounds bad, but actually, of course, the only equality we have is as being all essentially human. The denial of essence is extremely bad news. It points us towards Nazism as it is radically anti-civilization and anti-rights. Dignity must

be kept to its classic moorings. Dignity has been captured partly by the movement toward euthanasia as well as by the homosexual movement.

I do think there is a philosophical tradition, which is not fully dependent on Christianity or revelation and is valid, and could even, in some senses, be called secular, although Plato and Aristotle both were believers in the transcendent and in a God. I do not want to make dignity just a religious doctrine or a religion perception, let alone a Christian one. Though, de facto, when a civilization has been Christian and turns its back on Christianity, then it tends very strongly to turn its back on the sound philosophical tradition that Christianity welcomed and appropriated.

PATRICIA MORGAN (Independent researcher): It should be noted that there is a massive bias in the social sciences when it comes to these issues. The investigations into homosexual parenting are incredibly unscientific. Studies are conducted on a volunteer basis. Results are self-reported. Samples are small and there are little or no controls. There is very little that even approximates anything like proper research. These are abysmal empirical standards. There are some leading homosexual researchers who actually say that the research proves absolutely nothing because many studies do not test a proper hypothesis, but try to prove a negative, which is impossible. It is advocacy research, all skillfully publicized, and handed off to lawmakers who generally do not know any better. The responsibility, I suppose, would rest with peer review, which seems to be hopelessly corrupted here, because it does not want to appear politically incorrect in critiquing these studies.

LINDA MCCLAIN: I recently edited an interdisciplinary volume called *What is Parenthood*. We have a couple of chapters on these questions about social science. While it is certainly true that there are some flaws with some of the early studies, there are more recent studies that are more longitudinal and that are not vulnerable to some of the criticisms levied.

ROBIN WILSON: I agree with Linda on this point. It is very difficult for studies conducted early on at the beginning of a social change to quantify or to say anything meaningful about the phenomenon at hand.

ROGER TRIGG: There has been much talk of essentialism. A lot of talk about homosexuality nowadays is very essentialist. How does this square with the anti-essentialism that marks much of the call for same-sex marriage?

DERMOT O'CALLAGHAN: One of the finest studies of human sexuality was by Dr. Byron Lowman, a number of years ago in America. He says that the evidence is commonly assumed to support essentialism but in practice that is not the way it works.

CHRISTOPHER MCCRUDDEN: There is a concept called strategic essentialism that is an argument made in the political domain, where essentialist arguments are likely to be more successful. Essentialist arguments will be employed for same-sex marriage when thought useful in a particular context. In most contexts essentialism would be regarded as problematic,

to say the least. I think all sides of the debate are playing this game in various ways. Where the debate is likely to end up in litigation, some of the arguments are being formulated in order to appeal to the legal context. That is a relatively new dimension to the political debate in the UK and I think it will overflow into the United States.

ROGER TRIGG: In the last session it was suggested that the only difference in California between civil partnership and same-sex marriage was moral disapproval, as if moral disapproval were something subjective, irrational, and totally deliberately discounted. That is a big assumption. I would have thought moral disapproval might be a rather thick notion of putting forward arguments about what is good in the public place. Is there a philosophical notion of logical positivism at play here that sees morality as just a motive? How does that affect the debate?

PAUL DIAMOND: In many cases, evidence is produced to bring about a desired outcome. If that outcome does not result, there is a charge that lawmakers have been irrational. I am not even convinced that reason dominates the debate.

ROBIN WILSON: Part of the difficulty with the question of marriage is not really about essentialism. It is really a problem of the nature of marriage. In many ways, the state has been damned by not trying to enforce certain visions of marriage on people. For example, it is very difficult to claim that marriage is about the rearing of children, when we allow lots of people to marry who do not rear children. It is really a difficult proposition to say that marriage is about procreation, because people like my parents, who adopted, could marry all day long in every state in the United States. That is a problem of inclusiveness. There has been a progressive peeling back of the layers of marriage. At the end of the day, there is not much left and I think that is why moral disapproval is seen as the last argument against same-sex marriage. I think that there needs to be a more robust conception of marriage.

ROGER TRIGG: Many claim that common law must be updated and adjusted to modern circumstances. In changing common law like that, are we left to the prejudices of whichever judges are judging the case? What is the role of tradition and precedent in common law?

FEMALE SPEAKER: The whole point about common law is

precisely that it does, albeit slowly, adapt to modern circumstances. It is not just based on the judges' prejudices. While that does open the door for judicial activism, the Supreme Court is subliminally aware of this reality.

ANDREA PIN: Same-sex marriage claims are believed to be human rights, and therefore, they are kept out of Parliament where you have majority rule. These claims are taken up in Constitutional or Supreme Courts' decisions. This is very important because different arguments are used in courts, which could not be used in Parliament. Notions of equality and dignity play a strong role.

Secondly, there is believed to be a need for formal protection of minorities, precisely because they are two to three percent of the population. This is the reasoning that many judges take. Thirdly, in many European countries a balance between same-sex couples and traditional couples has been reached through legislation. This has occurred after a series of courts' decisions that have been acknowledging specific rights for same-sex couples. Rights, that used to be attached to marriage, were detached from marriage and accorded to same-sex couples or unmarried couples. This paved the way for new balances of rights through Parliaments.

LINDA McCLAIN: The famous Hart-Devlin debate in the UK in the 1950s and 1960s examined whether moral disapproval was a sufficient basis for criminalizing sodomy. Devlin argued that a community sense of morality should be a sufficient basis for using criminal law.

In the United States, *Lawrence v. Texas* says that moral disapproval of the community alone is not enough. The court talks about the right to privacy that was recognized in *Griswold v. Connecticut*. This should protect the private, consensual, intimate conduct of two people of the same sex in the home, because of the principles of dignity and liberty. *Lawrence v. Texas* becomes an important building block for contemporary debates about moral disapproval. Everyone argues about the import of *Lawrence* when it comes to the question of same-sex marriage.

Regarding Robin's point about a more robust conception of

marriage, I would recommend a 1992 article by Carl Schneider called *The Channelling Function in Family Law*, which is published in the *Hofstra Law Review*. Schneider basically said that one of the important functions of family law is to channel men and women into valuable social institutions like marriage and parenthood. The law has various tools to do that. Through various court decisions over the last 50 years, there are less of these tools. We have had these various steps that have broken down distinctions and have made marriage less significant for certain purposes like access to reproductive technology and access to adoption. We have all this evidence that there is no longer a tightly enforced link between procreation and marriage. In terms of the evolution of the law, one must try to assess rationality based on how things currently look.

STEPHEN LAW: Let us reconsider the example of the hoteliers that want to say no to accepting a gay couple into their hotel, and the hypothetical case where some hoteliers want to say no to a mixed race couple. In each case,

they are offering theological justifications for their position. Clearly, if you want to treat these two cases as different, if you want to allow an exemption in the first case but not the second, the onus is very much on you to identify the difference between the two cases that justifies treating these individuals differently. Some people have thought that they can do that. Dermot O'Callaghan suggested that the fact that race is genetic but homosexuality is not is a relevant difference, as is the fact that it is the homosexual behavior, rather than the person, that is objectionable.

Neither of those two explanations is good enough. First of all, as a mixed race couple, the hotelier is objecting to the behavior that they will engage in, not their race per se. Regarding the genetic argument, are we going to suggest that, for example, the hotelier might not allow Muslims to spend the night because they would be praying Muslim prayers inside the hotel? The hotelier has theological objections to that. Are we going to hold that that is acceptable because, after all, it is not genetic? It is only behavior, so we should allow this particular exemption. If you are going to make those exemptions on that basis, you are going to end up

**“Dignity stands for the human as spiritual and therefore, as above animals. We are animals, but we are spiritual animals. Dignity points us to what gives us equality.”**

*John Finnis*

with some ridiculous judgments. You have to come up with far better criteria than that.

JOHN FINNIS: Regarding the issue of moral disapproval, the Hart/Devlin debate that Linda McClain referred to was an intellectual catastrophe, because both parties to the debate who thought they were having a serious debate against each other, made the catastrophic blunder of assuming that the morality that they were talking about was positive morality, as they called it. They thought that they were speaking of the “morays of the tribe,” as it were, rather than what people who morally disapprove of some conduct really think. They do not think they are following the morays of the tribe, rather, they think this sort of conduct is harmful. That perspective, which is in fact the ordinary legislature’s perspective and the ordinary citizen’s perspective, simply was not present in the Hart/Devlin debate. Most law school professors are completely unaware of this elementary sophism, and teach the debate as being serious and important, which it is not, except sociologically and for its vast effect on law school professors.

Secondly, we are holding a distinction between public morality and private morality. In the English-speaking world, this line was never drawn, especially in relation to the criminal law. Thus, criminal laws made crimes out of secret, private, undetectable adult consensual behavior such as what is per-

haps involved in *Lawrence vs. Texas*. Had the distinction that was observed in civil law countries been observed, we would not have had *Lawrence vs. Texas*. We would not have had the absurd idea that if a behavior is no longer criminal, it must be socially acceptable and an approved form of conduct. These two intellectual disasters, one of them built into the law and one of them built into academia, have made all this a bit more messy than it needed to be.

CHRIS SUGDEN (Oxford Centre for Religion and Public Life): Throughout the discussion, it has been said that you cannot link marriage to procreation and children because we allow people who have no possibility of having children to be married. I want to question that. Would you apply it to something like murder? We define murder as the intentional killing of another human being, yet, then we qualify that. There are occasions where the intentional killing of another human being is not murder. It is manslaughter or it is self-defense or it is accidental death, etc.

The fact that we qualify them and that there are instances that do not count as murder, does not mean we resign from the definition and the category of murder. It still exists as a definitional category. I think what is happening in this debate is we are saying that because not everybody on the planet can get married and have children, we must redefine marriage. That, it seems to me, is nonsense.



# BIOGRAPHIES

**ROCCO BUTTIGLIONE** is a professor of political science at Saint Pius V University in Rome, and a member of the Pontifical Academy of Social Sciences. An academic and a Christian Democrat politician, Buttiglione has held various offices in Italian government including vice president of the Italian Chamber of Deputies since 2008. His most recent publication is *Karol Wojtyła: The Thought of the Man Who Became Pope John Paul II* (1997).

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**BISHOP PHILIP TARTAGLIA** is the archbishop of Glasgow, Scotland, a position he was nominated for in 2012 by Pope Benedict XVI. Prior to his installation in Glasgow he served as the bishop of Paisley, Scotland. He was ordained a

priest in 1975, and completed his Doctorate in Sacred Theology in 1980. He was appointed parish priest of St. Mary's, Duntocher, in 1995, and in 2004 the Bishops' Conference asked him to return to seminary as rector of the Pontifical Scots College in Rome.

**ROGER TRIGG** is senior research fellow at Kellogg College in the University of Oxford and is academic director of the Kellogg Centre for the Study of Religion in Public Life. He is professor emeritus of philosophy at the University of Warwick. His recent publications include *Morality Matters* (2004), *Religion in Public Life: Must Faith be Privatized?* (2007), and *Equality, Freedom and Religion* (2011).

**ROBIN WILSON** is professor of law and law alumni faculty fellow at Washington and Lee University School of Law. A specialist in family and health law, her academic interests also include insurance and biomedical ethics. She is the editor of *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Rowman & Littlefield, 2008) (with Douglas Laycock and Anthony Picarello).





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