

# A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law

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Conflicts among religious and ethnic groups have scored American cultural and political history. Some of these conflicts have involved campaigns of suppression against deviant religious and minority ethnic groups by the mainstream. Although the law has most often been deployed as an instrument of suppression, there is now a public law consensus to preserve and protect the autonomy of religious and ethnic subcultures, as well as the ability of their members to self-identify without penalty. One thesis of this Essay is that this vaunted public law consensus should be extended to sexual orientation minorities as well.

Like religion, sexual orientation marks both personal identity and social divisions.<sup>1</sup> In this century, in fact, sexual orientation has steadily been replacing religion as the identity characteristic that is both physically invisible and morally polarizing. In 1900, one's group identity was largely defined by one's ethnicity, social class, sex, and religion. The norm was Anglo-Saxon, middle-class, male, and Protestant. The Jew, Roman Catholic, or Jehovah's Witness was considered deviant and was subject to social, economic, and political discrimination. In 2000, one's group identity will be largely defined by one's race, income, sex, and sexual orientation. The norm will be white, middle-income, male, and heterosexual. The lesbian, gay man, or transgendered person will be considered deviant and will be subject to social, economic, and political discrimination.

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1. On identity in America, see Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA L. REV. 1695 (1993); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); and Martha Minow, *Identities*, 3 YALE J.L. & HUMAN 97 (1991).

The foregoing contrast can be made at a normative level. At the turn of the millennium, America is at least as religiously diverse as it was at the turn of the century, but religion is less socially divisive and identity-defining. America has internalized the idea of *benign religious variation*, that there are a number of equally good religions, and one's religion says little or nothing about one's moral or personal worth. The opposite is true of sexual orientation. The concept of sexual orientation barely existed at the turn of the century,<sup>2</sup> but it is charged with normative significance at the turn of the millennium. Most Americans reject the idea of *benign sexual variation*,<sup>3</sup> that there are a number of equally good sexual orientations, and that one's sexuality says little or nothing about one's moral or personal worth. Just as most Americans in 1900 viewed significant religious deviation as strange, shameful, perverse, or even wicked, so most in 2000 will view significant sexual deviation as strange, shameful, perverse, or even wicked.

The contrast between religion and sexuality has another dimension. Religious precepts are typically invoked as a reason for rejecting the idea of benign sexual variation. Although the rhetoric of family values (or compulsory heterosexuality) and sexual abstinence (or sex negativity) is often secular, it has explicit resonance with the tenets of most American religions. Along with abortion and school prayer, gay rights issues have galvanized religious activism in the political arena. Gay rights rhetoric, in turn, has sometimes been explicitly antireligious and usually seeks to relocate political discourse about sexuality in secular rather than religious values. Although local skirmishes between religion and gay rights had been frequent in the early 1970s, the focal date for national attention to the public collision between homosexuality and religion is 1977, when Anita Bryant's "Save the Children" campaign succeeded in repealing a Dade County (Miami) law that prohibited discrimination on the basis of sexual orientation.<sup>4</sup> After 1977, religious and gay groups have engaged in regular *pas de deux* over nondiscrimination laws, sex education, and proposals for the repeal of sodomy laws or the recognition of same-sex

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2. Same-sex intimacy has existed in every human civilization, and its characteristic expression has sometimes been considered sinful "sodomy" in Western culture. Nonetheless, characterization focusing on a medicalized sexual orientation rather than on sinful sexual acts did not begin in earnest until the late nineteenth century in Europe. See 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* (Michael Hurley trans., 1978); JEFFREY WEEKS, *SEX, POLITICS, AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* (1981). The concept of "sexual orientation" was quickly embraced by American doctors (1880s) but took longer to reach the popular culture (after 1900). See LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* 11-36 (1991). The term "homosexual" is only a century old. See David Halperin, *Sex Before Sexuality: Pederasty, Politics, and Power in Classical Athens*, in *HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST* 37-39 & nn.1-2 (Martin Duberman et al. eds., 1989).

3. The term is from Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *SEXUALITY, GENDER, AND THE LAW* (William N. Eskridge, Jr. & Nan D. Hunter eds., 1997).

4. See William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 *HOFSTRA L. REV.* 377 (1997).

marriages or domestic partnerships.<sup>5</sup> A lot of the clashes between religious and gay groups have ended up in court.

The public confrontations surprised no one. Religious and sexual subcultures have value-laden visions for the lives of their members and for the larger society as well. They tend to be, in Robert Cover's language, *nomie* communities, people bonded by associations that preserve and develop a common normative heritage.<sup>6</sup> *Nomie* communities have a vision of what is ethically right. That evolving vision constitutes an internal law that guides the lives of their members. Cover saw religious groups (his focus) as the classic law-creating, or *jurisgenerative*, communities. For all but the most insular religious groups, their visions of value and law compete with those of other communities, which today include gay and lesbian communities.<sup>7</sup> In the case of *nomie* communities competing to persuade the polity of their different values, Cover said, the judiciary stands available as a *jurispathic*, or law-killing, institution. The very office of judging arises out of the need "to suppress law, to choose between two or more laws, to impose upon laws a hierarchy."<sup>8</sup>

Cover's understanding of contending visions of law, only one of which will survive the lethal gaze of the judge, was echoed and contested by Justice Scalia's dissenting opinion in *Romer v. Evans*.<sup>9</sup> *Romer* held that a state initiative preempting local gay rights ordinances violated the Equal Protection Clause because its breadth reflected nothing more than anti-gay animus. Echoing Cover, Scalia charged the Court with mistaking a "Kulturkampf," which Scalia probably meant as a culture clash between fundamentalist religious and pro-gay *nomoi*, for a vicious "fit of spite."<sup>10</sup> Challenging Cover, Scalia denied that courts must play a *jurispathic* role and maintained that courts should remain neutral in such culture clashes. He maintained that culture clashes should be resolved in the popular and legislative arenas. Generally, courts should steer clear of involvement by acquiescing in almost any democratic resolution of that conflict.

Ironically, the term chosen by Scalia is more consistent with Cover's view that it is hard for the judiciary to be neutral. Historically, *Kulturkampf* means a state struggle to assimilate a threatening minority, or to force conformity

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5. See CHRISTOPHER BULL & JOHN GALLAGHER, *PERFECT ENEMIES: THE RELIGIOUS RIGHT, THE GAY MOVEMENT, AND THE POLITICS OF THE 1990s* (1996); Nan D. Hunter, *Life After Hardwick*, 27 HARV C R - C.L. L. REV. 531 (1992).

6. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV L. REV. 4 (1983), reprinted in *NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER* 95-172 (Martha Minow et al. eds., 1992).

7. See Steven Epstein, *Gay Politics, Ethnic Identity: The Limits of Social Constructionism*, 93/94 SOCIALIST REV. 9 (May-Aug. 1987), reprinted in *FORMS OF DESIRE* 239 (Edward Stein ed., 1989) (arguing that gay subcultures are akin to ethnic ones).

8. Cover, *supra* note 6, at 40.

9. 116 S. Ct. 1620 (1996).

10. *Id.* at 1629 (Scalia, J., dissenting).

upon it. The first Kulturkampf, the campaign that gave rise to the term, was German Chancellor Otto von Bismarck's program between 1871 and 1887 to yoke the Roman Catholic Church to ideological state control.<sup>11</sup> Roman Catholic practices were demonized as fit only for "womanly peoples" and inconsistent with the centralized, homogenous, nation-state that Bismarck was building.<sup>12</sup> To reconcile the goals of state centralization and cultural homogeneity with the deviant Catholic *nomos*, Bismarck asserted state control over the education, appointment, and speech of parish priests; dismantled church institutions; and expelled religious resisters.<sup>13</sup> Unlike later Nazi policies, Kulturkampf was (is) a campaign of domestication and conformity, not genocide and annihilation. Nonetheless, when the state acts as aggressively as it does in a Kulturkampf, judicial acquiescence is jurispathic and scarcely neutral, contrary to Scalia.

As exemplars of law's neutrality, Justice Scalia's dissent relied on two precedents of the Court that instead illustrated extraordinary jurispathy. The two most prominent examples of Kulturkampf in the United States during the last hundred years were the campaign in the 1880s to discipline the Church of Jesus Christ of Latter Day Saints and the campaign in the 1950s to suppress homosexuality. The anti-Mormon Kulturkampf was ratified by the Supreme Court's decision in *Davis v. Beason*<sup>14</sup> (among other cases), which Scalia invoked to support the proposition that a community can be excluded from privileges of citizenship if there is popular moral disapproval of its members' consensual practices. The antihomosexual Kulturkampf was ratified by the Court's decision in *Bowers v. Hardwick*<sup>15</sup> (among other cases), which Scalia invoked to support the proposition that homosexuals can be excluded from at least some privileges of citizenship if there is popular moral disapproval of their consensual practices. Both decisions relied on mainstream religious traditions to place sexualized groups (Mormons and homosexuals) outside of the law because of their deviant, even if consensual, conduct (polygamy and sodomy).

Part I of this Essay will start with the Kulturkampf connection and will argue that religion and sexual orientation have much in common as identity categories, that antireligious prejudice is systemically similar to anti-gay prejudice, and that the religion clauses of the First Amendment as they have been developed in the last generation are a model for the state's treatment of sexuality. The First Amendment's protections of free speech, association, and press are the leading constitutional assurances against Kulturkampf. The

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11. See HELMUT W. SMITH, *GERMAN NATIONALISM AND RELIGIOUS CONFLICT: CULTURE, IDEOLOGY, POLITICS, 1870-1914* (1995).

12. See *id.* at 54, 62, 79.

13. See *id.* at 40-41.

14. 133 U.S. 333 (1890), discussed in *Romer*, 116 S. Ct. at 1635-36 (Scalia, J., dissenting).

15. 478 U.S. 186 (1986), discussed in *Romer*, 116 S. Ct. at 1631-33 (Scalia, J., dissenting).

religion clauses embody a more particularized vision of nomic diversity along lines of religious belief. The Free Exercise Clause of the First Amendment, as read by the Court, prevents the state from censoring deviant religions and, as provisionally implemented by Congress, prevents the state from unduly discriminating against religious belief. The Establishment Clause prevents the state from enforcing religious orthodoxy. Similar rules against censorship, discrimination, and orthodoxy are being developed, and should be developed, by courts and legislatures to protect sexual orientation minorities as well. Thus, I read the religion clauses as embodying a more general public law insight: The state must allow individual nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others. This is a constitutionalism inspired by the positive value of diversity and by the negative experiences of *Kulturkampf*, exemplified historically by both gay and religious experience.

Gay and religious groups should join together in opposing state *Kulturkampf*, but instead they often part company when the state guarantees sexual equality. Part II of this Essay explores issues raised when religious liberty and sexual equality norms collide. With the advent of vigorous antidiscrimination laws that incidentally restrict expression, the collision of nomic communities is today often accompanied by a collision of constitutional commitments, between the liberty of one group to exclude and express its disapproval, and the desire of an excluded group for equal treatment. Cover is right to tell us that in situations of direct clash the state typically cannot remain neutral, but he provides few insights as to how the state ought to resolve the clash. He overstates the matter if he is read to insist that nonneutrality means jurispathy.<sup>16</sup> Among the most interesting and important cases are those involving direct or indirect clashes between religious and gay communities. Emblematic is the controversy between Georgetown University, where I teach, and the Gay Rights Coalition of the Georgetown University Law Center, an early name for the gay, lesbian, and bisexual student group for which I am an adviser. I use the Georgetown case as a field upon which to discuss different ways of treating the equality and liberty interests of gay and religious groups. The judicial resolution of the controversy, in the opinion delivered by Judge Julia Cooper Mack of the District's Court of Appeals, was jurisgenerative in

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16. Notwithstanding these reservations, I agree that gay and religious *nomoi* often interact in the way Cover describes, each appealing to the jurispathic judge to kill off the other's law or to squelch the other's efforts to transform existing law. Just as earlier ethnic and religious conflicts involved group animosity and violence, the current conflicts between gay and religious *nomoi* have been rancorous. I do not see that rancor, or even deep conflict, as inevitable. When there is conflict, I part company with Cover in that I see a less jurispathic role for courts. Rather than inevitably killing substantive law and rendering one group triumphant, courts can create structures and procedures of cooperation that are law-sustaining. Aspirationally, the most important role for courts in our system is to serve as a brake against *Kulturkampf* and its echoes, where the state itself is enlisted in a campaign to suppress not only law, but the nomic communities themselves.

a way that respected the Roman Catholic *nomos* without acquiescing in its wrongness on issues of sexual orientation.

Part II further, and more ambitiously, argues that the Georgetown case reflects a distinctively but not uniquely "gaylegal"<sup>17</sup> jurisprudence. One defining contribution of gaylaw derives from the gay experience of "coming out of the closet." This phenomenon and its history suggest several ideas and principles that illuminate the Georgetown case, especially the value of identity speech and its relevance for both sides of the controversy, and that lend support to Judge Mack's opinion, especially its accommodation of each side's identity needs and the encouragement of nomic dialogue. Most generally, the jurisprudence of coming out contributes to the public law project of understanding and constructively resolving identity clashes, a project impressively initiated by Professor Kenneth Karst and others.<sup>18</sup> Part III of the Essay applies these ideas to other recent culture clashes that have ended up in court: the Boston parade case,<sup>19</sup> where the Supreme Court permitted exclusion of lesbian, gay, and bisexual marchers; the Presbyterian landlord case,<sup>20</sup> where the California Supreme Court required a landlord to rent an apartment to a couple whose unmarried cohabitation offended her religious beliefs; and the Indianapolis pornography case,<sup>21</sup> where the Seventh Circuit disallowed local tort remedies against pornographers whose material harmed women.

#### I. IDENTITY IN AMERICA: CONNECTIONS BETWEEN RELIGION AND SEXUALITY

While often at loggerheads today, religion and sexual orientation have much in common as identity categories. Similarly, antireligious prejudice has manifested itself in American history in ways not unlike antihomosexual prejudice. The two great American Kulturkamps of the last century involved groups defined by their religion (Mormons in the 1880s) and sexual orientation (homosexuals in the 1950s). The First Amendment has been read to deploy American public law to prohibit censorship of, discrimination against, and orthodoxy of religion. This Part concludes with an argument that the reasons for protection of religious belief and *nomoi* require similar constitutional

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17. "Gaylegal" jurisprudence examines the law as it applies to lesbians, bisexuals, and gay men or from a gay point of view. (Consistent with common usage, I often deploy "gay" to refer to homosexual women and men.) There is no single gaylegal angle for the cases discussed in this Essay. Nor should gaylaw (the noun) be taken as simply parochial. This Essay maintains that gaylaw can contribute insights to law generally and that gaylegal arguments such as these can be persuasive to straight audiences as well.

18. See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (synthesizing earlier articles); KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993); Hunter, *supra* note 1.

19. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 115 S. Ct. 2338 (1995).

20. See *Smith v. Fair Employment & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996).

21. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

protections against censorship of, discrimination against, and orthodoxy in matters of sexual orientation.

A. *Religion and Sexuality as Identity Categories and Objects of Prejudice*

During the 1994 hearings on the proposed Employment Non-Discrimination Act (ENDA), a federal bill to prohibit sexual orientation discrimination in the workplace, Senator Nancy Kassebaum wondered why sexual orientation, a behavioral characteristic, should be protected when civil rights laws have traditionally protected only status-based characteristics.<sup>22</sup> Witnesses pointed out that civil rights laws have traditionally protected against discrimination based on religion, which, like sexual orientation, involves behavior as well as status. Senator Kassebaum was incredulous: While there are “certain behavioral characteristics that one could associate” with religion, she noted, it is not a characteristic based *wholly* on behavior, as is sexual orientation.<sup>23</sup> Senator Kassebaum’s remarks misconstrue sexual orientation, for it is based on a similar mix of cognition and conduct as religion. Religion involves both thought and action; a typical Presbyterian believes in God’s omnipotence and mercy, and engages in activities such as churchgoing, prayer, charitable contributions, and other conduct characteristic of her religion. Sexual orientation involves both thought and action; a typical lesbian feels erotic attraction or strong emotional bonds to other women and engages in sexual and social activities with other women.<sup>24</sup>

Senator Kassebaum’s widely shared incredulity stems from the cultural phenomenon whereby homosexuality (the status) is considered equivalent to sodomy (the conduct). From her point of view, the conduct part of homosexuality dominates, if not obliterates, the cognition part. Gay people see the matter differently. For us, sexual orientation is a feature of our personal make-up, our gender nonconformity, even our way of looking at things. More important, the tendency of mainstream society to view gay people through the totalizing, and hysterical, lens of sexual acts is one reason we need the Employment Non-Discrimination Act. Consider this thought experiment. When Kassebaum sees an open lesbian, she thinks, “here is someone who performs perverse sexual acts,” not, “here is a sister who loves and appreciates women and their beauty in a way I was not taught.” When Kassebaum sees an openly heterosexual woman, she does not think “here is someone who performs

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22. See *Employment Non-Discrimination Act (ENDA) of 1994: Hearings on S 2238 Before the Senate Comm. on Labor and Human Resources*, 103d Cong. 44–45 (1994).

23. *Id.*

24. See *infra* note 28. Some have suggested, in commenting on a draft of this Essay, that religion is more a matter of *belief*, while sexuality is more a matter of *desire*, both of which I subsume under thought. I think this formulation overstates the differences, linking one to the domain of the intellect, and the other to the domain of the emotions. Both religion and sexuality involve feelings and emotions as well as beliefs and ideas, and so I am disinclined to put weight on any difference in the overall mix of emotion to belief.

perverse sexual acts," even though that woman is more likely to have engaged in anal sex than the lesbian and almost as likely to have engaged in oral sex.<sup>25</sup> This cognitive process is erroneous. What distinguishes the heterosexual woman from the lesbian is not behavior so much as desire and status: The lesbian desires other women and by doing so challenges the orthodoxy of compulsory heterosexuality.

Now perform my thought experiment from another angle. In the 1950s, in rural Appalachia where I grew up, some Protestants could look at an openly Roman Catholic person and think "cannibalism,"<sup>26</sup> not "here is a brother who loves and appreciates God in ways I was not taught." Or, because Roman Catholic theology opposed birth control, many Protestants viewed Catholics as "sexually promiscuous." Roman Catholics saw these matters differently, and so do almost all of us today. When Senator Kassebaum sees a self-identifying Roman Catholic today, she thinks, "here is a brother who loves God, etc.," not "cannibalism." This is good. What she focuses on is the cognition she shares with the Catholic, not the conduct she does not share. A goal of antidiscrimination laws is to change our focus, from behavior-based negative stereotypes to more positive appreciation of connections in the face of cognitive diversities.

Consider from the perspective of equal protection concerns the deep categorical and historical similarities of religion and sexual orientation. They are identity characteristics that have much in common, especially in contrast to sex, ethnicity, or race—the categories most prominent in current antidiscrimination laws. At the most superficial level, religion and sexual orientation are usually not apparent to casual observation and are not known unless the person self-identifies. In contrast, sex, race, and (to a lesser extent) ethnicity are usually apparent upon casual observation, unless the person makes an effort to cloak these characteristics. Religion and sexual orientation cannot even be surmised from the most careful inspection of the person's physical characteristics, for they are identities based upon beliefs, feelings, cognitions, and emotions. We reveal our religious or sexual identities only by what we say and in what religious- or sexual-specific conduct we engage. Thus a religious or sexual orientation minority can almost always "pass" for mainstream, simply by expressing the religious or sexual views associated with the majority and

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25. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 98–99, 318–20 (1994) (finding that 73% of heterosexual female sample had engaged in oral sex, versus 82% of females reporting lesbian experiences; and over 20% of heterosexual women had engaged in anal sex (lesbians not asked)).

26. Roman Catholics believe in transubstantiation, that during Communion the bread and the wine actually become the flesh and blood of Christ. Because they are ingested by the communicants and the priest, thinking this to be so, the practice was labelled cannibalistic. Roman Catholics, in turn, could look at an openly Jewish person and think "Christ killer," or "food fetishist," rather than "here is a brother who loves God in a different way than I was taught."



keeping secret the conduct characteristic of one's minority group.<sup>27</sup> More important, religious and sexual identity is dependent upon the ability and willingness both to express the identity and to engage in activities characteristic of the identity.<sup>28</sup>

One's sex, race, and ethnicity are popularly seen as biologically determined in a straightforward way: They are the same as or a hybrid of the sex, race, and ethnicity of one's parents. Although one's religion and sexual orientation are often the same as those of one's parents, they need not be and often are not. That the impulse behind religion and sexual orientation is not completely predetermined creates room for speculation, conversion, and nosy intervention. There is a human tendency to view one's own religion and sexual orientation as "given," impelled, or even driven by inner needs or external forces, but to view a "deviant" religion or sexual orientation as "chosen" for some perverse or even malignant reason.<sup>29</sup> That perspective is just as wrong as the determinist one, however. While one's religion and sexual orientation are not biologically predetermined, neither are they completely voluntary. One rarely engages in a process of information-gathering, deliberation, and shopping to hit upon a religion (assuming one is serious rather than just social about religion) or a sexual orientation. The impulse comes from feelings we do not consciously process or understand.

Finally, religion and sexual orientation tend to be more normative than the other identity categories. Both are spiritual as well as moral and are characterized by bonding with a cohort of people linked by similar emotions and beliefs, moments of ritual ecstasy and fantasy, and fascination with

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27. The social boundaries defined by ethnicity are often so porous as to allow passing, however. See EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 75-81 (1990) (discussing story of Queen Esther, who averts genocide against her people by "coming out" to her husband, King Assuérus). Sex and race, of course, can be porous as well. Women have successfully passed for men throughout Western history, and some people can pass for members of a different race. The point in the text is only that these cases are exceptional, while religious and sexual minorities routinely pass.

28. Hence the famous Kinsey scale of sexual orientation considers the person's self-identification, her or his erotic fantasies, and her or his actual sexual activities. A Kinsey 6 is someone who identifies as a homosexual, has only same-sex fantasies, is only attracted sexually to people of the same sex, and has had exclusively same-sex experiences. See ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-41 (1948). A similar exercise can be conducted for religion. A devout Catholic (a John Paul 6) is someone who identifies as Catholic, believes Catholic theology, regularly takes Communion, goes to confession, and so forth.

29. I am open to the following difference. Religion might be easier to change than sexual orientation. Religious conversion experiences are common and are seen as a genuine change from one religious viewpoint to another. The convert "sees the light" just as Saul of Tarsus did on the road to Damascus, the classic conversion experience (he even changed his name, to Paul). See *Acts* 9:1-22. Earlier American sexologists notwithstanding, there is little evidence that homosexuals convert to heterosexuality or vice-versa. The married person who comes out as gay usually thinks of the experience less as a conversion from one identity to another than as a discovery about an identity he or she had all along. None of the foregoing analysis relies on the (controversial) thesis that sexual orientation is hard-wired genetically. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 *STAN. L. REV.* 503 (1994). Even scientific critics of the "hard-wired homosexuals" hypothesis believe that sexual orientation is a trait rooted early in life and beyond "conscious" choice or control. See, e.g., RICHARD A. POSNER, *SEX AND REASON* 101-05 (1992) (surveying various theories).

sumptuary pomp and deviation. Religious and sexual orientation communities are institutionalized, albeit in different ways. Religious community is focused around the local church or congregation, which is often the lowest rung in a larger hierarchy; sexual community is more loosely focused around a larger variety of subcultural institutions, including churches or faith groups, newspapers, professional associations and social clubs, and "gay ghettos."

Given these striking similarities between religion and sexual orientation, it is not surprising that antireligious prejudice in American history bears systematic resemblance to the more recent antihomosexual prejudice. Most religious groups that are considered mainstream today have been the objects of intolerance and state-imposed disabilities in the past, including Jews, Roman Catholics, and Baptists.<sup>30</sup> Like disabilities placed upon homosexuality, those placed on deviant religions stem from the firm belief that the majority religion or sexual orientation is universally true *and* that the existence of other religions or orientations is harmful or dangerous. The attitudes underlying prejudice, whether against religious or sexual minorities, are attitudes of intellectual orthodoxy and coerced conformity. The attitudes are "prejudiced" if there is scant reason to believe that religious or sexual deviations are actually harmful or dangerous, apart from the anxiety they create in the fearful mind. Persecution and Kulturkampf flow from prejudice when majority culture feels insecure in general and threatened by a minority gaining in social power or public visibility.<sup>31</sup>

Nativist and racist hysteria was the characteristic reaction in the United States to periods of intense social tension from the colonial period until after World War I; the objects of nativist hysteria were ethnic and, especially, religious minorities. Ideological and sexual as well as racist hysteria has been the characteristic social reaction in the United States to periods of intense social tension since World War I. The scholarship describing antireligious prejudice in the United States and other western societies discovers the same pattern as that found in anti-gay prejudice: Disempowered segments of the majority demonize or scapegoat religious "deviants" as predatory threats and invoke their supposed predation as a justification for violence against deviants. Specific tropes include warnings that the polity faces irrevocable decline because of corrosive forces within the society; depiction of the despised religious group as dirty, immoral, lecherous, subversive, disloyal, and militant, based upon unrepresentative examples or simple fabrications; and fixation on

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30. For the discussion that follows, I draw on the scholarship about "nativist" movements of religious persecution in American history. The germinal work is JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (corr. ed. 1965). *See also* sources cited *infra* note 32. My thinking has also been influenced by the work of Ben Zion Netanyahu. *See, e.g.,* B. NETANYAHU, *THE ORIGINS OF THE INQUISITION IN FIFTEENTH CENTURY SPAIN* (1995).

31. *Cf.* NETANYAHU, *supra* note 30, at 5 ("For it is an iron-clad rule in this history of group relations: the majority's toleration of every minority lessens with the worsening of the majority's condition, especially when paralleled with a steady improvement of the minority's status.").

the ways in which the despised group is bent on "recruiting" normal citizens, particularly the young.<sup>32</sup> Antireligious discourse is characterized by the same rhetoric as Senator Kassebaum's antihomosexual discourse: denial that there is discrimination based upon belief or status and insistence that any legal disabilities or discrimination is based upon the deviant group's (vile) behavior.

Once mobilized at the state level, social prejudice against a religious or sexual minority aims at suppression or erasure of the minority and its *nomos*. The extreme goal is elimination, from outright genocide to expulsion and exile to forced conversion. The more moderate goal is assimilation, where the minority renounces its distinctive nomic values and conforms at least in part to majority beliefs and practices. Whatever the ultimate goal, the processes for achieving it are expensive, requiring great mobilization of the state apparatus to hunt down deviants and reprogram, expel, or imprison them. Because an intense campaign of re-education, suppression, or erasure is so costly, it usually does not last long and is succeeded by an accommodation of some sort. Sometimes the accommodation is a truce premised on the view that the deviant group has survived.<sup>33</sup> More often, it is premised on the view that the deviant *nomos* has been defeated and can be assimilated into the mainstream culture.<sup>34</sup> In the latter instance, a remnant of the deviant minority goes underground, typically with the understanding that the state will not seriously look for them, an understanding breached sooner or later. This regime, where the minority pays homage to the shame attributed to them by keeping their identity secret in exchange for survival, is now known as the "closet."<sup>35</sup> In American public law it bears the tag, "don't ask, don't tell."

#### B. *Anti-Mormon and Antihomosexual Kulturkampf in the United States*

The process described in the last paragraph is Kulturkampf. The classic Kulturkampfs in western history have been religious, such as the Spanish

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32. See NATIVISM, DISCRIMINATION, AND IMAGES OF IMMIGRANTS (George E. Pozzetta ed., 1991), LES WALLACE, THE RHETORIC OF ANTI-CATHOLICISM: THE AMERICAN PROTECTIVE ASSOCIATION, 1887-1911 (1990).

33. This was the result of Bismarck's Kulturkampf against the Roman Catholic Church, which the Iron Chancellor abandoned as early as 1878. The antireligious campaign was largely ineffectual, served to politicize Roman Catholics against the state, and ended with a recognition that German nationalism did not require confessional unity for its success. See ERICH SCHMIDT-VOLKMAR, DER KULTURKAMPF IN DEUTSCHLAND 1871-1890 (1962); SMITH, *supra* note 11, at 19-49; Ronald J. Ross, *Enforcing the Kulturkampf in the Bismarckian State and the Limits of Coercion in Imperial Germany*, 56 J. MOD. HIST. 456 (1984).

34. This was the conclusion of the anti-Mormon Kulturkampf of the 1880s, which ended when the Church of Jesus Christ of Latter Day Saints abandoned its endorsement of plural marriage in this life, and the Territory of Utah criminalized bigamy and cohabitation in the constitution it presented as part of a statehood application. More extreme consequences flowed from the Kulturkampf against the Spanish Jews in 1391, which resulted in exile, expulsion, and massive conversions to Christianity. See NETANYAHU, *supra* note 30, at 127-213.

35. See Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753 (1996).

pogroms between 1391 and 1482 which produced the Marranos (Jews who converted to Catholicism),<sup>36</sup> the religious purges and wars of the late sixteenth and early seventeenth centuries, and secular campaigns against the Roman Catholic Church and Judaism in Europe and the United States in the mid- and late nineteenth century.<sup>37</sup> The most ambitious Kulturkampf undertaken by the United States in the last century further illustrate conceptual and tangible connections between religious and sexual deviance.

After the 1840s, the Church of Jesus Christ of Latter Day Saints encouraged its members to engage in plural marriage. Polygamy was controversial within the church and generated considerable anti-Mormon sentiment that pressed the community to relocate in the Utah Territory, where the federal government became its chief foe. Congress enacted the Morrill Anti-Bigamy Law<sup>38</sup> to criminalize Mormon polygamy in the Territory of Utah, but the law was virtually unenforced until the 1870s.<sup>39</sup> In 1874, federal authorities convicted Mormon elder George Reynolds of criminal bigamy. He appealed his conviction as inconsistent with the First Amendment's protection of his free exercise of religion. Without questioning the sincerity of Reynolds's beliefs, Chief Justice Morris Waite's opinion for a unanimous Court in *Reynolds v. United States*<sup>40</sup> held nonetheless that the First Amendment was not violated. The Court reasoned that Reynolds's religious beliefs could not immunize his unlawful conduct. Polygamy was "odious" conduct that was inconsistent with Anglo-American tradition of marriage and undermined not just marriage but the stability of the polity as well.<sup>41</sup> Although the Latter Day

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36. See BENZION NETANYAHU, *THE MARRANOS OF SPAIN, FROM THE XIVTH TO THE EARLY XVTH CENTURY* (2d ed. 1973); NETANYAHU, *supra* note 30.

37. The anti-Catholic campaigns in Europe are noted in SMITH, *supra* note 11, at 19 (citing Winfried Becker, *Der Kulturkampf als europäisches und als deutsches Phänomen*, 101 *HISTORISCHES JAHRBUCH* 422 (1981)).

38. Morrill Anti-Bigamy Law, ch. 125, 12 Stat. 501 (1862) (codified at Rev. Stat. § 5352).

39. RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 107 (2d ed. 1989).

40. 98 U.S. 145 (1878).

41. The Court explained:

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society.

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... In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

*Id.* at 164–66 (citation omitted). For an excellent historical exploration of the political theory of marriage embedded here, see Maura I. Strassberg, *Distinctions of Form and Substance: Monogamy, Polygamy and*

Saints were shocked that the Court upheld Reynolds's conviction, the decision did little to undermine the church's faith in, and its members' practice of, plural marriage.

The antibigamy law that Reynolds was convicted of violating was the precursor of a broader campaign to destroy the Latter Day Saints themselves, so long as they adhered to plural marriage.<sup>42</sup> Presidents Hayes, Garfield, and Arthur led a federal campaign against Mormon polygamists. In Congress, Senator George Edmunds, Republican of Vermont, procured legislation making "unlawful cohabitation" (easier to prove than polygamy) a federal crime, depriving polygamists of their right to vote and to serve on juries or in public office, and offering amnesty to polygamists who renounced their religious practice.<sup>43</sup> Apostle John Henry Smith witnessed the House vote for Edmunds's bill in 1882 and lamented: "'The Republicans were filled with venom and were bent on the accomplishment of their purpose. . . . God our Father must judge these men for their evil design and [I] doubt not he will do so in his own good time.'"<sup>44</sup> The Supreme Court did not consider the design evil enough to be unconstitutional and sustained the Act.<sup>45</sup>

With all three branches of the federal government united in a desire to erase or change the Mormon *nomos*, a Kulturkampf followed. More than one thousand Mormon polygamists, or "cohabits," were hunted down by federal marshals who specialized in their capture, convicted by juries packed with non-Mormons, and sentenced to imprisonment, some for long periods of time. In prison, the Mormons were attacked by convicted murderers, thugs, and legions of bedbugs. Latter Day Saints found they could avoid these horrors by renouncing their religious practice, for judges were inclined to let repenters off with fines. Yet Mormon resistance continued. The church refused to budge on this religious principle, and significant portions of the faithful and almost all the church elders continued to engage in plural marriages.

The federal government responded with the Edmunds-Tucker Act of 1887, which disenfranchised not only Mormon polygamists but also any person advocating polygamy, declared Latter Day Saints' property forfeit to the United States for the church's crime against marriage, made it easier to prove guilt in polygamy cases, abolished elective offices in Utah and made officials subject to federal appointment, declared children of plural marriages illegitimate and prohibited their inheriting from their parents, and abolished

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*Same-Sex Marriage*, 75 N.C. L. REV. (forthcoming 1997).

42. The campaign to destroy the Latter Day Saints is described in VAN WAGONER, *supra* note 39, at 115-22; and in Orma Linford, *The Mormons and the Law: The Polygamy Cases* (pts 1 & 2), 9 UTAH L. REV. 308, 543 (1964-65).

43. See The Edmunds Act, ch. 47, 22 Stat. 30 (1882) (codified at 48 U.S.C. § 1461) (repealed 1983).

44. Quoted in MERLO PUSEY, BUILDERS OF THE KINGDOM—GEORGE A. SMITH, JOHN HENRY SMITH, GEORGE ALBERT SMITH 135 (1982).

45. See *Cannon v. United States*, 116 U.S. 55 (1885) (criminal cohabitation); *Clawson v. United States*, 114 U.S. 477 (1885) (jury service); *Murphy v. Ramsey*, 114 U.S. 15 (1885) (disenfranchisement).

female suffrage in Utah.<sup>46</sup> The United States Supreme Court upheld these various invasions of civil and religious liberties in two decisions, *The Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*<sup>47</sup> and *Davis v. Beason*.<sup>48</sup>

Those Supreme Court decisions confirmed the constitutional sanction for anti-Mormon Kulturkampf. The campaign was successful in that the leadership of the Latter Day Saints officially abandoned polygamy as a religious principle after *Beason*.<sup>49</sup> The campaign was less successful in that it drove polygamy underground. Leading Mormons continued to practice plural marriage for years after the church's capitulation; after the Latter Day Saints hierarchy actually abandoned plural marriages, many of the faithful continued to embrace them. Even today, there are sects of fundamentalist Mormons who preach and practice polygamy in this life, and who were persecuted as recently as the 1940s and 1950s. In 1944, the Salt Lake City police arrested forty-six Mormon fundamentalists for violating Utah's anticonhabitation law and confiscated their magazine, *Truth*, as lewd and obscene because of its advocacy of polygamy.<sup>50</sup> State charges were dismissed, but fifteen men went to prison for transporting their plural wives in interstate commerce for "immoral purposes." The Supreme Court upheld these convictions in *Cleveland v. United States*.<sup>51</sup> Mormons cooperated in a 1954 raid on a fundamentalist community in Short Creek, Arizona, and the Church raised no protest against the state's arrest of polygamists and its confiscation of their children.<sup>52</sup> Notwithstanding this persecution, plural marriage in this life is still accepted and practiced as a foundational principle among Mormon fundamentalists.<sup>53</sup>

There are striking parallels between the anti-Mormon Kulturkampf of the 1880s and the antihomosexual Kulturkampf of the 1950s.<sup>54</sup> Just as the longstanding crime of bigamy became mobilized in the 1870s as a mechanism for regulating Mormon plural marriage, the longstanding crimes of sodomy,

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46. See The Edmunds-Tucker Act, ch. 397, 24 Stat. 635 (1887) (codified at 28 U.S.C. § 633, 660) (repealed 1978).

47. 136 U.S. 1 (1890) (allowing confiscation of Latter Day Saints' property).

48. 133 U.S. 333 (1890) (holding that membership in Latter Day Saints church can be basis for denying right to vote).

49. See VAN WAGONER, *supra* note 39, at 133–52.

50. See *id.* at 190–92.

51. 329 U.S. 14 (1946).

52. See VAN WAGONER, *supra* note 39, at 192–97.

53. See JESSE L. EMBRY, MORMON POLYGAMOUS FAMILIES (1987). As I now (perhaps imperfectly) understand current Latter Day Saints doctrine, Mormon men may no longer have plural wives in this life but will have them in the afterlife. While polygamy still has a place in Mormon theology, both theology and practice responded decisively to the state Kulturkampf. See also NETANYAHU, *supra* note 30, at xvii–xxi (arguing that forced conversion of Spanish Jews to Catholicism "worked"; Marranos were not "secret Jews," for most part, but assimilated steadily into Spanish Catholicism until Inquisition assailed them for trumped-up heresies).

54. The details of the antihomosexual terror are recounted in WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET ch. 2 (forthcoming 1998); and in William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet, 1946–1961*, 24 FLA. ST. U. L. REV. 703 (1997).

solicitation, cross-dressing, disorderly conduct, and lewdness were deployed in the 1950s as mechanisms for regulating homosexual intimacy. Since then, the Supreme Court has repeatedly reviewed the application of sodomy laws to consensual same-sex intimacy and, as it had done in *Reynolds* and the other Mormon cases, upheld them against any and every constitutional attack.<sup>55</sup> Resting, as Chief Justice Burger said, on “millennia of moral teachings” against homosexuality, *Hardwick* in 1986 was only the last in a line of these decisions. *Hardwick* is a modern echo of *Reynolds*, for in both cases defendants’ “deviant” sexual activities were criminalized because their activities were inconsistent with prevailing religious morality.

Like the Mormon who openly married more than one person, the homosexual who openly engaged in sexual relations with someone of the same sex was per se a criminal, and was condemned as a major social menace and threat to the stability of the polity. A 1950 Senate subcommittee report made out the case against having “homosexuals and other sex perverts” in the government.<sup>56</sup> The report concluded that “those who engage in overt acts of perversion lack the emotional stability of normal persons,”<sup>57</sup> and “indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility.”<sup>58</sup> Furthermore, “perverts will frequently attempt to entice normal individuals to engage in perverted practices. This is particularly true in the case of young and impressionable people who might come under the influence of a pervert. . . . One homosexual can pollute an entire office.”<sup>59</sup> This report echoes the paranoid political consequences of polygamy expressed by Professor Francis Lieber, whose theory of the state was the basis for *Reynolds*.<sup>60</sup>

State and federal governments invested substantial resources in campaigns to search out and expose homosexuals in big cities, in the armed forces, and in state and federal employment. When simple detection and prosecution proved insufficient, federal and state governments engaged in campaigns to lure homosexuals into violations of law. They also adopted additional regulatory mechanisms that raised the stakes of sexual nonconformity. The

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55. See, e.g., *Bowers v. Hardwick*, 487 U.S. 186 (1986) (rejecting privacy and Ninth Amendment challenge); *Doe v. Commonwealth’s Attorney*, 435 U.S. 901 (1976) (summarily affirming three-judge court’s rejection of privacy challenge); *Rose v. Locke*, 423 U.S. 48 (1975) (rejecting vagueness challenge), *Wainwright v. Stone*, 414 U.S. 1 (1973) (same); *Wade v. Buchanan*, 401 U.S. 989 (1971), *rev’g Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970) (rejecting privacy challenge).

56. SUBCOMMITTEE ON INVESTIGATIONS OF THE SENATE COMM. ON EXPENDITURES IN THE EXECUTIVE DEPT’S, INTERIM REPORT, EMPLOYMENT OF HOMOSEXUALS AND OTHER SEX PERVERTS IN GOVERNMENT (Dec. 15, 1950).

57. *Id.* at 4.

58. *Id.*

59. *Id.* at 3.

60. See *supra* note 41.

homosexual arrested for solicitation of consensual sex in the 1950s, usually by responding to a come-on from a decoy cop or agent provocateur, faced not only a possible jail or prison sentence, but also familial and social ostracism when names of arrested people were reported by the press; loss of employment in either the public or private sector and of any security clearance needed for many scientific and federal jobs; loss of professional licenses; potential indefinite incarceration in a mental institution if found to be a "sexual psychopath"; required registration as a sex offender with police departments and reporting of activities and movements; the break-up of one's marriage and loss of custody of one's children; surveillance by the FBI (wiretapping and spying) and the Post Office (opening people's mail); and expulsion from the country if one were not a citizen.<sup>61</sup> Just as the Supreme Court upheld novel and heightened penalties against Mormon polygamists in the nineteenth century, the Supreme Court and lower courts upheld novel and heightened penalties against homosexual sodomites in the twentieth.<sup>62</sup>

The foregoing comparison says as much about the American judiciary as it does about religion and homosexuality. Judges at the time of the campaigns acquiesced in the political consensus that demonized the despised groups. No Supreme Court justice or federal judge cast a single vote to invalidate the anti-Mormon or antihomosexual Kulturkamps during their peaks (1883–90 and 1947–55, respectively).<sup>63</sup> Some judges showed mercy to individual defendants, but most did not, and many were willing to bend established rules of law to assist the state campaign. The constitutional analysis that follows maintains that these campaigns are inconsistent with our current understandings of constitutional rights. This sort of post hoc analysis is possible, however, because it is far removed from the hysterias of the eras it criticizes. There is no compelling reason to believe that judges will not acquiesce to the next Kulturkampf. What follows are simply reasons to think that they should not and to hope that they will not.

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61. See Eskridge, *supra* note 54.

62. See *Boutilier v. INS*, 387 U.S. 118 (1967) (interpreting immigration law to require deportation of bisexual as "psychopathic personality"); *Kameny v. Brucker*, 282 F.2d 823 (D.C. Cir. 1960) (allowing federal government to deny employment and security clearance to man charged with homosexual "lewdness").

63. I denote 1947 as the start of the antihomosexual panic; this was the year the antihomosexual witchhunts began in earnest in the federal civil service, armed forces, and state civil services, and saw the beginning of many municipal campaigns against same-sex socializing. The craze passed its peak after the "Boys of Boise" scandal, which broke in 1955. See JOHN GERASSI, *THE BOYS OF BOISE: FUROR, VICE, AND FOLLY IN AN AMERICAN CITY* at xv–xvii (1966). After the peak of the antihomosexual campaign, the Supreme Court in a one line per curiam opinion reversed Post Office censorship of *One, Inc.*, the leading homophile magazine. See *One, Inc. v. Oleson*, 355 U.S. 371 (1958) (per curiam). Four years later, the Court reversed censorship of male physique magazines that homosexuals found erotic. See *Manual Enters., Inc. v. Day*, 370 U.S. 478 (1962).



### C. *Constitutional Protections Against Religious or Sexual Censorship and Discrimination*

*Reynolds*, *Beason*, and *Latter Day Saints*, the three Supreme Court decisions that ratified the anti-Mormon Kulturkampf, are in some tension with the structure and diversity values of the First Amendment. The right of association the Supreme Court has found in the Amendment assures nomic communities the right to band together without state suppression or discriminatory harassment. The community and its members have strong rights to speak freely, to assemble peaceably, to petition and lobby the government, and to publish their views, all under the protection of specific clauses in the First Amendment. The religion clauses prevent the state from burdening the free exercise of religious faith and from establishing any state religion. I read the religion clauses as echoing more general constitutional principles of anticensorship, nondiscrimination, and rejection of orthodoxy. The state must allow nomic communities to flourish or wither as they may, and the state cannot as a normal matter become the means for the triumph of one community over all others.

The anti-Mormon decisions are inconsistent with recent developments in American public law, albeit developments only possible because the political culture has internalized the idea of benign religious variation. The Supreme Court held in *Sherbert v. Verner*<sup>64</sup> that the Free Exercise Clause prevents a state from substantially burdening a citizen's exercise of religion unless it can show a compelling state interest. Under *Sherbert* and the Court's right to privacy cases, *Reynolds* ought not stand: The state's interest in preventing consensual bigamy or cohabitation, the crime in the Mormon polygamy cases, is no longer the compelling interest it was in the nineteenth century.<sup>65</sup> Even if *Reynolds* were good law under *Sherbert*, *Beason* and *Latter Day Saints* would not be, for they are deeply inconsistent with any vision of recent constitutional theory and practice. The Court's modern free speech jurisprudence is inconsistent with *Beason*'s holding that the state can criminally

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64. 374 U.S. 398 (1963) (holding that state cannot refuse to provide unemployment benefits to woman fired because she would not work on her Sabbath), followed in *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (same); see also *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (holding that state cannot deny unemployment benefits to person who refuses to work on personal Sabbath, not one of recognized religion).

65. See *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion) Five Justices voted to invalidate a regulation making it a criminal violation for non-family members to live together, four Justices on privacy grounds and one Justice (Justice Stevens) on takings grounds. See also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that right of privacy protects use of contraceptives by unmarried couples). I am open to the argument that prohibiting polygamy serves a state interest in creating family structures that are relatively conducive to gender equality. Cf. *VAN WAGONER*, *supra* note 39, at 89-104 (describing frequently terrible experiences of wives in Mormon plural marriages, but noting that many other marriages were happy ones). The argument is, however, necessarily speculative and, more importantly, cannot justify the criminal penalties imposed in *Reynolds*.

punish mere advocacy of polygamy.<sup>66</sup> The cases recognizing a fundamental right to vote would probably require a different result than *Beason's* willingness to deny Mormons the right to vote because of their status,<sup>67</sup> and the Free Exercise Clause after *Sherbert* surely prohibits the state from suppressing an entire religion simply because popular majorities consider its practices immoral.<sup>68</sup>

In 1990, the Supreme Court rejected the *Sherbert* approach to the Free Exercise Clause, holding that a neutral state regulation of general application that incidentally burdens someone's free religious exercise is valid unless it implicates another constitutional concern.<sup>69</sup> Even under the Court's current free exercise jurisprudence, *Reynolds* is wrong to the extent that it invaded privacy rights, and *Beason* and *Latter Day Saints* are wrong because the anti-Mormon statutes of the 1880s were not neutral laws of general application. They were enacted with the intention, and had the effect, of suppressing a religion, which violates the Free Exercise Clause under post-1990 caselaw.<sup>70</sup> Moreover, Congress reinstated the *Sherbert* approach as a statutory right with the Religious Freedom Restoration Act of 1993 (RFRA).<sup>71</sup> Section 2000bb-1 of the Act provides that government can "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>72</sup> If held to be a constitutional exercise of Congress's authority (an issue now before the Court),<sup>73</sup> RFRA would surely require *Reynolds*, *Beason*, and *Latter Day Saints* to come out differently.

I would make the following generalizations from the religion cases. First, the religion clauses have been read to disable the state from imposing religious orthodoxy on the population and, more specifically, from conducting an antireligious Kulturkampf such as the anti-Mormon campaign or Bismarck's campaign against the Catholic Church. That reading is suggestive of both the least that the religion clauses can mean as well as of their most important role. The anti-Mormon Kulturkampf was harmful to thousands of people and was

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66. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that advocacy of unlawful action cannot be criminalized unless lawless action is "imminent").

67. See *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that durational residence requirements violate Equal Protection Clause).

68. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that state cannot force Amish children to attend public schools). *Beason* stands for the proposition that polygamy can be the basis for denying any kind of civil right and, read with *Reynolds*, for imprisonment for long periods as well. One can be critical of polygamy as an institution while still being open to tolerance of polygamy as a religious practice because of its spiritual importance for many people. See JOHN STUART MILL, ON LIBERTY 91-113 (Currin V. Shields ed., Bobbs-Merrill 1956) (1859).

69. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

70. See *Church of the Lukumi Babula Aye v. City of Hialeah*, 508 U.S. 520 (1993).

71. 42 U.S.C. §§ 2000bb-1 to 2000bb-4 (1994).

72. *Id.* § 2000bb-1(b).

73. See *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996).

an unproductive expenditure of state resources. Like other *Kulturkämpfs* before it, the campaign against the Mormons had powerful effects. Most Mormons ultimately conformed to the accommodation outlawing plural marriage, and the Latter Day Saints church now endorses traditional religious orthodoxy in matters of sex and marriage during its members' life on earth. As read today, the religion clauses stand for the proposition that forced conformity in matters of religion is an unworthy goal, and certainly not a goal justifying the human suffering, anger, and cruelty imposed by the campaign.

Second, the Free Exercise Clause has been read to prohibit state censorship of or discrimination against particular religious *nomoi*. Thus the state cannot dictate to religions what they must say or cannot say, and the state cannot discriminate against particular religions. *Sherbert*, now codified in RFRA, also reads the Free Exercise Clause to prevent the state from imposing unnecessary burdens on religious *nomoi*. Even when state law does not target religious expression, it may not interfere with it without substantial justification. It remains to be seen how stringent an obligation this is. The Supreme Court before RFRA did not press the idea very far, and neither did most lower courts after RFRA. The key normative point is that the Free Exercise Clause operates as a super-Equal Protection Clause for classifications based on religion or (under RFRA) having an effect on religion.

Third, the overarching principle that emerges from the American experience is the idea of benign religious variation. It is both acceptable and good that we are a nation of diverse religious communities. It is acceptable because there is no single religious truth and the practice of forced conversion is inconsistent with fundamental freedom in our country. And religious diversity is good because it offers spiritual and emotional satisfaction to a broader range of people, including lesbians, gay men, and bisexuals, many of whom are devoutly religious and worship in mainstream denominations or in gay-oriented Metropolitan Community Churches all around the country.<sup>74</sup>

Given the similarities between religion and sexual orientation, religious and sexual *nomoi*, and antireligious and antihomosexual prejudice, roughly the same precepts should govern American public law of sexuality: The state is presumed to have no authority to engage in a *Kulturkampf* against sexual minorities; the state has a presumptive duty not to censor people's sexual expression or discriminate on that ground; and the affirmative principle is one of benign sexual variation, according to which it is acceptable and good that we are a nation of diverse sexualities.<sup>75</sup> Senator Kassebaum's untenable

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74. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 46 & app (1996) I am aware that religious diversity protects many religions dedicated to antihomosexual messages, but this is not a neutral or even rational reason to oppose diversity. Also, as openly lesbian and gay people demonstrate that homosexuality is not monstrous, religions now intolerant of homosexuality might soften their views. See *HOMOSEXUALITY AND WORLD RELIGIONS* (Arlene Swidler ed., 1993).

75. I propose to set aside the popular fixation on child molestation as the consequence of tolerated sexual variation. That is no more true than the idea that human sacrifice is the consequence of tolerated

distinction between behavior-based sexual orientation and belief-based religion surely reflects her view, shared by most Americans, that religious variation is benign but sexual orientation variation is not. A generation of biologists, sociologists, and anthropologists have studied the latter point and have overwhelmingly concluded—in my opinion, without any serious scientific disagreement—that most sexual orientation variations are in fact benign.<sup>76</sup>

Because there are no “sexuality clauses” in the Constitution analogous to the religion clauses, the foregoing precepts are aspirations of where public law ought to be rather than binding constitutional rules. Yet all three precepts can inform our reading of the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments, just as their analogues informed recent congressional as well as judicial interpretations of the religion clauses of the First Amendment. As Justice Scalia complained in his dissenting opinion, *Romer v. Evans*<sup>77</sup> opens up the Due Process (*Hardwick*) and Equal Protection (*Romer*) Clauses to such a reading.

## II. A JURISPRUDENCE OF COMING OUT:

### GAYLEGAL PRECEPTS FOR RECONCILING COLLIDING LIBERTY AND EQUALITY NORMS (THE GEORGETOWN UNIVERSITY CASE)

The meta-precepts of benign religious and sexual variation support affirmative as well as negative obligations for the state. Just as the state is constitutionally prohibited from engaging in public antireligious or antihomosexual persecution, censorship, or discrimination, so it should be constitutionally encouraged to prohibit private censorship or discrimination on the basis of religion or sexual orientation. The Civil Rights Act of 1964<sup>78</sup> prohibits discrimination on the basis of religion in employment, public accommodation, and education.<sup>79</sup> If enacted, ENDA would prohibit discrimination on the basis of sexual orientation in employment. Nine states, the District of Columbia, and more than a hundred municipalities prohibit employment discrimination based on sexual orientation, and most of these

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religious variation. Just as the religion clauses would allow the state to reject religious precept as a justification for “mistreating” children, so the approach outlined in text would allow the state to discipline adult pedophiles who sexually “molest” children.

76. See generally ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* (1979) (sexual sociology); CLELLAN S. FORD & FRANK A. BEACH, *PATTERNS OF SEXUAL BEHAVIOR* (1951) (anthropology); *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* (John C. Gonsiorek & James D. Weinrich eds., 1991) (psychology); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE AMERICAN FEMALE* (1953) (biology); *THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR* (Evelyn Blackwood ed., 1986) (anthropology).

77. 116 S. Ct. 1620, 1629 (1996) (Scalia, J., dissenting).

78. 42 U.S.C. § 1971–2000 (1964).

79. See also Equal Access Act, 20 U.S.C. § 4071 (1994) (prohibiting most secondary schools from discriminating against religious clubs).

jurisdictions also prohibit such discrimination in housing and public accommodations.<sup>80</sup>

Because these antidiscrimination laws necessarily restrict economic liberties of employers, landlords, and those frequenting public accommodations, they have presented a new generation of public law problems. Among the most discussed, and intractable, of the problems involve collisions of attractive public law norms. This Part will focus on collisions between the norms of religious liberty and sexual orientation equality. There is no easy or universal method for resolving these normative collisions. Cases are particularly fact-bound, and so I use litigation which arose between Georgetown University, a Roman Catholic institution, and lesbian, bisexual, and gay students, as a field upon which to think about these issues. What I hope to do is to derive helpful principles from the gay and, to some extent, religious experience of "coming out" of the sexual, and religious, closet.

#### A. *The Georgetown University Case*

The most sharply defined legal clash between gay and religious *nomoi* culminated in a decision by the District of Columbia Court of Appeals in *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*.<sup>81</sup> Founded in 1789, the same year our Constitution was written, Georgetown is a university in Washington, D.C., that is affiliated with the Roman Catholic Church. While there are no religious tests for admission or employment at the University, a majority of its trustees are typically officers of the Church, and, since 1825, each president of the university has been a member of the Society of Jesus (the Jesuits). In late 1977, one group of gay and lesbian students organized at the University's main campus and one group at the Law Center. Their stated goals were nomic: to foster "an atmosphere in which gay people can develop a sense of pride, self-worth, awareness, and community" (the main campus group) and to provide information to lesbian and gay students about the area's gay community (the Law Center group).<sup>82</sup> Beginning in academic year 1978–79, the main campus group sought to obtain University recognition that would give it access to services and benefits routinely available to other student groups, such as an office. Reasoning that University recognition would imply approval of gay and lesbian activities,

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80. See sources cited *infra* note 146.

81. 536 A.2d 1 (D.C. 1987) (en banc). I have examined this decision in an earlier work from the perspective of statutory interpretation theory, see WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 174–204 (1994), and of jurisprudential history, see William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991). My account of the case is drawn not only from the comprehensive judicial discussion and the trial record, but also from the oral history of the case being compiled under the auspices of the Georgetown University Law Center's Bisexual, Lesbian, and Gay Students' Association (BiLAGA).

82. *Gay Rights Coalition*, 536 A.2d at 8 n.5.

which was contrary to Catholic religious doctrine, Georgetown denied the students' first application in 1979 and every other application after that.

The two student groups sued Georgetown, arguing that its refusal to recognize them and make available services and benefits accorded other student groups violated the District's Human Rights Act of 1977, which makes it "an unlawful discriminatory practice . . . for an educational institution . . . [t]o deny, restrict, or to abridge or condition the use of, or access to, any of its facilities and services to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon . . . sexual orientation."<sup>83</sup> Georgetown argued that the statute could not require it to recognize, fund, and provide support to a gay and lesbian group. Any such application of the statute would be compelled speech and a burden on the free exercise of religion, which are both invalid under the First Amendment. These arguments prevailed in the District's Superior Court, and the students appealed.<sup>84</sup>

The seven judges who heard the appeal wrote seven different opinions. The judgment of the District Court of Appeals was delivered by Judge Julia Cooper Mack, who interpreted the Act to require Georgetown to provide the gay and lesbian student groups with access and tangible benefits on the same terms afforded other student groups but not to require it to grant official university "recognition" to the gay and lesbian groups.<sup>85</sup> The language of the Human Rights Act does not inevitably suggest this interpretation, but Judge Mack was reluctant to turn the statute's broad command into a story in which the state "compel[s] a regulated party to express religious approval or neutrality towards any group or individual,"<sup>86</sup> for that would be jarringly inconsistent with our society's commitment to freedom of religion and our discomfort with state-compelled speech, as Georgetown had maintained. In the context of Georgetown's religious as well as secular educational mission and its plausible belief that recognition carried with it the implication of endorsement, Mack read the statute to allow the Catholic institution some discretion.

But not much. Judge Mack found the statutory focus to be on equality of treatment and not equality of attitudes and, therefore, required Georgetown to provide equal access and benefits to the gay and lesbian student groups, which Georgetown had resisted on the same free exercise and speech grounds on

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83. D.C. CODE ANN. § 1-2520 (1981); *see also id.* § 1-2501 (setting forth intent of Council).

84. *See Gay Rights Coalition*, 536 A.2d at 3.

85. *See id.* at 4-39. Judge Mack delivered the judgment of the court, but no one else joined her opinion. Chief Judge William Pryor and Judge Theodore Newman concurred in the judgment and in most of Judge Mack's analysis. Judges John Ferren and John Terry concurred in that part of the judgment requiring Georgetown to provide equal access and services and dissented from that part not requiring recognition. Judges James Belson and Frank Nebeker concurred in the part of the judgment not requiring recognition and dissented from that part requiring equal access and services. Hence, although only three judges agreed with both parts of the judgment, there were five (of seven) votes for each part.

86. *Id.* at 21.

which it had refused formal recognition. Still, the judge reasoned that once Georgetown was relieved of the obligation to recognize the gay and lesbian student groups, its free exercise and speech interests became less compelling. Set against this consideration was the compelling societal interest in protecting lesbian and gay students from tangible discrimination. In a remarkable survey of the medical and sociological literature, Mack debunked antihomosexual prejudices as unfounded and built a normative case for protecting the rights of gays and lesbians.<sup>87</sup>

The dissenting opinions argued that this resolution was unprincipled. Judges John Ferren and John Terry criticized Judge Mack's acceptance of a regime that treated gay and lesbian student organizations differently from other student organizations.<sup>88</sup> To the extent that the court's statutory analysis was inspired by its constitutional concerns, they maintained that university recognition would not have been tantamount to endorsement and that Georgetown's free exercise rights were not abridged. Conversely, Judges James Belson and Frank Nebeker took the court to task for forcing Georgetown "to subsidize activities by those groups that offend the religious beliefs to which the university adheres."<sup>89</sup> They found the state's intrusion into Georgetown's religious freedom unjustified by the nondiscrimination policy, in part because they believed that such discrimination was not as much of a social problem as racial discrimination. Judge Nebeker, in a separate dissent, went further to argue that there was "no factor favoring a state interest under the Act which can be balanced against Georgetown's rights" because the "conduct inherent in homosexual 'life-style' is felonious" under the District's sodomy statute.<sup>90</sup> To make his point, Nebeker attached three pictorial examples of "propaganda used to announce dances and gatherings" among gay and lesbian students at George Washington University.<sup>91</sup>

*Gay Rights Coalition* illustrates our normative heterogeneity, and a strength of Judge Mack's opinion is that it values the claims of both *nomoi*. The Roman Catholic community in which the court found Georgetown is a world-creating *nomos*, for it draws upon a common history and tradition within which its members are educated and which provide the community "a sense of direction of growth that is constituted as the individual and his community work out the implications of their law"; it is a "strong community of common obligations," and common "initiatory, celebratory, expressive, and

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87. *See id.* at 30–38.

88. *See id.* at 46 (Ferren, J., joined by Terry, J., concurring in part and dissenting in part)

89. *Id.* at 63 (Belson, J., joined by Nebeker, J., concurring in part and dissenting in part); *see also id.* at 72 (Belson, J., joined by Nebeker, J., concurring in part and dissenting in part)

90. *Id.* at 75 (Nebeker, J., concurring in part and dissenting in part). Recall Senator Nancy Kassebaum's belief that sexual orientation discrimination is largely on the basis of conduct, not status. *See supra* text accompanying note 22.

91. *Gay Rights Coalition*, 536 A.2d. at 75–78 (Nebeker, J., concurring in part and dissenting in part)

performative" discourse.<sup>92</sup> The Catholic *nomos* teaches that homosexual behavior is a sin. Although the Church offers "homosexuals" compassion as people, it does not tolerate what it considers sinful actions.<sup>93</sup> Georgetown University, as part of the Catholic *nomos*, did not directly ostracize gay men, lesbians, and bisexuals; it did oppose homosexual activity, however, and refused to include groups within its institutions which it thought would encourage such activity. Thus, the starting point for Mack's analysis was the "deeply rooted doctrine that a constitutional issue is to be avoided if possible," and her opinion read the Human Rights Act "so as to avoid difficult and sensitive constitutional questions concerning the scope of the First Amendment," specifically its Free Exercise and Free Speech Clauses.<sup>94</sup>

Yet Judge Mack's opinion also recognized the birthing of a new *nomos*: the gay and lesbian community.<sup>95</sup> Though multifariously different from the Catholic Church, this community shares many of its nomic characteristics, including common experiences that have engendered a shared framework of thinking about a wide range of issues; formal organizations for reporting and comparing those experiences, expressing group identity, and developing group positions; and a collective commitment to implementing shared values in people's lives. Like other nonreligious nomic communities, the gay community's insularity is not protected by the Free Exercise Clause, but is protected by the First Amendment's other guarantees of free speech, association, and assembly. Potentially, the Equal Protection Clause shields gay, lesbian, and bisexual communities, as vulnerable and unpopular minorities, against arbitrary state intrusion, a point explicitly invoked by Judge Mack.<sup>96</sup> She upheld the Human Rights Act requirement that Georgetown provide facilities and services to the students, because the burden on the university's free exercise and speech was justified by the compelling state interest in ameliorating discrimination on the basis of sexual orientation.

The objections to Judge Mack's resolution are serious, however. Judge Ferren charged that her interpretation of the statute "permits a 'separate but

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92. Cover, *supra* note 6, at 12–13.

93. See The Vatican's Congregation for the Doctrine of the Faith, *The Pastoral Care of Homosexual Persons*, 16 ORIGINS 377 (1986) (letter to Catholic Bishops, urging them to exclude from pastoral programs organizations in which "homosexuals" participate "without clearly stating that homosexual activity is immoral").

94. *Gay Rights Coalition*, 536 A.2d at 16 (opinion of Mack, J.) (citing *NLRB v. Catholic Bishop*, 440 U.S. 490, 507 (1979) (refusing to interpret federal labor law to regulate employment conditions of lay teachers at parochial schools)).

95. See *id.* at 31–38.

96. See *id.* at 37; see also *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated*, 875 F.2d 699 (9th Cir. 1989) (en banc) (holding sexual orientation to be "suspect" classification, in part because gay people are politically vulnerable "discrete and insular minority") (quoting *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938)); *Commonwealth v. Wasson*, 842 S.W.2d 487, 499–500 (Ky. 1992) (applying *Watkins*'s heightened scrutiny because homosexuals "'form virtually a discrete and insular minority'") (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1616 (2d ed. 1988)); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (discussing applicability of strict scrutiny to homosexuals).



equal' access to university facilities reminiscent of the justification that once permitted blacks on public buses, but only in the back."<sup>97</sup> Would the court allow a fundamentalist Protestant college, such as Bob Jones University, to refuse recognition to a student group that favored interracial dating and marriage, practices that are antithetical to Bob Jones's interpretation of the Bible? Would such action not be simple race discrimination that would justify the incidental burdens on free speech and expression? The 1983 Supreme Court decision in *Bob Jones University v. United States*<sup>98</sup> supports Ferren's argument. There, a near-unanimous Court interpreted the Internal Revenue Code to strip Bob Jones of its exemption as a charitable institution because the school discriminated on the basis of race in admissions and internal student affairs. Bob Jones argued that its underlying policy, the prohibition of interracial dating, was mandated by its fundamentalist religious beliefs. The Court assumed that Bob Jones's free exercise of religion was substantially burdened but unanimously rejected the constitutional attack because the burden served the "fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history."<sup>99</sup> Precisely the same point could be made in the Georgetown case: Burdens on the university's free exercise of religion serve the fundamental, overriding interest in eradicating sexual orientation discrimination in education—discrimination that prevailed, with official approval, for most of this century.

Judge Belson charged that Judge Mack's interpretation forced a Catholic institution to support students in sacrilegious advocacy and pornography. Judge Nebeker's pictures feature substantially naked men with lewd expressions.<sup>100</sup> According to Belson, this was not just a burden on free expression and the exercise of faith; it was state direction to church officials to violate their faith. He argued that "Georgetown has a free speech" and a free exercise "right not to endorse or subsidize the groups' promotion of ideas with which it disagrees," particularly when that disagreement is a matter of well-documented religious faith.<sup>101</sup> His argument is supported by the Supreme Court's decision in *Wooley v. Maynard*,<sup>102</sup> where the Court held that the First Amendment prevented New Hampshire from requiring a Jehovah's Witness couple to

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97. *Gay Rights Coalition*, 536 A.2d at 49 (Ferren, J., dissenting in part). As I explain later in this Part, the more precise race analogy would be the "with all deliberate speed" directive for school desegregation in *Brown v. Board of Education*, 349 U.S. 294 (1955) (*Brown II*).

98. 461 U.S. 574 (1983); see also PHILIP B. HEYMANN & LANCE LIEBMAN, *THE LEGAL RESPONSIBILITY OF LAWYERS: CASE STUDIES* 139 (1988) (providing background of *Bob Jones* policies). Cover, *supra* note 6, at 63–68 (criticizing Court's decision in *Bob Jones*).

99. *Bob Jones*, 461 U.S. at 604.

100. See *Gay Rights Coalition*, 536 A.2d at 76–78 (Nebeker, J., concurring in part and dissenting in part).

101. See *id.* at 68 (Belson, J., dissenting in part); see also *id.* at 71–72 (Belson, J., dissenting in part) (making same point regarding free exercise right).

102. 430 U.S. 705 (1977).

display the state motto, "Live Free or Die," on the license plate of their car. Because the state measure "force[d] an individual, as part of his daily life . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," it implicated core First Amendment interests,<sup>103</sup> whose sacrifice was hardly justified by the administrative (traffic control) and ideological (state pride) reasons advanced by the state.<sup>104</sup> So, too, in the Georgetown case, the state measure forced a Roman Catholic institution and its priests, as part of their daily lives, to be an instrument for fostering public adherence to an ideological point of view they found unacceptable and contrary to their religious tradition.

The common ground for Judges Mack, Ferren, and Belson was that two norms (nondiscrimination and free exercise/speech) were colliding, and their collision reflected two nomic communities in fundamental conflict. The judges differed over how best to resolve disputes among those colliding norms and how to calibrate the legal entitlements of the clashing groups. Only Judge Mack conceded that the precedents did not resolve the case for the court. Authorities like *Wooley* demonstrated that the case implicated Georgetown's free speech and free expression, but authorities like *Bob Jones* demonstrated that reducing historical discrimination was a compelling state interest that could justify some burdens on First Amendment interests. Both *Wooley*, where the state interests were so weak, and *Bob Jones*, where the state interest of reducing racial discrimination was exceptionally important, were easier cases than Georgetown's case, however.<sup>105</sup>

The most striking aspect of Judge Mack's opinion is its avoidance of traditional rights discourse and its focus instead on community needs and

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103. *Id.* at 715.

104. *See id.* at 716–17. The *Wooley* rule against forced speech was derived from *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which held that school children cannot be required to pledge allegiance to the flag if the pledge is inconsistent with their religious belief, and was applied in *Pacific Gas & Electric Co. v. Public Utilities*, 475 U.S. 1 (1986), to prevent the state from requiring a public utility to act as a conduit for an ideological message with which it disagreed.

105. *Bob Jones* poses the greater challenge to Judge Mack's position, because Mack joined Judge Newman's concurring opinion, which found the District's interest in eliminating *sexual orientation* discrimination no less important than the compelling, and quasiconstitutional, interest in eliminating *racial* discrimination. *See Gay Rights Coalition*, 536 A.2d at 46 (Newman, J., concurring). Because Judges Ferren and Terry also joined that part of Judge Newman's opinion, that part was the only reasoning that commanded a majority (four of seven) of the en banc court. This presented Judge Mack with a dilemma. Probably, she would have required Georgetown (or a Bob Jones-like university) to recognize an African-American student group and would have overridden free exercise objections. But if fighting sexual orientation discrimination is just as compelling a state policy as fighting racial discrimination, as Mack and three colleagues expressly held, why should a university be able to escape recognizing a sexual orientation-based group, when it would have to recognize a race-based group notwithstanding religious objections?

One way to resolve Judge Mack's dilemma would be to read *Bob Jones* narrowly. Cover, *supra* note 6, criticizes the Court's decision for disrespecting the religious community without taking stronger responsibility for the act of jurisprudence. *See also* WILLIAM N. ESKRIDGE, JR. & PHILIP B. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 826–28 (2d ed. 1995). Notably, the decision has not been applied by the Court to restrict nomic community in other contexts and may be a constitutional outlier.

nomic interests. Rather than speaking accusatorially of the "violation" of Georgetown's free exercise "rights," or of Georgetown's violation of the students' rights of "full citizenship" and association in the university community, as did her dissenting brethren, Mack discussed the "burden . . . on Georgetown's religious exercise," and the "interest" of the larger community in eliminating discrimination based on sexual orientation.<sup>106</sup> In her treatment of the colliding norms—free speech/free exercise of religion versus nondiscrimination—Mack's opinion was even more distinct from those of her brethren, for she was open to long-submerged voices while also seeking reasonable accommodation of their needs. Analyzing the District's interest in nondiscrimination, amply revealed in the legislative history, Mack subjected the Council's findings to independent but sympathetic examination in light of the history of society's understanding of homosexuality. She expanded the record to consider information about the benign nature of sexual variation, the needless persecution of gay men and lesbians, and the ways in which such persecution demeans the whole political community.<sup>107</sup>

While Judge Mack's accommodationist approach is subject to the charge that she was just splitting the difference for political rather than principled reasons, the approach can pragmatically be defended as Solomonic. Elsewhere, I have praised this approach to colliding norms by appealing to feminist and republican theories of law.<sup>108</sup> Here, I appreciate her approach and her resolution from the perspective of a gaylegal jurisprudence. Reading my account of the debate within the court, the reader might be surprised that the Gay Rights Coalition argued for the Mack position, not for the Ferren position. There were strategic considerations involved in the students' arguments,<sup>109</sup>

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106. *Gay Rights Coalition*, 536 A.2d at 31 (opinion of Mack, J.) Compare *id.* (opinion of Mack, J.), with *id.* at 56–60 (Ferren, J., dissenting in part) (emphasizing students' rights to "full citizenship" in university community as guaranteed by Human Rights Act), and *id.* at 67–74 (Belson, J., dissenting in part) (repeating focus on Georgetown's "rights" and evils of state "compulsion"), and *id.* at 75 (Nebeker, J., dissenting in part) (raising similar arguments). For a detailed statement of Judge Mack's position, see also *id.* at 30–39 (opinion of Mack, J.).

107. See *id.* at 33–38 (opinion of Mack, J.).

108. See ESKRIDGE, *supra* note 81, at 185–92. For discussion of the development of feminist and republican jurisprudence, see Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Margaret Jane Radin, *The Pragmatist and the Feminist*, in PRAGMATISM IN LAW AND SOCIETY 127 (Michael Brint & William Weaver eds., 1991); and Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

109. Vacating the panel opinion by Judge Ferren, with Judge Mack in partial dissent, the Court of Appeals agreed to hear the case en banc without even waiting for a motion from Georgetown. This was a signal that there was not a court majority for the Ferren position, and there were good strategic reasons for the students to tack to new winds. According to Lori Jean (one of two lead student plaintiffs) and the students' attorney, Richard Gross, the plaintiffs were originally reluctant to argue the Mack position but were persuaded to do so because there was no other way to win the case. See GULC/B1-LAGA Oral History of Gay Rights Coalition, Interview Tapes for Lori Jean (Aug. 8, 1991) and Richard Gross (Sept. 15, 1991). They were ultimately delighted that her position prevailed.

but in my view they reflected jurisprudential insights of the gay experience as well. Inspired by the many lessons of the coming-out experience, gaylegal jurisprudence, as I would articulate it, provides ideas that help reconcile the colliding commitments of our polity to both equality and liberty, to nondiscrimination, free exercise, and free speech.

### B. *Coming Out of the Closet: A Linguistic Archaeology*

The political precepts and phenomenological claims by which Judge Mack defended the District's compelling concern with sexual orientation discrimination merit further exploration. An implication of the District's Human Rights Act is that lesbians, gay men, and bisexuals ought to be able to "come out of the closet" at school, in public accommodations, and in the workplace. The morphogenesis of the phrase "coming out of the closet" tells much about the history of homosexuality in this century and is a useful prelude to deriving legal insights from it. Perhaps surprisingly, the phrase itself is a historically recent conflation of two different but related terms, "coming out" and "the closet," both of which assumed politicized and sexualized meanings after World War II.

Homosexual activity has been secretive this entire century, and the closet has long been a metaphor for secrecy,<sup>110</sup> but it was not until mid-century that the closet became such a key metaphor for the secrecy entailed in sexuality, especially deviant sexuality. An early example is John Horne Burns's *Lucifer with a Book*, a novel about budding sexuality in a New England boys' school.<sup>111</sup> Homosexuality is nowhere explicit, but its force saturates the novel. The central character, instructor Guy Hudson, is a scarred war hero of intense but ambiguous sexuality; he is an erotic magnet attracting both students and colleagues, women and men, promiscuous and prim alike, but the only clue as to his own sexuality is a lewd but ambiguous Renaissance print he keeps in his dormitory closet.<sup>112</sup> Other characters pry into the closet to glimpse that sexuality,<sup>113</sup> and this ultimately contributes to Hudson's expulsion from the school.<sup>114</sup> The probable cultural reference is to the idea of deviant

110. Samuel Warren and Louis Brandeis wrote of the press's ability to assure that "what is whispered in the closet shall be proclaimed from the house-tops." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

111. JOHN HORNE BURNS, *LUCIFER WITH A BOOK* (1949).

112. The etching kept in the closet was of three people writhing in sexual ecstasy. The implication is that a blond man is deriving sexual pleasure from intercourse with both a man and a woman. *See id.* at 105-06.

113. Ralph DuBochet, a student attracted to Hudson, forms an ambiguous link with Hudson when he surprises him looking at the closeted etching, *see id.*, but Hudson rebuffs further efforts at intimate connection by refusing to "uncloset" the etching to Ralph again, *see id.* at 132-33.

114. When the school turns militarist under the leadership of a bachelor professor who is fascinated with and repelled by Hudson's closet, and of a stormtrooper student who tries to penetrate Hudson's closet in a clumsy seduction attempt, they turn on the man who rebuffed them. The bachelor professor even invades Hudson's closet and exposes his polymorphous sexuality.

sexuality as a "skeleton in the closet," a connection explicitly made in the 1950s.<sup>115</sup> By the 1960s, homosexuals who were completely secretive about their sexual preferences or experiences were known as "closet queens" (men) and "lace curtains" (women).<sup>116</sup> As a metaphor for homosexuality in particular, and perhaps sexuality more generally, the closet combined themes of secrecy, shame, and mystery.

The concept of "coming out" has a different history and a multiplicity of homophile meanings. One was entry into gay subculture, like the "coming out" of a debutante entering into society. "'I've been invited to a faggot party,'" matinee idol Ronald Shaw told Jim Willard in Gore Vidal's *The City and the Pillar*. "'I'll take you. It can be your coming-out party in New York.'" <sup>117</sup> Vidal used the term broadly, to connote any activity through which one associated oneself with the subculture, but by the late 1950s the term had a more specialized meaning in some circles: one's first intimate experience with someone of the same sex, a kind of baptism into gay society.<sup>118</sup> A man might realize he is gay and hang around with homosexuals, but he had not "come out" until he had sex with another man.

By the 1960s, some gay people were using "coming out" as an expression for the homosexual's sharing her or his own private disapproved identity, his or her "skeleton in the closet," with people not known to be homosexual.<sup>119</sup> By then, the closet had become a metonym for what one writer called "the absolute necessity for secrecy from the majority (which, immediately, included your family and the police, but also all other heterosexuals) regarding the truth of your sexuality,"<sup>120</sup> and coming out connoted one's willingness to share this secret with outsiders: "You, as a homosexual, know that your 'coming out'

115. For a later reference to homosexuality as a "private skeleton in the closet," see Marlin Prentiss, *Are Homosexuals Security Risks?*, ONE, INC., Dec. 1955, at 4.

116. Michelle Duloc & Rene Autil, *Fluff, Buff, and Butch: Spy vs Spy vs Yourself*, VECTOR, July 1968, at 11; see also Samuel R. Delany, *Coming/Out*, in *BOYS LIKE US: GAY WRITERS TELL THEIR COMING OUT STORIES* 1, 14 (Patrick Merla ed., 1996) (explaining that "closet queens" were men who enjoyed fact that their families and friends did not know of their deviant sexuality).

A competing metaphor for the closet was the masquerade. See, e.g., Lisa Ben, *Masquerade*, VICE-VERSA, Oct. 1947, reprinted in LADDER, Oct. 1958, at 6-10, 26-29. Sharing one's secret orientation with others was considered discarding or taking off the mask. See, e.g., Bob Bishop, *Discard the Mask*, MATTACHINE REV., Apr. 1958, at 14-16, 21-24. The closet metaphor did not overtake the mask metaphor until the 1960s.

117. GORE VIDAL, *THE CITY AND THE PILLAR* 172 (rev. ed. 1965). The quotation in the text is from the novel as revised by Vidal. The original 1948 edition read "You can come with me if you want to. You'll meet most of the prominent ones in town; I think it'd be fun." GORE VIDAL, *THE CITY AND THE PILLAR* 233 (1948).

118. See, e.g., Delany, *supra* note 116, at 13; Andrew Holleran, *Memories of Heidelberg*, in *BOYS LIKE US*, *supra* note 116, at 88, 97.

119. See Barbara Stephens, *The Coming Out of Martos*, LADDER, May 1958, at 14-16, 25-26. Roger Austen refers to John Horne Burns's statement, apparently made during the 1950s, that writing *Lucifer with a Book* reflected Burns's decision to "come out of the cloister." Unfortunately, Austen provides no reference or precise date for this quotation. See ROGER AUSTEN, *PLAYING THE GAME: THE HOMOSEXUAL NOVEL IN AMERICA* 110 (1977).

120. A.E. Smith, *Coming Out*, ONE, INC., June 1962, at 6, 7.

changed your whole life. It was like coming out of a cocoon. The world thereafter to you was a whole new world."<sup>121</sup> That many homosexuals felt an impulse to "come out" in the early 1960s reflected a shift in the culture of the closet, either a reduction in its shame or a determination that personal integrity outweighed the shame. Nonetheless, before 1969, it was just as likely that the homosexual would be cast out of the closet by the police state as by his or her own free will. To fight against "homosexual recruiting of youth," for example, Florida's Legislative Investigation Committee wrote in 1964, "the closet door must be thrown open and the light of public understanding cast upon homosexuality."<sup>122</sup>

Yet because sexuality was perceived as a personal truth, and because the closet was considered suffocating, gay people did increasingly share their secrets in the 1960s. They did so not just for reasons of personal integrity or emotional survival, but as a collective strategy for fighting anti-gay laws. As Ernestine Eckstein, Vice President of the New York Chapter of Daughters of Bilitis put it, "[h]omosexuals are invisible, except for the stereotypes, and I feel homosexuals have to become visible and to assert themselves politically . . . . They have to come out on behalf of the cause and accept whatever consequences come."<sup>123</sup> As lesbians and gays came to realize that their political survival depended upon open protests against antihomosexual policies, they urged closet queens and lace curtains to "[c]ome out, come out wherever you are . . . preferably to the open door of the S.I.R. Center," a San Francisco gay rights group.<sup>124</sup>

The gay liberation that followed the Stonewall riots of June 1969 saw "coming out of the closet" congeal into the catch phrase of a generation.<sup>125</sup> Building upon the "gay is good" features of the 1960s homophile movement, the Stonewall generation not only definitively associated coming out with the destruction of the closet, but also deepened and transformed the meaning of the particular phenomenon. Coming out as lesbian, gay, or bisexual now is viewed as telling outsiders, not just insiders, about one's sexual identity. It no longer is understood merely as a discrete personal discovery and expression of one's sexuality, but is now seen as a process of continual discovery and exploration

121. *Id.*

122. FLORIDA LEGISLATIVE INVESTIGATION COMM., *HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA*

14 (1964). Earlier in the report, the Committee quoted an investigator, who said:

"Since the homosexual has seen fit to come out into the open and get himself accepted by society, I think it is about time that thinking members of society . . . realize that if we don't stand up and start fighting, we are going to lose these battles in a very real war of morality."

*Id.* For a poignant example of this phenomenon from the South of the 1950s, see Allan Gurganus, *He's One, Too*, in *BOYS LIKE US*, *supra* note 116, at 40, 40-72.

123. Kay Tobin & Barbara Gittings, *Interview with Ernestine [Eckstein]*, *LADDER*, June 1966, at 4, 9; see also James Colton, *The Homosexual Identity*, *LADDER*, Sept. 1968, at 4-8.

124. Duloc & Autil, *supra* note 116, at 11.

125. See, e.g., *OUT OF THE CLOSETS: VOICES OF GAY LIBERATION* (Karla Jay & Allen Young eds., 1972).

made possible through liberation from the clichés of “compulsory heterosexuality.”<sup>126</sup> No longer a debutante’s entry into the society of deviance, coming out is now viewed in quasi-religious terms, like being “born again” or baptized into a society that is spiritual as well as physical.<sup>127</sup> Most important, coming out is an act of community, through which the uncloseted individual both joins a subculture and becomes an ambassador at large of that subculture as well. The post-Stonewall understanding of coming out of the closet has implications for American law as well as culture.

### C. *A Jurisprudence of Coming Out as a Source of Legal Principles*

The foregoing account helps to situate the Georgetown case both historically and jurisprudentially. The students’ desire to form a campus group was an effort to oppose the sexual closet at all levels. Students would find a supportive group as they struggled with issues of their sexuality; a lesbian and gay *nomos* would be established at Georgetown, one that was linked to the larger subculture thriving in the District of Columbia; and gay political power would be asserted against the shame of the closet. In the 1950s and 1960s, the students’ individual and collective coming out would have been the object of state persecution in the District. By the 1970s and 1980s it was the object of explicit state support: the Human Rights Act. In the 1950s and 1960s, Georgetown could remain on the sidelines, silently going along with the state-sanctioned “apartheid of the closet.” By the 1970s, Georgetown was involved against its will, and in the 1980s it was subjected to a court order that it felt trenched on both religious and expressive liberties that its lawyers insisted were protected by the First Amendment.

Coming out as an intellectual phenomenon also helps us think about the Georgetown case at a more general level. As Eve Sedgwick has argued, coming out of the closet is a metaphor that transcends homosexuality.<sup>128</sup> For example, it is possible for someone to come out as a fat person, and an openly gay person can still be in the closet about his HIV status, attraction to children, or leather fantasies. Sedgwick maintains that the closet has become a reigning metaphor for sexuality and knowledge. The phenomenology of coming out has distinct metaphorical possibilities for thinking about issues of law. Specifically, there is a jurisprudence suggested by the coming-out experience that can

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126. The term originated in Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in POWERS OF DESIRE: THE POLITICS OF SEXUALITY 177 (Ann Snitow et al. eds., 1983). The point in the text reflects women’s different experience in particular. Although lesbians contributed to the “coming-out discourse,” see *supra* notes 116, 123, 125, it was primarily a male discourse describing gay and bisexual men’s experience. Women’s experience of sexual self-identity has tended to be more fluid or gradual and less act-oriented than that of men. See James T. Sears, *The Impact of Gender and Race on Growing Up Lesbian and Gay in the South*, 1 NAT’L WOMEN’S STUD. ASS’N J. 422, 437 (1989).

127. See, e.g., Dennis Hunter, *The Cure*, in BOYS LIKE US, *supra* note 116, at 284, 292.

128. See SEDGWICK, *supra* note 27, at 72; see also Yoshino, *supra* note 35, at 1794–802.

generate ideas relevant to the collision of liberty and equality norms in cases like *Gay Rights Coalition*. Although the ideas suggested by my reading of the coming-out experience are not unique to gaylaw, they are distinctive to it, and to the extent they are consonant with precepts drawn from other sources, such as feminism, their persuasive power is thereby increased.

### 1. *The Value of Identity Speech and Some Asymmetries*

Once a culture has elevated one personal trait to the level of an identity characteristic, that characteristic becomes socially relevant. When a socially relevant trait such as sexuality or religion is not immediately apparent, the individual runs the risk of deceiving others—or of losing social, economic, or political opportunities—if she or he does not reveal her identity, usually through expression (“I am a lesbian”) or expressive conduct (sporting a pink triangle). The value of identity speech is greatest for the minority. The person whose trait is widely shared need not say anything, for her correct identity will be presumed in the absence of rebuttal. Indeed, most of the time it will unconsciously be presumed both by the person and her interlocutors. For the minority person, the identity trait will loom larger. Unfortunately, it is both more important and much harder for her to self-identify.

Self-identification for a gay person is particularly important because, left uncorrected, the default assumption of “normalcy” will create a misleading basis for her relations with others, and because disclosing her actual sexual orientation offers the possibility of forging deeper connections with other minority members, visible and invisible alike. Self-identification is also much harder for her, because she must then fear the disapproval or ostracism of the majority. This is the dilemma of the closet: The closet is a temptingly safe hiding place, but it forecloses psychological, social, and political opportunities. The closet diminishes not only the integrity of its denizens, but also their mental health. Those bearing socially disapproved identity traits tend to internalize society’s disapproval. A wide variety of psychologists have found that internalized homophobia, in particular, obstructs the development of an emotionally healthy life for the gay person, and that the best-adjusted gay individuals have gone through a process of “acceptance and appreciation” of their sexual identity.<sup>129</sup> Virtually every coming-out story is a story of relief that its teller can feel honest about herself and free to make her life good.

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129. John C. Gonsiorek & James R. Rudolph, *Homosexual Identity: Coming Out and Other Developmental Events*, in *HOMOSEXUALITY*, *supra* note 76, at 161 (surveying psychological literature and setting forth model of healthy psychological development that depends on gay person’s comfort); *see also* J. Schippers, *Gay Affirmative Counseling and Psychotherapy in the Netherlands* (1990) (unpublished manuscript) (noting that “acceptance and appreciation process” better captures the coming to terms with gay self-identity, especially for lesbians, than “coming out”), *discussed in id.* at 169.



Homosexual self-identification is also crucial for the formation of a lesbian and gay *nomos*, consisting of discernibly gay history, institutions, and mores, and is essential to gay political power as well. The gay experience reinforces the feminist idea that the personal is political; coming out of the closet as a gay person is also an explicitly political act.<sup>130</sup> The anonymity of closeted homosexuals in the 1950s was key to their political marginalization and contributed to antihomosexual stereotypes; because folks did not realize that their friends and family were gay, they were more likely to believe that homosexuals were lonely, psychopathic, and dysfunctional.<sup>131</sup> The closet also disabled gay people from forming social and political groups. Hence homophobes were able to persecute gay people virtually at will, without political or social repercussion. Only after a significant number of gay people came out—or were cast out—of the closet did the polity let up on persecuting gays generally, in response to organized gay pressure groups and noisy social activism.<sup>132</sup>

Consider this final twist. Once minorities become more salient through identity speech, the majority has an incentive to speak too. Minority speech destabilizes the norm, which then loses its social invisibility. At that point, individuals or groups in the majority will speak out, to assert or reassert their identity. Typically, there will still be an asymmetry, as the majority will tend to self-identify in negative rather than positive ways. Rather than saying, “We are good old-fashioned heterosexuals,” the majority will say things like, “I’m no pansy,” or “Those people are sick,” or “Our way of life is threatened.” Note the irony. In the regime of the closet, the “deviant” views herself in a negative way, as “not normal.” Once the closet door flies open and former “deviants” proclaim themselves normal, many in the mainstream initially find themselves in a state of denial (no, those “queers” are not normal), and many of the deniers will root their identity more explicitly in what they are not.

## 2. *The Social Costs of Suppressing Identity Speech: Perversion of Identity, Empowerment of the Vicious, and Social Anger*

Suppression of identity speech is harmful at three distinct social levels: It undermines the flourishing of individuals, their nomic communities, and the polity itself. At the first level, identity speech suppression places citizens in a double bind in which they can either lie and sacrifice their personal integrity,

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130. See *Gay Law Students Ass’n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 610-11 (Cal. 1979) (holding that self-identity of gay people is “political expression” under California law).

131. See Colton, *supra* note 123, at 4-5.

132. See Eskridge, *supra* note 4; see also BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (1987); Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 719-21 (1985) (discussing special organizational problems faced by “anonymous” and stigmatized minorities).

or speak out and feel the wrath of authority.<sup>133</sup> Each choice entails psychological pain or dysfunction for those censored. If the person admits her sexual orientation, she faces potentially paralyzing social ostracism and professional ruin; if she conceals her sexual orientation, she will be stunting and perhaps even destroying her psychological development. Living a lie by outwardly conforming to compulsory heterosexuality harms those living it by giving their lives a mark of inauthenticity, disrupting their relationships with others, and hurting those whom they marry or otherwise implicate in the lie.<sup>134</sup> The double bind may work even worse than that, as the censored individual often lies for awhile and then is destroyed when the truth somehow escapes.<sup>135</sup> The suffocating effects of the closet are illustrated by exceedingly high suicide rates for bisexual and gay teenagers<sup>136</sup> and by the loneliness and anomie depicted in autobiographical or even fictional accounts of unfulfilled lives.<sup>137</sup> The worst creatures of the closet are the individuals who triumph over the censorship by becoming supercensors, trumping accusations of illegal identity with counteraccusations of their own. Joe McCarthy, J. Edgar Hoover, and Roy Cohn were such demons of the closet.<sup>138</sup>

Suppression of identity speech may have social consequences, as it potentially inhibits or distorts the flourishing of nomic communities. A *nomos* is a chain of interlocking identities, linked to the past by stories of struggle and identification. The lesbian and gay *nomos* is one marked by the recognition by each new generation that its members feel attraction to persons of the same

133. On the double bind, see SEDGWICK, *supra* note 27, at 69–71; and Janet Halley, *The Construction of Heterosexuality*, in FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY 82, 82–99 (Michael Warner ed., 1993).

134. On the price of the double bind to human beings thus stigmatized, and their partners, see BRUCE BAWER, A PLACE AT THE TABLE: THE GAY INDIVIDUAL IN AMERICAN SOCIETY 106–07 (1993); LAUD HUMPHREYS, OUT OF THE CLOSETS: THE SOCIOLOGY OF HOMOSEXUAL LIBERATION (1972); Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, in HATE CRIMES 207 (Gregory M. Herek & Kevin T. Berrill eds., 1992); Sue Kiefer Hammersmith & Martin Weinberg, *Homosexual Identity: Commitment, Adjustment, and Significant Others*, 36 SOCIOLOGY 56 (1973); and Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in HOMOSEXUALITY, *supra* note 76, at 60. See generally GORDON W. ALLPORT, THE NATURE OF PREJUDICE (1954) (discussing destructive effect of prejudice on its objects).

135. For the most fascinating legal examples, see *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009 (1985); and *Acanfora v. Board of Education of Montgomery County*, 491 F.2d 498 (4th Cir. 1974).

136. See Paul Gibson, *Gay and Lesbian Youth Suicide*, in U.S. DEP'T OF HEALTH & HUMAN SERVS. YOUTH SUICIDE REPORT 110 (1989) (explaining how social stigma of homosexuality and lack of support from families and peers lead directly to high suicide rates for lesbian and gay adolescents).

137. See, e.g., JAMES BALDWIN, GIOVANNI'S ROOM (1956); LILLIAN HELLMAN, THE CHILDREN'S HOUR (1934).

138. Cohn was clearly a gay man, see NICHOLAS VON HOFFMAN, CITIZEN COHN (1988), and the bachelor Senator Joseph McCarthy operated under that suspicion, which he sought to allay by marrying his longtime assistant, Jean Kerr, in 1953, see DAVID M. OSHINSKY, A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY 310–11, 328–29 (1983). There is substantial but unverified evidence that J. Edgar Hoover was a cross-dressing homosexual married for 40 years to his best friend and deputy, Clyde Tolson. See ANTHONY SUMMERS, OFFICIAL AND CONFIDENTIAL: THE SECRET LIFE OF J. EDGAR HOOVER (1993). It is clear that Tolson and Hoover shared an emotional intimacy and association without any other close parallel in Hoover's life.

sex, and that these new personal narratives relate to those of the previous generation as well as those of the new generation. In this century, the American state has sought to disrupt the lesbian and gay *nomos* for its deviance, but the gay experience has been that censorship more readily perverts than destroys. This was also the consequence of Bismarck's anti-Catholic Kulturkampf. State persecution stiffened the resistance of German Catholics, and made them more determined to preserve their culture.<sup>139</sup> When a state seeks to destroy a *nomos*, its legacy can be anger or a hardening of identity or a politicizing of a previously unorganized group.

Even when the state campaign is more successful, its legacy tends to be a *nomos* of fear and hiding. Consider this parallel. Between 1391 and 1478, powerful popular and political forces in Spain sought to erase Judaism in an early example of Kulturkampf.<sup>140</sup> Although attacks on the Jews impelled many to convert to Christianity, these forced conversions perverted Spain as well as its Christianity. The "Old Christians" never trusted the "New Christians." The Inquisition, a national calamity, was invited to Spain to root out Jewish practices among the *conversos*. Although Jewish nomic identity was diminished, it was not publicly erased until the Jews' expulsion from Spain in 1492. Even after 1492, Judaic tradition survived among the "secret Jews," Marranos who passed as Catholic but continued to practice their religion notwithstanding the Inquisition.<sup>141</sup> Today, centuries after the Inquisition and after their families fled Spain, a few Marranos remain "closeted," ostensible Catholics who maintain their Jewish heritage. Something culturally good is lost when fine people live in such fear of nonconformity, and something culturally dangerous is instantiated if the majority's values become universal by force rather than persuasion.

Admittedly, we would all be better off without some nomic communities. One problem is making the correct choices. The bad *nomoi* on my list (private militias) are not on yours (liberal academia). Another difficulty is that a campaign of identity suppression may have the effect of reinforcing the identity it is trying to suppress. Not only is it futile for the state to tell us who we can be, but the state's telling also helps mold a coherent identity for some of those lectured. The best example of that process is America's first full-fledged effort to censor homosexual identity. During World War II, the United States sought to identify homosexual recruits so that they could be excluded from military service. The interrogations "discovered" few homosexuals, but

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139. See SMITH, *supra* note 11, at 42-47.

140. See generally NETANYAHU, *supra* note 30

141. The story of the "secret Jews" is told in TRUDI ALEX, THE MEZUZAH IN THE MADONNA'S FOOT 253-92 (1993), and is discussed in Chai R. Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 327-30 (1996). The Alexy account is anecdotal and should be discounted by the scholarship of Ben Zion Netanyahu, who demonstrates that most Marranos abandoned their Jewish faith and that very few "secret Jews" remained in Spain when the Inquisition was established in 1482. See NETANYAHU, *supra* note 30, at xvii-xxi.

thousands were first alerted to their possible homosexual orientation by the official quizzing.<sup>142</sup> Both stigmatized and traumatized by state interrogations and occasional witch hunts, the closeted homosexuals in the armed forces formed clandestine subcultures under the noses of the military's psychiatric gendarmerie.

The destruction of the lives of individuals and the creation of secret *nomoi* without good cause are morally wrong. What counts as "good cause" is a point of contest. Intolerant priests in the fifteenth century thought Spanish Jews were an irritant to Spanish society; Bismarck thought Roman Catholics impeded the formation of a national social and political culture; Senator Edmunds thought that Mormons threatened the family and, with it, the state; politicians during the McCarthy era thought homosexuals both immoral and subversive (subject to blackmail). In all these instances—the classic *Kulturkampfs*—groups were vilified by reference to their affront to popular feelings and without any showing that they harmed other people. Such speculative and usually makeweight harm cannot justify *Kulturkampf*, either as a matter of social justice or, in the United States, of the First Amendment's protection of nomic pluralism.<sup>143</sup> Even when society is justified in suppressing a *nomos*, it needs to consider the harms engendered by the process of suppression. As a political matter, censorship is unhealthy in two different ways. On the one hand, by expending so much social effort in hunting and hiding, the state is squandering valuable human resources that could be used more productively. At the very level of two-person cooperation, when one person feels she has to be guarded and secretive about herself, the whole enterprise of cooperation will be compromised, if only a little. Multiplied manifold, this social loss is very significant.

On the other hand, suppression creates unnecessary risks for a society, especially the possibility of a malignant dynamic of anger, as it raises the stakes of clashing nomic communities. When the state makes it a crime to express oneself as a Jew, as a lover of Africans, or as a homosexual, the state is likely to embitter the objects of the suppression and to empower its own worst bigots. As to the latter, the person who is most likely to enforce rules of suppression is someone who feels the most intense animosity toward the targeted class, often people who themselves resent being members of the class. By empowering such people, the state is giving its most potentially vicious citizens power over its most vulnerable. This is not only cruel but counterproductive, as it creates resistance among the vulnerable, and even anger that can spill over into violence. By demonizing a vibrant nomic

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142. See ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR TWO* (1990).

143. The First Amendment even protects the Ku Klux Klan from *Kulturkampf*, unless its members tangibly harm other people, see *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and sometimes even then, see *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

community, the state is inviting social turmoil. Kulturkampf is politically destructive as well as morally squalid.

### 3. *The Connection Between Private Discrimination and Public Censorship*

The main lesson suggested by the experience of the closet and the impulse to come out is the value of uncloseted identity speech. Suppressing such expression generates horrendous costs and should be avoided if possible. Gay experience suggests the many ways identity expression can be suppressed. A minority identity can be silenced by direct prohibition or by indirect threat of losing promised benefits, by pain of criminal sanction or of civil penalties, and by private as well as public sources of power. Generally, the jurisprudence of coming out reinforces the interconnection between the anticensorship and nondiscrimination principles suggested by the religion cases. Specifically, identity is just as easily closeted by private discrimination as it is by public censorship. Consider how they relate in the Georgetown case.

The case involved two different kinds of identity-speech claims, both treated in Judge Mack's opinion. Georgetown argued that it was discriminating, if at all, only on the basis of the students' expression and not their sexual orientation.<sup>144</sup> Because only the latter was forbidden by the Human Rights Act, the university maintained that the former was legal. Judge Mack properly rejected this argument. Lesbians and gays are discriminated against by being forced into a closet; hence, claims of discrimination on the basis of sexual orientation and censorship on the basis of sexual expression merged in the Georgetown case. Indeed, nondiscrimination cases usually involve this kind of relationship. Discrimination on the basis of identity is a way of undermining a *nomos*, and prohibiting such discrimination limits the ability of institutions to censor their members' expression through their politics of presence.

Georgetown also argued that requiring it to recognize the gay student groups would be censorship of its identity as a Catholic-affiliated institution. By refusing to recognize the gay groups, Georgetown was expressing its identity as an institution supporting Roman Catholic values and that faith's intellectual tradition. This claim is admissible. If (indeed, *because*) the gay students wanted to express their identity and connection with larger lesbian and gay culture, Georgetown wanted to express its identity as a Roman Catholic institution. Forcing Georgetown to recognize the gay student groups could

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144. Note that if Georgetown were a public university subject to the First Amendment but not an antidiscrimination law, it would probably have denied it was excluding the gay group because of the students' *expression* and contended that it was only considering their sexual orientation and its associated *behavior*. See *Gay Liberation v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974).

create the same sort of masquerade—a phony identity—that compulsory heterosexuality forces upon lesbian, gay, and bisexual people.<sup>145</sup>

Identity-speech values therefore cut both ways in the Georgetown case. How should a judge resolve the cross-cutting claims? A facile answer would be that, because the Constitution just regulates state action, only the District's censorship of Georgetown's identity, and not Georgetown's censorship of the students' identity, implicates the constitutional commitment to anticensorship (the First Amendment). Gay experience resists making so much of the public-private distinction. The closet that obstructed lesbian and gay nomic identity was enforced by institutions of private (corporate) as well as public (state) authority. Most important was discrimination by employers, both corporate and state. The tangible fear of losing one's job was and remains, next to family shame, the most powerful motivator for gay people to remain closeted. When gays came out in great numbers and asserted political power, their second agenda, after easing police harassment, was to end state employment discrimination on the basis of sexual orientation. At the same time, gay activists called for laws prohibiting sexual orientation discrimination in private workplaces and public accommodations as well.<sup>146</sup>

Antidiscrimination statutes such as the District's Human Rights Act are therefore important and productive for ending the regime of the closet and assuring gay people equal citizenship. This normative point finds ample support in caselaw. As Judge Mack held, remedying private discrimination or censorship can be the sort of compelling state interest that would justify some public censorship. In addition to *Bob Jones*, discussed above, the Supreme

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145. One might distinguish Georgetown's forced masquerade from the students' forced masquerade. Pushing an institution into a closet does not harm human lives as much as doing that to individuals, and the Roman Catholic *nomos* is in no important way threatened by this closet. I doubt these distinctions as a matter of fact. The lives of individual priests and officials at Georgetown in the 1980s (some of them homosexuals who had chosen lives of celibacy, others who were sexually active) were implicated by forced recognition. To the extent that the latter distinction is an appeal to comparative powerlessness in our society, one should consider that anti-Catholic prejudice remains palpable in the United States, that Georgetown is in the uncomfortable position of being a religious island surrounded by a sea of secularity in the nation's capital, and that the District government sometimes treats gays with more respect than it treats Georgetown.

146. The District's Human Rights Act (1973 and 1977) was the first jurisdictionwide law to this effect; California (1979) and Wisconsin (1982) were the first states to protect against anti-gay job discrimination by court decision and statute, respectively. See D.C. CODE ANN. § 1-2512 (1981); Gay Law Students Ass'n v. Pacific Tel. & Tel., 595 P.2d 592 (Cal. 1979); WIS. STAT. ANN. § 101.22 (West 1988 & 1996 Supp.). Massachusetts (1989), New Jersey (1991), Hawaii (1991), Minnesota (1991), Vermont (1991), California (1992), Connecticut (1993), and Rhode Island (1995) have all adopted job discrimination statutes in the last decade. See MASS. GEN. LAWS ANN. ch. 272, § 98, ch. 151B, § 4 (West 1990 & 1996 Supp.); N.J. STAT. ANN. §§ 5-4, 5-12 (West 1991); HAW. REV. STAT. § 368-1 (Supp. 1996); MINN. STAT. ANN. § 363.03 (West 1993); VT. STAT. ANN. tit. 21, § 495 (1992); CAL. LAB. CODE § 1102.1 (West 1992); CONN. GEN. STAT. ANN. §§ 46a-81c (West 1994); R.I. GEN. LAWS §§ 28-5-5, 28-5-7 (1995). More than 150 municipal and county jurisdictions have adopted similar policies. See NAN HUNTER ET AL., THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS 204-08 (3d ed. 1992). In 1996, the U.S. Senate came within one vote of passing the federal Employment Non-Discrimination Act (ENDA) of 1995, S. 2056, 104th Cong. (1996), which would have prohibited sexual orientation discrimination in the entire country.

Court has recognized the same idea in cases involving sex discrimination. In *Roberts v. United States Jaycees*,<sup>147</sup> the Court upheld the application of Minnesota's Human Rights Act to require the Jaycees, a young men's community service organization, to admit women. Writing for the Court, Justice William Brennan conceded that the antidiscrimination law burdened the Jaycees' First Amendment associational rights but ruled that the law served a compelling state interest that was unrelated to any expressive purpose of the Jaycees as an association.<sup>148</sup> Like Judge Mack in the Georgetown case, Justice Brennan in the Jaycees case found censorship on both sides of the controversy. When state censorship is invoked to remedy private censorship or discrimination, the anticensorship principle should not be dispositive. *Roberts* and *Bob Jones* illustrate how public values are implicated on each side of the equation. While First Amendment liberty values are implicated in state censorship, Fourteenth Amendment equality values are implicated in the state justification.

#### 4. *The Value of Accommodation*

The Georgetown case is the quintessential hard case because identity speech values and constitutional norms were implicated for both contending parties or *nomoi*. How should society or the legal system resolve colliding norms such as those in the Georgetown case? American law talk has traditionally spoken of colliding norms in win/lose terms: One norm must prevail, the other must be quashed by a jurispathic court.<sup>149</sup> Scholars have challenged this way of thinking. Writing from a variety of perspectives, these scholars maintain that decisionmakers ought to seek ways to reconcile or accommodate colliding norms, rather than just choosing one and suppressing the other.<sup>150</sup> This theme is prominent in Judge Mack's opinion for the Georgetown case. The other judges posed the issues in starkly dichotomous win/lose terms: Either Georgetown was required to recognize the gay and lesbian student groups, with all the attendant benefits, or it was not.<sup>151</sup> This way of posing the issue sharpened the normative conflict in the case. Over the objection of most of her colleagues, Mack found this an unproductive way of looking at the case and bifurcated the issue into a recognition-endorsement

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147. 468 U.S. 609 (1984).

148. See *id.* at 622-29.

149. See Cover, *supra* note 6, at 40-44; Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

150. For discussions of alternative ways to treat colliding norms, see ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 2d ed. 1992); CAROL GILLIGAN, IN A DIFFERENT VOICE (1982); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976).

151. See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 46-47 (D.C. 1987) (Feren, J., concurring in part and dissenting in part); *id.* at 62 (Belsen, J., concurring in part and dissenting in part).

feature, which reflected Georgetown's core objection, and an access-to-benefits feature, which reflected the students' main demands.<sup>152</sup> Analytically, this permitted Mack to save the Human Rights Act from serious constitutional difficulty, while preserving its core policy. Practically, the move enabled her to show both sides that she had attended to their key interests and to offer a result that accommodated the most significant nomic needs of both groups.

Is this approach unprincipled, as concurring Judge Theodore Newman suggested and the dissenting judges charged? Mack's opinion advanced the nondiscrimination principle by requiring Georgetown to provide tangible benefits to the bisexual, lesbian, and gay student groups. Her dissenting brethren charged that she violated the nondiscrimination principle by not requiring recognition as well (Ferren and Terry) or that she violated the anticensorship principle by forcing Georgetown to allow an openly gay presence (Belson and Nebeker). Notwithstanding these charges, it is unfair to assail Mack for being unprincipled, as she was accommodating two principles that collided in the particular case. The only legitimate criticism of her approach is that it reached an incorrect accommodation of the principles.

The coming-out experience provides support for Judge Mack's accommodation. Coming out of the closet to one's friends and family has in the last two generations been the defining moment or cluster of moments for many lesbians, gay men, and bisexuals. Because the gay person desires an ongoing relationship with friends and family, coming out to them is an invitation to equal treatment: You have been my parent/friend, and I want you to continue to be my parent/friend now that you know more about me. This is an invitation sometimes declined and sometimes accepted unconditionally. Most often, however, the invitation is accepted with conditions, such as a tacit insistence that the gay person be discreet in her discussions of sexuality.<sup>153</sup>

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152. Judge Mack held that requiring Georgetown to "recognize" Gay Rights Coalition would be identity-speech censorship and therefore refused to interpret the Human Rights Act to compel such recognition, but she interpreted the Act to require Georgetown to provide the students equal access to facilities and services so that they could carry on their nomic activities. *See id.* at 25-30 (opinion of Mack, J.). Judge Mack was playing upon ambiguities in the word "recognition." She was treating it as an expression of Georgetown's identity, but university recognition at Georgetown usually connotes nothing more than an administrative ticket student groups have to punch to get the tangible benefits (an office, a phone, university publicity for their events) of being a student organization. Georgetown itself did not consider recognition and tangible benefits to be different, nor had the students in their original challenge. *See id.* at 20 n.16. Only Mack insisted upon their disaggregation into an identity component (recognition) that could not be regulated and a conduct component (tangible benefits) that could be. *See id.* While this move can be criticized as a semantic formalism, it served the functional goal of affirming the anticensorship rule on behalf of both parties: The students should be free to express themselves within the university community, but Georgetown should be equally free to express its commitment to compulsory heterosexuality. Importantly, once Mack announced her judgment, both the students and the university found her disaggregation liberating. *See* Letter from Timothy J. Healy, S.J., to the Faculty and Alumni of Georgetown University (Mar. 28, 1988) (on file with the *Yale Law Journal*).

153. *See, e.g.,* Rodney Christopher, *Explaining It to Dad*, in *BOYS LIKE US*, *supra* note 116, at 302-11 (describing author's father who will not discuss son's sexuality). For other examples of accommodation, *see* Ron Caldwell, *Out-Takes*, in *BOYS LIKE US*, *supra* note 116, at 270 (recounting author's promise to father not to tell his younger brother about his homosexuality until his brother's high school graduation);



The conditions themselves may change over time, as the parent/friend becomes accustomed to the gay person's identity and as she talks about the issues her coming out raises. Is it unprincipled for the openly gay person to trim her openness in order to accommodate the needs of other persons?

Philip Bockman's story *Fishing Practice*, recounts the shock his disclosure yielded for his parents.<sup>154</sup> His father implored Bockman to soften the blow of disclosure to his ill mother by agreeing to see a psychiatrist. This Bockman agreed to do; happily for him, the psychiatrist turned out to be a "friend of Dorothy." The knowledge that he was seeking professional help made it easier for his parents to deal with this new knowledge; each parent privately expressed continued love but was not yet comfortable talking about the subject. Bockman writes:

Once, I expressed my frustration to my father about "the silent treatment." "We're trying," he explained. "Please give us time." He smiled, and I was reminded of an incident from my childhood, at about the age of six. He had taken me fishing. He hauled in one fish after the other, while I caught none. At the end of the day, I burst out crying. Kneeling beside me, he told me gently, "Don't be too sad. Remember, it takes a long time to get good at something. Be patient. Don't think of today as fishing, just think of it as fishing practice."<sup>155</sup>

After several years, Bockman brought his lover home to meet his parents, who welcomed the friend but still did not feel comfortable talking about homosexuality.<sup>156</sup> Still later, after his mother's death, the author found his father positively affirming and finally willing to talk.<sup>157</sup> Bockman's coming out of the closet with his family occurred over a period of discursive time, not suddenly, as on the road to Damascus. Judge Mack's judgment gave Georgetown some practice time before it fully assimilated the gay groups, the same discursive breathing room Bockman gave his parents. The question remains, How much "equality practice" is required before the gay person, or the state, asks for more?

##### 5. *Principles of Accommodation: Comparative Need and Dialogue*

The circumstances of Bockman's and other people's stories are familiar. A gay person (group) expresses sexual identity to a shocked loved one

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and William Sterling Walker, *January 18, 1989*, in *BOYS LIKE US*, *supra* note 116, at 293-301 (describing mother who accepts her son's homosexuality but does not want him sharing food with his nieces and nephews).

154. See Philip Bockman, *Fishing Practice*, in *BOYS LIKE US*, *supra* note 116, at 73-81.

155. *Id.* at 80.

156. *See id.*

157. *See id.* at 81.

(institution) with which the gay person (group) wishes or needs to have an ongoing relationship. To preserve the relationship in the face of knowledge that creates a normative rupture, each side has to make accommodations, respectful of the other's different views about sexuality. What principles should mediate this accommodation? The substantive principle of accommodation is comparative need: Each side should accommodate the central need of the other unless that accommodation would sacrifice that side's central needs. The procedural principle is dialogue: Each side should operate in good faith and should remain open to information about the other and to the common interests that are still shared.

These principles of accommodation are well illustrated in Judge Mack's judgment. The University and the student groups by necessity were going to have an ongoing relationship. There was ample ground for mutual respect, as the students had all chosen to attend Georgetown, which in turn was happy to admit openly gay students. As a Catholic school under direct papal supervision, Georgetown's greatest need was an official distance from the gay groups, to ensure that outsiders or the Vatican would not think that the university was "approving" the student advocacies. The student groups' greatest need was access to the services and benefits afforded other student groups, so that they could have a stable presence within the university. Mack's opinion treated each party with respect and gave each what it most needed. The students got access to facilities and services on an equal basis with other student groups, and the university was relieved of the formal association it feared would be inferred from official recognition of the gay student groups. Mack's opinion also created a structure friendly to dialogue between the parties over time.<sup>158</sup>

What of the charge that such accommodationist strategies preserve remnants of the closet? Philip Bockman acquiesced in precisely that when he agreed to go slowly with his parents. Rather than viewing this as nothing more than a concession to prejudice, I consider it also a gesture of respect and an

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158. There was no assurance this would occur, but Judge Mack's opinion gave it a chance. I joined the Georgetown Law Center's faculty soon after the Court of Appeals' decision and became the sponsor of the Law Center's bisexual, gay, and lesbian student group. I found the Law Center completely supportive of student efforts to create a healthy gaylesbian community and to provide informative programs for all students and faculty. Father Alexei Michalenko, the Law Center's Catholic chaplain, has been a counselor for students of all orientations and has materially supported gay scholarship as well as gay community at the Law Center. The main campus was also supportive, and the priests who run the school have been kind and respectful of gay identity and issues. The apparatus Mack set in motion has impelled the students and the priests into a productive dialogue, where agreement and mutual respect have dominated disagreement.

In 1988, Congress enacted the Armstrong Amendment, Pub. L. No. 100-462, § 145, 102 Stat. 2269-314 (1988), which conditioned federal funding for the District upon the City Council's adoption of an amendment to the Human Rights Act that would relieve religious institutions of obligations not to discriminate on the basis of sexual orientation. Significantly, Georgetown lent no support to that amendment, which the courts invalidated for its coercion of speech by the Council. *See Clarke v. United States*, 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990) (en banc). Congress then directly enacted the amendment pursuant to its constitutional power over the District; Georgetown neither supported the second Armstrong Amendment nor sought to take advantage of it. Judge Mack's principled accommodation held firm.

open door to further progress. Gay and, especially, lesbian experience is that coming out of the closet is not an all-or-nothing matter. It is instead a process of mutually respectful education, dialogue, and accommodating the greatest needs of one another. Another caution worth considering is that the closet is not unalloyedly bad. Good manners and common decency require that we closet our feelings much of the time. The closet is a mediation between my desire to express and your desire not to see.

A concern about using these coming-out experiences as constitutional exemplars arises from the view that we should expect greater acceptance and neutrality from the state than we do from private families and institutions. This is true with regard to rules applicable to the state itself. Even if families and institutions are permitted to discriminate against gay people, the state should not be permitted to exclude a group of worthy citizens for reasons of prejudice. But the converse is also true. That the state as employer ought not discriminate on the basis of sexual orientation in its own employment and contracting policies, perhaps as a matter of constitutional law, does not mean that the state also must require private institutions to follow the same nondiscrimination policy.<sup>159</sup> When the state seeks to censor my expression or discriminate against me, I am on strong constitutional ground in resisting; when the state seeks to impose my expression on your turf or to silence your opposition to open homosexuality, I am on much weaker constitutional ground. The continuum from nuclear family to the regulatory state parallels a continuum of defensible imposition of public equality goals, with the state being most defensible and the family being least. Where did Georgetown fit on this continuum? Consider this final lesson from the coming-out literature.

#### 6. *The Value of Subcultural Diversity: A Nomic Autonomy Exception*

Suppose Philip Bockman's family had expelled him because of his sexual orientation. A gay perspective would lament that too-frequent reaction. Nowhere is the closet more stifling than within the family, as most coming-out stories indicate. Yet no gaylegal theory argues that the state can force a family to take back its openly gay relative, even though that would be justified in the abstract by the nondiscrimination principle.<sup>160</sup> Why is it that we are generally unwilling to regulate the family in this way? It is decidedly not because the family is immune from state regulation; the police can justifiably intervene in response to physical and sexual abuse by parents of their children. If the state

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159. In fact, one gay author believes that the only desirable nondiscrimination rules are those applicable to state policy. See ANDREW SULLIVAN, *VIRTUALLY NORMAL* 171 (1995).

160. One can imagine other state mechanisms that might help: education for adults as well as minors about the "facts" concerning homosexuality, state counseling services for parents or their gay children, and mediation of parent-child disputes.

regulates physical violence within the family, why not regulate emotional violence as well?

The answer lies in my earlier critique of *Kulturkampf*. State censorship of family life would be more perilous and less promising than its suppression of dissident communities through the *Kulturkampf* described in Part I. The internal emotional dynamics of a family cannot easily be regulated without undermining or destroying the creative dimensions of family. The best solution for familial homophobia is mutual accommodation according to the principles of comparative need and dialogue described above. It is increasingly rare for accommodation not to work, but if it does not the better alternative is for the gay child to separate from the family, rather than for the state to impose tolerance from above. This is both the normative advantage and weakness of families. The parents can inculcate values, which the child assimilates in some ways and rejects in others; at some point, the offspring must go out into the world, and her normative heritage will evolve in yet new directions.

Today, that evolution can be informed or assisted by gay subcultures that exist in most American cities. This *nomos* of like-feeling and potentially supportive individuals is particularly important and necessary for gay people who have lost their blood families and who need new, or supplemental, families of choice. Religious subcultures have long served this useful purpose of supplementing blood families, and in today's society, gay subcultures work alongside religious ones. Some of the most poignant coming-out stories are those involving gay people who are emerging from a religious cloister.

Essex Hemphill's *The Other Invisible Man* is a story of the young author's sexual initiation with an older man, George Hart of Washington, D.C.<sup>161</sup> The experience was liberating as well as thrilling for the author, but the story is more about Hart. The older man with the baritone voice was a person of "multiple identities," a Christian believer, man of color, homosexual, macho boxer. "Each identity was capable of causing him profound pain and profound invisibility. Each mask he wore could put him at risk, even as it served to protect him. . . . But each false identity was a chosen denial . . . ."<sup>162</sup> The author and Hart were intimate in an Episcopal church where Hart worked and worshipped, a church that in the 1970s would have been shocked by homosexuality in any locale. When Hart died not long after their friendship, the author lamented the lost possibilities of a life lived in a closet impelled by his chosen religion as well as by his unchosen society.<sup>163</sup> Hart might have been better off if his church had welcomed gay people, or if he had left the church altogether. But neither can reliably be imposed from above by the state:

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161. See Essex Hemphill, *The Other Invisible Man*, in *BOYS LIKE US*, *supra* note 116, at 176-85.

162. *Id.* at 184.

163. On the complex closeting of homosexuals within African-American religious communities, see Harlon L. Dalton, *AIDS in Blackface*, *DAEDALUS*, Summer 1989, at 205, 215.

The second was a matter of Hart's choice, the first a matter of his religion's choice.

My interpretation of stories like Hemphill's is that, while society's contribution to closeted sexuality must end as a matter of law, the church's contribution, like the family's, is not susceptible to legal intervention. Like the family, the church can be support or torture for the gay person. When it is the latter, accommodation usually does not work, but state intervention (in the name of the nondiscrimination principle) works no better, and at great cost. A virtue of American society is the freedom to leave unproductive associations and form new, more productive ones. Just as the heterogeneity of families is good for America, so is the heterogeneity of subcultural *nomoi*, so long as their members have the option of separating. Unless she leaves the country, on the other hand, the individual cannot easily separate from the public culture, and this exception for nomic autonomy applicable to families and churches should not apply to institutions in the world.

This idea has direct relevance to liberty/equality clashes. Concurring in the *Roberts* judgment, Justice Sandra Day O'Connor relied on the fact that the Jaycees were a commercial organization, and therefore not entitled to the strong First Amendment protection that associations promoting a message receive.<sup>164</sup> She considered the Jaycees a garden-variety public accommodation not closely linked to any community of ideas or values. The closer an institution is to the center of a *nomos*, the greater freedom that should be afforded to it by the state. Characteristic of a viable nomic community is that it links its members together through the inculcation of values. Those values create discrimination and closets, but members objecting to discrimination have the option of leaving, and nonconforming members who refuse to be closeted can be kicked out. Religions are the classic *nomoi*, of which lesbian and gay communities are looser, more informal examples.

What is Georgetown University? It claimed that it was part of the Roman Catholic *nomos*, and therefore exempt from the nondiscrimination principle, but that claim was undermined by the fact that its admissions, governance, and scholarly traditions were (and are) overwhelmingly secular. Like the Jaycees, Georgetown diluted its nomic claims by entering the world and inviting religious and sexual outsiders into its world. Unlike the Jaycees, however, Georgetown could have presented a nomic claim as a university insisting upon its academic freedom. Georgetown did not make such a claim, perhaps because the nomic values developed by universities in the Western tradition are diversity of viewpoint, vigorous debate, and intellectual challenge—all values suggesting recognition of the gay student groups.

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164. See *Roberts v. United States Jaycees*, 468 U.S. 609, 633–36 (1984) (O'Connor, J., concurring in judgment).

Georgetown, therefore, did not present a good case for invoking a nomic autonomy exception to the nondiscrimination principle. The application of a human rights act to a Catholic seminary, on the other hand, would be much less justifiable because such an institution is central to a nomic community. Parochial schools also ought to be harder for the state to regulate than ordinary private schools, not just because of the Free Exercise Clause, but for the more general purpose of protecting nomic autonomy. Within its own *nomos*, the Catholic Church ought to be free of state regulation, but the Church is fairly subject to it when it enters the world of culture, commerce, and education. It is for this reason that the proposed Employment Non-Discrimination Act, like the state nondiscrimination laws, excepts "religiously affiliated institutions" (parochial schools but not secularized ones like Georgetown) from its ambit. Gay rights advocates put that provision in ENDA, and it should be retained.

### III. APPLYING A JURISPRUDENCE OF COMING OUT TO OTHER LIBERTY/EQUALITY COLLISIONS

The gaylegal principles I have identified as relevant to the Georgetown case and supportive of Judge Mack's approach in it can be elaborated by reference to subsequent (post-1987) legal developments. How would such principles apply in other cases involving First Amendment/equality clashes? This Part considers three provocative cases involving different kinds of collisions between liberty and equality: Massachusetts's effort to require the organizers of the Boston St. Patrick's Day Parade to allow an openly gay marching group to participate; the effort of the California Fair Housing Commission to require religious landlords to rent to unmarried couples; and Indianapolis's effort to impose tort liability on pornographers whose work causes harm to women. A jurisprudence of coming out insists that there are no pat answers to these cases. Indeed, the theory put forth in this Essay demands a more complex analysis than that adopted by the courts in each case.

#### A. *The Boston Parade Case*

A different forum for considering the principles developed above is the Boston parade case, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*<sup>165</sup> (GLIB). Since 1947, the South Boston Allied War Veterans Council has organized and sponsored a large parade on March 17th to commemorate both Evacuation Day and St. Patrick's Day, the former a major veterans' event and the latter a major ethnic (Irish) celebration. This is the major civic event of the year in Boston, and the city government lends its seal,

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165. 115 S. Ct. 2338 (1995), *rev'g* *Irish-American Gay, Lesbian & Bisexual Group v. City of Boston*, 636 N.E.2d 1293 (Mass. 1994).

some money, and the city streets for the celebration. In 1992 GLIB was formed and obtained a state court order for it to march in the parade, over the Council's objections. GLIB's members were among the 10,000 marchers that year (before 750,000 spectators), and they marched without incident. In state court litigation the next year, GLIB won a trial court order that the parade was a "public accommodation" barred from excluding GLIB under Massachusetts's law prohibiting sexual orientation discrimination by public accommodations. The trial court rejected GLIB's claim that the parade was a governmental event subject to the First Amendment but ordered the Council to admit GLIB on the same terms as other groups. The Massachusetts Supreme Judicial Court affirmed that order; the U.S. Supreme Court unanimously reversed.<sup>166</sup>

Justice David Souter's opinion for the Court started with the proposition, instinct in the Court's prior cases, that parades such as the Boston parade are expressive conduct entitled to First Amendment protection. GLIB's own participation was likewise expressive—"to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community"<sup>167</sup>—but the First Amendment was not implicated, because the Council and its parade were not state actors according to the lower courts. This determination was not before the Supreme Court because it was not appealed by GLIB. The Council disclaimed any intent to discriminate against bisexual, lesbian, or gay participants and only wanted to exclude GLIB's message, not its members per se, as they could march in other contingents. The state court order requiring the Council to include GLIB as a group "had the effect of declaring the sponsors' speech itself to be the public accommodation. . . . But this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."<sup>168</sup> The Council's message was one of compulsory Irish heterosexuality, a message that would be disrupted by the gay participants.

The legal question in *Hurley* was whether the state could require access for GLIB, as the state did in 1992 and as the District of Columbia did in the Georgetown case. Justice Souter's resolution successfully develops the proposition that the government should not censor identity speech. It is, however, problematic in exaggerating the coherence of the asserted expression of community values and in slighting the serious state justification (nondiscrimination) suggested by *Bob Jones* and *Roberts*.

The gaylegal principles outlined above are friendly to the result in *Hurley* in terms of the way Justice Souter presented the case. The anticensorship principle is key to the result and reasoning in *Hurley*, which in turn is an

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166. *See id.*

167. *Id.* at 2346.

168. *Id.* at 2347.

eloquent precedent for the proposition that the state cannot censor identity speech. If gays have the right to express their sexual orientation, straights have a right to express their disapproval. The nomic autonomy exception to the nondiscrimination principle also lends support to the result. For Souter and his colleagues, the Council represented the traditionalist community of Irish Bostonians and, as such, ought to have maximal freedom to express their orthodoxy on issues of sexual orientation. Given the nomic context of the case, the nondiscrimination principle is not strongly implicated and cannot counterbalance the general rule against censorship. With the conflict between the anticensorship and nondiscrimination principles thus attenuated, the principles associated with accommodation were not implicated in the case.

But there is more to *Hurley* than Justice Souter's opinion reveals. Doctrinally, the queerest feature of the opinion is the way the Court's governing precedent, *Roberts*, disappeared into a legal closet. It may be that Souter felt the state courts were wrong to treat the parade as a public accommodation, like the Jaycees in *Roberts*. Truly, the state courts were stretching the meaning of public accommodation to reach parades,<sup>169</sup> and *Hurley* can be read to cast doubt on the validity of such broad statutory interpretations in future cases. Still, Justice Souter was stuck with the state determination of the issue, because the Supreme Court has no jurisdiction to review state court constructions of state law.<sup>170</sup> If the parade were a public accommodation complaining that application of a state nondiscrimination law to it violated the First Amendment, *Roberts* should govern. The state courts followed *Roberts*'s analytical framework; the Supreme Court scarcely bothered to cite the precedent.

Under *Roberts* as applied by the trial court based upon its findings of fact (binding on the Supreme Court unless clearly erroneous), *Hurley* is not such an easy case. While the parade was not a commercial association in the way that the Jaycees were, neither did the parade have an expressive agenda beyond "Irish are great" and "veterans are wonderful." The Council was able to cite only three instances (the KKK, an antibusing group, and a pro-life group) when it had, during the four decades it had managed the parade, ever excluded a group from the parade. Justice Souter analogized the Council to a composer orchestrating the theme for a symphony, but *Hurley*'s symphony had no theme

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169. The Massachusetts statute defined a public accommodation as "any place . . . which is open to and accepts or solicits the patronage of the general public," including but not limited to "a boardwalk or other public highway" and "a place of public amusement, recreation, sport, exercise or entertainment." MASS. GEN. LAWS ANN. ch. 272, § 92A (West 1990). The trial court found that the parade was "an open recreational event that is subject to the public accommodations law." *Quoted in Hurley*, 115 S. Ct. at 2342. That may be an overstatement. A theme parade would include elements of both recreation and expression, and the Massachusetts law should have been interpreted more narrowly in order to avoid the constitutional problems presented in *Hurley*.

170. See RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 521-65 (4th ed. 1996).



and everybody was allowed into the orchestra, except recognizable homosexuals. Allowed to participate in the 1993 parade were radio stations, several candidates for public office, McGruff the crime dog, a nursing home, a smoke shop, several beauty queens, the AFL-CIO, marching bands, Budweiser beer, a water pollution association, a Baptist "Bible trolley," Northern Ireland AID, and Pepsi-Cola.<sup>171</sup> The trial court found, as a matter of fact, a "lack of genuine selectivity in choosing participants and sponsors" and rejected, as a matter of fact, the Council's argument that its exclusion of "groups with sexual themes merely formalized that the Parade expresses traditional religious and social values."<sup>172</sup> The factual context of the Boston St. Patrick's Day and Evacuation Day parade contrasts with that of New York's St. Patrick's Day parade, which gays tried to crash as well. The trial court in the New York case found that the Ancient Order of Hibernians who ran the parade had always viewed their parade as expressing a particular viewpoint, had been selective in whom they would allow to march, and had rules restricting expression in the parade.<sup>173</sup> The New York findings justified First Amendment concern much more than the Boston findings did.

At best, the Council came to its ideological message, compulsory heterosexuality, only after GLIB sought to participate in the parade. More realistically, there is no reason to believe the Council ever had a message, and some reason to think they were simply excluding GLIB because of antihomosexual animus, again unlike the New York case. In 1992, Hurley told GLIB it was excluded because of "safety reasons and insufficient information regarding [the] club."<sup>174</sup> In 1993, Hurley told GLIB it was excluded because its "sexual themes" clashed with a policy "that the Parade expresses traditional religious and social values."<sup>175</sup> At trial in 1994, Hurley testified under oath that GLIB was excluded because its members were also members of ACT-UP and Queer Nation and could therefore be expected to disrupt the parade.<sup>176</sup> Hurley's final justification for excluding GLIB was, according to the trial judge, "because of its values and its messages, i.e., its members' sexual orientation."<sup>177</sup> Given this record and the trial judge's finding of fact that the Council's shifting reasons proved that they were pretexts for exclusion by reason of sexual orientation alone, it was Justice Souter and not Hurley who created a coherent message for the parade. Contrast the Court's sharp-eyed discernment of an utterly occluded idea in the Boston parade case with the

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171. See *Irish-American Gay, Lesbian & Bisexual Group*, 636 N.E.2d at 1296 n.9

172. Quoted in *Hurley*, 115 S. Ct. at 2342.

173. See *New York County Bd. of Ancient Hibernians v. Dinkins*, 814 F. Supp. 358, 361-62 (S.D.N.Y. 1993).

174. *Irish-American Gay, Lesbian & Bisexual Group*, 636 N.E.2d at 1295

175. *Id.*

176. There was no factual basis for that belief, and the trial judge treated it as simply fabricated. See *id.* at 1295 n.8.

177. *Id.*

Court's blindness to the expressive idea in the *Jaycees* case: Business is for guys. A disturbing implication of this contrast is that the Court reflexively considered the message in *Roberts* so off-limits that it denied the possibility of a message, while it considered the message in *Hurley* so obvious that it overrode findings of fact to insist that it must have been the message all along.

Relatedly, *Roberts* held that nondiscrimination is a compelling state interest justifying restrictions on the *Jaycees*' right of association.<sup>178</sup> An implication of *Roberts* is that if a parade is a public accommodation, parade organizers cannot exclude women or people of color or, to make the analogy to *Hurley* closer, cannot require women marching in the parade to pass as men or people of color to put on whiteface. The state's requirement of nondiscrimination would trump any post hoc rationalization for such exclusions, under this reading of *Roberts*. If such a parade cannot exclude women generally, why can it exclude lesbians? Of course, *Roberts* might be limited to sex and race nondiscrimination, which enjoy special constitutional status, but Justice Brennan (the author of *Roberts*) has laid out a persuasive case for similar public concern for sexual orientation discrimination.<sup>179</sup> Judge Mack's opinion in the *Georgetown* case developed a more detailed case for that proposition,<sup>180</sup> an argument that went unchallenged in the otherwise compendious concurring in part and dissenting in part opinions. The Supreme Court's decision in *Romer v. Evans*<sup>181</sup> suggests that the Brennan-Mack position has some resonance with six Justices on the current Court, one of whom wrote *Hurley* and all of whom joined it without reservation.

*Roberts* might better be limited to cases where the nondiscrimination principle imposes only incidental burdens on rights of association and expression, and not expanded to cases where nondiscrimination undercuts the expression of a nomic community. For this reason, *Roberts* should not be read to require New York's *Hibernians* to allow the lesbian and gay marchers. Although the New York parade has become a civic event, it is organized by and for Irish New Yorkers and purports to be an expression of traditional Irish Catholic values. According to the trial court, it is in fact an expression of these values. The same cannot be said, however, of the Boston parade. In Boston, the parade was decidedly more civic than Irish. It celebrated Evacuation Day along with St. Patrick's Day and included anyone who wanted to march. The evidence of nomic expression in the Boston parade case not only was mighty thin, but was rejected by the finder of fact.

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178. See *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

179. See *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1011-17 (1985) (Brennan, J., dissenting from denial of certiorari).

180. See *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 31-38 (D.C. 1987) (opinion of Mack, J.).

181. 116 S. Ct. 1620 (1996).

Even without reference to *Roberts* and to the assumption that the parade was a public accommodation, the opinion in *Hurley* raised more questions than it answered. At oral argument, Justice O'Connor asked whether the state could require a circus parade to include protesters who objected to the way circuses treat animals.<sup>182</sup> Because this hypothetical is an instance of pure viewpoint rather than status discrimination, it was extremely off point, and this is revealing in light of Justice Souter's opinion. The slip suggests that some of the Justices treated the exclusion as one resting solely on GLIB's expression rather than on its members' identity. This may have been the Justices' assumption, but it was an assumption substantially rejected by the finder of fact. Within the Court, only Justice Stephen Breyer showed any curiosity about the relationship between GLIB's message and the identity of its members. In one of the last questions of the oral argument, Justice Breyer asked Chester Darling, lawyer for the Council whether GLIB's signs were "self-identifications," or were they a "message"? Darling answered: "It's a message, it's an identification, it's a proclamation . . . ."<sup>183</sup>

The reason Darling was confused was that he assumed that GLIB's identity was its message, an assumption shared by his clients by the end of the trial. This was the central dilemma of both *Hurley* and *Roberts*. The Jaycees' ideology was determined long before the women knocking at their door impelled them to claim publicly that business is for guys. Women's mere presence in the Jaycees undermined that ideological message; sex discrimination was integral to the association and what it stood for. The Council's ideology was determined only after GLIB came knocking, whereupon it was proposed that Irish must be heterosexual. The mere presence of openly lesbian, gay, and bisexual marchers would have undermined that ideological message, and sexual orientation discrimination was integral to the association and what it stood for. The main difference here between *Hurley* and *Roberts*, however, is that the message would not have been undermined had lesbians, gay men, and bisexuals been dispersed throughout John Hurley's crowd because their sexual orientation would have been invisible to the audience. By contrast, women such as Kathryn Roberts would have been apparent in the Jaycees even without badges and signs. To amend my intuition about the Council's always ambiguous message: It was not compulsory heterosexuality so much as it was an apartheid of the closet this message bespoke. Gay people should be unseen but not heard.

Like the Jaycees and Georgetown cases, the Boston parade case was one where identity speech was implicated on both sides of the controversy. I am unhappy to report that both Supreme Court cases obscured this collision; only

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182. See 1995 US Trans Lexis 89, \*25.

183. *Id.* at \*42. Justice John Paul Stevens posed a few follow-up questions suggesting this parallel. If the Council excluded a Jewish group because its members wanted to wear yarmulkes, wouldn't the exclusion be due to the marchers' religious "identity" as well as their "message"? *Id.* at \*42-43

the D.C. court dealt forthrightly with the collision. Viewed in its proper factual context, *Hurley* failed to implicate the anticensorship principle as strongly as the Court suggested and implicated the nondiscrimination principle in ways the Court ignored. With regard to the former, there was never an explicit theme for the parade. It is therefore unclear why *Hurley* excluded GLIB, and whether his views reflected the sense of other paraders. Moreover, the nondiscrimination principle suggests that GLIB should have been allowed to participate in the parade.<sup>184</sup> Like the Georgetown case, the Boston parade case was one where the courts should have been open to accommodation. The principle of comparative need would suggest that GLIB should have been allowed to march, as it did in 1992, without incident, and that other marching groups could have chosen to distance themselves from GLIB if they desired, either physically, through their place in the queue, or expressionally, with signs proclaiming family values. Alternatively, the Council itself could have issued disclaimers either in the media, in programs for the march, or on its own banners.<sup>185</sup> The dialogue principle would suggest that the courts could have required GLIB's inclusion but directed the parties to work out an arrangement subject to judicial supervision.

An important question is whether *Hurley*, which is now the leading Supreme Court precedent, overrules *Gay Rights Coalition*, a lower court decision operative only in the District of Columbia. Although *Roberts* presumably survives *Hurley*, *Roberts* may be confined to the sex and race discrimination context. Therefore, *Roberts* is not readily available as a source of distinction. In my opinion, if *Hurley* is understood in its precise factual context, it is substantially inconsistent with *Gay Rights Coalition*. There are several different ways to distinguish the cases if *Hurley* is understood in the way Justice Souter presented the decision, however. For one thing, the Massachusetts courts were stretching their antidiscrimination law to impose what Justice Souter thought was a direct burden on free expression, while the District of Columbia court was narrowly construing its antidiscrimination law to avoid a direct burden on free expression. This makes the District's decision more attractive than Massachusetts's. Indeed, the best reading of *Hurley* is to establish the following canon of statutory interpretation: General antidiscrimination statutes will not be read expansively, beyond their clear

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184. The nomic autonomy exception seems substantially inapplicable here. There remained a plausible but unclear case for state involvement in the Boston parade under either federal or (more likely) state constitutional law. Whether or not the city could be deemed a coparticipant, the Boston parade was indisputably a major civic event drawing in the entire community and including many contingents with no connection to the Irish or to Evacuation Day. Even less than the Georgetown case, the Boston parade case was not limited to a nomic community alone; it involved the whole community.

185. This has been a technique used in cases where shopping malls are required to provide access to unpopular groups, see *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980), but Justice Souter's opinion rejected the technique because he believed it would dilute the parade's expressive message. If Souter's view were supported by the facts of the case, I would agree, but there was no theme beyond the bromides noted earlier.

application, when the broad reading would directly burden protected First Amendment rights. Such a clear statement rule not only would ameliorate clashes between nondiscrimination and free speech norms but would appropriately place the burden on the legislature to consider First Amendment values when it adopts antidiscrimination laws.<sup>186</sup>

My reading might make too little of *Hurley*, but the analytical problems with its reasoning suggest that it is a precedent to be applied cautiously. In any event, there is an explicit suggestion in the decision that could rescue Mack's resolution of the Georgetown case. At the very end of his opinion, Justice Souter distinguished *New York State Club Ass'n v. City of New York*,<sup>187</sup> a case in which the Court had applied *Roberts* to uphold a public accommodations ordinance against facial First Amendment attack. Justice Souter read *New York State Club* as permitting accommodation of colliding norms. The nondiscrimination principle could be applied to assure women and people of color the tangible benefits of membership in social clubs, such as networking, but the clubs would be left free to engage in the same expressive activity as before.<sup>188</sup> I am more struck by the ambiguities of the *New York State Club* case and the Boston parade case than was Justice Souter. Nonetheless, Justice Souter was open to the sort of dialogic accommodation, encompassing tangible benefits but not official recognition, that Mack crafted in the Georgetown case.

#### B. *The Presbyterian Landlord Case*

Consider the application of the foregoing ideas to a recent case. Evelyn Smith owned four rental units in Chico, California. Smith was a member of the Bidwell Presbyterian Church and believed that sexual cohabitation outside of marriage was sinful and contrary to her religion. It was for that reason she refused to lease a unit to Gail Randall and Kenneth Phillips, an unmarried cohabiting couple. The Fair Employment and Housing Commission ruled that her refusal was discrimination on the basis of marital status, in violation of the state's fair housing law, and ordered her to rent to unmarried couples and pay Randall and Phillips modest damages. Smith objected that the order violated her First Amendment and RFRA rights. Rejecting both constitutional and statutory defenses, the California Supreme Court in *Smith v. Fair Employment & Housing Commission*<sup>189</sup> affirmed the agency rulings except for a reduction in the damages awarded.

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186. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 630-31 (1992).

187. 487 U.S. 1 (1988).

188. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 115 S. Ct. 2338, 2351 (1995).

189. 913 P.2d 909 (Cal. 1996).

Justice Kathryn Werdegar's opinion for the court held that the Supreme Court's opinion in *Employment Division v. Smith*<sup>190</sup> precluded First Amendment relief for Evelyn Smith because the antidiscrimination law was a law of general application with only incidental burdens on religious free exercise, like the statute upheld in *Employment Division*. Writing for only a plurality of justices, Werdegar also ruled that RFRA did not afford a defense, because Smith's free exercise of religion was not substantially burdened by the requirement that she rent to unmarried couples. A fourth justice found RFRA unconstitutional, therefore creating a majority of the court for the proposition that Smith had no RFRA defense.<sup>191</sup> Werdegar argued that Smith could have sold her rental units and invested her money in other activities that did not confront her with a choice between obeying the law and following her religious beliefs. Such an argument, of course, would have applied in *Sherbert v. Verner*.<sup>192</sup> The employee should simply find a job in which her fundamentalist beliefs would be respected. Werdegar distinguished *Sherbert* on the ground that job relocation would have been more of a hardship for Adele Sherbert than reinvestment would have been for Evelyn Smith. Like the three dissenting justices,<sup>193</sup> I am underwhelmed by this distinction. *Sherbert* itself gave no credit to the degree of economic hardship. The Court held that the state substantially burdened free exercise when it "forced [the believer] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to work, on the other hand."<sup>194</sup> Although the Supreme Court has declined to extend *Sherbert*'s First Amendment holding beyond its facts (denial of unemployment compensation), Congress sought to codify *Sherbert* in RFRA.<sup>195</sup> If RFRA is held to be constitutional, I would read the statute to encode a central lesson of the jurisprudence of coming out: Identity expression can be chilled either by direct censorship or by indirect discrimination.<sup>196</sup>

Identity speech values, therefore, should inform our reading of RFRA. The key questions are these: Does the state's rule closet religious identity by a

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190. 494 U.S. 872 (1990).

191. *Fair Employment & Hous. Comm'n*, 913 P.2d at 931 (Mosk, J., concurring).

192. 374 U.S. 398 (1963).

193. See *Fair Employment & Hous. Comm'n*, 913 P.2d at 942-51 (Kennard, J., concurring in part and dissenting in part); *id.* at 966-69 (Baxter, J., concurring in part and dissenting in part); see also *Attorney General v. Desilets*, 636 N.E.2d 233, 246 (Mass. 1994) (O'Connor, J., dissenting) (arguing that state may not legally impose choice between violating religious beliefs and withdrawing from commercial endeavor on landlord refusing to rent to unmarried couple).

194. *Sherbert*, 374 U.S. at 404.

195. Construction of *Sherbert* is important not for the First Amendment inquiry, governed by Scalia's opinion in *Employment Division*, which limited *Sherbert* to the context of unemployment compensation, but for the RFRA inquiry, which codified *Sherbert*'s approach statutorily.

196. Courts have applied RFRA to overturn state orders preventing a Roman Catholic school from discharging a non-Catholic teacher, see *Porth v. Roman Catholic Diocese*, 532 N.W.2d 195 (Mich. Ct. App. 1995), requiring the Amish to mark their slow-moving horse-drawn buggies with orange triangles rather than the silver tape they prefer, see *State v. Miller*, 538 N.W.2d 573 (Wis. Ct. App. 1995), and imprisoning Rastafarians for using marijuana, see *United States v. Bauer*, 75 F.3d 1366 (9th Cir. 1996).

forced conformity? Is the state rule justified as a remedy for the closeting effects of private discrimination? Is there a way to protect the victims of private discrimination without censoring religious identity? In the end, I see no clear answer to these inquiries.

As to the first, it was undisputed in the case that Smith believed sex outside of marriage and heterosexual cohabitation to be sinful, that this belief was important to Smith's religious identity, and that the state forced her to choose between the identity-belief and a penalty. The state rule did discriminate against Smith's religious views. Under the rule, she could not, for example, advertise her apartments "for married couples and singles only." On the other hand, Smith remained free to preach against sex outside of marriage, to bend the ears of her tenants on the subject, to post religious tracts at her apartments, and so forth. Nor was it clear that Smith's belief system entailed that it was a sin for her to deal with unmarried couples, whom she surely dealt with on a daily basis in modern California. (I, too, am a Presbyterian, and that is decidedly not a tenet of our faith.) This idea provides a sharper basis for the California Supreme Court's plurality to distinguish *Sherbert* from *Smith*: Adele Sherbert would have violated a direct command of her religious community by obeying an employment requirement that she work on her Sabbath, while Evelyn Smith would not have violated a direct command of her religious community by obeying a nondiscrimination requirement that she rent to unmarried couples.

Only the dissenting justices addressed the issue whether burdens on religion are needed because of discrimination against couples such as Randall and Phillips. Justice Joyce Kennard argued that the prohibition against marital status discrimination, added to the housing statute in 1975, reflected legislative concern only with single or divorced tenants and not cohabiting ones. There was no evidence that unmarried couples suffered from unusual amounts of discrimination or had trouble finding suitable housing; the importance of nondiscrimination against unmarried couples was undercut by the other discriminations the legislature had made in favor of married couples.<sup>197</sup> Although California courts have recognized that the right to privacy includes the right to cohabitation, including sexual cohabitation, with others who are not related by blood, marriage, or adoption,<sup>198</sup> it is not clear that cohabiting couples are pushed into a closet because of substantial discrimination against them in the housing market.

The record was similarly bereft of facts needed to calibrate an appropriate balance of the needs of landlords like Evelyn Smith and tenants like Gail Randall and Kenneth Phillips. In that event, the dialogue principle becomes

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197. See *Fair Employment & Hous. Comm'n*, 913 P.2d at 951-55 (Kennard, J., concurring in part and dissenting in part).

198. See *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980).

key. Justice Marvin Baxter urged that the matter be remanded to the state housing commission to develop a factual record to determine whether exempting landlords like Evelyn Smith from the housing act's nondiscrimination rule would undermine that rule in any material way.<sup>199</sup> I would go one step further than Baxter. All seven justices went along with the plurality's interpretation of the 1975 amendment, which added nondiscrimination on the basis of marital status, as protecting unmarried cohabiting couples. This was a dynamic interpretation of the statute well beyond the legislature's goal of protecting single men and women, especially single mothers. The court justified the dynamic interpretation on the basis of deference to the agency, but when dynamic interpretation runs up against constitutional considerations, as in the case of the Presbyterian landlord, it is inappropriate for courts to defer to agencies.<sup>200</sup>

I would urge courts in such cases to follow Judge Mack's approach in *Gay Rights Coalition*, where she construed a broad statute more narrowly than the agency and the plaintiffs did, so as to accommodate the constitutional concerns raised by Georgetown. If the legislature overrides the narrowing construction and broadens the statute, then the constitutional issues are sharpened and the court has a better idea of what policies might justify the constitutional abridgments. If Justice Baxter's remand idea had prevailed, the agency should have alerted the legislature that it was narrowing the statute's reach, and perhaps reversing its earlier view that the law protected unmarried cohabiting tenants as well as single tenants.

### C. *The Indianapolis Pornography Case*

In 1983–84, Andrea Dworkin and Professor Catharine MacKinnon drafted an ordinance to regulate pornography. The ordinance defined “pornography” as “the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes” the presentation of women either in scenarios of domination, as sexual objects for domination, or as sexual objects who enjoy pain, rape, bondage, or penetration by objects; the ordinance provided civil tort remedies for victims of pornography.<sup>201</sup> Although the Mayor of Minneapolis vetoed the measure, Indianapolis enacted the ordinance in April 1984. The U.S. Court of Appeals for the Seventh Circuit invalidated the

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199. See *Fair Employment & Hous. Comm'n*, 913 P.2d at 974–75 (Baxter, J., concurring in part and dissenting in part).

200. See ESKRIDGE, *supra* note 81, at 161–64.

201. The ordinance is excerpted at *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986). Its history is recounted and analyzed in DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989). The conceptual framework which generated the ordinance is detailed in ANDREA DWORKIN, *PORNOGRAPHY* (1979); subsequent defense of the statute is provided by Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).



ordinance in *American Booksellers Ass'n v. Hudnut*,<sup>202</sup> and the Supreme Court summarily affirmed.<sup>203</sup> Under the approach set forth in this Essay, the Supreme Court acted too quickly.

Judge Frank Easterbrook's opinion treated the ordinance as "thought control,"<sup>204</sup> the sort of regulation that classically violates the First Amendment's core command that the state not impose ideological orthodoxy. His opinion has been criticized as woodenly formalistic and hypocritical.<sup>205</sup> The opinion can be contrasted with *Regina v. Butler*,<sup>206</sup> where the Supreme Court of Canada upheld a less specific obscenity prohibition based on the harms that pornography visits upon women: stimulation of specific assaults upon women, abuse of women within the industry, and perpetuation of sexist stereotypes about women. *Butler*, in turn, has been criticized as sex negative and homophobic.<sup>207</sup>

Gaylegal principles offer one way to understand these issues more deeply. The pornography cases resemble the Boston parade and Georgetown cases insofar as they implicate issues of identity speech and the problems associated with closeting it. Professor Nadine Strossen has written the most detailed and persuasive brief against antipornography laws based on the traditional problems with this form of state action.<sup>208</sup> On her account, censorship of this sort would likely be applied in ways that discriminate against works valuable to women, deprive women and men of sexually explicit materials, and undermine women's efforts to develop their own sexuality. Moreover, these laws would be ineffective and would ultimately simply drive porn underground.<sup>209</sup> Gay experience with censorship, including censorship in Canada of lesbian materials after *Butler*,<sup>210</sup> is consistent with Strossen's arguments and would add this one: By drawing lines and threatening to enforce them with the state's own violence and domination, censorship contributes to a discourse of sexuality that is furtive, nasty, and violent.<sup>211</sup>

202. 771 F.2d 325.

203. 475 U.S. 1001 (1986).

204. *Hudnut*, 771 F.2d at 328.

205. See ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 232-35 (1996), Mary Becker, Searching for Any Fixed Star: Regulation of Same-Sex Relationships but Protection for Pornography (1994) (unpublished manuscript, on file with author).

206. 89 D.L.R.4th 449 (Can. 1992).

207. See NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 229-44 (1995).

208. See generally *id.*

209. See *id.*; see also Lisa Duggan et al., *False Promises: Feminist Anti-Pornography Legislation*, 38 N.Y.L. SCH. L. REV. 133 (1993); Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 691-92 (1995).

210. Systematic state persecution of a lesbian bookstore under *Butler* is detailed in JANINE FULLER & STUART BLACKLEY, RESTRICTED ENTRY: CENSORSHIP ON TRIAL (1995), but the Canadian courts, as of 1996, have enjoined this persecution. See *Little Sisters Book & Art Emporium v. Minister of Justice & Attorney General*, No. A901450 (Sup. Ct. B.C. Jan. 19, 1996).

211. Cf. David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U PA. L. REV. 111 (1994) (arguing that sexual expression subverts attempts at regulation)

Gay experience also strongly disputes the views of writers who dismiss pornography as "low value" speech, like libel and commercial speech. Professor MacKinnon maintains that pornography "does not engage the conscious mind" as traditionally protected (political) speech does.<sup>212</sup> She is right to say that hardcore porn has traditionally been treated by judges and professors as more like sexual activity, which can be regulated, than like communicative speech, which is hard to regulate. Both she and they are wrong, however, to deny the communicative features of pornography. While pornography is not identity speech in the same way student organizing was at Georgetown University in the 1970s or carrying placards is in the Boston parades, pornography does contribute images and knowledge that help people formulate and understand their sexual identities.

Socially disapproved porn can have an informative value. It is worth recalling that Radclyffe Hall's *Well of Loneliness* (1929) and *Sappho Remembered*, a 1954 short story of lesbian romance, were considered obscene by the censors of their eras simply because they described woman/woman romance in positive terms.<sup>213</sup> Not only do I consider *Well* and subsequent lesbian novels, such as Ann Bannon's *Odd Girl Out* (1957), both intellectually interesting and erotic, but thousands of women who read these books in their youths found them affirming, instructive, and mind-bending as well.<sup>214</sup> In retrospect, the censors were wrong. They were not wrong because the sex blinded them to the communicative value of the romances. To the contrary, they were wrong because they did recognize their communicative value and censored the books in order to stamp out those ideas. Such censorship was foolish as well as inhumane, and sporadic judicial enforcement of the First Amendment slowed these censors down in their heyday.

Sexual diversity is greater today than it was when Radclyffe Hall wrote *Well*, and pornography has contributed to that sexual diversity. The gay experience has been that pornography remains a trove of useful information about sex—not only about the options for fitting one body part into another, but also about various sexual practices and preferences and about subcultural mores and customs.<sup>215</sup> More fundamentally, gay porn communicates not just

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212. CATHARINE MACKINNON, ONLY WORDS 16 (1993); see also FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993).

213. See *One, Inc. v. Olesen*, 241 F.2d 772 (9th Cir. 1957), *rev'd per curiam*, 355 U.S. 371 (1958) (allowing Post Office to censor *Sappho Remembered*, but overturned by Supreme Court); *People v. Friede*, 233 N.Y.S. 565 (N.Y. Magis. Ct. 1929) (allowing police to censor *Well*). *Friede* was overturned in an unreported decision by a three-judge panel in Special Sessions. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1557 n.37 (1993).

214. For a complex understanding of the place of *Well* in the formation of lesbian consciousness, see Esther Newton, *The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman*, 9 SIGNS 557 (1984).

215. This point was first developed in SCOTT TUCKER, RADICAL FEMINISM AND GAY MALE PORN (1983), and later in Sherman, *supra* note 209, at 681–89. But see JOHN STOLTENBERG, REFUSING TO BE A MAN: ESSAYS ON SEX AND JUSTICE (1989) (agreeing with MacKinnon that gay pornography is harmful).

information, but identity. If you like these pictures of men bound and gagged, then you are a "bondage and discipline" person. In our culture, your sexual tastes go as much to your personal identity as do your religious tastes. Would it be imaginable to say that the state can censor religious literature such as the erotic *Song of Solomon* on the ground that it is "low value" speech? As Professor Jeffrey Sherman has recently argued, MacKinnon's insistence that antiporn feminism target gay porn as well as straight porn is too quick a leap. Sexual materials depicting same-sex intimacy serve many expressive, informative, and identity-creating purposes uniquely useful to sexual-orientation minorities.<sup>216</sup>

In short, Judge Easterbrook was right to reject assertions that pornography is not communicative and to insist that what pornography often communicates, sexuality as violence or domination, is why feminists want to censor it. Gaylaw should support his view that the First Amendment is deeply implicated in antiporn censorship, but ought not accept Easterbrook's easy dismissal of MacKinnon's reasons for suppressing this speech. Easterbrook deferred to the legislative findings that pornography does cause harm, both physical and personal, to women but then closed off serious analysis by asserting that the First Amendment simply does not allow suppression of speech because of its content, its ability to persuade. That is untrue. The First Amendment allows the state to regulate cigarette ads that may persuade people to harm themselves by smoking,<sup>217</sup> false alarms that may persuade people to run from a building that is not really on fire,<sup>218</sup> threats or lies that persuade people to hand over money they would otherwise not relinquish,<sup>219</sup> and so on. In at least one (controversial) decision, the Supreme Court went further, to hold that the state can regulate "group libel," statements that a minority group is depraved, unchaste, and so forth, subject to the defendant's showing that the statement was both true and nonmalicious.<sup>220</sup>

Contrary to Judge Easterbrook, the discussion cannot end with the anticensorship principle, the finding that pornography involves communication and even implicates identity speech. One must consider also the

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216. See Sherman, *supra* note 209, at 681-89.

217. See *Packer Corp. v. Utah*, 285 U.S. 105 (1932) (upholding statute prohibiting billboard advertising of cigarettes).

218. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (stating in dictum that First Amendment does "not . . . protect a man in falsely shouting fire in a theatre").

219. See *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that commercial speech that is "misleading" enjoys no First Amendment protection); see also *Virginia State Bd of Pharmacy v. Virginia Citizens Common Cause*, 425 U.S. 748, 771-72 (Stevens, J., concurring) ("The First Amendment as we construe it today does not prohibit the state from insuring that the stream of commercial information flow clearly as well as freely.").

220. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Some feel that the decision does not survive *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), but others find robust First Amendment wisdom in the group libel idea, see, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). At the very least, the requirement that defendant show both truth and lack of malice has been overruled by *Sullivan*.

nondiscrimination principle, whether suppressing pornography materially contributes to public equality of the sexes without trampling the autonomy of a *nomos*. There is no defensible way to avoid MacKinnon's central factual assertions, that pornography hurts women's ability to participate in the public sphere and that such hurt can be alleviated by state suppression. Much ink has been spilled on the empirical question whether pornography actually does contribute to violence against women,<sup>221</sup> and I claim that the legal system was wrong to reach closure on the First Amendment issue before a clear answer was reached concerning the effect-on-women issue.

Consider one angle. Social scientist Edward Donnerstein, whose work has been cited by both sides of the debate, now concludes that "it is the violent images fused with sexual images in some forms of pornography, or even the violent images alone, that account for many of the antisocial effects reported by social science researchers."<sup>222</sup> He and his colleagues emphasize that "materials that were merely sexual in nature had no effect on aggressive behavior."<sup>223</sup> If this observation is borne out over time, the Indianapolis ordinance would then be in tension with the comparative need principle, as most of its prohibitions regulate material that sexualizes and subordinates women, without any nexus to violence.<sup>224</sup>

Even for pornography depicting sexual violence, there is cause for concern. Sexualized violence is not limited to pornography but is commonplace in television, movies made for general release, and magazines of all sorts. Would the First Amendment tolerate censorship of these media as well as under-the-counter pornography? This is not a ridiculous question, in light of MacKinnon's charge that pornography, and surely popular culture as well, contribute to women's subordination by perpetuating stereotypical images of women as helpless sex objects. Like much feminist theory, gaylaw would attempt to identify a more effective way to resist violent or degrading pornography, other than state censorship. Is there not a dialogic way to accommodate the discrimination problems MacKinnon identifies and the censorship concerns of the First Amendment?

The First Amendment tradition suggests that the best response to objectionable speech is counterspeech. Antiporn feminists respond that pornography silences women and, thereby, makes counterspeech unlikely. The gay experience cuts against this response. Consider gay responses to movies

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221. See, e.g., ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 299-352 (1986); Frederick Schauer, *Causation Theory and the Causes of Sexual Violence*, 1987 AM. B. FOUND. RES. J. 737. For a response to the Attorney General's Report, see GORDON HAWKINS & FRANKLIN ZIMRING, PORNOGRAPHY IN A FREE SOCIETY (1988).

222. EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 2 (1987).

223. *Id.* at 98. By sexual violence, Donnerstein et al. mean depictions of "sexual coercion in a sexually explicit way," especially when the woman initially resists and then gives way to enjoyment. See *id.* at 89.

224. This is the criticism of Duggan et al., *supra* note 209, at 154.

that depict gay people as predatory and worthy of execution.<sup>225</sup> Before 1962, American movies were prohibited by the Motion Picture Production Code from depicting "sexual perversion." When that prohibition was dropped, in part because of its ineffectiveness and in part because of market demands, the Code's seal of approval was immediately given to movies that featured pathetic suicides by lesbian (William Wyler's *The Children's Hour*)<sup>226</sup> and gay (Otto Preminger's *Advise and Consent*)<sup>227</sup> characters. It was withheld from Basil Dearden's *Victim*,<sup>228</sup> a British thriller which depicted gay people with sympathy.

The appropriation of lesbian and gay characters followed this dreary pattern through the 1960s. Virtually all American movies depicted such characters as sick, predatory, or violent, and often all three.<sup>229</sup> Homosexuals typically ended up dead by their own hands or at the hands of disgusted heterosexuals, or, if they were lesbians, seduced and cured (for example, James Bond's seduction of the amazon Pussy Galore in *Goldfinger*).<sup>230</sup> Only after Stonewall, with more out lesbians and gay men as potential moviegoers and gaylib organizations such as Gay Activists Alliance breathing down the censors' necks,<sup>231</sup> did a more gay-affirmative cinema begin to develop, relatively unimpeded by state censorship. The first significantly "gay" American movie was William Friedkin's slavish adaptation of Mart Crowley's depressing play, *The Boys in the Band*.<sup>232</sup>

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225. See VITO RUSSO, *THE CELLULOID CLOSET* (1987), and the movie by the same name (Sony Pictures 1996).

226. *THE CHILDREN'S HOUR* (United Artists 1961).

227. *ADVISE AND CONSENT* (Columbia 1962).

228. *VICTIM* (Alfred Filmakers Parkway 1961).

229. Homosexual characters often killed either the objects of their desires (Marlon Brando in *REFLECTIONS OF A GOLDEN EYE* (Warner Bros. & Seven Artists 1967), Carol Kane in *MY SISTER, MY LOVE* (Jerry Gross Organization 1977)), innocent third parties (Rod Steiger in *NO WAY TO TREAT A LADY* (Paramount 1968), Tom Berenger in *LOOKING FOR MR. GOODBAR* (Paramount 1977), Christopher Reeve and Michael Caine in *DEATHTRAP* (Warner Bros. 1982)), or themselves (Shirley MacLaine in *THE CHILDREN'S HOUR* (United Artists 1961), Rod Steiger in *THE SERGEANT* (Warner Bros. & Seven Artists 1968)).

230. *GOLDFINGER* (United Artists 1964).

231. In 1973, the Gay Activists Alliance and the National Gay Task Force developed "Some General Principles for Motion Picture and Television Treatment of Homosexuality." See RUSSO, *supra* note 225, at 220-21. The overriding theme of the various principles was that movies should not reinforce popular myths and stereotypes about homosexuality and should, instead, present gay characters as natural, complex human beings. For example, Principle 3 states: "Use the same rules you have for other minorities. If bigots don't get away with it if they hate Catholics, they can't get away with it if they hate gays. Put another way, the rights and dignity of homosexuals are not a controversial issue." *Id.* at 221.

232. *THE BOYS IN THE BAND* (Cinema Center/Leo 1970). Although the male characters were a menagerie of popular stereotypes (the sissy, the dumb hustler, the acid wit concealing guilt, the tolerant but shocked heterosexual), the movie also included a well-adjusted gay couple who displayed obvious physical affection and dramatically reaffirmed their love at the end. The film gave even the stereotyped characters human depth and sympathy. Just as *Well of Loneliness* was both depressing and liberating for some lesbians, so was Crowley's *Boys in the Band* for some gay men. Indeed, the film could be viewed as a searing indictment of the closet culture, for the unhappiness the film documents is, in part, a product of the outlaw status of gay relationships.

The remainder of the 1970s saw a fair number of movies, the most interesting of them made in Europe, reflecting a gay sensibility or at least more complicated gay characters.<sup>233</sup> Most American movies continued to treat gay characters as sissy boys and butch women, but other (mostly European) movies depicted more normal gay characters. When Hollywood in 1980 produced three homophobic clunkers—William Friedkin's *Cruising* (United Artists), Paul Schrader's *American Gigolo* (Paramount), and Gordon Willis's *Windows* (United Artists)—it provoked angry protests from gay organizations and from individuals fed up with Hollywood stereotypes. Under constant market and intellectual pressure since 1980, American movies have come to depict lesbian, gay, and bisexual characters more realistically and less stereotypically, all through the process of dialogic accommodation and without the censorship of the past. Given that attitudes change slowly, it is remarkable that Hollywood's depiction of gay characters has moved from *The Children's Hour* to *Philadelphia*<sup>234</sup> in only a generation—without any state censorship.

Education and discussion can affect people's attitudes about sexuality and gender, and gay experience supports the idea that dialogue is better than censorship. Some social science studies, in fact, suggest that the best way to deal with violent pornography is by showing it to people and following the show with personal narratives or debriefings explaining how abusive the sex is to some women. The studies suggest, tentatively, that the combined exposure to porn and counterporn reduces misogynistic attitudes more effectively than exposure to feminist materials alone.<sup>235</sup> This is an insight that antiporn feminists have taken to heart, as they have developed precisely such countereducational programs where porn is shown and then deconstructed. In light of the tangibly misogynistic themes of much porn and the public equality goal, all as articulated by MacKinnon, at the very least the state has an obligation as well as the authority to support feminist education and resistance

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233. These include John Schlesinger's *SUNDAY BLOODY SUNDAY* (United Artists 1971), an amazing film and my favorite; Luchino Visconti's *DEATH IN VENICE* (Alfa Cinematographica & Productions et Editions Cinématographiques Françaises 1971); Bob Fosse's *CABARET* (Lorimar 1972), a highly ambivalent adaptation of Christopher Isherwood's *BERLIN STORIES* (1945); Christopher Larkin's *A VERY NATURAL THING* (Montage Creations, Inc. 1974); Sidney Lumet's sensationalist *DOG DAY AFTERNOON* (Warner Bros. 1975); George Schlatter's amusing *NORMAN, IS THAT YOU?* (MGM 1976); Wolfgang Petersen's *THE CONSEQUENCE* (Solaris Film Prods. & Westdeutscher 1977); Nancy and Peter Adair's gay-affirming *WORD IS OUT* (Mariposa Film Group 1977), which was electrifying for many of the lesbians and gay men who saw it; Richard Benner's *OUTRAGEOUS* (Film Consortium of Canada 1977), a terrific forum for female impersonator Craig Russell, as well as the same director's sensitive *HAPPY BIRTHDAY GEMINI* (United Artists 1979); and Richard Lester's *THE RITZ* (Warner Bros. 1978), a lackluster adaptation of the wittier Terence McNally play.

234. *PHILADELPHIA* (Tristar 1993).

235. See DONNERSTEIN ET AL., *supra* note 222, at 180–85; MARCIA PALLY, *SENSE AND CENSORSHIP: THE VANITY OF BONFIRES* 34–36 (1991); Neil Malamuth & Edward I. Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, 15 *ADVANCES EXP. PSYCHOL.* 103, 129 (1982).

to pornography. Gay people also have an obligation to examine the tendency of gay porn to sexualize race-based stereotypes.<sup>236</sup>

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Equality comes on little cat's feet and not in a single leap or bound. This lesson of the nation's experience with sex and race discrimination applies with full force to gaylegal experience. Like the young Philip Bockman whose initial foray into angling was just "fishing practice," the recently enacted sexual orientation antidiscrimination laws are "equality practice" for the time being. The ultimate goal of gay rights is full equality, but I doubt that will be possible in the near term, and not just for pragmatic reasons.<sup>237</sup> In some instances, full gay equality would be a fundamental affront to liberty interests of religious or traditionalist groups, in ways that full gender or race equality no longer are.<sup>238</sup> In such instances, accommodation is both likely and appropriate, from a gaylegal as well as religious point of view.<sup>239</sup>

Accommodation and equality practice can be criticized from a gay perspective as acquiescing in or perpetuating the apartheid of the closet. But just as the Radicalesbians and other early gay liberationists were both naive and wrong to think that the act of coming out would change everything, today's gay radicals would be both naive and wrong if they believed that gay equality trumps the rights of everybody else. It would be naive, because we are the new "rights group" on the block, and human beings and their institutions require time and struggle to internalize a new group. It would be wrong, because the gay *nomos* should accept what the Roman Catholic and most other religious *nomoi* have accepted, the need to respect and accommodate other people's and other groups' normative space. In a country whose hallmark is

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236. This has been documented in an excellent paper by my former student, Perry Chen. See Perry Chen, *Jungle Negroes, Madame Butterflies, Hot Tamales: Talking About Race in the Dialogue of Love Speech* (Harvard Law School 1994) (unpublished manuscript, on file with author). To my chagrin, this paper has found the path to publication blocked on several fronts.

237. See POSNER, *supra* note 29, at 318 (1992) (offering pragmatic arguments for excluding gays from armed services and institution of marriage).

238. For example, even Bob Jones University in the 1970s accepted racial integration, its discrimination was confined to prohibitions of interracial dating and marriage. The University's policy would not have brought such censure from even the liberal Warren Court immediately after *Brown*. The Court in the 1950s refused to attack even state laws criminalizing interracial cohabitation or marriage. See *Naim v. Naim*, 350 U.S. 985 (1956). A decision like *Bob Jones*, penalizing a religious school for its interracial dating policy, would have been inconceivable in the 1950s. It became possible only after the country and its religions had gone through thirty years of equality practice.

239. Notwithstanding the views of many religions that benign sexual variation is unacceptable for their nomic communities, the public community ought to adopt this stance. Indeed, to reject the idea, and treat gay communities less respectfully than religious ones for religious-inspired reasons, would be partial to religion in ways that the Establishment Clause discourages. Cf. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2521 (1995) (finding that "neutrality" required by Establishment Clause does not tolerate partiality toward or exclusion of religious viewpoints but is satisfied "when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse").

a balance of independent cooperation and autonomy, gay groups should join religious groups in working together in the face of nomic competition.

To return to the idea that inaugurated this Essay, I also concede that my effort to connect religion and sexual orientation as identity categories suitable for antidiscrimination legislation can be criticized from a religious perspective as connecting the religious with the profane, or even the sacrilegious. But just as the "Save the Children" campaign in Dade County and other early opponents of gay rights were both naive and wrong to think that open homosexuality would corrupt children, today's religious conservatives would be naive and wrong to deny the similarities between antireligious and anti-gay prejudice. It would be naive because inconsistent with the historical record, examined in Part I. It would be wrong because inconsistent with the charitable principles at the heart of the large majority of religions in America. In a country founded upon principles of religious liberty, we have prospered under a public law philosophy embodying benign religious variation. Gaylaw's challenge to American public law, and to our religions as well, is to consider the truth of benign sexual variation, too.