
GAY RIGHTS, RELIGIOUS LIBERTY, AND NONDISCRIMINATION: CAN A TRAIN WRECK BE AVOIDED?[†]

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For a parable telling the story of where the argument between gay rights and religious liberty had come to by 2016, consider two bills before the 114th Congress.

One bill was called the Equality Act.¹ It would grant LGBT Americans—whom I’ll interchangeably shorthand as “gay,” with no disrespect or exclusion implied or intended—protection from housing, employment, and public-accommodations discrimination under federal law, something they lack at present. It was championed by Democrats and liberals.

The other was called the First Amendment Defense Act.² It would pre-emptively shield those who object to or discriminate against same-sex marriages (whether on religious or moral grounds) from any federal sanction or disallowance of benefit. It was championed by Republicans and conservatives.

Though coming at the question from opposite corners, the two bills had something in common: each tried to take all the marbles and leave the other side with nothing, or as little as possible. The Equality Act included a provision revoking any protection that religious objectors might enjoy under the Religious Freedom Restoration Act (“RFRA”).³ The First Amendment Defense Act (“FADA”) shielded objectors from discrimination while leaving gay people wholly unprotected under federal law.⁴

If such bills were opening positions in a negotiation, then what should ultimately happen is legislative bargaining leading to the obvious compromise: protections for gay people plus exemptions for religious objectors. That may or may not happen; little happens in Congress these days, for which reason the safer bet is perhaps “not.”

[†] This Article was originally presented as a lecture on October 18, 2016, in the David C. Baum Memorial Lecture series at the University of Illinois College of Law.

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1. Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

2. First Amendment Defense Act, H.R. 2802, 114th Cong. (2015); First Amendment Defense Act, S. 1598, 114th Cong. (2015).

3. H.R. 3185 § 1107; S. 1858 § 1107.

4. H.R. 2802 § 3; S. 1598 § 3.

In fact, however, both bills seemed to be based on moral conviction, not merely strategic positioning. In that respect, they were emblematic of an unfortunate development: an issue on which a few years ago there seemed to be reasonably good prospects for reasonable accommodations has hardened into legal and political trench warfare.

Reasonable-accommodationist that I am, I haven't given up. Not by any means. The 2015 gay-Mormon deal in Utah⁵ demonstrated that conciliation is still politically possible and socially ennobling. The polarization and backlash and general nastiness following upon one-sided mini-RFRAs and bathroom bills in places like Indiana and North Carolina demonstrated that the absolutist path is politically costly and socially divisive.

That said, to understand where we are, we need to talk about an elephant in the room that gets little or no direct public discussion. We need to talk about what's wrong with the way most Americans think and talk about nondiscrimination.

I am going to argue in this talk that perhaps the biggest obstacle to conciliation—certainly one of the biggest, and possibly the toughest—resides outside the four corners of the gay-rights/religious-liberty debate. That obstacle is the absolutist, relentlessly stake-raising nature of nondiscrimination policy as activists and the public increasingly understand it. Or, rather, as they *misunderstand* it.

I will start with recent hardening of the lines on each side of the LGBT/religion debate, then explain why I think a misinterpretation of nondiscrimination policy is pushing compromise out of reach, and then assess the choice between two social models of nondiscrimination—one absolutist and myth-based, the other pluralist and reality-based.

I. THE RELIGIOUS SIDE

Religious doctrines about, and objections to, public acceptance and recognition of homosexuality take many forms. As an atheist homosexual, I am an outsider to those doctrines and objections, and I disagree with them. But here is not the place to talk about religious teachings and sexual orientation. My respect for the First Amendment's unique protectiveness of religion, and also for the unique social centrality and sensitivity of religion, strongly inclines me to find ways to let religion go on about its business whenever that is possible.

Thus, some stipulations: I acknowledge that human sexuality is part and parcel of the theologies of many religions (in a way that, say, race is not); I accept that religion enjoys and is entitled to a special place in American law and life; and, to avoid subjecting religious individuals and faiths to public inquisitions, I believe in treating religious objections as

5. Antidiscrimination and Religious Freedom Amendments, S.B. 296, 2015 Gen. Sess. (Utah 2015).

sincere and genuine, at least as far as law and public policy are concerned.

All of which leaves me believing that religious people and institutions have a legitimate and well-founded claim to be cut some slack by law and society, even if they sometimes use that slack to behave in a way that strikes many of us as intolerant and hurtful.

Many—okay, most—gay folks, though, don’t share my assumptions. Instead, they look at religious objectors and see a desire to discriminate in the name of religion and to leverage religion to obtain an explicit “license to discriminate.” To many of my gay friends, this is not about “live and let live”; it is an aggressive effort to deny LGBT people legal protections and social equality, which religious people already enjoy and take for granted.

Unfortunately, over the past several years, the words and deeds of many on the religious-rights side have done nothing to allay my friends’ suspicion. To the contrary, some religious-liberty advocates have been quite explicit about their desire and intent to discriminate—at least against gay couples if not necessarily against gay individuals—and to do so even in commercial environments that advertise themselves as open to all comers and that seem, facially, remote from any kind of religious venue or activity.

My LGBT friends, thus, look with dismay and shock upon Mississippi’s very broad religious-protection law, which gave religious people exemptions from anti-discrimination laws that did not in fact exist. (It was struck down by a federal district court.)⁶ We have seen quite a lot of that “heads I win, tails you lose” legislating in the wake of the Supreme Court’s gay-marriage decision in *Obergefell*. Many states began moving mini-RFRAs.

In some cases, advocates of such measures made explicit that their goal was not just to defend religion, but also to resist, and ultimately revoke, same-sex marriage using salami-slicing tactics similar to those of the pro-life movement. Ryan Anderson, of the Heritage Foundation, put his cards on the table when, in a meeting at Brigham Young University, he explained (according to *The Deseret News*) “how taking a page from the anti-abortion movement could help traditional marriage supporters chip away at the high court’s *Obergefell vs. Hodges* ruling”⁷

Same-sex marriage has thus been the leading catalyst of conflict. Bakers, florists, and photographers have been sued and sanctioned for turning down same-sex marital business. Mom-and-pop companies like

6. Barber v. Bryant, Case No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647 (S.D. Miss. June 30, 2016) (granting preliminary injunction against Mississippi’s H.B. 1523), appeal filed *sub nom.*, Campaign for S. Equality v. Bryant, Case No. 16-60478 (5th Cir. June 10, 2016).

7. Kelsey Dallas, *The Pro-Life Plan that Could Reverse Recent Attitudes on Marriage*, DESERET NEWS (June 26, 2016, 6:00 AM), <http://www.deseretnews.com/article/865656913/The-pro-life-plan-that-could-reverse-recent-attitudes-on-marriage.html>.

Oregon's Sweet Cakes by Melissa⁸ and New Mexico's Elane Photography⁹ have become nationally famous, or infamous, for turning away gay couples.

It is important to remember, though, that same-sex marriage is only the most prominent aspect of a multi-faceted conflict. Some cases involve homosexuality more broadly, not marriage *per se*. ChristianMingle.com recently settled a lawsuit by agreeing to allow searches for same-sex matches. In Michigan, a pediatrician refused to treat a baby with two moms, telling the parents, "after much prayer . . . I felt that I would not be able to develop the personal patient doctor relationship that I normally do with my patients."¹⁰

Indeed, the boundaries of these kinds of disputes extend beyond sexual orientation and gender identity. The *Hobby Lobby* and *Little Sisters of the Poor* cases involved contraception, for example.¹¹ Albert Mohler, the intelligent and influential president of the Southern Baptist Theological Seminary, writing in July of 2016, sees the conflict as implicating the entire sexual revolution, not just the LGBT piece of it: "the conflict of liberties means that the new moral regime, with the backing of the courts and the regulatory state, will prioritize erotic liberty over religious liberty."¹²

Given the potentially far-reaching nature of this conflict, I wish I could say that religious leaders were generally trying to ratchet down the rhetoric and the stakes or were otherwise playing an emollient role. Unfortunately, I can't. Instead, we're often told we are on the brink of a war on religion, a vast apocalyptic battle. Mohler warns us that no person of faith, anywhere, is safe: "The religious liberty challenge we now face consigns *every* believer, *every* religious institution, and *every* congregation in the arena of conflict where erotic liberty and religious liberty now clash."¹³ Virginia State Delegate C. Todd Gilbert had this to say when he spoke in support of a state version of FADA: "[t]he activists who pursue same-sex marriage . . . are not satisfied with equality and they will not be satisfied until people of faith are driven out of this discourse, are made to cower, are made to be in fear of speaking their minds, of living up to their deeply held religious beliefs. They want us driven out."¹⁴ One of my

8. See *In re Melissa Elaine Klein, dba Sweetcakes by Melissa*, Case Nos. 44-14 & 44-15, 2015 WL 4868796 (Or. Bureau of Labor & Indus. July, 2 2015) (finding of fact).

9. See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), cert. denied, 134 S. Ct. 1787 (2014).

10. Sean Philpott-Jones, *When Doctors Discriminate*, BIOETHICS PROGRAM (Feb. 26, 2015), <http://www.bioethics.uniongraduatecollege.edu/blog/2433/When-Doctors-Discriminate>.

11. *Zubik v. Burwell*, 136 S. Ct. 1557 (2016); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

12. Albert Mohler, *Religious Liberty and the Right to be Christian* (July 19, 2016), <http://www.albertmohler.com/2016/07/19/religious-liberty-right-christian/>.

13. *Id.* (emphasis added).

14. Jenna Portnoy, *Va. House Vote Hints at a Generational Divide on Gay Marriage*, WASH. POST, (Feb. 18, 2016), <https://www.washingtonpost.com/local/dc-politics/va-house-vote-hints-at-a-generational-divide-on-gay-rights/2016/02/17/4bd2985c-d594-11e5-be55-2cc3c1e4b76b>.

own Catholic acquaintances recently asked me, in agonized and angry tones: “How much longer am I going to be able to live in this country before someone makes it impossible for me to raise my kids in my faith or go to the schools they go to?”

I don’t doubt his sincerity. But “*they want us driven out*” is not only wildly inaccurate, it is also the sort of hysterical talk one hears in broken and violent societies. Although those who invoke it may regard their posture as defensive, their hysteria reframes just about any imaginable compromise as an act of cultural suicide. This is, if I may say so, very, very unhelpful.

Meanwhile, at both the state and federal levels, the religious-liberty movement has generally (though not universally) drawn hard lines against anti-discrimination protections for LGBT people. (It has demagogued bathrooms for good measure.) Though it is not my job to advise Alliance Defending Freedom, I doubt that such intransigence is strategically wise. Inasmuch as any politically viable deal would need to benefit both sides, it would need to include anti-discrimination protections for gay people. Because the culture is growing more pro-gay and more anti-discrimination by the day, when religious activists and politicians rule out any such protections—and, in fact, pre-emptively block or revoke them—they effectively adopt the Palestinian bargaining strategy of waiting for a worse deal.

Here, though, the story gets complicated. Many of the religious side’s objections to anti-discrimination laws strike me as misguided: the view that homosexuality involves behavior rather than just an intrinsic characteristic (so does religion, which is protected); that discrimination is an act of compassion (it sure doesn’t feel that way); that observing a law entails endorsing it (then why do Catholic bakers cater second marriages without a peep?); that religious objectors face an absolutist juggernaut and compromise only hastens defeat (in point of fact, accommodations, if enacted through political compromise, tend to be very durable, as Robin Wilson has shown).¹⁵

One point, though, needs more thought. It goes like this:

Anti-discrimination laws establish sexual orientation as a protected category—like race. When such laws gain wide adoption and acceptance, those whose religious beliefs distinguish morally or theologically between homosexuality and heterosexuality will be treated in law, and also in society, as being like racists. Religion, or at least some of its core teachings, will become the moral equivalent of racism. Once that happens, religious observance will be relentlessly hounded from the public square.

That is a challenging argument. It is grounded in assumptions not about gay rights but about nondiscrimination. In effect, it says this:

15. Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015).

In today's America, nondiscrimination is not a slippery slope but a slippery cliff, an all-or-nothing proposition. So we can't budge an inch toward protecting LGBT people from discrimination without losing everything—even if we wish we could.

In yet other words, the claim here is that, like it or not, nondiscrimination has become a social principle that militates against compromise.

II. THE GAY SIDE

On the gay side of the debate, there has been something of a parallel evolution. It is not something I feel happy about.

Six years ago, in the prominent gay monthly *The Advocate*, I published an essay arguing for a conciliatory attitude. “The smart approach,” I said, “is to bend toward accommodation, not away from it, whenever we can live with the costs.”

I argued my case from legal strategy, saying that the First Amendment and religious liberty are bad issues to get on the wrong side of. I argued from political strategy, saying that reasonable accommodations will speed public acceptance of LGBT equality at an acceptable and rapidly declining cost to gay people. I argued my case above all from morality:

“The real point of the gay rights movement is not just to secure equality for homosexuals; it is to maximize all Americans’ freedom to be true to themselves—the freedom we were denied. The last thing a movement of former pariahs should seek is to inflict the same agony on someone else.”

For those reasons, I said, reasonable religious accommodations are something we should embrace as a cause, not resent as a concession.

At the time, I got a hearing. But that door, never more than ajar, has closed. The strong consensus in the LGBT world today is that religious accommodations are a “license to discriminate” and are, by their very nature, a concession.

The game we are playing now is increasingly zero-sum. It has become quite hard—not by any means impossible, but quite hard—for leaders in the LGBT world to accept a compromise on religious accommodations, even if the compromise includes significant new protections.

One reason is the tactical calculation that victory will eventually fall into the lap of the gay-rights side via the culture and the courts, so why negotiate? The answer is that negotiating will get LGBT Americans protected faster than by waiting around, and with broader social buy-in and less backlash, which matters if the goal is to diminish discriminatory behaviors and attitudes.

Moreover, even if you see religious accommodations as concessions, they are affordable concessions. Outside of religious institutions and organizations at the very core of the First Amendment, there just aren’t

many landlords and schools and places of business that want to discriminate, and the number is declining by the day.

Here, however, is the problem: cost and benefit become irrelevant when an absolutist mentality sets in. We saw that mentality on display when equality-minded activists, many of them nongay, demanded, and got, the firing of Mozilla's chief executive, Brendan Eich, on the grounds that, six years earlier, he had contributed \$1,000 to California's 2008 anti-gay-marriage initiative. Though the activists were entirely within their legal rights, I was among a contingent of gay-marriage supporters (gay and nongay) who found the spirit of the campaign against Eich worryingly intolerant.¹⁶ Given our own historical role as victims of majoritarian repression—repression which was cultural as well as legal—LGBT people should be wary of joining or abetting campaigns to enforce moral conformity.

I can't deny the presence of an absolutist strain in gay-rights activism. I'm not even sure it's a bad thing. Activists are in the business of being true believers, and morality is in the business of making universalist claims. Most gay (and gay-friendly) people believe that opposition to same-sex marriage or to LGBT anti-discrimination protection is intellectually and morally indefensible. Why shouldn't gay-rights activism reflect that view?

It is possible to believe that you're morally in the right, though, and still want to get along with your friends and neighbors in a pluralistic society. The urge toward *moral* intolerance may be strong, but the urge toward *social* or *legal* intolerance does not necessarily follow.

And most gay people, I think, are not by inclination intolerant—including of religion. Remember, many of us are religious, and most of us grew up in religious households, and all of us have religious friends and loved ones. Like all Americans, we both desire and manage to get along with many people with whom we disagree, even on moral issues.

So what's driving the hardening of attitudes in the LGBT world toward claims of religious liberty? Partly the hardball tactics of the other side: as I've already mentioned, the people driving efforts like FADA and the Indiana and North Carolina and Mississippi legislation could not do a better job of seeming hostile and uncompromising.

Also, however, I believe that many LGBT people who are temperamentally inclined to conciliation have concluded that principles of non-discrimination afford them no room for flexibility: precisely the same conclusion which many of their religious-rights counterparts have reached.

The peculiar result is that many (not all) gay-rights advocates and many (not all) religious-rights activists, while disagreeing about every-

16. Jonathan Adler et al., *Freedom to Marry, Freedom to Dissent: Why We Must Have Both*, REALCLEAR POLITICS (Apr. 22, 2014), http://www.realclearpolitics.com/authors/a_public_statement/.

thing else, join in a concurrence that, like it or not, the logic of nondiscrimination brooks no compromise, *even if compromise is desired*.

Why should this be so? The reason, or an important reason, is that both sides are applying—misapplying, I would argue—the lessons of the granddaddy of civil rights struggles, that of African Americans.

III. THE ZERO-TOLERANCE NONDISCRIMINATION MODEL

Discrimination is a dirty word in America. It should be.

No one, I hope, needs to be told today how legal and cultural discrimination oppressed, abused, and terrorized African Americans for many, many years. So pervasive and evil was the regime of racial discrimination that rooting it out required the legal and cultural equivalent of overwhelming force, putting the whole country through a necessary and just, but traumatic, upheaval whose effects echo through our politics to this day.

Culturally, what the country learned from the civil-rights movement is that discrimination is everywhere and always wrong, and therefore it must be everywhere and always illegal and unacceptable. In the racial paradigm, discrimination cannot just be minimized. It must be eradicated. *Every* diner, drinking fountain, and swimming pool open to the public must be open to blacks. In practice, after all, any lesser standard was exploited by racists as a tool of Jim Crow. In principle, the very existence of discrimination debased African American dignity. If any middle ground was possible in that struggle, whites' massive resistance blew it away.

The oppression of black Americans is, I believe, historically and morally unique. Thank goodness there is no other stain like it. That said, the persecution inflicted on gay Americans was very severe in its own way. Gay people were terrorized on the streets and in the schools, fired from our jobs, banned from government or military service; psychiatrists called us sick, politicians called us subversive, and preachers called us a stench in God's nostrils. Our bars and churches were vandalized and burned, our children were taken away, and police, instead of protecting us, entrapped us for sport. As recently as 2003, in multiple states, we were deemed criminals for loving each other in our own homes.

Emotionally, gay people and our equality-minded allies have reason to reach instinctively for the black civil-rights model. And that is what many of us have done. When I suggest religious accommodations, very often the reply I get from my LGBT and progressive friends is something like this: "We don't accommodate racist storekeepers if they cite the Bible to kick out black customers. Why should we accommodate homophobes?"

In the LGBT world, this comparison to racism is often perceived as a trump card, a conversation-ender. For many LGBT people, settling for "equality-minus" is, in and of itself, a form of discrimination. So the only

religious accommodations they will even discuss are ones that apply with equal force to race.

To my friends and allies in the gay-rights movement, I have argued that the black civil-rights model is not a great fit for us, and that equating opposition to same-sex marriage with racism is especially problematic.¹⁷ I can't say I've made huge headway. Maybe this is not even a good argument for me to win. Maybe massively over-detering anything that looks remotely like discrimination is a price we pay for the magnitude of America's crimes against African Americans, and maybe it is also a way we forestall other such crimes in the future.

Maybe. Here, though, I want to pause for thought, because over-deterrence, if that's what is happening, comes at the high social and political cost of marginalizing and delegitimizing compromise, exception, accommodation, and the normal variation in practices and preferences which inhere in a pluralistic society.

That is true not just where LGBT rights are at issue but wherever anti-discrimination law or public morality follows a context-blind, zero-tolerance approach. In particular, a zero-tolerance model militates against the balancing of interests in the courts and in the legislative process, because allowing even a narrow "license to discriminate" is seen as eviscerating the whole principle of nondiscrimination. Zero-tolerance is also blind to diversity of community preferences and precludes geographic variation, so that Texas and Massachusetts must have the same rules, virtually guaranteeing a bad fit for one place or the other, or both.

And zero-tolerance disallows comparing costs with benefits, weighing relative harms, and taking into account the particular structure of local markets. The effect of a Christian baker's refusal to cater a same-sex wedding is very different in a small rural community where there are no other bakeries than in a large city where bakeries are numerous. When regulating antitrust issues and price discrimination, we *always* look at marketplace context in deciding whether to allow a commercial practice, and we reason that diversity of practice and pricing is a *good* thing, so long as the customer has plenty of choices. Zero-tolerance, by contrast, militates against diversity. If one of hundreds of bakers wants to adhere to idiosyncratic religious views by discriminating, that one is still too many.

At some level, there is an abiding irony in gay-rights activists' arguing against diversity. But that is where the absolutist nondiscrimination model leads. Logically, albeit not necessarily politically, it points to the denial of government funds and student-loan dollars to religious universities that teach homosexuality is wrong. California's legislature recently entertained (and fortunately dropped) a provision to do just that.

17. Jonathan Rauch, *Opposing Gay Marriage Doesn't Make You a Crypto-Racist*, DAILY BEAST (Apr. 24, 2014, 4:45 AM), <http://www.thedailybeast.com/articles/2014/04/24/opposing-gay-marriage-doesn-t-make-you-a-crypto-racist.html>.

Asked in the *Obergefell* arguments if a pro-gay-marriage decision might lead to the withdrawal of tax-exempt status from a school that opposed same-sex marriage, Donald Verrilli, the U.S. Solicitor General, famously replied: “it’s certainly going to be an issue . . . I don’t deny that.”¹⁸ He was talking, not about the ultimate political outcome, which depends on many factors and about which I make no prediction, but about the logic of anti-discrimination as widely interpreted by progressives and conservatives alike. That absolutist logic, left to its own devices, pushes social conciliation out of reach.

IV. THE ACCOMMODATIONIST NONDISCRIMINATION MODEL

But here’s the thing. The zero-tolerance interpretation is wrong. It has always been wrong, from day one. As in *The Wizard of Oz*, the solution is right here, under our nose, and has been all the while.

In point of fact, the landmark civil-rights bills which broke the back of racial segregation in the 1960s were not absolutist. They provided exemptions for religious organizations. They also exempted “Mrs. Murphy,” the landlady renting a room in her own house. At the time, civil-rights advocates in Congress made the pragmatic argument that exemptions were needed to pass the bill, but they also made the politically principled argument that exceptions would increase social comfort with the legislation while still covering the vast majority of cases—a trade they deemed worth making. So not even in those dire days, a time of genuine social emergency, did we rise up and say, “no discrimination ever.”

Since then, discrimination law, as enacted in countless jurisdictions and as interpreted by the courts, is nothing like as absolute as discrimination law as interpreted by today’s activists and popular culture. Employment-discrimination law offers exemptions for *bona fide* occupational qualifications, a conceptually elastic category which has proved, in practice, quite workable. State and federal discrimination laws, as written and as judicially interpreted and as further inflected by RFRA and its non-federal equivalents, are shot through with religious exemptions, most of which are so uncontroversial that only a few specialists even know they’re there. Age-discrimination rules allow pension plans to treat old people differently from young people (how could they not?) and sex-discrimination rules allow single-sex elementary and secondary schools. Sexual-orientation discrimination laws, where enacted, include religious carve-outs as a rule.

Then there is disability-discrimination law, which is one immense tangle of exceptions because its “reasonable accommodation” standard is *entirely* contextual. (What’s reasonable? It depends.) When the Americans with Disabilities Act passed in 1990, I thought it would be a bottom-

18. Transcript of Oral Argument at 38, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556), http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf.

less pit of litigation and expense, but in practice it has proved to be surprisingly stable, affordable, and uncontroversial. In general, for every accommodation or exception which sparks a public argument (like Hobby Lobby's), there are thousands which no one notices.

In fact, if I might be indulged in a paradox, the pop-culture ideal of zero-tolerance nondiscrimination is possible only *because* of the underlying reality of ubiquitous accommodation. "The world would fall apart if you tried to pursue the logic of racial antidiscrimination into all these other areas," Walter Olson, a senior fellow at the Cato Institute, told me. Olson is right: if Americans actually practiced nondiscrimination remotely as inflexibly as they preach it, the whole edifice would collapse.

Thus, in reality, zero-tolerance is not the rule. It is more like the opposite of the rule. In practice, Americans have come to observe an informal spectrum of anti-discrimination models. Socially, if not always legally, race comes close to no-exceptions. The circumstances in which a court or the public will accept race as, say, a *bona fide* job qualification, or accept race as grounds for a religious exemption, are vanishingly rare. Where the law does allow racial discrimination, few Americans will avail themselves of it.¹⁹ Mrs. Murphy still has the legal right to refuse her upstairs room to black renters, but nowadays she is probably a sociopath if she exercises it.

Where nondiscrimination is concerned, race is socially in a class by itself, but ethnicity also admits of relatively few contextual exceptions. Age and religion are in a middle range, in which more exceptions are allowed. Sexual orientation and gender identity, although in flux, are probably somewhere in this middle range. Disability discrimination, as I already noted, is contextual all the way through.

It is important to note that what I describe is a spectrum, not a hierarchy. It does not rank anti-discrimination rules from "better" or "stronger" at the race end to "worse" or "weaker" at the disability end. It also does not rank the social importance of various groups or the validity of their nondiscrimination claims. It is not a nondiscrimination Olympics in which blacks get the gold and gays or the disabled settle for bronze. Rather, the spectrum reflects the natural diversity of needs, situations, and histories of groups seeking protection and of the social contexts in which they are embedded.

What I am suggesting, then, is that, when religious conservatives and gay-friendly progressives say nondiscrimination principles force them to forswear social compromise, they occupy a prison of their own making. By embracing a mythical version of nondiscrimination, in which race is the master template and exceptions always weaken the underlying principle, they lock themselves, and each other, into unnecessary and escalating conflict, with the likely result that LGBT people miss opportuni-

19. I'm setting aside the knotty question of affirmative action.

ties to get anti-discrimination protections and religious people miss opportunities to get safe harbors.

The moment one drops the fallacious and counterproductive presumption that nondiscrimination is inherently a no-compromise value, all kinds of compromises become, at least in principle, reasonable and viable—even in the commercial sphere, today the most controversial category. What might you do about a Christian-owned business that wants to refuse service to same-sex weddings? Lots of things. You could provide a “mom and pop” exception for businesses below a certain size. You could define and exempt a category of “religious-based enterprises.” You could define and exempt a category of “expressive enterprises.” You could allow accommodations if they are arranged so as to cause no dignitary shock or meaningful inconvenience to the customer. You could bar commercial discrimination while allowing businesses to express a preference not to serve same-sex weddings.²⁰

Such options are not mutually exclusive. They could be mixed and matched. Nor is there any reason for every place to adopt the same approach. Within reason, accommodations and exemptions can, and should, look different in different places. (I would remind my LGBT friends that even a fairly wide range of exemptions would offer much more protection than the *status quo*, in which many places offer zero protection.)

The point is not that any particular accommodation or compromise is politically easy or philosophically perfect. The point is that there is plenty to talk about once we cast aside the zero-tolerance paradigm and acknowledge that context and flexibility occupy hallowed and honored places in anti-discrimination policy. We can get away from the slippery cliff, from all-or-nothingism, and from foreclosure of compromise. And we can start talking about win-win instead of win-lose or, in practice, lose-lose.

V. A FORK IN THE ROAD

As I’ve said, the question I am raising is not about gay rights, nor is it about religious liberty. It is about two interpretations of the modern Eleventh Commandment, “thou shalt not discriminate.” It frames a choice between an absolutist interpretation of nondiscrimination that is based on myth and impels us toward conflict and a pluralist interpretation that is reality-based and invites us to compromise. I guess it is obvious which one I prefer.

In the current moment, it seems to me, the gay-rights/religious-liberty conflict is playing a role something like that of the proverbial ca-

20. Thanks to Prof. Andrew Koppelman, of Northwestern University Pritzker School of Law, for this idea. See his article, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125 (2016).

nary in the mineshaft. What we will find out over the course of the next few years, as the conflict plays out, is which interpretation of nondiscrimination our politics and culture are moving toward. In one future, the Equality Act and the First Amendment Defense Act—and their state and local equivalents—are opening bids in negotiations which ultimately produce compromises, enhancing both the fairness and the flexibility of anti-discrimination law. In another future, negotiations never start, or they fail for lack of support, and both sides dig in for an existential battle—not just between LGBT advocates and religious people but, more scarily, also between the moral principle of nondiscrimination and the social imperative of conciliation.

Both futures have implications beyond the arguments at hand. The flexible version of nondiscrimination, I expect, offers significantly less resistance and therefore more political hope to future claimants, such as transgender people. It also helps legitimize and sustain flexibility in existing law, which matters if we want that law to succeed.

On the other hand, the all-or-nothing version makes nondiscrimination seem inherently, not just incidentally, threatening to all manner of good-faith dissidents, not just religious ones, and so seems certain to ignite and inflame moral conflict down the road.

So this is not a decision only about gay people or religious people. It is a decision about how much play we will allow in the democratic joints of our society and whether we can interpret America's core principles in ways that honor and celebrate America's characteristic pragmatism and diversity.

