RELIGION AS THE LANGUAGE OF DISCOURSE OF SAME SEX MARRIAGE

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I. ABSTRACT

The debate over the availability of the institution of marriage to couples of the same sex, like that over the regulation of abortion, has reached the point of exhaustion. Everything that can be said has been said; everything that can be done has been done. And yet, there is no victory for either side of the debate. For advocates of same sex marriage, this state of affairs is particularly distressing. Once confident of carrying the country after decisions in Hawaii, Alaska, and Vermont appeared to eliminate legal barriers to same sex marriage, these advocates again confront the reality of deep division concerning the extension of the dignity of marriage to same sex couples. Opponents of same sex marriage work towards their goal with renewed vigor, backed by a reinvigorated political establishment peopled by those who find the notion of same sex marriage revolting, and a language of religious discourse that is finding increasing favor within the American polity. Faced with this dynamic and unfavorable political reality, advocates have been forced to renew tired arguments or satisfy themselves with an unfavorable, and unstable, political settlement such as civil unions in Vermont. This paper explores the nature of the exhaustion of argument about same sex marriage. It suggests that fatigue is a product of an aversion to embracing the most powerful weapons in the arsenal of traditionalists – religion, religious discourse and religious community – in the service of marriage between all affective couples. The road to the legitimization of same sex marriage lies through the work of emerging communities of faith and their religious discourse. In a deeply religious land, only acts of faith that embrace as an article of that faith the marriage rights of people of the same sex can effectively respond to the arguments of other faithful communities. The article ends with a proposed plan of action for the maximum effect of the new religions in carving a space for same sex marriages.

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II. INTRODUCTION

In his correspondent's reconstruction of the debates of the Constitutional Convention in 1787, Jeffrey St. John relates how influential delegates of the larger states confronted the problem of small state resistance to proportional representation in the new Senate:

> A month ago, Mr. Madison and Mr. Wilson, as leaders of the large States, were confident they would carry the Convention with them. Now they have been forced to adopt the strategy of their adversary Roger Sherman [of Connecticut], who believes that when you are in the majority, vote, and when in a minority, talk.[1]

Like the representatives of large states at the Philadelphia convention, the advocates of same-sex marriage, once confident of carrying the country after Hawaii[2], Alaska,[3] and Vermont,[4] now again confront the reality of the absence

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[1] JEFFREY ST. JOHN, CONSTITUTIONAL JOURNAL: A CORRESPONDENT'S REPORT FROM THE CONVENTION OF 1787 106 (1987) (discussing attempts to block equality of voting in the proposed Senate).

[2] The Supreme Court of Hawaii initially held that same sex marriage was not prohibited in Hawaii, and might be protected from discrimination under Hawaii's constitution. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993). But in 1998, Hawaii adopted a constitutional amendment precluding legal recognition of same-sex marriages. *See* HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."); Baehr v. Miike, 994 P.2d 566, 566 (Haw. 1999).

[3] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998) (stating "the recognition of one's choice of a life partner, is a fundamental right" subject to strict scrutiny). The possibilities inherent in this case were, like those of Hawaii, extinguished by constitutional amendment to the state constitution. ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman.").

[4] In 2000, Vermont enacted the first civil union statute in the country. VT. STAT. ANN. tit. 15, ch. 23 (2000). In the elections that followed, a number of legislators in favor of civil unions were targeted by opponents and defeated. American Political Network, *So, Tell Us How You Really Feel*, THE HOTLINE, Sept. 13, 2000, *available on* Westlaw *at* 9/13/2000 APN-HO 41 ("Opponents of VT's civil unions act turned out 'in force' yesterday in an attempt to force out various GOP candidates whom support the law which gives legal rights to same-gender couples. Eight GOPers were 'prime targets,' and four were defeated."). In the session following the enactment, a number of proposals were made to limit or undo the Vermont Civil Union Act, or severely limit its utility to sexual non-conformists, especially from other states. Allison Bell, *What Has Vermont's Civil Union Law Changed?*, NAT'L UNDERWRITER LIFE & HEALTH-FIN. SERV. EDITION 5, July 2, 2001, 2001 WL 22875133 ("Republican lawmakers have been working hard to repeal the civil unions act, and the original

(*continued*)

of consensus for raising unions between people of the same sex to a dignity equal to that of marriage.

Proponents of same-sex marriage find themselves in the position of Madison and Wilson. Faced with a dynamic and unfavorable political reality,[5] we are forced to talk or face the inevitability of an unfavorable political settlement.[6] This conference,[7] along with others held recently along the same lines,[8] evidences this understanding. I will speak about the exhaustion of both talk and action in connection with efforts to secure marriage rights for same-sex couples. I will then turn to the utility of religion as a means of effecting those rights to marriage that both traditional religions and the state appear to deny. I will end with a proposed plan of action for the

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language of the law and related regulations incorporate many restrictions.").

[5] *See, e.g.*, American Political Network, *supra* note 4; Bell, *supra* note 4.

[6] The Defense of Marriage Act (DOMA), Pub. L. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)), is an indication of the direction of political consensus. The strengthening of this consensus is likely after the ascension of the Republican Party to the Presidency in 2001.

[7] The symposium on Same Sex Marriages, Domestic Partnerships, and Civil Unions held in Columbus, Ohio, at Capital University Law School, March 3, 2001, focused on a discussion of:

> some of the many legal issues raised by same sex unions. The call for recognition of those unions from the lesbian and gay community, from a few religious organizations, and from many civil rights groups, has fostered extensive and sometimes heated debate. The private sector has listened to the debate and has begun to extend benefits to same sex partners. Religious communities have also reached out to gay and lesbian people for inclusion in many aspects of religious life. States' responses to these steps have been slow in developing but continue to evolve.

Capital University Law School, *Same Sex Marriages, Domestic Partnerships and Civil Unions Symposium, available at* http://www.law.capital.edu/news/domesticpart.asp (last visited Feb. 10, 2002).

[8] There has been a spate of conferences aimed both at supporting or opposing moves to regularize marriage between people of the same sex within legal academia. *See, e.g.*, Conference on Interjurisdictional Marriage Recognition, Creighton Law School (co-sponsored by Columbus School of Law at The Catholic University of America and the J. Reuben Clark Law School at Brigham Young University), June 1998; Conference on the Right to Marry, *Loving v. Virginia*, Catholic University of America (co-sponsorship by the Howard University School of Law and the J. Reuben Clark Law School at Brigham Young University), Nov. 19-21, 1997; Fifth Annual Sexual Orientation and the Law Conference, Vermont Law School, Mar. 19, 1999; Freedom to Marry Conference, Harvard Law School, Feb. 13, 1999; Legal Recognition of Same-sex Partnerships: A Conference on National, European and International Law, London, England, July 1-3, 1999.

maximum effect of the new religions in carving a space for same-sex marriages.

III. DISCUSSION

A. *The Exhaustion of Talk and Action*

This *talk* must be encouraged. It is valuable.

> The American cultural conversation about sexual non-conformity has never been monolithic. It is *possible* that sexual non-conformity can also be reconstituted either as difference or as inconsequential – that is, as normal. Possibility, however, is not certainty. Possibility carries with it responsibility, a burden to converse within the social, political and judicial spheres.[9]

Expression is a powerful means of witnessing[10] the reality of alternative visions of what is normal or acceptable.

Action within the framework of the issues expressed in argument must also be encouraged. Many who participated in this conference have been integral parts of that effort.[11] Despite a number of arguments to the contrary,[12]

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[9] Larry Catá Backer, *Toleration, Suppression and the Public/Private Divide: "Homosexuals" Through Military Eyes*, 34 TULSA L.J. 537, 554 (1999).

[10] I use the term "witnessing" here loosely in its Christian religious sense—of bearing firsthand accounts of the manifestation of the divine in the personal life of the bearer or witness.

[11] *See, e.g.*, Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551 (1993); Patricia A. Cain, *Privileges and Stereotypes: A Commentary*, 3 J. GENDER RACE & JUST. 659 (2000); Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998); David B. Cruz, "*Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925 (2001); David B. Cruz, *Same-Sex Marriage I*, *in* 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2307 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000); Arthur S. Leonard, Boy Scouts of America v. Dale*: The "Gay Rights Activist" as Constitutional Pariah*, 12 STAN. L. & POL'Y REV. 27 (2001); Arthur S. Leonard, *Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 415 (2000); Arthur S. Leonard, *Lesbian and Gay Families and the Law: A Progress Report*, 21 FORDHAM URB. L.J. 927 (1994); Mark Strasser, Loving *in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. CHI. ROUNDTABLE 61 (2000); Mark Strasser, *Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 753 (2000).

[12] *See, e.g.*, Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda"*, 1 AFR.-AM. L. & POL'Y REP. 33 (1994).

there is much to be learned from the experiences of African-Americans in their struggles to remake the social and political system of this country.[13] In the last century they were able to undo a society whose symbolic form was encapsulated in *Plessy*[14] by working within *Plessy* itself to produce its defeat in *Brown*.[15] It is important that social action movements play themselves out with the creation of the new status of civil unions,[16] benefits for domestic partnerships,[17] the adjustment of adoption rules to reflect non-traditional families,[18] and the attainment of all of the other civil benefits of marriage[19] for those heretofore denied that status because of the nonconforming nature of their unions. But it is also important to remember the limitations of political, and especially judicial action, in the secular sphere. *Brown* was an important change in the law,[20] but the last fifty years have demonstrated the difficulty of

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[13] Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000); Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Courts, Law and the Interpretive Process*, 20 B.C. THIRD WORLD L.J. 291 (2000).

[14] Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896) (upholding Louisiana statute requiring segregation of African-Americans in public accommodations and putting an official imprimatur on the legal doctrine of "separate but equal" that was to be the law of the land until 1954), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[15] Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954) (rejecting constitutional protection for the doctrine of "separate but equal").

[16] For a discussion of Vermont's new civil union provisions, see Johnson, *supra* note 11. For a discussion of the rise of civil unions and other similar institutions in Europe, see Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141 (2001); Nicholas J. Patterson, Recent Development, *The Repercussions in the European Union of the Netherlands' Same-Sex Marriage Law*, 2 CHI. J. INT'L L. 301 (2001) (discussing Dutch law, effective April 1, 2001, permitting same sex partners to marry and adopt on the same terms as mixed sex couples).

[17] *See, e.g.*, Arthur S. Leonard, *Mayor Giuliani Proposes His Domestic Partnership Policy*, 4 CITYLAW 49 (1998).

[18] *See, e.g.*, Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 194 (1995); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 522 (1990); Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 68-69 (1996); Karen Markey, Note, *An Overview of the Legal Challenges Faced by Gay and Lesbian Parents: How Courts Treat the Growing Number of Gay Families*, 14 N.Y.L. SCH. J. HUM. RTS. 721, 726 (1998).

[19] *See, e.g.*, Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000).

[20] As I have stated before:

Plessy was not overturned in an act of imperial will by the court in *Brown.* Rather, the interpretive, if prophetic, possibilities, inherent even in the days of *Plessy*, were freed to roam

(*continued*)

changing social patterns and the hearts of people on the basis of changes in the law.[21]

Yet, with respect to the rights of sexual non-conformists to form affective unions sanctioned by the states on a level of dignity equal to that of traditional heterosexual marriage, *talk* and *action* have been exhausted. Given the ground rules of the regulation of difference in the United States, there is a fairly well defined and confined space for argument and action.[22] The

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and percolate through society for several generations, to come back triumphally as the formal voice of "that which is becoming" when the court was confronted fifty years after *Plessy*, with the need to acknowledge the ways in which culture had modulated.

Catá Backer, *supra* note 13, at 343.

[21] For a discussion of the limits of judicial interference with community preferences in the context of racial integration, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (1995). Odeana R. Neal put it nicely when she remarked:

> Those of us in the legal profession must take care that we do not overly depend on the degree to which law can transform a culture or society. While it is no new story that law and society interact with and affect one another, a set of legal rules not endorsed by a majority of the population—and particularly legal rules that a majority of the population is determined to thwart—cannot transform a society. We lawyers, legal academics, and judges then, should continue to do those things we do best, but we must do it knowing that if we are ahead of the curve of our communities on any issue, our work may not have the sweeping effects we sometimes imagine it will. Indeed, our efforts may create a backlash against our goals.

Odeana R. Neal, *Writing Rules Does not Right Wrongs*, 7 TEMPLE POL. & CIV. RTS. L. REV. 303, 303 (1998).

[22] Like all communities, the American community tolerates social, political and economic dialogue only within the bounds of its foundational norms. *See* Larry Catá Backer, *Poor Relief, Welfare Paralysis, and Assimilation*, 1996 UTAH L. REV. 1, 6 (1996). I have described these norms in connection with the construction of systems of poor relief; the explanation is equally applicable to the limitations of current dialogue about the alternatives available in the "gay-marriage" debate:

> Think about poor relief as coordinates within a small sphere. Each variant of poor relief, existing or proposed, occupies coordinates within this sphere. The coordinates may overlap, or they may be separated by some distance. Within the boundaries of the sphere, the distances between coordinates appears large, the way the distance from bedroom to kitchen may appear large in a house. From outside the boundaries, however, those distances may appear smaller, just as the distance between bedroom and

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parameters of the debate, and the actions possible within those parameters, have been fully developed. Our society is reduced to the imperialism of power;[23] both sides now attempt to use the power of majority rule to silence their opponents without any attempt to convince them of the error of their ways.[24]

In a way analogous to the developments in the abortion debates,[25] the

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> kitchen appears smaller when seen from an airplane overhead.
>
> The boundaries of the sphere are defined by the normative substructure provided by the static paradigm [positing the limited nature of change within a stable social system]. The boundaries consist of the taboos or rules comprising our sociocultural substructure. The broad outlines of the paradigm within which all forms of social structuring occur (including the structuring of poor-relief programs) consist of a number of assumptions about the way society operates and about individuals' relationship to each other.

Id. (footnotes omitted).

[23] Consider Justice Scalia's recent lesson in the politics of religious practice (and its suppression within the American republican polity):

> Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. . . . But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Dept. of Human Res. v. Smith, 494 U.S. 872, 890 (1990).

[24] I do not mean to imply that foundational change is impossible. Indeed, the thrust of this paper is meant to illustrate the means by which even the most basic social taboo—concerning marriage—can be revalued. But revaluation is not revolution. The former proceeds like a glacier, a *constant* process of change and changing in a barely perceptible way. The latter happens hardly at all. Yet when it does, it eliminates substantially all that came before. *See, e.g.*, THOMAS S. KUHN, THE COPERNICAN REVOLUTION 74 (1957). Changes in detail, in implementation or programmatic form, while remaining true to the same underlying values, is flashy but not revolution. The "norms and standards and rules that foundationalist theory would oppose to history, convention, and local practice are in every instance a function or extension of history, convention, and local practice." Stanley Fish, *Consequences*, 11 CRITICAL INQUIRY 433, 439 (1985).

[25] For an attempt to provide a balanced interpretation of that debate, see ELIZABETH MENSCH & ALAN FREEMAN, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? (1993).

debate about same-sex marriage is passionate and immovable because the arguments center on the definition of taboos at the very foundations of the ordering of society.[26] Within the confines of those parameters: *what can be said has been said; what can be done has been or is being done*, or at least considered.[27]

The parameters of that debate are currently divided into several categories: historical, religious, moral, legal, political, economic, and psychiatric. I will describe each in turn. None of the arguments suggest anything more than that people are deeply divided in ways that make it unlikely that either side of each of these debates will triumph.

The arguments based on history are simple enough to flesh out. The arguments are based on the ability to prove that people of the same sex actually married each other, or that institutions—whether political, social or religious—tolerated, condoned or facilitated such unions. The idea, among proponents of same-sex marriage, is that proof of the existence of these relationships in the past should refute arguments against same-sex marriage based on the idea that such unions are historically unknown.

For example, proponents point to unions among Chinese lesbians,[28] English lesbians,[29] North American indigenous peoples,[30] and Sudanese and Nigerian women entering into long-term relationships to ensure fertility.[31]

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[26] As I have stated before:

> That, after all, is the nature of taboo—a wall limiting societal as well as individual action. It separates the permitted from the unspeakable, stability and social order from alternative and *incompatible* social orderings. Beyond taboo is theory—usually laughable, barely comprehensible, easily ignored, and useful only to the extent it can be rebuilt within the walls of our inviolate conduct and value codes.

Catá Backer, *supra* note 22, at 8.

[27] For a good summary of the arguments, see ANDREW SULLIVAN, SAME -SEX MARRIAGE: PRO AND CON, A READER (1997).

[28] James McGough, *Deviant Marriage Patterns in Chinese Society*, *in* NORMAL AND ABNORMAL BEHAVIOR IN CHINESE CULTURE 171 (Arthur Kleinman & Tsung-Yi Lin eds., 1981) (pacts not to marry).

[29] Editors of Fincher's Trades' Review, *A Curious Married Couple*, *in* ANDREW SULLIVAN, SAME -SEX MARRIAGE: PRO AND CON, A READER 30-32 (1997) (Victorian English lesbian couples married for decades).

[30] Walter L. Williams, *A Normal Man*, *in* ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON, A READER 35 (1997) (Timurica Indian men married to each other as reported in 1542 by the Spanish adventurer Cabeza de Vaca).

[31] Melville J. Herskovits, *A Note on "Woman Marriage" in Dahomey*, *in* 10 AFRICA 335 (1937).

Greek philosophical texts on love between men have also been deployed.[32] In an important work, the historian John Boswell argued that rituals were developed within the Roman Catholic religion for the union of males as early as the eleventh century.[33] Opponents of same-sex marriage remain unconvinced. On the one hand, they tend to reject the findings from history as inaccurate.[34] On the other hand, they argue that the existence of marginal conduct throughout the ages only proves that a tiny minority of people have always thought to flout strong social mores in every generation and in every place.[35] Moreover, the marginal nature of the conduct confirms social indifference at best and hostility, at worst to marriage-like unions among people of the same sex.[36] Ultimately, the historical arguments pit evidence that people sometimes engaged in such unions, more or less clandestinely, against the importance and meaning of the fact that such unions were more or less clandestine and not widely known.

The legal arguments have been extensively explored.[37] Opponents and proponents have sought refuge in the arcana of interpretation of the individual rights provisions of the American federal and state constitutions.[38] Three United States Supreme Court cases appear to be the most widely cited—by both sides—in the debate. The first, *Griswold v. Connecticut*,[39] upheld

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[32] PLATO, SYMPOSIUM (Alexander Nehamas & Paul Woodruff trans., Hackett Publishing Co. 1989) (the speech of Aristophanes). This work has for years been the intellectual basis for proponents of the legitimacy of same sex relations.

[33] JOHN BOSWELL, SAME SEX UNIONS IN PREMODERN EUROPE 39 (1994). Boswell's defenders have sought to buttress Boswell's argument with other evidence from history—for example contemporary sixteenth century reports of male-male marriage in Portugal. Ralph Hexter, *"Same Sex Union in Pre-Modern Europe": An Exchange*, NEW REPUBLIC, OCT. 3, 1994, at 39.

[34] This is particularly the case with respect to the work of John Boswell, which had been seen as an important attack on the hegemony of the "we-never-countenanced-same-sex-marriage" school of cultural history. Critics of Boswell's work focused on re-characterizing the ceremonies that Boswell described as "brotherhood" ceremonies, buttressing their arguments by suggesting the ceremony did not produce a relationship similar to those of a married couple (for example, household formation). *See, e.g.*, Brent D. Shaw, *A Groom of One's Own?*, NEW REPUBLIC, July 18 & 24, 1994, at 33.

[35] *Id*. at 36.

[36] *Id*.

[37] For a good summary of the arguments through the mid-1990s, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996).

[38] *See generally* i*d*.

[39] 381 U.S. 479 (1965). For a then-contemporary academic reaction to the novel jurisprudence of *Griswold*, see Paul G. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case*, 64 MICH. L. REV. 235 (1965).

married couples' right to contraceptives.[40] The broad scope of the language, as well as the very broad application of the language in the cases that followed,[41] suggested to many that the United States Constitution protected rights, including the right to marry, as institutions and practices that predated the Constitution itself.[42] The second case, *Loving v. Virginia*,[43] invalidated state prohibitions against interracial marriage in language as broad as that used in *Griswold*.[44] Together, these two cases suggested that the right to marriage was fundamental to the American way of life, and that the regulation of marriage was severely limited.[45] The third case, *Romer v. Evans*,[46] suggested that legislation, the origin of which could be supported only by anti-gay animus, could not survive constitutional scrutiny under the federal Equal Protection Clause.[47] Together, the three cases appear to make a strong argument against laws limiting marriage to people of different sex.[48]

However, opponents of same-sex marriage interpret the three cases far more narrowly.[49] Moreover, it has been suggested that there is a compelling

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[40] *Griswold*, 381 U.S. at 485-86.

[41] *See, e.g.*, Carey v. Population Services Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[42] Thus, the importance of history and the historical arguments. If, indeed, history bears out the existence of a practice of same sex unions, even if availed of only by a small portion of any population, then the case would be stronger for the preservation of those unions under the expansive language of *Griswold*, and conversely the attempt to limit *Griswold* heterosexual unions blessed by the state would be harder.

[43] 388 U.S. 1 (1967). The expansiveness of this holding can be seen in cases like *Turner v. Safely*, 482 U.S. 78 (1987), in which the Court held that prisoners had the right to marry. *Turner*, 482 U.S. at 99-100.

[44] *Loving*, 388 U.S. at 11-12.

[45] *See Griswold*, 381 U.S. at 485-86; *Loving*, 388 U.S. at 11-12.

[46] 517 U.S. 620 (1996).

[47] In an often cited passage (at least often cited by proponents of same sex marriage and the rights of sexual non-conformists) the Supreme Court explained:

> A second and related point is that laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. . . . Amendment 2 . . . in making a general announcement that gays and lesbians shall not have any particular protections from the law, inflicts on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.

Id. at 634.

[48] *See generally* Eskridge, *supra* note 37.

[49] *Compare* Eskridge, *supra* note 34, *with* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1; Lynn D. Wardle, (*continued*)

state interest in limiting marriage to people of different sex – the regulation of potentially procreative bonded pairs.[50]

In what was the greatest oblique blow to the construction of a legal argument based on an interpretation of the federal Constitution, the United States Supreme Court refused to find that criminalization of the sexual conduct of gay men was forbidden by the constitution.[51] Moreover, the Supreme Court has also held that marriage rights are not unlimited, even for heterosexual couples.[52] And the ancient limitations against polygamy appear also to permit further regulation outside the core coupling of one man and one woman.[53] Indeed, the federal government has enacted a statute defining marriage as limited to people of different sex.[54] The status of that legislation has yet to be definitvely determined. A very few state courts have determined that same-sex marriage might be protected under their respective state constitutions, among them Hawaii and Alaska.[55] However, in both cases, the

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"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771 (2001).

[50] *See, e.g.*, Lynn D. Wardle, *"Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771 (2001).

[51] *See* Bowers v. Hardwick, 478 U.S. 186, 197 (1986).

[52] *See* Califano v. Jobst, 434 U.S. 47, 58 (1977) (upholding a section of the Social Security Act providing for termination of dependent child benefits upon marriage to a person not entitled to benefits).

[53] Reynolds v. United States, 98 U.S. 145 (1878) (multiple heterosexual marriage). *But see* Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

[54] *See* Defense of Marriage Act (DOMA), Pub. L. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)). For additional discussion of DOMA, see David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623 (2001) (positive comments); Daniel A. Crane, *The Original Understanding of the "Effects Clause" of Article IV, Section 1 and Implications for the Defense of Marriage Act*, 6 GEO. MASON L. REV. 307 (1998) (positive comments); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335 (1997) (negative comments); Maurice J. Holland, *The Modest Usefulness of DOMA Section 2*, 32 CREIGHTON L. REV. 395 (1998) (positive comments); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (negative comments); Mark Strasser, Loving *the* Romer *out for* Baehr*: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997) (negative comments); Timothy Joseph Keefer, Note, *DOMA as a Defensible Exercise of Congressional Power Under the Full-Faith-and-Credit Clause*, 54 WASH. & LEE L. REV. 1635 (1997) (positive comments).

[55] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

state constitutions were rewritten to avoid this result.[56] Moreover, a number of older state cases suggest that there is no constitutional impediment to denying people of the same sex the right to marry.[57] Thus, at the beginning of the twenty-first century people are left to devise new and interesting ways to interpret decisions which might provide useful tidbits to either side of the argument and which grow older by the day, in hopes that, should a court in the future be squarely faced with the issue, it might be persuaded by one or the other sets of arguments.

Political and economic arguments are, in a sense, legal arguments in which the public policy discussion becomes unmasked. The arguments, well developed, are nicely illustrated in the debates that preceded the passage of the federal Defense of Marriage Act.[58] On the one side of the debate, those proposing recognition of same-sex marriages invoke the policy of tolerance, inclusion, and fairness to all groups.[59] They also invoke the struggles of African-Americans for full civil rights by analogy.[60] Opponents argue history, morals and states rights.[61] All agree that marriage confers economic benefits.[62] Proponents would like to see those benefits made available to couples of the same sex as a matter of fairness; opponents would withhold those benefits from same-sex couples as a means of making such unions less desirable.[63] These arguments call for political choices. As such, depending on the strength of the mores invoked, each side hopes to use general principles of social conduct to sway "public opinion" one way or the other.

When sexual non-conformity is involved, sooner or later the issue of children becomes prominent.[64] No less so in the debates about same-sex

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[56] See discussion *supra* notes 2 and 3.

[57] *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588 (Ky. Ct. App. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

[58] See *infra* notes 59 to 63 and accompanying text.

[59] *See, e.g.*, 142 CONG. REC. H7444 (1996) (statement of Rep. Lewis concerning DOMA).

[60] *Id.*

[61] *See, e.g.*, 142 CONG. REC. S10,105-11 (1996) (statements of Sen. Gram and Sen. Byrd concerning DOMA).

[62] *See Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. On the Constitution of the House Comm. on the Judiciary*, 104th Cong. (May 15, 1996) (remarks of Rep. Frank) *available at* 1996 WL 10163704.

[63] *Id.* (remarks of Hadley Arkes, Professor of Political Science, Amherst College, Massachusetts).

[64] *See, e.g., Defense of Marriage Act: Hearings on S. 1740 Before the Sen. Comm. on the Judiciary*, 104th Cong. (July 11, 1996), *available at* 1996 WL 10829445 (statement of Rep. Largent) ("If our law determines that homosexual marriage is permitted, the law is actually declaring to society and to our children that homosexual marriage is desirable and good. . . . Unfortunately, the practice of homosexuality is not healthy and is actually destructive to

(*continued*)

marriage. Here the battle lines are drawn in the middle of a long and ongoing debate within the psychiatric community about the nature of same sex desire, its ability to be passed by "environmental" factors, and the effect of being brought up by a same-sex couple on the mental health of children.[65] Each side proffers those studies that seem to support their position. There are studies suggesting that being raised by gay men or lesbians has no effect on the development of children,[66] and there are studies that suggest children are indeed psychologically affected.[67] Each side finds something fatally defective with the studies of the other side.[68] We can only await more studies, counter-studies and refutations in an area of "science" or "medicine" that may be more notable for the malleability of its foundations than for the objectivity of its practitioners. Members of the psychiatric community thus appear to act like

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individuals."); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997) (same sex marriage bad for children).

I have elsewhere explained, with a great deal of irony, of the way the courts have distilled this social fear of the gay man as the instrument for the corruption of children:

> Judges quickly learn from the narratives of their courts that the sodomite loves children. Unwilling to breed any for himself, he recruits them from among otherwise innocent children. We commonly believe that sexual nonconformists try to get sexually involved with children. Sodomites target both the willing and the unwilling, boys and girls. Further, the belief feeds commonly held fears that young people become lifelong homosexuals after being "recruited" by adults.

Larry Catá Backer, *Constructing a "Homosexual" for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529, 572 (1996).

[65] For a taste of the great debates of the last half of the twentieth century relating to sexual non-conformists and their mental "health," see RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 100-154 (1981); CHARLES W. SOCARIDES, HOMOSEXUALITY (1978); ALAN STONE, LAW, PSYCHIATRY AND MORALITY (1984).

[66] *See, e.g.*, Charlotte Patterson, *Children of Lesbian and Gay Parents: A Summary of Research Findings*, *in* LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS (1995); Bonnie R. Strickland, *Research on Sexual Orientation and Human Development: A Commentary*, 31 DEVELOPMENTAL PSYCHOL. 137 (1995).

[67] *See, e.g.*, Philip A. Belcastro et al., *A Review of Data Based Studies Addressing the Affects of Homosexual Parenting on Children's Sexual and Social Functioning*, 20 J. DIVORCE & REMARRIAGE 105 (1993).

[68] For a good example of this genre in the service of those opposing same sex marriage, see Wardle, *supra* note 64. For an example of the other side of the argument, see Marc E. Elovitz, *Adoption by Lesbian and Gay People: The Use and Mis-use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207 (1995).

lawyers with a more scientific sounding vocabulary.

Ultimately, perhaps, the arguments about the availability of marriage to same-sex couples reduces to questions of religion and morality. And with these arguments, of course, there can be no debate; how do you argue with the word of God, even the word of God interpreted by God's representatives on earth?

> There is a thin line between the use of religious sensibilities in forming political decision-making and democratic theocracy based on absolutist obedience to the interpretive powers of religious leaders. We ought not to pretend that religious sensibilities of individuals can mask the potentially incompatible systems of Religion for which they are meant to substitute when we think of "religion" informing "politics." Nor can we fail to remember that, until quite recently, Religion, or at least the Christian Protestant Religion was different in this country.[69]

At issue in the religious debate about same-sex marriage is the Word of God, and principally, that Word as recorded in the Bible and interpreted by those in authority of the principal Christian and Jewish sects.[70] The principal sects of the principal religions of the West – Roman Catholicism, Protestantism, Judaism, (and now) Islam – have all developed complex systems of behavior norms touching all aspects of life.[71] All of those sects

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[69] Larry Catá Backer, *Religion as Object and the Grammar of Law*, 81 MARQ. L. REV. 229, 242 (1998). "Religion, and the Protestant version of this Religion, has had a critical place in the development of American civil society. To assume otherwise requires us to *forget*. It requires us to sanitize Religion of its history and context." *Id*. at 243.

[70] Authority may be deemed divinely commanded and de jure, as is the authority of the Bishop of Rome, or a matter of community and held de facto by a college of representatives of congregants, as is the authority of the Southern Baptist Convention, or be a matter of reputation for sagacity or holiness, as is the authority of many Jewish rabbis.

[71] Religion as legal codex and jurisprudence demands an exclusive allegiance every bit as jealous as that traditionally required by the state in civil matters. To merge such systems requires the disappearance of one in favor of the other.

> We have become quite adept at substituting this notion of religious sensibilities, and politically expedient religious moral philosophy, for what used to pass for Religion. We have the temerity to do this in the name of Religion. Yet to do this is to pretend that *R*eligion does not exist, at least in the sense commonly understood at the beginning of the Republic. Yet we know that this complete system of law—Religion—does exist. Still, we engage in this strange enterprise.

Catá Backer, *supra* note 69, at 238.

have traditionally maintained that the Bible, as properly interpreted, forbids unions between people of the same sex. The primarily scriptural provisions cited as the basis for this position are set forth in the books of Genesis[72] and Leviticus.[73] There are other texts as well, sprinkled among what Christians call the Old and New Testaments.[74] On the basis of these provisions, the Roman Catholic Church,[75] the Southern Baptist Convention,[76] Orthodox Judaism,[77] and others,[78] have all interpreted the Word of God to mean that

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[72] *Genesis* 2:24 ("Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.").

[73] *Leviticus* 20:13 ("If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them.").

[74] *See generally* Victor Paul Furnish, *The Bible and Homosexuality: Reading the Texts in Context*, *in* HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE 18 (Jeffrey S. Siker ed., 1994).

[75] Rev. Joseph L. Charron & Rev. William S. Skylstad, *Statement of Same Sex Marriage*, *at* National Conference of Catholic Bishops (United States Catholic Conference, 1996); s*ee also* CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2357-65 (1995).

[76] The Southern Baptist Convention has adopted the following tenets relating to marriage:

> Marriage is the uniting of one man and one woman in covenant commitment for a lifetime. It is God's unique gift to reveal the union between Christ and His church and to provide for the man and the woman in marriage the framework for intimate companionship, the channel of sexual expression according to biblical standards, and the means for procreation of the human race.
>
> The husband and wife are of equal worth before God, since both are created in God's image. The marriage relationship models the way God relates to His people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ. She, being in the image of God as is her husband and thus equal to him, has the God-given responsibility to respect her husband and to serve as his helper in managing the household and nurturing the next generation.

Baptist Faith and Message Study Committee, *Report to the Southern Baptist Convention*, Part XVIII, (Adopted June 14, 2000), *at* http://www.sbc.net (last visited March 14, 2002).

[77] Dennis Prager, *Homosexuality, the Bible, and Us—A Jewish Perspective*, *in* ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON, A READER (1997).

[78] Thus for example, the Church of Jesus Christ of Later Day Saints has declared:

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marriage is reserved for two people, one of whom must be male and the other female.[79] Much of this interpretation is buttressed by interpretations that appear to place on people a religious obligation to procreate.[80] Yet, just as belief in the existence of a Divine presence has generated a world full of

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We, the First Presidency and the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, solemnly proclaim that marriage between a man and a woman is ordained of God and that the family is central to the Creator's plan for the eternal destiny of His children.

> All human beings—male and female—are created in the image of God. Each is a beloved spirit son or daughter of heavenly parents, and, as such, each has a divine nature and destiny. Gender is an essential characteristic of individual premortal, mortal, and eternal identity and purpose.
>
> . . . .
>
> The family is ordained of God. Marriage between man and woman is essential to His eternal plan. . . Further, we warn that the disintegration of the family will bring upon individuals, communities, and nations the calamities foretold by ancient and modern prophets.

Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World*, Sept. 23, 1995, *at* http://www.lds.org (last visited March 14, 2002).

[79] Consider, for example, the position statement of the Southern Baptist Convention on this point:

> We affirm God's plan for marriage and sexual intimacy—one man, and one woman, for life. Homosexuality is not a "valid alternative lifestyle." The Bible condemns it as sin. It is not, however, unforgivable sin. The same redemption available to all sinners is available to homosexuals. They, too, may become new creations in Christ.

Southern Baptist Convention, *Position Statements: Sexuality and Sanctity of Life*, *at* http://www.sbc.net/sexuality.html (last visited March 14, 2002).

For the Catholic position, see, e.g., CATECHISM OF THE CATHOLIC CHURCH (1995) ¶ 2357 (Homosexual acts "do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved."), ¶ 2359 ("Homosexual persons are called to chastity."), ¶ 2360 ("Sexuality is ordered to the conjugal love of man and woman"), ¶ 2363 ("The spouses' union achieves the twofold end of marriage: the good of the spouses themselves and the transmission of life."), ¶ 2365 ("The Sacrament of Matrimony enables man and woman to enter into Christ's fidelity for his Church."), and ¶ 2366 ("Fecundity is a gift, and *end of marriage*, for conjugal love naturally tends to be fruitful.").

[80] "No same sex union can realize the unique and full potential which the marital relationship expresses." Rev. Joseph L. Charron & Rev. William S. Skylstad, *Statement on Same Sex Marriage*, *in* ANDREW SULLIVAN, SAME -SEX MARRIAGE: PRO AND CON, A READER 53 (1997). For the counter argument, see, e.g., Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997).

different religions, so has the Word of God in the Bible generated a host of interpretations. In recent decades, at least three religious denominations, the Episcopal Church,[81] the Unitarian Universalist Church,[82] and the Reconstructionist Movement within Judaism,[83] have sought to reinterpret the Word to permit religious recognition of unions between members of the same sex. Even here, though, movement within religion has been to favor the celebrations of unions, but not necessarily marriage, between people of the same sex.[84] It has been impossible to decide who is right in these interpretive battles for obvious reasons.

Moral arguments track religious arguments—religious systems without any investment in the Divine. But in addition to religious arguments dressed up without God, opponents of same-sex marriage suggest if one traditional restriction on marriage falls, the others will fall as well—particularly prohibitions against incestuous and polygamous marriage.[85] In addition, others argue that the "natural" promiscuity of gay men in particular will

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[81] The Episcopal Church has recognized what they term "faithful relationships" other than marriage, but have not yet agreed to confer the status of marriage on these relationships. *See, e.g.*, David Skidmore, *Convention Recognizes Faithful Relationships Other than Marriage*, EPISCOPAL NEWS SERVICE, July 19, 2000, *available at* http://www.episcopalchurch.org/ens/GC2000-098.html (last visited March 14, 2002). Previously, the Episcopal Church had been less willing to budge on this issue, prompting a significant move within the Church for change. *See, e.g.*, A Pastoral Statement to Lesbian and Gay Anglicans from Some Member Bishops of the Lambeth Conference, Aug. 5, 1998, *at* http://www.newark.rutgers.edu/_lcrew/lambeth30.html (last visited March 14, 2002). The Alliance of Lesbian and Gay Anglicans continues to work for "unconditional inclusion and full participation of lesbian and gay people in every facet of the Church's life throughout Anglican Communion." Alliance of Lesbian and Gay Anglicans, *Purpose Statement*, *at* http://www.alga.org/purpose.html (last visited March 14, 2002).

[82] For the position of the Unitarian Universalist Church, see http://www.uua.org (last visited March 14, 2002). The Unitarian Universalist Church has established under its auspices the Office of Bisexual, Gay, Lesbian and Transgender Concerns. See http://www.uua.org/obgltc (last visited March 14, 2002). This office advocates "ceremonies of union and same-gender marriage, the right to serve in the military, the right to lead congregations as ministers and religious professionals, and the right to be parents." *Id*. Affiliated congregations, including the Covenant of Unitarian Universalist Pagans, share this vision. See http://www.cuups.org (last visited March 14, 2002).

[83] On the Jewish Reconstructionist Movement, see, e.g., http://www.jrf.org. On the struggles within Reconstructionist Congregations to welcome same gender congregants, see Roberta Israeloff, *Becoming a "Kehillah Mekabelet," The Struggles of Transformation*, http://www.jrf.org/rt/transformation.html.

[84] *See, e.g.*, *supra* note 71.

[85] Charles Krauthammer, *When John and Jim Say, "I Do,"* TIME, July 22, 1996, at 102.

cheapen marriage.[86] Proponents of same-sex marriage have accepted these lines of argument at face value and countered by arguing that the same-sex marriage impulse is stronger than the impulse for incestuous or polygamous marriage.[87] Some attempt to fuse religious and moral principle.[88] Moreover, proponents argue that if moralists are right about male promiscuity, then lesbian unions should be valued over heterosexual unions.[89]

All of these arguments, in as subtle a form as they might otherwise be dressed, can be reduced to their essential forms. The historical arguments are all variations on the theme of prior social practice, and the interpretation of its significance in the construction or implementation of social norms.[90] Definitive historical conclusions will likely elude us, especially with respect to conclusions designed to provide us with a sense of societal significance. The legal arguments are similarly simple in one of two forms. In one form the questions raised relate to what the federal or state constitutions *really* mean in relation to the power of the state over marriage.[91] In another form, the questions raised relate to the issue of the authority of the state over marriage at all.[92] But the history of constitutional interpretation at the state and federal level teach us that the courts have answered these questions inconsistently in the past.[93] Reduced to its most cynical level, then, the legal question reduces itself to the answers social groups can convince a majority of five people on the federal Supreme Court to give.

Political, economic, and psychiatric arguments are, to a large extent, also essentially subjective, and are based on the answers to "factual" questions, the answers to which will always be elusive, at best. Fairness and inclusion versus history and the traditions of the majority are the language of these debates; though the meanings of each of these concepts is highly dependent on the position of the person who resorts to the use of those concepts.[94]

The economic arguments essentially reduces itself to politics and morals—if we all agree that marriage provides an economic benefit, then making the benefit available to same-sex couples becomes a function of one's belief in the value of same-sex unions. The psychiatric arguments keep alive

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[86] William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996, at 27.

[87] Andrew Sullivan, *Three's a Crowd*, NEW REPUBLIC, June 17, 1996, at 10.

[88] For an example such an argument from a Catholic perspective, see Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449 (2001).

[89] Sullivan, *supra* note 87, at 10.

[90] *See supra* notes 28-34 and accompanying text.

[91] *E.g.* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[92] *E.g.* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971).

[93] *Compare* Romer v. Evans, 517 U.S. 620 (1996), *with* Bowers v. Hardwick, 478 U.S. 186 (1986).

[94] *See supra* notes 60-64 and accompanying text.

old bugaboos about the predatory nature of gay men in particular and uses the mental health of children as a proxy for essentially moral and political discourse.[95] It asks essentially unanswerable questions: are children better off with mixed-sex or same-sex couples. Because no two parents are alike, and because the basis on which we judge these questions changes from generation to generation as notions of child rearing change, such a question becomes impossible to answer.

The last set of arguments—based on religion and morals—is hardly worthy of acknowledging by that name. I do not believe one can argue with people who presume to speak for God. The parameters of that debate, though, are clear—the holy books of the religions involved in the debate.[96] The fact that institutionally significant *debate* and *action* can occur only within these borders evidences the power of the model of liberal toleration in ordering western secular society. The foundation of this model of organization is based on acknowledgment of cultural difference and toleration of difference. Yet these concepts, now built into worldwide conceptions of basic human dignity,[97] have proven to be double-edged swords. The cult of difference has at once produced both diversity and permitted a space for the validation of hegemony.[98] "The liberal canon, therefore, preserves, substantially undisturbed, the core traditional purpose of morals legislation—the restraint of official (public) conduct both sinful and, on that basis, irredeemably offensive."[99]

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[95] *See supra* notes 65-69 and accompanying text.

[96] *E.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2357-65 (1995).

[97] For example, human dignity is the basis of the fundamental rights of the German people as expressed in the constitution of the German Republic, the Grundgesetz:

> (1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
>
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
>
> (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly enforceable law.

GRUNDGESETZ [GG] [Constitution] art.1 (F.R.G.), *reproduced and translated in* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY app. A (2d ed., 1997).

[98] For a thoughtful analysis of modern notions of liberal communitarianism and its limitations as a foundational basis for gays rights, see Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 445 (2000) ("Communitarians, then, believe that it is entirely proper for the state to promote particular conceptions of the good.").

[99] Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of*

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Modern norms of liberal toleration have created a political space for non-conforming minority groups existing among a hegemonic majority. But the price for creating this space is to permit the tolerating group to suppress groups, practices and the like that are considered too deviant to be tolerated.[100] Toleration, combined with difference theory, also provides the means of erecting barriers to entry into the privileged space reserved for members of the dominant group, that is, to separate acceptance from toleration.[101] Every

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Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration, 45 U. FLA. L. REV. 755, 787 (1993). What I have argued with respect to the repeal of the laws criminalizing acts of sodomy and other sexual non-conformist acts, is equally applicable in the context of the same-sex marriage debates:

> Indeed, my basic theme is that inherent in modem liberal notions of de-criminalization of sexual nonconformist conduct is the understanding that society has given little and purchased a great deal. In return for removing the formal threat of severe criminal sanction for *hidden and discrete* acts (which society had rarely enforced in any case), dominant heterosexual society has sought the quiescence of sexual nonconformists--their tacit agreement to hide themselves from view and spare the beneficent dominant culture the disgust of any type of public presence.

Id. at 759.

[100] One form of conduct that falls beyond toleration in American pluralistic society is female circumcision. *See generally* Alexi Nicole Wood, *A Cultural Rite of Passage or a Form of Torture: Female Genital Mutilation from an International Law Perspective*, 12 HASTINGS WOMEN'S L.J. 347 (2001). When taboo-breaking conduct is practiced in other societies, it is not uncommon to hear arguments for the provision of asylum in the United States for victims of such breaches of taboo.

> Children arrive unaccompanied in the United States for a number of reasons, including flight from war and the resulting human rights abuses in their homeland. Some have been abused by their parents or family in their home country. Others has suffered more child-specific abuses; for example, forced conscription, child labor, prostitution, female genital mutilation, or child bride trafficking.

Carolyn Amadon, *Standing in the Gap: Pro Bono Attorneys Help Unaccompanied Immigrant Children Find Asylum*, CHICAGO BAR ASS'N RECORD, Sept. 15, 2001, at 46. *See generally* Susan Moller Okin, *Is Multiculturalism Bad for Women?*, *in* IS MULTICULTURALISM BAD FOR WOMEN? 7 (Joshua Cohen et al. eds., 1999); *but see generally* Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001) (questioning the premise that Western liberal societies are, in their own more subtle ways, less gender- subordinating than minority immigrant communities subordinating women in more traditional ways).

[101] The United States Supreme Court has both recognized the difference and acknowledged that sexual non-conformists have attained no more than toleration within

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society creates signs or indicia of privilege that serves to mark the privileged majority from the tolerated minority. The treatment of Jews and Quakers in the early American Republic provides an early relevant case in point of the way the barriers to entry operated on tolerated groups.[102] The persecution of Mormons in the nineteenth century,[103] African-Americans in the nineteenth and twentieth centuries,[104] and the suppression of sexual non-conformists through the middle of the twentieth century,[105] evidences the how groups can be constructed as too deviant to tolerate.[106]

The treatment of sexual non-conformists in the twenty-first century provides the current example of the operation of both the barriers to entry of toleration, and diversity's permission to suppress the threateningly deviant. The reservation of the status of marriage to the dominant sexual group serves as a highly important signifier of their superior social position within our society. It also marks the privileged place of religion in the construction of the parameters of marriage.[107] Marriage, and its unattainability, serves as a constant reminder to sexual non-conformists that the social closet door is not in the control of those placed within its dark and confining space—that the price of toleration is a permanent residence in the social closet. The cultural,

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American society as a matter of law. *See*, *e.g.*, Romer v. Evans, 517 U.S. 620, 646 (1996) (Scalia, J., dissenting) ("Quite understandably, [this minority] devote[s] this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.").

[102] *See generally* George Dargo, *Religious Toleration and Its Limits in Early America*, 16 N. ILL. U. L. REV. 341 (1996). For particular histories of persecution, see DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 35-40 (1958) (persecution of Quakers by Puritans); NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY (1992).

[103] *See generally* KLAUS J. HANSEN, MORMONISM AND THE AMERICAN EXPERIENCE 51-54 (1981).

[104] There is much written about this persecution from a great number of angles. For a taste, in the context of welfare rights, see JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

[105] *See generally* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES (1983); JONATHAN KATZ, GAY AMERICAN HISTORY (1976). Persecution has occurred with even greater viciousness in other parts of the West. *See generally* HIDDEN HOLOCAUST? GAY AND LESBIAN PERSECUTION IN GERMANY 1933-1945 (Gunter Grau ed., Patrick Camiller trans., 1995).

[106] On the construction of gay men as monsters worthy of suppression, see Catá Backer, *supra* note 64.

[107] *E.g.*, Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All?*, 34 FAM. L.Q. 271 (2000); *cf.* Jeb Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2359-60 (1997) (discussing how RFRA violates the Establishment Clause because it requires that a compelling government interest be shown in order to invalidate traditional marriage laws).

religious and political realities of our day have resulted in a dialogue based on acceptance of the normative status quo on which the social order is constructed. These realities implicate Pierre Bourdieu's concept of the "power of naming" in the juridical field.[108] In many respects, and among conventional combatants,[109] this acceptance has reduced the arguments to multi-faceted and subtle variations on a single theme—a plea for cultural redefinition so that current outsiders can be included within social common understanding of what is "normal." Because our social, political and religious

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[108] Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 837-39 (1987).

> Symbolic acts of naming achieve their power of creative utterance to the extent, and only to the extent, that they propose principles of vision and division objectively adapted to the preexisting divisions of which they are the products. . . . In other words, the specific symbolic effect of the representations, which are produced according to schemas adapted to the structures of the world which produce them, is to confirm the established order.

Id. at 839.

[109] *But see* DANIEL A. FARBER AND SUZANNA SHERRY, BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW (1997) (suggesting radicals have fundamentally changed the nature of the dialogue). I do not think "radical multiculturalism" or "moral relativism" has captured much of anything, other than academic journals. Larry Catá Backer, *Measuring the Penetration of Outsider Scholarship into the Courts: Indifference, Hostility, Engagement*, 33 U.C. DAVIS L. REV. 1173 (2000). But these radicals are oftentimes marginalized by those who view themselves as representing the mainstream of opinion among the affected communities:

> Marginalized by dominant culture, consigned to the zoo of exotic (but dangerous) endeavors, transformative *critical* (outsider) theory at times best serves the very members of the dominant culture which this theory seeks to recast. Critical theory can be the dominant culture's theoretical bogeymen. It assumes its greatest social utility as fairy stories evoking images of the evil (witches, goblins, little people, spirits, deformities—you choose) which lives in the dark, apocryphal forest just outside the safe clearing of current dominant norms. These are the kind used by a dominant culture to reinforce its cultural norms. As our welfare reform debates since 1994 make clear, these images are more useful than ever [as a means of policing conformity to dominant norms], especially now that communism is no longer readily available for scapegoating.

Larry Catá Backer, *By Hook or By Crook: Conformity, Assimilation and Liberal and Conservative Poor Relief Theory*, 7 HASTINGS WOMEN'S L.J. 391, 433 (1996).

norms have been modified in this way before—consider slavery[110]--we believe it is possible again.[111] Besides, to some extent, we all have a stake in the current normative structure of what we all consider "normal."[112] The result is a general understanding that talk should be structured to do little more than expand toleration of non-conforming groups, and that action should lead only to small steps in the direction of something approaching equal treatment for

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[110] This shifting is especially telling in the case of the absolutist tenets of religion. In the United States, organized religion transformed its doctrine from one accepting the morality of slavery to one unalterably opposed to slavery, on doctrinal grounds. For a history, see BRUCE R. MCCONKIE, MORMON DOCTRINE 107, 476-77, 554 (1958) (official Mormon text describing "the negro race" as cursed by the mark of their ancestor Cain with dark skin); ALBERT J. RABOTEAU, SLAVE RELIGION: THE "INVISIBLE INSTITUTION" IN THE ANTEBELLUM SOUTH (1978) (on the tension within Christianity in slave states); FORREST G. WOOD, THE ARROGANCE OF FAITH: CHRISTIANITY AND RACE IN AMERICA FROM THE COLONIAL ERA TO THE TWENTIETH CENTURY (1990) (suggesting that certain Christian sects used scripture to support the institution of slavery). *Cf.* David A.J. Richards, *Public Reason and Abolitionist Dissent*, 69 CHI.-KENT L. REV. 787, 836 (1994) (abolitionist religious expression as growing out of distaste for organized religion's support of slavery).

[111] *See, e.g.*, Wendy Brown Scott, *Transformative Desegregation: Liberating Hearts and Minds*, 2 J. GENDER RACE & JUST. 315 (1999) (race); Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-critical Analysis of Latcrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503 (1998); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995). For the limits of the possibility of this transformation, see Larry Catá Backer, *Queering Theory: An Essay on the Conceit of Revolution in Law*, *in* LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES 185 (Leslie J. Moran et al. eds., 1998). "Critical theory has acquired the defects that it claims as an essential sin of the dominant group: the narrow hermeneutic vision of lawyers. It *includes* and *excludes* us all at some point and at some time." *Id.* at 190.

Indeed, there have been other manifestations of these sorts of changes, even within the foundational doctrines of absolutist religion. Consider, for example, the fortuitous change in the doctrine of polygamy experienced by the Church of Jesus Christ of the Latter Day Saints about the time Utah was considered for statehood. *See generally* RICHARD S. VAN WAGGONER, MORMON POLYGAMY: A HISTORY 140 (2d ed. 1989) (discussing the "Woodruff Manifesto" outlawing polygamy in 1890).

[112] To some extent, same sex marriage represents an overt attempt to normalize its practitioners, to make them as "white" as the next person. The idea here, as well crafted by critical race theory, is that in a way similar to that affecting race the secular institutions of the United States have systematically benefited heterosexual coupling to the detriment of all other forms of affective unions. Courts, legislatures, and other institutional officials have structured a system that privileges heterosexual marriage and subordinates all other forms of unions—in some cases, suppressing such unions with the power of criminal law. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715-21 (1993) (race).

non-conforming affective unions.

The hope among advocates of same-sex marriage, much like that of the NAACP after *Plessy*,[113] has been that continued small steps would evidence the fatuousness and immorality of the status quo, and lead, at least, to its *formal* abandonment. But the limited goals of affecting private conduct and non-governmental prejudice appear to have stalled. Reflecting the stasis of the structure of arguments for and against same-sex marriage, even small movements based on the sorts of secular argumentation favored by social action groups in America for the last half century appear to be a lost causes, at least for the foreseeable future.[114]

B. *Elevating Religion as the Path to the Realization of Same Sex Marriage in America.*

It is time to go beyond those tired debate parameters. Indeed, there seems little else to do but either act to change the parameters of the debate or reconcile ourselves to the inevitability of the direction and limitations of the current box within which these issues are addressed. I believe the best place to find this new language of talk and action may lie in that area of discourse that has been studiously avoided[115] or reviled[116] by advocates of non-conformist marriage—in the bosom of religion. Perhaps it is time to welcome the rise of a language of absolutism that mirrors the most effective absolutism of existing religious discourse.

It is understandable that the discourse of sexual non-conformists avoids religion. Traditional religion, at least those of the West and the Middle East, have, with varying degrees of fierceness, rejected, expelled, and condemned sexual non-conformity.[117] Religious sentiment, however much the organs of institutional religion attempt to deny it, has served as the justification for violence against sexual non-conformists.[118] Religious communities lead the

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[113] For a history of those efforts, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

[114] Catá Backer, *supra* note 13.

[115] Shawn Zeller, *Gay Group Seeks Denied Rites*, NAT'L J., Dec. 2, 2000, at 3754.

[116] Demian (Co-director, Partners Task Force for Gay & Lesbian Couples), *Most Compelling Reasons for Legal Marriage* (1997), *at* http://www.buddybuddy.com/toc.html (last visited Feb. 27, 2002).

[117] For just a taste, see Mark I. Pinsky, *Southern Baptists Slam Gays in Closing*, ORLANDO SENTINEL, June 17, 1999, at A11.

[118] *See* Michael Cooper, *Reports of Anti-Gay Violence Increase by 81 Percent*, N.Y. TIMES, Sept. 18, 1998, at B2.

In a survey conducted by the Henry J. Kaiser Family Foundation, 76 percent of gays surveyed reported that they felt more accepted. Associated Press, *Gays Report a Rise in Public Acceptance*, N.Y. TIMES, Nov. 13, 2001, at A12. "But 74 percent reported encountering verbal abuse, and 32 percent said they had experienced physical abuse or damage to their property

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charge against the normalization of sexual non-conformity within secular society.[119] Institutional religion has made it an absolute task to conform the rules of secular society to those of its own internal organs. Speaking a language of absolutist universalism, organized religion, and the religious sentiments to which it gives rise, have made it a point of honor to instruct secular society on the necessity of denying that human dignity to sexual non-conformists that forms the core of their beliefs, at least as applied to those who conform to their conduct rules.[120] Against the absolutist language of institutional religion, against the eternal word of God, can there be any recourse?

For sexual non-conformists, the general response to religion has been to abandon the field. Like good Enlightenment rationalists, sexual non-conformists curse religion as irrational cults and concentrate their battle within the secular society on moral and social systems created by humankind—law, economics, sociology and philosophy.[121] The standard understanding is that even "[r]eligious proponents of same-sex marriage cannot wholly refute those points of [religious objectors]."[122] Religion is a lost cause.

But this has proven to be a fatal misjudgment. Our secular systems of morals, governance, economics, and social organization arose from the comprehensive systems of organization provided by institutional religion.[123] Each is again increasingly and deliberately infused with religious sensibility.[124] The language of religion is becoming an accepted part of

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because of their sexual orientation. Eighty five percent of lesbians, 76 percent of gay men and 60 percent of bisexuals said they had experienced discrimination." *Id*.

[119] Hans Johnson, *Latter-Day Politics: Mormon Church Supports California's Anti-Gay Marriage Measure*, THE ADVOCATE, Dec. 7, 1999, at 33. The Roman Catholic Church and the Mormon Church have contributed more than $8 million in the campaign to defeat a same sex marriage initiative in California. Yasmin Anwar, *Will States Say "I Do" to Gay Marriage?*, USA TODAY, Mar. 6, 2000, at A3.

[120] See, for example, *supra* note 76, discussing the Southern Baptist's Convention's view.

[121] *See* Shawn Zeller, *Finding Their Religion*, NAT'L J., Jan. 1, 2000, at 52 (discussing the Ad Hoc Committee for an Open Process's and other state and local activist groups' objection to relying on religious arguments for support).

[122] Michael H. Tow, Book Review, 44 FED. LAW. 39, 39 (1997) (reviewing ANDREW SULLIVAN, SAME -SEX MARRIAGE: PRO AND CON, A READER (1997)).

[123] *See* David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877 (1993) (discussing the role of religious belief in a pluralistic and democratic society).

[124] Thus, the current governor of Texas has stated that he sees nothing wrong with ignoring the United States Supreme Court's decisions declaring organized prayer in public schools unconstitutional. Wayne Slater, *Perry Defends Prayer in School*, DALLAS MORNING

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secular institutional discourse.[125] Liberal and conservative, Christian[126] and Jew,[127]—we all "gotta have it."[128] The dangers of the identity of secular and religious systems of organization are great,[129] but unavoidable for the foreseeable future. The law is being bent to the will of religious communities,[130] and suggestions that accommodation of religion to the extent

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NEWS, Oct. 23, 2001, at A17. Indeed, this man would make those decisions an issue in his campaign for re-election. He stated, "Why can't we say a prayer at a football game or a patriotic event like we held at Palestine Middle School? I don't understand the logic of that. I happen to think it was appropriate." *Id*.

[125] There has been much commentary about the utility of religious discourse in political and social discourse. *See, e.g.*, Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1994); Hollenbach, *supra* note 123.

[126] Consider, for example, the position of the current president, George W. Bush, on stem cell research. *See generally* Evan Thomas & Eleanor Clift, *Battle for Bush's Soul*, NEWSWEEK, July 9, 2001, at 28.

[127] The Democratic Party's vice presidential candidate during the 2000 presidential campaign, Joe Lieberman, made much of his reliance on the tenets of his form of Judaism for his political and social positions. Howard Fineman, *Praying to Win*, NEWSWEEK, Aug. 21, 2000, at 18.

[128] An oblique reference to the movie of the same name—SHE'S GOTTA HAVE IT! (40 Acres and a Mule Filmworks 1986). The film explores the male chauvinism of African-American men by flipping the stereotype. "The film's protagonist, Nola Darling is an independent career woman who balances three lovers to the growing irritation of each. [Spike] Lee responds to the male domination in black film by making Nola's chief desire to achieve sexual freedom from her lovers and avoid possession." Stanley Kaufmann, *She's Gotta have It—Movie Review*, NEW REPUBLIC, Sept. 15, 1986, at 30. Religious chauvinism, especially that of main stream Protestant, Catholic, Jewish, and Muslim institutional churches must, like Nola's lovers, be acknowledged as essential, but not as controlling.

[129] *See generally* Catá Backer, *supra* note 69.

[130] Thus, a commentator noted recently:

> [F]ree speech arguments are being used as part of a concerted effort to reduce or eliminate Establishment Clause restrictions on the intermingling of church and state. Jay Sekulow, chief counsel for Pat Robertson's American Center for Law and Justice, specifically cited this strategy in a recent interview with *The New York Times*. Sekulow told the *Times* that "the free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment's clause against the establishment of religion." This strategic use of free speech arguments has been especially prominent in efforts by Pat Robertson's group and others to reintroduce prayer into public schools. The free speech claim is also a major factor in cases in which

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now increasingly practiced effectively establishes religion and thus violates the general right to be free of particular religions have not prevailed.[131]

For the sexual non-conformist, however, religious discourse provides a powerful means of breaking out of the confines of the system of liberal toleration that produced the unacceptable discursive box within which sexual non-conformity finds itself trapped. Indeed, by speaking the language of religion within the institutional frameworks of religion, sexual non-conformists can begin to fully speak in culturally significant ways.[132]

The new language of non-conformist absolutism will manifest itself in two guises. Each provides different possibilities for reshaping the debate about same sex marriage. The first is that of interpretivism within established religion. The second, and most transformative, is the manifestation of a new gospel for our times. Many variants of the major religions of the West are nomocracies, systems in which religious authority is vested in an interpretive community with a broad scope of elucidative authority beyond divine text.[133]

> religious groups seek to engage in religious exercises—including weekly worship services—in public parks and buildings. In many of these cases—including some decided by the Supreme Court—Establishment Clause concerns regarding state endorsement of religion have been avoided or minimized simply by treating the cases as indistinguishable from cases involving political, social, or artistic speech.

Steven G. Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379, 380-81.

[131] For such arguments, see, e.g., Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 593 (1991); Mark Tushnet, *"Of Church and State and the Supreme Court":* Kurland *Revisited*, 1989 SUP. CT. REV. 373, 391-94.

[132] On the importance of culturally significant speech in the context of social, political and cultural change, see Larry Catá Backer, *Culturally Significant Speech: Law, Courts, Society, and Racial Equity*, 21 U. ARK. LITTLE ROCK L. REV. 845 (1999).

[133] Dr. Gidon Sapir wrote succinctly on the difference between nomocracy and theocracy in the context of Judaism:

> A Theonomy, or a Religious Nomocracy differs from theocracy. In a classic theocracy, God is the ruler, and the means through which he rules—priests, judges, prophets etc.—have very minimal flexibility. In a religious nomocracy the divine law does indeed exist, but the power is invested in the hands of its interpreters. As Aaron Kirschenbaum has observed, "The distinction between theocracy and religious nomocracy is not merely semantic; its ramifications are far reaching. . . . Any Jurist knows that the law is not the ruler but rather the interpreter." Aaron Kirschenbaum, *Teokratya Yehudit* [Jewish Theocracy], 8 DINEI ISRAEL, 223, 225 (1977). . . . On religious nomocracy *see also* J. Faur, *Some*

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It is within these communities that interpretivism is possible for the full acceptance of sexual non-conformists within those communities. To the extent that powerful variants of predominant religious communities assume the characteristics of theocracy, the community of sexual non-conformists will be forced, like other religious communities before it, to open itself to the reception of divine word.

1. *The Interpretive Projects Within Organized Religion*

There are many, conformist and non-conformist alike, who are engaged in the interpretivist project. Many have been engaged quietly in this project for years. We all know of the priest, minister or rabbi who has come, however tentatively, to a conclusion of the error of contemporary official institutional positions with respect to sexual non-conformists.[134] Interpretation and application of the Word of God, hermeneutics, is as old as religion.[135] It has proven to be unavoidable as religious communities, over millennia, try to apply their understanding of the meaning of the received word to their social, political and cultural organization.[136] Every attempt to limit interpretation, to

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General Observations on the Character of Classical Jewish Literature: A Functional Approach, 28 J. JEWISH STUD. 37, nn. 44-45 (1977). The fact that most of the interpretive and creative power is invested, in a religious nomocracy, in the hands of the religious authorities may create a tension between the divine will and those in charge of its interpretation. The classic source that presents this reality is the narrative of the Oven of Akhnai. On this narrative, *see* Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 855-65 (1993).

Dr. Gideon Sapir, *Religion and State in Israel: The Case for Reevaluation and Constitutional Entrenchment*, 22 HAST. INT'L & COMP. L. REV. 617, 640 n.83 (1999). These notions apply to Christian and Muslim religious communities as well.

[134] *E.g.*, JOHN SHELBY SPONG, LIVING IN SIN? A BISHOP RETHINKS HUMAN SEXUALITY (1988).

[135] Indeed, hermeneutics got its start as the science and methodology of biblical interpretation. It quickly expanded well beyond its original confines to become a critical focus of philosophy, see generally HANS-GEORG GADAMER, TRUTH AND METHOD (Garrett Barden & John Cumming trans., 1975) (interpretation as dialogue between text as words and history and interpreter), and law, see generally William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166 (1996) (on postmodern interpretivism); Mark Poster, *Interpreting Texts: Some New Directions*, 58 S. CAL. L. REV. 15 (1985).

[136] Interpretation of even fundamental tenets of religion is not something confined to the past. Consider for example the great transformation in fundamental Mormon doctrine, which

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finally and definitively provide a comprehensive gloss on the divine word, has proven futile.[137] While the word of God is eternal enough—the understanding of that word has continue to elude the human communities receiving these words. That understanding has proven to be both temporal and mutable. It is within this interpretive tradition that sexual non-conformists can provide a powerful, divinely inspired voice.

For non-conformist interpretivists, even conventional religion embraces both sexual conformists and non-conformists as full members of the religious community. The only impediment to that embrace is religious error—the current religious communities' imperfect ability to understand and live the divine command. It has been possible to provide alternative interpretations to the doctrinal positions of many Christian and Jewish sects. The Episcopal Church, the United Church of Christ, the Union of American Hebrew Congregations, and the Unitarian Universalist Church have been leaders among traditional religious sects in the reinterpretation of traditional Scriptural commands.[138] Members of other churches continue to work for changes in the official interpretation of doctrine by their churches. Included among these are Catholics,[139] Baptists,[140] Lutherans,[141] Anglican,[142]

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before 1978 prohibited people of African descent from serving in the Mormon priesthood. RICHARD N. OSTLING & JOAN K. OSTLING, MORMON AMERICA: THE POWER AND THE PROMISE 94-95 (1999) (see pages 99-101 on the theological disability of dark skin within LDS).

[137] Compare the efforts within Judaism producing the Talmud, with that of the Roman Catholics producing Canon Law, to that of the Protestants producing volumes of canons and other writings, to that within Islam producing a modulating Shar'ia.

Should people face Mecca while praying? Should the Sabbath fall on Saturday or Sunday? Should Jesus be worshipped as God? Should certain foods be banned from consumption? Disputes over questions such as these are, in principle, unadjudicatable by rational means and are, therefore, interminable because there are no commonly accessible reasons that can be offered for or against each side. In such disputes we all become, to paraphrase the Trappist Monk Thomas Merton, pontiffs hurling anathemas at one another.

Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for The Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 175-76 (1998) (citing, in part, THOMAS MERTON, CONJECTURES OF A GUILTY BYSTANDER 40 (1968)); s*ee also* Gabriel A. Almond et al., *Fundamentalism: Genus and Species, in* FUNDAMENTALISMS COMPREHENDED 412 (Martin E. Marty & R. Scott Appleby eds., 1994). Even fundamentalists interpret. *E.g*. JERRY FALWELL, LISTEN, AMERICA! (1980) (an example of literalist interpretivism). Even those who reject the power of humans to interpret sacred text must interpret sacred text to reach this position—as a result, each must read and understand the words in an identical, if literal, sense.

[138] Each has, to some extent, welcomed participation by gay clergy. Chris Glaser, *The Love that Dare Not Pray Its Name: The Gay and Lesbian Movement in America's Churches, in* HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE 155 (Jeffrey S. Siker, ed., 1994).

[139] Catholic activists have established a sophisticated working group of about thirty

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organizations dedicated to changes in Catholic doctrine. *See generally* Call to Action USA, *Catholic Organizations for Renewal*, *at* http://www.cta-usa.org/COR.html (last visited March 13, 2002). It's mission statement states that Catholic Organizations for Renewal ("COR") was organized as "a coalition of Catholic groups, inspired by Vatican II, to further the reform and renewal of the Catholic Church, and to bring about a world of justice and peace, reflecting the sacredness of all creation." *Id.* That reform effort, radical from the perspective of conservative Catholic institutional opinion, is set forth in a document entitled "A Call for Reform in the Catholic Church," *at* http://www.cta-usa.org/cta-ad.html (last visited March 13, 2002). One of those groups, Dignity/USA, "envisions and works for a time when Gay, Lesbian, Bisexual and Transgender Catholics are affirmed and experience dignity through the integration of their spirituality with their sexuality, and as beloved persons of God participate fully in all aspects of life within the Church and Society." Dignity/USA, *Dignity/USA Vision Statement*, *at* http://www.dignityusa.org/whatis.html (last visited on March 13, 2002). Dignity/USA has developed an extensive guide for what they call "Holy Unions" between people of the same sex. Dignity/USA, *Couples' Ministry Resource Guide*, *at* http://www.dignityusa.org/couples/index.html (last visited March 13, 2002).

[140] For example, "The Baptist Peace Fellowship of North America and The Alliance of Baptists have jointly developed a resource whose purpose is to encourage local congregations to undertake intentional conversations on the subject of sexual orientation and Christian faith and to support those churches in their efforts." The Baptist Peace Fellowship of North America, *Rightly Dividing the Word of Truth*, *at* http://www.bpfna.org/rightly01.html (last visited March 13, 2002). Two Baptist organizations, "American Baptists Concerned for Sexual Minorities" and "Honesty," have created a gay-friendly website, Rainbow Baptists, *at* http://www.rainbowbaptists.org (last visited March 13, 2002) "providing support, information and advocacy for gay, lesbian, bisexual and transgender Baptists, their family and friends." Rainbow Baptists, *Who We Are*, *at* www.rainbowbaptists.org (last visited March 13, 2002).. Another group, The Association of Welcoming and Affirming Baptists, joins over forty-five individual congregations and organizations "who are willing to go on record as welcoming and affirming all persons without regard to sexual orientation, and who have joined together to advocate for the full inclusion of lesbian, gay, bisexual and transgendered persons within Baptist communities of faith." The Association of Welcoming & Affirming Baptists, *Who We Are*, *at* http://www.wabaptists.org (last visited March 13, 2002).

[141] For example, Lutherans Concerned North America has undertaken for itself the task of ministering "to people who the institutional church often shuns" and they "seek to lead the church to live the Gospel to the fullest, affirming sexual diversity" as they "grow in the faith and understanding of God's grace." Lutherans Concerned/North America, *More About LC/NA*, *at* http://www.lcna.org (last visited March 13, 2002).

[142] The Evangelical Anglican Church in America,

is called to be an Inclusive Church. Unlike other Independent Catholic, Old Catholic and Anglican bodies, the EACA is committed to providing a community where *All peoples are welcome* regardless of gender, marital status, sexual orientation, age, ethnicity, and/or physical challenges. We are deeply committed to embracing diversity within our membership, trusting that through this commitment we may grow in strength, understanding and truth.

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Presbyterians,[143] Methodists,[144] and members of Christian evangelical communities.[145]

These possibilities exist within other religious traditions as well. The Reconstructionist division of Judaism provides an example.[146] Muslim

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The Evangelical Anglican Church in America, *Who We Are*, *at* http://www.eaca.org/eaca_today.html (last visited March 14, 2002). This embrace of diversity includes making available marriage/Holy Union to all congregants. *Id*.

[143] The organization More Light Presbyterians, works "for the full participation of lesbian, gay, bisexual and transgender people of faith in the life, ministry and witness of the Presbyterian Church (USA)." More Light Presbyterians, *About Us*, *at* http://www.mlp.org/about.html (last visited March 14, 2002). To that end, members of this organization have committed themselves to work within the Church to welcome members of the LGBT community within the body of the Church as fully accepted members. *Id*.

[144] The Reconciling Ministries Network, "[e]xists to enable full participation of people of all sexual orientations and gender identities in the life of the United Methodist Church, both in policy and practice." Reconciling Ministries Network, *Who Are We?*, *at* http://www.rmnetwork.org/whoarewe.html (last visited March 14, 2002). Though not an official part of the Methodist Church, it is composed of 171 reconciling congregations and twenty-four reconciling campus ministries, and works for full participation of all people within the United Methodist Church. *Id*.

[145] One of the umbrella groups for sexual non-conformists within the evangelical community is Evangelicals Concerned ("E.C.") Western Region, Inc. It's vision statement describes the organization as:

> highly visible, easily accessible, financially stable, geographically diverse, and open and affirming to all who embrace the Christian faith regardless of sexual orientation, age, ethnicity, or church membership. Through conferences, retreats, local groups, bible studies, resource materials, education, leadership training, and personal support, E.C. serves as a role model to all evangelicals (gay or straight), to foster an integrated and healthy gay/lesbian Christian life. In realizing its mission, E.C. provides organizational outreach so that no gay or lesbian Christian will disown their faith or suffer unnecessarily because of who they are.

Evangelicals Concerned Western Region, Inc., *Who Are We?*, *at* http://www.ecwr.org/who.html (last visited March 14, 2002).

[146] Since 1993, the Federation of Reconstructionist Congregations and Hauvrot and the Reconstructionist Rabbinical Association adopted a position formally bringing same sex relationships within the religious umbrella:

> We affirm the qualities of mutual respect, trust, care, and love in committed relationships regardless of sexual orientation. . . . As we support the long-term commitment of heterosexual couples and the acknowledge the kedushah [holiness] of their marriages, so do we support

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organizations have also begun to flourish, in the West at least, to attempt a revaluation of the relationship of Islam to sexual non-conformity.[147]

Centering debate on the divine command within organized institutionally based religion to welcome sexual non-conformists as fully enfranchised member of those communities would transform the nature of the secular debate about the social, legal and cultural position of sexual non-conformists within society. As sexual non-conformists acquire a divinely grounded dignity within religious communities, their rehabilitation within the secular sphere would more easily follow.[148] Perversely, embroiling religious

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> long-term partnerships between gays or lesbians and affirm that kedushah resides in committed relationships between same-gender Jewish couples.

RECONSTRUCTIONIST COMMISSION ON HOMOSEXUALITY, HOMOSEXUALITY AND JUDAISM: THE RECONSTRUCTIONIST POSITION (1993). The position of the American Conservative movement has been more restrained. In March 2000, the Central Conference of American Rabbis adopted a position that provided that "the relationship of a Jewish, same gender couple is worthy of affirmation through appropriate Jewish ritual." 111th Convention of the Central Conference of American Rabbis, *Resolution on Same Gender Officiation* (March 2000), *available at* http://www.ccarnet.org/cgi-bin/resodisp.pl?file=gender&year=2000 (last visited March 14, 2002).

[147] There are a number of sites and organizations involved in this effort. "Queer Jihad is the queer Muslim struggle for acceptance: first, the struggle to accept ourselves as being exactly the way Allah has created us to be; and secondly, the struggle for acceptance and tolerance among Muslims in general." Sulayman X (Queer Jihad), *About Queer Jihad, at* www.stormpages.com/newreligion/aboutqj.htm (last visited March 14, 2002). This group suggests that homophobia was imported from the West. *Id*. "Since the 1700s Islam has been strongly homophobic, perhaps influenced by colonialization by European powers." *Id*. The group is also sensitive to charges that gay Muslims are in the employ of Jews. *Id*. ("We are not 'Jews trying to destroy the image of Islam' or any other such nonsense that we've been accused of time and again.").

Another organization, the Al-Fatiha Foundation, based in New York, "aims to support LGBTQ Muslims in reconciling their sexual orientation or gender identity with Islam. Al-Fatiha promotes the Islamic notions of social justice, peace, and tolerance through its work, to bring all closer to a world that is free from injustice, prejudice, and discrimination." Al-Fatiha Foundation, *About Us*, *at* http://www.al-fatiha.net/about.html (last visited March 14, 2002). One of its goals is to "[e]ncourage dialogue with the larger Muslim community around issues of sexuality and gender." *Id*.

[148] Here, I speak of legitimacy accorded precisely because the position of the community is based on divine command. There is irony to legitimacy in this respect. It is only in cases where human proof is insufficient, and faith essential, that legitimacy can be accorded to a religious community. And because a community is legitimate and religious, its practice and beliefs will be entitled to the deference and respect accorded other religious communities. Were other religious communities to deny a sibling religion its due, these communities would

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communities in the interpretive project serves the sexual non-conformist community as well. Communities in turmoil tend to have to turn inward to preserve their unity and resolve questions relating to the normative foundations of those communities. Such communities are distracted and to that extent may abandon the field of secular politics. Such communities also become less effective because they no longer appear to speak with one voice. Multi-voiced communities tend to lose the power that their institutional organization otherwise provides them. They are less able to support a dogmatically based defense of the traditional limitations of liberal toleration in the secular sphere.

It is possible that these interpretivist projects will fail. This would not be the first time that doctrinal reform is rebuffed or otherwise remains impermanent.[149] Whether or not successful, this interpretivist battle is likely to produce martyrs at the hands of the religious communities in error, and at the hands of the secular apparatus of a state that is effectively controlled by those communities in error.[150] The crucible of sacrifice is well built into the

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in turn risk the same type of ill treatment by others. Catholics who remember the long periods of discrimination by a Protestant majority, and Protestants with memories of persecutions and martyrdom within Catholic Europe, should make them sensitive to issues of religious dignity for dissenting communities. This sensitivity is an essential part of the understanding of the First Amendment. *See generally* Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES (1990).

[149] Consider Europe in the age of the Protestant reformation, see A.G. DICKENS, REFORMATION AND SOCIETY IN SIXTEENTH-CENTURY EUROPE 60-67 (1966) (Luther and the Catholic Church), or Judaism at the time of the founding of imperial rule in Rome, see MAX L. MARGOLIS & ALEXANDER MARX, A HISTORY OF THE JEWISH PEOPLE 179-180 (2d ed. 1965) (description of the various interpretive communities within Judaism at the time of Jesus), or Islam at the time of the establishment of the Ummayyad caliphate and the split between Sunnis and Shi'ites. In each case, the failure by charismatic people to convince an established religion of the value of a new form of interpretation of divine command has led to the formation of new sects. Rejection results in the creation of new communities of faith, as in the case of the Christians after the Reformation. The new Jewish communities persisted for a time but then died out. The split within Islam continues to this day, with Shi'ites primarily in the lands of the old Persian Empire, and Sunnis elsewhere.

[150] Martyrdom seems to be a feature of American secular as well as religious history. From the sacrifice of the settlers at the Alamo, to John Brown's stand at Harper's Ferry, to the destruction of the battleship Maine in Havana harbor, to the sinking of the Lusitania, to the sneak attack on Pearl Harbor, to the assassination of Martin Luther King, the list is long. The ritual of sacrifice was at the core of the relations between white and African-Americans in the United States until the middle of the last century. *See generally* ORLANDO PATTERSON, RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES 188-218 (1998).

(*continued*)

rhythm of religion everywhere.[151]

When man thinks it necessary to make for himself a memory, he never accomplishes it without blood, tortures and sacrifice; the most dreadful sacrifice and forfeitures (among them the sacrifice of the first born), the most loathsome mutilation (for instance castration), and the most cruel rites of all the religious cults (for all religions are really at bottom systems of cruelty)—all these things originate from that instinct which found in pain its most potent mnemonic.[152]

2. *Dissent and Revelation*

Yet religion again offers two related and powerful avenues for a religiously grounded discourse of change. The first results in the creation of dissenting communities within organized religion. The second invokes the prophetic traditions of Judaism, Christianity and Islam, and suggests that the time may be here for the reappearance of the divine voice in the creation of a new sect.

The possibility and power of religious *dissent* is evidenced spectacularly enough by the Pilgrims of Massachusetts Bay Colony—Protestant dissenters who carved out their own sect of Christianity rather than continue to practice

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"Although rarely made explicit, there is no denying the profound religious significance that these sacrificial murders had for Southerners. As I have noted, fundamentalist preachers not only condoned the sacrifices but actively incited many of them." *Id*. at 202.
Martyrdom produces a socio-cultural *pain* that amplifies speech in culturally significant ways.

> Pain encompasses the culturally significant act of *sacrifice*. Pain requires us to acknowledge the power of the hermeneutics of cultural modulation Christologically. Every change in the "common sense" of our understanding of the significance of difference, and especially racialized difference, requires its martyrs and saints—its crucifixion. There can be no Easter without Good Friday. Ours is a world which understands and responds to sacrifice. In the absence of culturally potent sacrifice, there can be little conversation between groups. Sacrifice is what gets groups to pay attention in a cultural sense.

Catá Backer, *supra* note 132, at 860.

[151] "The sacrificial ritual created not only a compact between the sacrificers and their god but a compact of fellowship among the sacrificers themselves." PATTERSON, *supra* note 150, at 183. On sacrifice as a component of religion, see generally Friedrich Nietzsche, *On the Genealogy of Morals*, *in* THE PORTABLE NIETZSCHE (Walter Kaufmann ed. & trans., 1968).

For the more works in the field, see HENRI HUBERT & MARCEL MAUSS, SACRIFICE: ITS NATURE AND FUNCTION (W.D. Halls trans., 1964); GODFREY ASHBY, SACRIFICE: ITS NATURE AND PURPOSE (1988); and the contributions in SACRIFICE (M.F.C. Bourdillon & Meyer Fortes eds., 1980).

[152] Nietzsche, *supra* note 151.

under the tenets of a form of Christian worship and belief they found abominable.[153] Judaism and Islam have demonstrated an equally large capacity for fracture.[154] What now passes for brothers within the larger umbrella of Jewish, Christian and Muslim religious communities were at their creation products of fierce, and bloody dissent.[155] The seeds for the creation of such dissenting communities based on the understanding of divine truth inherent in communities of sexual non-conformists have already been planted. We may well see the flowering of such distinct communities, worthy of secular protection as religion under our Constitution, in our time.

Among those religious communities that have begun the process of embracing dissent is the offshoot of the Catholic faith, Dignity/USA.[156] Although once a welcome member of the Catholic community,[157] since 1986 the Catholic Church has effectively disowned Dignity/USA.[158] The fundamental act of dissent was Dignity/USA's declaration that Catholic lesbians and gay men could engage in loving, life-giving, and life-affirming sex, always in an ethically responsible and unselfish way.[159]

Another dissenting religious community, SDA Kinship International, was connected to the Seventh-day Adventist Church.[160] SDA Kinship International was established as a support organization ministering to the

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153 For a discussion of the Puritan migration to the New World, see generally

154 On the rise and nature of divisions within Judaism and Islam, see generally

155 For a discussion on the beginnings of the religious wars within Christianity, see G.R. ELTON, REFORMATION EUROPE 1517-1559 239-73 (1963). The religious wars within Christianity continue in places such as Ireland, between the Catholic and Protestant Irish, and in the Balkans, between Catholic and Eastern Orthodox Slavs. *See generally* MARK JUERGENSMEYER, THE NEW COLD WAR? RELIGIOUS NATIONALISM CONFRONTS THE SECULAR STATE (1993) (current religious violence evidences a decline in the intellectual hegemony of the Enlightenment's notion of civil society, spawning attempts to reimpose some version of society based on modern renditions of traditional religious norms).

156 *See generally* http://www.dignityusa.org/whatis.html (last visited March 5, 2002).

157 In 1969 the Archdiocese of Los Angeles initially granted permission to Father Patrick Nidorf, the founder of Dignity/USA, to form an outreach ministry for Catholic homosexuals. Hank Stuever, *Spurned by the Archbishop of L.A., Members of Dignity, an Organization of Gay Catholics, Maintain Their Allegiance to the Church but . . . They Pray Alone*, L.A. TIMES, Aug. 29, 1990, at E1. "The height of Dignity's relationship with the mainstream church, ('If there was one,' says Patrick E. Roche, the current national president of Dignity) came in Seattle in 1983 at Dignity's national convention." *Id.*

158 *See id*. (stating that since a letter was issued by Cardinal Joseph Ratzinger in October 1986 condemning pro-homosexual movements within the church, "many U.S. bishops began evicting Dignity chapters from church property and prohibiting priests from saying Masses for the groups").

159 Http://www.dignityusa.org/purpose.html (last visited March 5, 2002).

160 *See generally* http://www.sdakinship.org (last visited March 5, 2002).

"spiritual, emotional, social, and physical well-being of Seventh-day Adventist lesbian, gay men, bisexual, and trans-gendered individuals and their families and friends" to facilitate and promote "the understanding and affirmation of homosexual and bisexual Adventists among themselves and within the Seventh-day Adventist community through education, advocacy, and reconciliation."[161] Its position not only caused its formal rejection by the institutional leadership of the Seventh-day Adventist Church;[162] it also led to a lawsuit by the Seventh-day Adventist Church against the organization, seeking to prevent SDA Kinship International from using the name "Seventh-day Adventist" or "SDA."[163] That litigation resulted in a victory for SDA Kinship International,[164] which thus assumes the classic position as a dissenting religious community[165] within the Christian tradition.

Other communities of faithful have also moved beyond the traditional denominational structure of Christianity to strike out on their own. The work of Mel White in the evangelical community provides a case in point.[166] The formation of the Universal Fellowship of Metropolitan Community Churches (UFMCC) is yet another.[167] The UFMCC might be considered by others as standing somewhat apart from other Christian churches. Yet it continues to view itself as comfortably within the mainstream of Christianity.[168] But its

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[161] Http://www.sdakinship.org/ks_welcome.htm (last visited March 5, 2002).

[162] *See* http://www.sdakinship.org/ks_church.htm (last visited March 5, 2002) (stating "Seventh-day Adventist Kinship International, Inc. (Kinship) has no formal connection with the Seventh-day Adventist Church. Kinship does not receive support in any form from the General Conference of Seventh-day Adventists or its constituent churches.").

[163] Gen. Conference Corp. of Seventh-day Adventists v. Seventh-day Adventist Kinship Int'l, Inc., No. CV S7-8113 MRP (G.D. Cal. Oct. 3, 1991), *available at* http://www.sdakinship.org/kin_layout/judge.htm (last visited March 5, 2002).

[164] United States District Judge Mariana R. Pfaeizer held the use of the name by SDA Kinship International did not infringe on the Seventh-day Adventist Church's use of the name. *Id*.

[165] SDA Kinship International states it is "not a church." Http://www.sdakinship.org/ks_church.htm (last visited March 5, 2002). Rather, it is a "support group" whose "congregations and pastors are in the regular Adventist churches." *Id*.

[166] *See generally* MEL WHITE, STRANGER AT THE GATE: TO BE GAY AND CHRISTIAN IN AMERICA (1994) (attempting a Christian reinterpretation of biblical imperatives from a modern perspective). Mel White's efforts have extended his evangelical project to the Internet. Http://www.soulforce.org (last visited March 5, 2002). For a brief discussion of Soulforce Inc., see *infra* note 174 and accompanying text.

[167] Founded in Los Angeles in 1968 by Reverend Troy Perry, this non-denominational church has expanded to become an international community of believers. Http://www.ufmcc.com/today.htm (last visited March 5, 2002).

[168] "Founded in the interest of offering a church home to all who confess and believe, Metropolitan Community Churches moves in the mainstream of Christianity." (*continued*)

theology adopts a gay friendly interpretation of scripture.[169] Such a theological recasting makes same sex marriage not only possible, but also natural.[170] Among the more interesting dissenting communities is that of the

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Http://www.ufmcc.com/state.htm (last visited March 5, 2002).

[169] A pamphlet by the Reverend Nancy L. Wilson, Pastor of the Metropolitan Community Church of Los Angeles and a Member of UFMCC's Board of Elders, provides an illustration of a very different interpretation of Christian scripture that strives for greater inclusion. NANCY L. WILSON, OUR STORY TOO . . . READING THE BIBLE WITH "NEW EYES" (1992), *available at* http://www.ufmcc.com/1rstry2.htm Her premise is that the Bible, correctly read, does not condemn sexual non-conformists. *Id*. Indeed, the Bible is full of stories of gay men and lesbians. Http://www.ufmcc.com/opendrs.htm (last visited March 5, 2002). She suggests a divine blessing on "barren ones" and particularly biblical "eunuchs," who may include gay men and lesbians. Http://www.ufmcc.com/baren.htm (last visited March 5, 2002). She states:

> Jesus Christ, the fulfillment of Isaiah 53, was "cut off" [like a "eunuch"] from his people in two ways: he was executed as a criminal and died without heirs. He was a functional, if not physical, eunuch. The death and resurrection of Jesus Christ redefined eternal life, dissociating it from the necessity to produce children.

Http://www.ufmcc.com/newfam.htm (last visited March 5, 2002). As a result "[t]he new Christian community in Acts includes childless widows, former prostitutes, social outcasts, celibates, married people, eunuchs, blacks, Jews, and Gentiles. Those previously excluded were now fulfilling the promise of Isaiah 56: '*My house will be called a house of prayer for all the peoples*.'" *Id*. Also noted are the existence of other same sex relationships in the Bible—principally those between Ruth and Naomi, and between Jonathon and David. Http://www.ufmcc.com/samesx.htm (last visited March 5, 2002).

[170] Thus, the official position of the UFMCC on same sex marriage comes as no surprise:

> Whereas some of the earliest recorded Christian marriages were between people of the same gender;
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> Whereas clergy in the Universal Fellowship of Metropolitan Community Churches have conducted commitment ceremonies between people of the same gender since 1968;
>
> Whereas Holy Union and Holy Matrimony between two people regardless of gender are among the Rites and Sacraments of the Universal Fellowship of Metropolitan Community Churches: and
>
> Whereas the Universal Fellowship of Metropolitan Community Churches is committed to equity and justice for all people;
>
> Therefore, be it resolved that the General Council of the Universal

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Mormon dissenters, Affirmation.[171] Affirmation consists of a community following the Mormon tradition that believes that "same gender-orientation and same-gender relationships can be consistent with and supported by the Gospel of Jesus Christ" in the tradition of the Latter Day Saints.[172] There is also a tentative movement for dissent within Islam.[173]

One organization in particular, Soulforce,[174] deserves special mention in any discussion of the interpretivist battles over the place of sexual non-conformists within traditional organized religion. Soulforce has become a powerful force for questioning traditional interpretations of scripture within

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> Fellowship of Metropolitan Community Churches endorses the right of two people regardless of gender to enter into legally recognized marriages.

Statement of the Official Position of UFMCC on the Issue of "Gay Marriage," at http://www.ufmcc.com/issues.htm (last visited March 5, 2002).

What is interesting, though, is that the UFMCC still does not describe its marriage ceremonies as such. *See id*. It suggests a leading role for law in this regard, *see id*. (encouraging opposition to legislation denying recognition of same gender marriages), whereas a more religiously centered approach might put God before the State and lead the UFMCC to declare its unions marriages, however the state might characterize these unions.

[171] *See generally* http://www.affirmation.org (last visited March 5, 2002).

[172] Http://www.affirmation.org (selecting the "About Us" link) (last visited March 5, 2002). Affirmation describes itself as:

> a fellowship of gays, lesbians, bisexuals, their family and friends who share the common bond of the Mormon experience. Its purpose is to provide a supportive environment for relieving the needless fear, guilt, self-oppression and isolation that LDS gays and lesbians can experience in an era where willful ignorance about human sexuality is too often a reality.

Id.

[173] "The Al-Fatiha Foundation aims to support LGBTQ Muslims in reconciling their sexual orientation or gender identity with Islam." Al-Fatiha Foundation, *Mission Statement, at* http://www.al-fatiha.net/about.html (last visited March 5, 2002). To this end, the organization encourages dialogue with the larger Muslim community around issues of sexuality and gender. Al-Fatiha Foundation, *Goals and Objectives*, *at* http://www.al-fatiha.net/about.html (last visited March 5, 2002). The organization is established in the larger cities of the North American continent. Al-Fatiha Foundation, *Past, Present, & Future of the Foundation*, *at* http://www.al-fatiha.net/about.html (last visited March 5, 2002).

[174] "Soulforce Inc. is a non-profit organization located in Laguna Beach, California, co-founded and run by the Rev. Dr. Mel White and his partner, Gary Nixon. Soulforce operates as an ecumenical network of volunteers committed to teaching and applying the principles of nonviolence on behalf of sexual minorities." Soulforce, Inc., *Soulforce Strategy*, *at* http://www.soulforce.org/sfbio.html (last visited March 5, 2002).

organized religion.[175] As its primary goal, Soulforce states:

> We believe that religion has become the primary source of false and inflammatory misinformation about lesbian, gay, bisexual, and transgendered people. Fundamentalist Christians teach that we are "sick" and "sinful." Liberal Christian denominations teach that we are "incompatible with Christian teaching." Most conservative and liberal denominations refuse to marry us or ordain us for ministry. The Roman Catholic Church teaches that our orientation is "objectively disordered" and our acts of intimacy "intrinsically evil." They teach that we should not marry, adopt, co-parent, teach children, coach youth or serve in the military. Members of Dignity (the Catholic GLBT organization) are refused the use of Church property and the presence of a priest to conduct a Dignity Mass. We believe these teachings lead to discrimination, suffering, and death. Our goal is to confront and eventually replace these tragic untruths with the truth that we are God's children too, created, loved, and accepted by God exactly as we are. [176]

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[175] Over the past several years, Soulforce has protested and engaged in non-violent dissent against the Southern Baptist Convention, the Evangelical Lutheran Church of America, and the United States Conference of Catholic Bishops, among other religious organizations. Soulforce, Inc., *Soulforce News Releases*, *at* http://www.soulforce.org/newsreleases.html (last visited March 5, 2002).

[176] Soulforce, Inc., *What is the Primary Goal of Soulforce?*, *at* http://www.soulforce.org/faq.html (last visited March 5, 2002).

Soulforce is currently in the midst of a two-prong campaign aimed at the theology of the major traditional Christian denominations. Soulforce, Inc., *Soulforce FAQ*, *at* http://www.soulforce.org/faq.html (last visited March 5, 2002). Called "Stop Spiritual Violence," the first prong of the campaign consisted of non-violent protests leading to arrests at the national conventions of the United Methodist, Southern Baptist, Presbyterian, and Episcopal Churches. *Id*. The second prong calls for mass non-cooperation against untruth in Christian Churches. *Id*.

> [Dr. Mel]White [founder of Soulforce, Inc.] believes he is called to work directly with religious leaders and bring the truth to them about homosexuality. "We must continue fighting the antigay political actions. We must continue helping those who suffer. But we must also work to cut off that suffering at its source. That's why we launched Soulforce," White explains. "The toxic rhetoric flows unabated, primarily from sincere but misinformed religious leaders. It is poisoning the national discourse, dividing homes and churches, ruining families and wasting lives. We

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As important, perhaps, Soulforce has had an ecumenical effect—it has begun to influence faith communities other than Christian faith communities.[177]

The second is both far more fantastical and explosively revolutionary. In this age of Brigham Young, of Scientology, of other new faiths, it may be possible to conceive of the rise of new communities of faith. It may become a matter of survival to embrace these new communities of faith. The American experience includes the possibility of the revelation of a new word of the divine. The rise of the Church of Jesus Christ of Later Day Saints stands as proof to the religious that the Divine still speaks in new ways to humankind. A modern day divinely inspired community, in the tradition of Martin Luther, Calvin, Ali, or Moses Mendelssohn, or a new prophetic community in the manner of the founder of the Church of the Later Day Saints, may well reveal a new message based on notions of human dignity at the core of the experience of sexual non-conformists. That new religious calling will deserve as much respect, as much room for practice within the American polity, as was made available to Catholics, Jews and Muslims, in turn in this country over the course of the last two hundred years.

C. *A New Religious Community; A New Action Plan.*

Recasting the debate in religious terms takes battle for human dignity back to the heart of the religious communities that hold themselves out as divinely appointed experts in this field of cultural production.[178] It changes the focus of the debate from the conduct of sexual non-conformists to the moral worthiness of religious communities. In this context, the fundamental barriers to equal social and cultural dignity for sexual non-conformists, at the core of secular liberal toleration, may be overcome. Sexual non-conformists once sought liberation from religion as a means of securing even a limited

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> must do our best to stop that flow of poison at its source, and the 'soul force' rules of nonviolent resistance show us how."

Soulforce, Inc., *Soulforce Strategy*, *at* http://www.soulforce.org/sfbio.html (last visited March 5, 2002). To this end, Soulforce engages in substantial educational work, some of which is directly targeted at traditional religious communities whose theological views do not permit the acceptance of sexual non-conformity or same sex marriage. Soulforce, Inc., *Soulforce Tactics*, *at* http://www.soulforce.org/sfbio.html (last visited March 5, 2002).

[177] Thus, for example, Queer Jihad states that it is a Soulforce affiliate. Sulayman X (Queer Jihad), *What is Queer Jihad's Involvement with Soulforce?*, *at* http://www.stormpages.com/newreligion/soulforce.html (updated April 25, 2001) ("With the kind permission of the Rev Mel White and the Soulforce organization, Queer Jihad is adopting the Soulforce principles as part of our attempt to deal with the oftentimes overwhelming rejection and condemnation we experience as queer Muslims.").

[178] *See* Catá Backer, *supra* note 13.

form of personal freedom. It is clear to me that sexual non-conformists must now seek the liberation of religion from their interpretive error as a means of raising sexual conformist and non-conformist alike to that level of human dignity which forms the bedrock of the divine purpose for humans on earth.

The religious activists of the late twentieth century, and their allies on the United States Supreme Court, have raised protection of religious practice to a new level of dignity, or at least importance.[179] The freedom of churches to participate in governance has grown stronger after receding almost to insignificance in the period between the 1930s and the 1980s.[180] Protection for religious practice, and its support by government, grows,[181] although not without some setbacks.[182]

We should take the recent conservative movement towards faith based

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[179] For a taste, see Robert Audi, *Religiously Grounded Morality and the Integration of Religious and Political Conduct*, 36 WAKE FOREST L. REV. 251 (2001); Carl H. Esbeck, *Religion and the First Amendment: Some Causes of the Recent Confusion*, 42 WM. & MARY L. REV. 883 (2001).

[180] *See generally* FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE (1995).

[181] *E.g.*, Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488, 1488-89 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994)) (held unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)). The current push to permit the participation of faith based organizations in the provisions of essential governmental services to the poor and other deserving classes is a current case in point. *E.g.* John Gibeaut, *A Question of Faith: Bush Considers Licensing Exemption for Religious-Based Social Services*, 87 A.B.A. J. 46 (2001). The long running battles for state subsidy of religious school education is another. *E.g.* Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47 (1999/2000); Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807 (1999); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987). *See generally* H. Wayne House, *A Tale of Two Kingdoms: Can There Be Peaceful Coexistence of Religion with the Secular State?*, 13 BYU J. PUB. L. 203 (1999).

[182] These set backs include the Supreme Court's opinions in *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (state permitted to outlaw cult practice of native Americans, even though at the heart of religious observance), and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act, which represented a Congressional attempt to overturn *Smith*). Even conservative states will sometimes seek to discipline the full flowering of religion. *E.g.*, Michael Janofsky, *Utahan is Sentenced to 5 Years in Prison in Polygamy Case*, N.Y. TIMES, Aug. 25, 2001, at A9. "The framers and ratifiers could not conceivably have anticipated that the Supreme Court, sitting in a courtroom with a painting of Moses and the Ten Commandments, would hold it an unconstitutional establishment of religion for a high school to have a copy of the Ten Commandments on a wall." ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 289-90 (1996) (referring to the Court's ruling in *Stone v. Graham*, 449 U.S. 39 (1980)).

governance and faith tolerance seriously. Combined, these conservative religious principles can provide the means for achieving a religiously based sexual liberation. Indeed, as the religious keep reminding us—we are all religious now. But religion in a tolerant land can be hard—it requires all religions to act in a way that does not make the practice of any community's faith more difficult than any others. To do otherwise is to reveal the hypocrisy of the appeals of religious communities over the past half century as they have strived to create a space for their participation in the polity.[183]

An expanded role for religious toleration provides the basis for action. Ronald Dworkin has reminded us, in the context of abortion and euthanasia, that because the disagreements about abortion, euthanasia and the like are religious disagreements, our civil society must be prepared to agree to disagree about these views, and to treat each view with the respect and commitment to non-interference required by the First Amendment to the United States Constitution.[184] An equally compelling analogy can be made with respect to the slaughter of animals, or pork. Disagreements over the nature of marriage, like abortion and the ingestion of pork, involve fundamental religious disagreements. State interference in this context ought to be as restrained as it has been with respect to the regulation of animal slaughter,[185] or the religious practices of Afro-Caribbean peoples.[186] United

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[183] "[E]veryone has a religious viewpoint, but the hidden norm in law has been based upon those viewpoints familiar to American religious sensibilities." Samuel J. Levine, *Toward a Religious Minority Voice: A Look at Free Exercise Law Through a Religious Minority Perspective*, 5 WM & MARY BILL RTS J. 153, 160-61 (1996).

[184] *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993).

[185] *See* Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995) (invalidating a Baltimore municipal ordinance prohibiting the fraudulent sale of kosher food enforced in part through a board appointed by the mayor and consisting of three rabbis and three lay persons); Ran Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992) (invalidating state consumer protection laws effectively regulating kosher laws in New Jersey). *But see*, Shelley R. Meacham, Note & Comment, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as* Ran-dav's County Kosher *Proclaims?*, 23 SW. U. L. REV. 639 (1994) (arguing that consumer protections laws do not violate the Establishment Clause). *See generally* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 785-810 (1998); Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951 (1997); Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667 (1993).

[186] *E.g.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (sustaining a First Amendment attack on municipal ordinance targeted at Santeria ritual animal sacrifice).

States courts, no less than United States legislatures, have no business involving themselves in the regulation of marriage as a covenant of the religions of people attempting to join in this estate. Some commentary touching on the state's involvement with religious divorce in connection with the grant of a secular divorce have begun to articulate these sentiments well:

> The Torah's zealous guardianship of the family caused the Rabbis to build a protective fortress of marriage laws. Marriage is legally, morally, and socially binding; private, sacrosanct, and untouchable from the outside. That spirit accounts for the religious divorce laws. "As the marriage is a personal agreement sanctified by Jewish law, the dissolution of marriage is a personal agreement sanctioned by the law of God and the Torah."[187]

Not everyone would agree.[188] Moreover, there exists some precedent that suggests that religious disagreements cannot be of regulatory concern to a state, except with respect to the wishes of the majority of a religious majority.[189]

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[187] Patti A. Scott, *New York Divorce Law and the Religion Clauses: An Unconstitutional Exorcism of the Jewish Get Laws*, 6 SETON HALL CONST. L.J. 1117, 1117 (1996). Patti A. Scott argues that New York law compelling divorcing spouses to take "all steps solely within his or her power to remove any barrier to the defendant's remarriage" violates the First Amendment. *Id*. at 1146-89 (analyzing N.Y. DOM. REL. LAW § 253(2) (McKinney Supp. 1993)). When Scott discusses *Avitzur v. Avitzur*, 449 N.Y.S.2d 83, 84 (N.Y. App. Div. 1982) (while refusing a request that a spouse be compelled to appear before a religious tribunal to effect a religious divorce, the court noted that where religious terms are incorporated into a civil marriage contract the results would be different), *rev'd* Avitzur v. Avitzur, 446 N.E.2d 136 (1983), she correctly notes that

> [a]lthough many would argue that aiding her to do so would be a noble aim for any secular court or legislature, the United States Constitution forbids it. No matter how admirable its reasons for doing so, New York is not constitutionally permitted to excise a tenet, that it finds to be disagreeable, from a particular religion if doing so would effect an establishment of religion in this country.

Id. at 1189. But see Greenawalt, *supra* note 185, at 810-39 for an approach with more nuance. *See also* Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131 (1995).

[188] *E.g.*, Wardle, *supra* note 50, at 781-96 (state interest in possibility of procreation is substantial enough to justify state intrusion into a religious area such as marriage).

[189] Employment Div. v. Smith, 494 U.S. 872, 890 (1990) (rejecting free exercise objection to state law forbidding peyote use that extended to Native American religious ceremonies). This notion has old roots in American jurisprudence. *E.g.*, Reynolds v. United

(*continued*)

Participating fully in the public debate as faith-based entities adds significantly to the dignity of the debate. There is great power in the ability to assert the Divine as absolute authority for a point of behavior, or the construction of an institution. It is time for the rise of religions that embrace the unions of all people, regardless of their sex. What God wills, let no man put asunder.

When communities act in accordance to their understanding of the Word of God and his desires, then much of the lifestyle choice debate disintegrates. Because now we no longer deal with a lifestyle choice as a selfish act, but we rather deal with a faith-driven choice. The debate now can become one in the equation of the choice of a gay-based faith with that of the choice of a religious community. Interference with the core beliefs of a faith-based community, and discrimination against the practices of such a community with respect to its interpretation of the nature of marriage, would constitute the sort of religious discrimination that our courts have found to violate the federal constitution, and our conservative religious leaders have found to be so un-American. It is difficult to believe that a Court that protects the right of a religious community to the freedom to practice animal sacrifice[190] would deny the same level of protection to a religious community seeking to join in marriage members of its community in accordance with the tenets of its faith.[191]

I end this essay by suggesting a number of specific actions that faith based communities can take, once established, to engage significantly in the religious dialog about same sex marriage, and to naturalize the concept of marriage between people of the same sex.

1. *Embrace Your Faith*

Your communities are not pale imitations of those faiths that came before yours, or the corruption of faith as practiced by others. Communities of faith have been created from out of the fires of expulsion from other communities of faith.[192] Each of your faith-based communities must embrace its faith—its

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States, 98 U.S. 145, 166-67 (1878) (upholding regulation of polygamy against a First Amendment challenge).

[190] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (sustaining a First Amendment attack on municipal ordinance targeted at Santeria ritual animal sacrifice).

[191] To those that suggest that there is a difference between permitting animal sacrifice and permitting human sacrifice, and that on this basis faiths that permit the marriage of same sex couples can be regulated and their ministry denied, all that can be said is that the analogy does not apply. Indeed, resort to the analogy is a subterfuge and an attempt to inflame and misdirect by conflating something fundamentally odious in our culture—human sacrifice—with something far more mundane—the religious union of two people.

[192] As one protestant theologian has recently written in this regard:

(*continued*)

difference—from other communities. This embrace requires both courage and strength; it must survive the ridicule and invective of those communities of faith from which you emerge.[193] As fully formed, complete, and autonomous members of the communities of faith which must necessarily exist in fraternal community within the United States, participation in dialogues of faith become possible from a position of different but equal.

2. *Witness Your Faith*

Like the early Christians in the Roman world of Late Antiquity,[194] and modern day Southern Baptists,[195] other evangelicals, and Mormons,[196] gay

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The primary message of the church should *not* be, "We're a nice place; you'll like us." Instead the message should be, "This is a holy place where sin is despised." . . . . The church that tolerates sin destroys its own holiness and subverts the discernment of its own members. How can the lines be drawn in people's thinking when a church refuses to regulate behavior? If the goal is to make everyone feel all right, tolerate and compromise must rule. Discernment and discrimination are then ruled out.

JOHN F. MACARTHUR, RECKLESS FAITH: WHEN THE CHURCH LOSES ITS WILL TO DISCERN 61 (1994) (John F. MacArthur was pastor of the Grace Community Church in Sun Valley, California, and president of The Master's College and Seminary when he wrote this book).

[193] Emerging communities of faith will likely be regarded as illegitimate, and organized religion will attempt to characterize the emerging communities of faith as "cults" or as illegitimate expressions of political rather than religious faith.

Hypocrisy! For these are the very charges leveled against many traditional communities of faith by the emerging governments of Eastern Europe (to which such communities of faith respond with a loud and politically potent voice of anger). It seems that what applies to evangelical religions striving for recognition in Russia applies with greater force to communities of faith seeking recognition within the United States. For a discussion of the recent efforts of the Russian Duma to limit the influx of charismatic Christian sects, see T. Jeremy Gunn, *Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations*, 12 EMORY INT'L L. REV. 43 (1998). For a discussion of the efforts of the Catholic hierarchy in Spanish speaking America against Protestant and Mormon missionaries, see Paul E. Sigmund, *Religious Human Rights in Latin America*, 10 EMORY INT'L L. REV. 173 (1997).

[194] The remarkable rise of the Christian community is extensively documented. For a readable account, see PETER BROWN, THE WORLD OF LATE ANTIQUITY AD 150-750 49-70 (1971). In this regard it is worth noting that witness could involve more than words:

> At a time of inflation, the Christians invested large sums of liquid capital in people; at a time of increased brutality, the courage of Christian martyrs was impressive; during public emergencies, such as plague or rioting, the Christian clergy were shown to be the only united group in the town.

Id. at 67.

[195] The Southern Baptist Convention has adopted the following position on evangelism:

(*continued*)

religious communities must witness their faith at every opportunity.[197] Converts ought to be welcome. Such new religious communities must be protected in the expression of those who witness to the same extent as Evangelicals, Muslims or Mormons.[198] Preaching the Word at every street corner may ultimately be more effective in bringing cultural change and acceptance of the practice of these faiths than any coercive action of government or its courts.

> It is the duty and privilege of every follower of Christ and of every church of the Lord Jesus Christ to endeavor to make disciples of all nations. The new birth of man's spirit by God's Holy Spirit means the birth of love for others. Missionary effort on the part of all rests thus upon a spiritual necessity of the regenerate life, and is expressly and repeatedly commanded in the teachings of Christ. The Lord Jesus Christ has commanded the preaching of the gospel to all nations. It is the duty of every child of God to seek constantly to win the lost to Christ by verbal witness undergirded by a Christian lifestyle, and by other methods in harmony with the gospel of Christ.

Report of the Baptist Faith and Message Study Committee to the Southern Baptist Convention (adopted June 14, 2000), *at* http://www.sbc.net/default.asp?url=2000-bf_m.html (last visited March 13, 2002) [hereinafter *Baptist Report*].

[196] The Mormon Church has explained that

> [e]very member of the Church is to be a missionary. We should be missionaries even if we are not formally called and set apart. We are responsible to teach the gospel by word and deed to all of our Heavenly Father's children. The Lord has told us, "It becometh every man who hath been warned to warn his neighbor" (D&C 88:81). We have been told by a prophet that we should show our neighbors that we love them before we warn them. They need to experience our friendship and fellowship.

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GOSPEL PRINCIPLES ch. 33 ("Missionary Work") (1985), *available at* http://library.lds.org (must search Gospel Library Archive) (last visited March 13, 2002).

[197] As the Southern Baptist Convention notes, "Baptist churches, associations, and general bodies have adopted confessions of faith as a witness to the world, and as instruments of doctrinal accountability." *Baptist Report*, *supra* note 195. On Southern Baptists witnessing their faith, see *supra* note 195.

[198] Thus, for example, all religious groups should be entitled to talk freely about their religion to others within the guidelines applicable to federal workers that ensure the religious rights of these employees. *See* Larry Witham, *Federal Workers Get Religious Voice*, WASHINGTON TIMES, Aug. 14, 1997, at A1 ("Under the new rules, for example, federal employees may read Scripture during breaks, talk about religion with fellow employees, invite others to attend a house of worship, or advertise a religious event.").

Conservative American religionists have made a faith out of the right to protection of their worldwide missions to bring the unenlightened to their faiths. They mean to create a world order in which both their rights to convert others, and respect for the core principles of their faiths, are respected. Such protection exists within the United States.[199] They acknowledge that,

> [m]any parts of the world have seen the prodigious rise of a host of new or newly minted faiths—Adventistis, Bahi'as, Hare Krishnas, Jehovah's Witnesses, Mormons, Scientologists, Unification Church members, among many others—some wielding ample material, political, and media power. "Religion today has become the latest 'transnational variable."[200]

It is time the community of those that embrace the sacred in the union of people who commit to loving relationships acknowledge both their community and their faith. So conscious of the blessing of the divine, they must join the rest of the world's faith communities in the fight for the protection of the freedom to practice their faith without religiously based state interference.

3. *Teach Your Faith Within Your Community*

Places of religious instruction should be established. Only through instruction in the faith can its tenets be spread and the community of the faithful brought to the Word. Such instruction also serves as a means of legitimating claims to status as a religion equal in dignity to others. Affirm your teaching mission in public places—public schools, colleges, and universities that make their facilities available to other religious groups.[201] Seek funding for your mission, your religious perspective, for educational purposes, from institutions offering funding to other similar groups.[202] Where

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[199] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (stating that oral and written dissemination of religious views is protected by the First Amendment, although it "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."). *Cf*. Widmar v. Vincent, 454 U.S. 263, 269 n.6 (1981) ("no reason why the Establishment Clause, or any other provision of the Constitution, would require different treatment for religious speech designed to win religious converts . . . than for religious worship by persons already converted").

[200] John Witte, Jr., *A Primer on the Rights and Wrongs of Proselytism*, 31 CUMB. L. REV. 619, 620 (2000-01).

[201] In *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, the Court held it was unconstitutional to deny religious groups after hours access to school facilities that were otherwise made available to a wide range of other groups. 508 U.S. 384, 395-97 (1993).

[202] In *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, the University of Virginia, through its student council, had to pay to print a student publication that complied

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you are denied these rights, insist that they be denied to other similarly situated groups—Protestant, Catholic, Jewish, Muslim, Hindu, or others. You should be entitled to share the benefits of religious rights accorded to other faiths without discrimination by those other faiths.[203] Copy the Christians and Mormons in your efforts to bring others to your faith—and use the law as a tool to further your mission.[204]

4. *Protect Your Faith*

A program of litigation should be devised for the protection of the faith community against discrimination based on the exercise of the articles of its faith, including the sacrament or state of marriage between people of the same sex. This offers a more traditionally powerful means of combating anti-gay prejudice. The prohibitions against discrimination on the basis of religious belief—now a well established and accepted art-form within American Constitutional jurisprudence[205]--should be equally applicable to emerging gay religious communities. A Rutherford Institute[206] should be established for the

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with the authors' duty to, as the Good Book says, "Go into all the world and preach the good news to all creation." 515 U.S. 819, 845-46, 866 (1995).

[203] For an interesting account of religious discrimination against an emerging faith and the jurisprudence developed ultimately to protect the exercise of that faith, see SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION (2000).

[204] For examples of this philosophy as practiced by conservative Christian and Mormon groups, see Edward P. Antonio, *The Politics of Proselytization in Southern Africa*, 14 EMORY INT'L L. REV. 491 (2000); Thillayvel Naidoo, *Proselytism Within South Africa's Hindu Community*, 14 EMORY INT'L L. REV. 1121 (2000); Tad Stahnke, *Proselytism and the Freedom to Change Religion in International Human Rights Law*, 1999 BYU L. REV. 251.

[205] *See generally* JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995). For a taste of the nature of jurisprudential art making, see Craig Anthony (Tony) Arnold, *Religious Freedom as a Civil Rights Struggle*, 2 NEXUS 149 (1997). On the decadence of this form of constitutional interpretation, see Larry Catá Backer, *The Incarnate Word, That Old Rugged Cross and the State:On the Supreme Court's October 1994 Term Establishment Clause Cases and the Persistence of Comic Absurdity as Jurisprudence*, 31 TULSA L.J. 447 (1996).

[206] The Rutherford Institute describes itself as follows:

> The Rutherford Institute is an international legal and educational organization dedicated to preserving human rights and defending civil liberties. Deeply committed to protecting the constitutional freedoms of every American and the integral human rights of all people, The Rutherford Institute has emerged as a prominent leader in the national dialogue on civil liberties and equal rights.

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> The Institute, a nonprofit, nonpartisan organization whose international headquarters are located in Charlottesville, Virginia, is comprised of a full-time staff of 50 and a network of more than 1,000 volunteer attorneys across the United States. Institute attorneys handle a full range of cases in the realm of civil liberties and human rights. The Institute's multi-faceted approach of integrating litigation and educational opportunities has made it a formidable leader in defending and teaching the Constitution. The defense of civil liberties and human rights through litigation and education are at the heart of the Institute's purpose.

The Rutherford Institute, *About The Rutherford Institute: Vision of the Institute*, *at* http://www.rutherford.org/about/default.asp (last visited March 13, 2002). What makes The Rutherford Institute even more interesting from the perspective I advocate is what its detractors have to say about it. Consider the following analysis:

> The Institute for First Amendment Studies receives many calls concerning a number of Religious Right organizations. Near the top of the list is the Rutherford Institute, a Virginia-based Christian legal organization that promotes the Christian Right agenda through the courts. The following report offers some pertinent and basic information about this influential organization.
>
> Samuel Rutherford, a 17th-century Scottish minister, is best known for his defiance of the King. Rutherford proclaimed that, as kings were not divine, kings' laws were not above God's laws. He urged his followers to disobey any royal decrees that failed to follow God's laws.
>
> In 1982, attorney John W. Whitehead, writer/filmmaker Franky Schaeffer, and other "concerned Christians" formed a new organization to act as "the legal arm of Christian civil liberties in this country." They named it the Rutherford Institute after Samuel Rutherford.
>
> Schaeffer contended that "modern-day courts issue laws which are contrary to God's law." And Whitehead believes, according to an article by Martin Mawyer published in the May 1983 issue of the *Moral Majority Report*, "that courts must place themselves under the authority of God's law."
>
> Mawyer's article explains, "The Institute states that 'all of civil affairs and government, including law, should be based upon principles found in the Bible.'" That statement is a simplified definition of Christian Reconstruction, an important movement within evangelical Christianity.
>
> From the beginning, the Rutherford Institute has taken a militant position. "We need to be very aggressive, not passive," Whitehead said in a 1983 interview. "Take the initiative. Sue rather than waiting to be sued. That's

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purpose of protecting the religious liberties of these faith-based communities. Other organizations must be created to combat prejudice, perhaps along the lines of B'nai B'rith,[207] or the Lambda Legal Defense and Education Fund.[208]

5. *Act on Your Faith in the Secular Community*

Participate fully in all faith-based initiatives as an independent and autonomous community of faith.[209] Such participation, as a faith-based

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> where we've been weak. We've always been on the defensive. We need to frame the issue and pick the court. The institute, if necessary, will charge that government is violating religious freedoms rather than the church waiting for the government to charge it with violating the law. [sic]

The Institute for First Amendment Studies, *Profile: The Rutherford Institute*, FREEDOM WRITER (June 1994), *available at* http://www.ifas.org/fw/9406/rutherford.html (last visited March 13, 2002).

[207] For general information about B'nai B'rith, see http://bbi.koz.com/servlet/bbi_ProcServ (last visited March 13, 2002).

[208] This organization describes itself as follows:

> Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work.
>
> Lambda Legal carries out its legal work principally through test cases selected for the likelihood of their success in establishing positive legal precedents that will affect lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS. From our offices in New York, Los Angeles, Chicago, and Atlanta, Lambda Legal's staff of attorneys works on a wide range of cases, with our docket averaging over 50 cases at any given time.
>
> Lambda Legal also maintains a national network of volunteer Cooperating Attorneys, which widens the scope of our legal work and allows attorneys, legal workers, and law students to become involved in our program by working with our legal staff.

Lambda Legal Defense and Education Fund, *About Lambda Legal*, *at* http://www.lambdalegal.org/cgi-bin/pages/about (last visited March 13, 2002).

[209] For a critical view of governmental involvement in faith-based service organizations, see Jonathan Friedman, Student Research, *Charitable Choice and the Establishment Clause*, 5 GEO. J. FIGHTING POVERTY 103 (1997). "For years, faith-based organizations ("FBOs") have offered critical social services in struggling communities and, like the nonprofit-sector, FBOs have tended to fill gaps in public services." Jerry Mashaw et al., Panel Discussion, *Living with Privatization: At Work and in the Community*, 28 FORDHAM URB. L.J. 1397, 1412-13 (*continued*)

organization of equal dignity to other faiths, tends to legitimize the faith in the eyes of others as something other than a subterfuge for the imposition of regimes of same-sex marriage. Such participation as a legitimate faith makes it possible to speak more forcefully as a faith, about the tenets of the faith, including the availability of marriage for people of the same sex. In particular, such faiths should seek to participate in any form of government sponsored or sanctioned programs. For example, such religious communities should strive to become involved in the current administration's faith-based welfare programs[210]-–reaching out to all gay people to spread the message of their faith and to provide aid by their example. Such participation also serves to legitimate the faith.

6. *Appeal to Others*

The emerging techniques of cultural movement[211] must be used aggressively.[212] Many of the great faiths of the United States have not shied

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(Comments of Cathlin Baker). The speaker, Ms. Baker, also noted that a number of FBO's have operated for years in New York, including Catholic Charities, Good Shepherd, Little Sisters of the Assumption, the Federation of Protestant Welfare Agencies, United Jewish Appeal, Harlem Congregations for Community Improvement, and Abyssinian Development Corporation. *Id*. at n.66 (citing, e.g., DOROTHY M. BROWN & ELIZABETH MCKEOWN, THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE (1997); VIRGINIA A. HODGKINSON & MURRAY S. WEITZMAN, FROM BELIEF TO COMMITMENT: THE COMMUNITY SERVICE ACTIVITIES AND FINANCES OF RELIGIOUS CONGREGATIONS IN THE UNITED STATES (1993)).

[210] The federal government is currently considering a series of reforms to provide financial and administrative relief to faith-based organizations delivering social services to the "deserving." The heart of the proposals would make federal social service grant money available to faith-based organizations whose programs currently do not qualify for such funds because of the religious nature of the services provided. "Besides asking for direct government aid to religious organizations, Bush also gave five Cabinet agencies six months to identify and propose reforms to eliminate regulatory barriers that either prevent or discourage faith-based service providers from participating in federal programs." John Gibeaut, *A Question of Faith: Bush Considers Licensing Exemption for Religious-Based Social Services*, A.B.A. J., Aug. 2001, at 46.

[211] For a contextualized exploration of the inter-linking of law and social practice, see Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001); Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615 (2000). Current constitutional jurisprudence appears to support the freedom to use these methods of cultural movement. *Cf*. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (observing that the First Amendment is designed "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail").

[212] Here emulation of Catholic thought is worth considering:

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from this form of participation in the secular life of the American polity.[213] The great mechanisms of cultural communication must be invoked in order to make the case for same sex marriage.[214] Religion is greatly suited to this

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> The inversion of means and ends, which results in giving the value of ultimate end to what is only a means for attaining it, or in viewing persons as mere means to that end, engenders unjust structures which "make Christian conduct in keeping with the commandments of the divine Law-giver difficult and almost impossible."
>
> It is necessary, then, to appeal to the spiritual and moral capacities of the human person and to the permanent need for his *inner conversion*, so as to obtain social changes that will really serve him. The acknowledged priority of the conversion of the heart in no way eliminates but on the contrary imposes the obligation of bringing the appropriate remedies to institutions and living conditions when they are an inducement to sin, so that they conform to the norms of justice and advance the good rather than hinder it.

CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1887-88 (1995).

[213] In addition to Catholic doctrine that suggests a faith-based need for such participation, the Mormons have been particularly active with respect to the secularization of their religious beliefs with respect to the limited availability of marriage. "It is, perhaps, ironic that present day Mormons have weighed in as strong opponents of same-sex marriage after having suffered for their belief in polygamous marriage. The Mormon Church spent $1.1 million to fight same-sex marriage propositions in Hawaii and Alaska in 1998, and the 740,000 Mormons in California were asked to spend as much to support California's Proposition 22, the Protection of Marriage Act." Keith E. Sealing, *Polygamists out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 693 n.3 (2001).

[214] The actions of the founder of The Rutherford Institute are instructive and worth serious emulation.

> In 1990, constitutional attorney and author John W. Whitehead teamed with a handful of radio stations to take stories of religious persecution to the airwaves. As greater awareness of religious freedom issues took root across the nation, hundreds more stations began broadcasting *Freedom Under Fire*. Today, *Freedom Under Fire* is a popular public service announcement airing on over 350 Christian radio stations in the US and abroad.

The Rutherford Institute, *Freedom Under Fire: True Stories of People Like You Defending Their Religious Freedom*, *at* http://www.rutherford.org/fuf/default.asp (last visited March 13, 2002).

task.[215] These great tools include advertising, including "normal" same sex couples in television and movie programs, and producing newspaper and magazine stories about same sex couples that attempt or have for their purpose the normalization of those relationships.[216] Censorship must be fought.[217] *Our object ought to be to bring society closer to a state of cultural indifference to difference.* We must become blind to the difference in the sex of the partners in a marriage relationship.

We are here to create new stories; new interpretations of our basic cultural text in the context of the sacrifices and martyrdoms which have created the cultural space in which we can speak. We do this well aware that there are other voices contending for the ear of our culture who have a different view of a fair cultural common sense about difference and its effect socially, politically and economically.[218]

7. *Call It Marriage*

This point contextualizes the others. Merely because the government has chosen to use, whether ultimately permissible or not under the federal or state constitutions,[219] its legislative power to deny secular recognition of marriage between people of the same sex does not mean that such marriages have not occurred—in the eyes of God or those of the religious communities in which such unions take place. When religious communities join people, call it

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[215] *See generally* David Hollenbach, S.J., *Contexts of the Political Role of Religion: Civil Society and Culture*, 30 SAN DIEGO L. REV. 877 (1993) (religion plays the public by its influence in the broader realm of civil society and culture).

[216] Groups such as Soulforce have begun to work on this project.

> Soulforce is educating thousands in the principles of nonviolence through its educational program, Journey into Soulforce. Soulforce also is producing films and other informational/educational materials, as well as developing and maintaining its comprehensive web site. Soulforce founders White and Nixon have also been tracking, for over a decade, anti-gay rhetoric in television and radio programs, as well as fund-raising letters, pamphlets, and other printed material, and responding to it in a number of ways in line with its mission.

Soulforce, Inc., *Soulforce Strategy*, *at* http://www.soulforce.org/sfbio.html (last visited March 5, 2002).

[217] For a discussion of the role of censorship in advertising political issues dealing with religious themes, see Barry W. Lynn, *Billboard Battle: Who's Being Censored?*, CHURCH & STATE , Dec. 1996, at 21 (exploring in part the difficulty of Americans United for Separation of Church and State to post anti-religious fundamentalist ads).

[218] Catá Backer, *supra* note 132, at 867.

[219] See *supra* notes 185-190 regarding the construction of legal arguments relating to the constitutional basis of the regulation of marriage by the state.

marriage. Treat it as marriage to the outside world. File federal tax returns as a married couple;[220] describe yourself as married on information on other forms you are required to complete; insist on treatment as married by your employers and insurance companies; seek compensation as a spouse in tort actions.[221] *Adickes* suggests the power of entire communities of faith sharing in these acts—those who would take advantage of same-sex marriage as well as those that would not.[222]

In a sense, this is a call to the sort of action, of martyrdom, that has been the catalyst for change in this country for the last century and a half. Multi-racial couples understood the importance of this prior to *Loving*,[223] when they joined together in marriage relationships that the state would not recognize as such.[224] African-Americans understood this when they boarded trains,[225] or

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[220] This action would constitute a violation of DOMA as currently written and interpreted. *See* The Defense of Marriage Act (DOMA), Pub. L. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2000)). Its challenge—over and over—would require courts to confront, and the legislature to understand the depth of, opposition to its provisions. Judicial challenge would provide the sort of notorious forum from which the voices of those seeking equal treatment could more clearly be heard. *See* Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1333 (1995) (losing cases, arguments made and rejected in the courts, "represent a prophetic vision of law, stemming from the Old Testament prophets such as Amos who viewed justice as 'a fighting challenge, a restless drive.'"); Catá Backer, *supra* note 13. In losing arguments,

> the prophetic voice was not suppressed. It was accorded a dignity equal to that of the Homeric expression of the majority in the process of memorialization. Thus memorialized along with the majority expression of "what is," the prophetic vision coursed back into the nonjuridical (social) fields of cultural production, there to provide guidance to individuals and groups attempting the process of applying and reapplying, interpreting and reinterpreting, the working rules of popular culture.

Id. at 337.

[221] See John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 975-79 (2000) for a discussion on the current problems for same sex couples in this area.

[222] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 161-62 (1976).

[223] Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding Virginia's miscegenation statute unconstitutional).

[224] For instructive insights on the effects of such issues as interstate comity, racial identity, and miscegenation on interracial marriages, see Peter Wallenstein, *Law and the Boundaries of Place and Race in Interracial Marriage: Interstate Comity, Racial Identity, and Miscegenation Laws in North Carolina, South Carolina, and Virginia, 1860s-1960s*, 32 AKRON L. REV. 557 (1999).

[225] *See* Plessy v. Ferguson, 163 U.S. 537, 538 (1896).

sought service at department store restaurants,[226] knowing that the constitution then permitted states to deny them this right. But neither defeat in court, nor temporal judicial misunderstanding of the Constitution, nor, in the case of same-sex marriage, refusal to evenly apply the Religion Clauses except to suit their own peculiar religious agendas,[227] should prevent same-sex couples in communities of faith from openly declaring the true nature of their unions, and acting on that declaration.

8. *Take Advantage of the Law*

Underlying much of the discussion that has preceded is the idea that, like the other great faiths of the West, new communities of faith must take advantage of the law, even as the law has sought to disadvantage, to punish the faithful for the exercise of their faith. There are a number of ways that the new communities of the faith can use the "master's tools" against the state, and the prejudice of the other great religions of the World, each of whom has sought to use the secular power to suppress the emerging religious communities of the same sex marriage faithful.

The American federal courts have increasingly indicated a willingness to protect the right of communities of faith to use public property.[228] Rights within private property areas are more constrained.[229] Religious speech rights have been vindicated in a variety of settings.[230] Legally coercive rights within the workplace are considerably more circumscribed, but provide at least a small opening for introducing the faith community to others.[231] Moreover, the federal courts have increasingly broadened their understanding of the sorts of faith communities that may be entitled to protection under the federal

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[226] *See Adickes*, 398 U.S. at 146 (refusal to serve lunch to a white woman who was in the company of African-Americans).

[227] *See generally* Catá Backer, *supra* note 205. On "family bias" in the law, see Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527 (2001).

[228] *E.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394, 396 (1993); *see also* Bd. of Educ. v. Mergens, 496 U.S. 226, 248, 250-52 (1990); Widmar v. Vincent, 454 U.S. 263, 267 (1981).

[229] *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678, 680, 683 (1992) (holding it is constitutionally permissible to ban religious solicitation in airport terminals under a reasonableness standard).

[230] *E.g.*, Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654 (1981).

[231] *See generally* MICHAEL WOLF, ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES (1998); Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959 (1999).

constitution.[232]

None of these current legal rules directly offer a conventional legal challenge to rules that prevent recognition of same-sex marriages. Even the bona fide establishment of communities of the faith embracing same-sex marriage as religions within the meaning of the federal constitution need not guarantee the invalidity of state interference with the definition of marriage and discrimination in favor of married couples of different sexes over same sex-married couples. First, heightened scrutiny under the federal constitution in matters of interference with important religious faith practices requires a showing of an impermissible purpose—religious discrimination.[233] Where such direct motivation is impossible to prove, the state is accorded substantially greater latitude to impair even core religious practices in creating and enforcing reasonable laws of general applicability.[234] This result is embraced by the federal courts in full knowledge that "leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[235]

Whatever aid federal statutes like the Religious Freedom Restoration Act might have provided to communities of faith embracing same-sex marriage, that aid disappeared along with the RFRA when the Supreme Court invalidated that statute. State attempts to re-impose the core of RFRA within the state[236] may prove fruitful.[237] Indeed, the resort to gay friendly religion

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[232] *E.g.*, Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534, 538, 542 (1993). On the problems of defining religion, see Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 980-89 (1989).

[233] *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533.

[234] Employment Div. v. Smith, 494 U.S. 872, 889-90 (1990).

[235] *Id*. at 890.

[236] In the aftermath of the federal invalidation of the Religious Freedom Restoration Act of 1993, *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), several states sought to provide similar protections through state constitutional or statutory enactments. *E.g*. ALA. CONST. amend. 622; ARIZ. REV. STAT. §§ 41-1493 to 41-1493.02 (West Supp. 2001); CONN. GEN. STAT. ANN. § 52-571b (West Supp. 2001); FLA. STAT. ANN. §§ 761.01-761.05 (West Supp. 2002); 2000 Idaho Sess. Laws 133-34; 775 ILL. COMP. STAT. ANN. 35/10, 35/15, 35/20, 35/25 (West 2001); 2000 N.M. Laws 17; OKLA. STAT. ANN. 51 §§ 251-258 (West Supp. 2002); R.I. GEN. LAWS § 42-80.1-3 (1998); S.C. CODE ANN. §§ 1-32-10, 1-32-20, 1-32-30, 1-32-40, 1-32-45, 1-32-50, 1-32-60 (West Supp. 2001); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.003-110.012 (Vernon Supp. 2002).

[237] For an analysis in the context of the Texas legislation, see Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755 (1999) (state RFRAs, if sensibly interpreted can lessen the ability of state to use land use regulation to burden exercise of religion). These statutes generally require a state to demonstrate a compelling interest, sometimes with an additional showing that no less restrictive alternative existed, to justify an interference with, or burden on, faith based practice, even if the burden results from facially

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may be the most potent method of blunting the utility of the state RFRA for purposes of otherwise discriminating against sexual non-conformists generally.[238] Because of the difficulty of resorting to state RFRAs, as my arguments above have suggested, success in the judicial sphere must be preceded by a cultural acceptance, or at least a toleration, of a practice now deemed morally and socially unacceptable by many. The power of culture to bend the law to its practice—eventually, and perhaps not in our lifetime—is the only guarantee that law will not only be pronounced by a court, but practiced within a society. As religious conservatives have argued, ironically for my purposes here,[239] the compelling state interest test now, built into state RFRA legislation may provide little real benefit for religion.[240] Even if this assessment by religious conservatives is extreme, the applicability of federal constitutional limitations may well otherwise limit the breadth of these state

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neutral laws. *See* sources cited in *supra* note 237. It might be possible to construct an argument that indeed it would be impossible, even as a matter of conjecture, for the state to construct arguments demonstrating a compelling interest in denying people of the same sex the benefits of marriage. Yet, this sort of legalistic argumentation usually results in the same sort of jurisprudential paralysis that has characterized the legal debate about same sex marriage to date. *See supra* notes 39-60. Indeed, religious traditionalists are already gearing up for this contest should it be fought using the traditional language and analysis of the law. *See*, *e.g.*, Wardle, *supra* note 50.

[238] For a discussion, see Alvin C. Lin, Note, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719 (2001).

[239] Such arguments were meant, in their deployment, to further the agenda of these sects' missions. It was hardly understood that the creation of a broad protection for religious practice would be used to foster actions that these sects have spent a tremendous amount of time, money, and trouble to suppress.

[240] Gary Stuart McCaleb summarized:

> Despite an occasional victory for religious believers, the powerful rhetoric of the compelling state interest test was, in practice, shorn of strength. Of ninety-seven cases brought to federal appellate courts in the ten years prior to *Smith*, the state prevailed in eighty-five. Similarly, of the seventeen cases heard by the Supreme Court in the *Sherbert* era (1963-1990), the religious believer's claim failed in all but four cases. Three of these four dealt with unemployment benefits, leaving only *Wisconsin v. Yoder* as an example of religious behavior exempted from a facially neutral, generally applicable law. The compelling state interest test appeared more adept at compelling the religious adherent to accept his burden than in restraining the government's ability to regulate conduct.

Gary Stuart McCaleb, *A Century of Free Exercise Jurisprudence: Don't Practice What You Preach*, 9 Regent U. L. Rev. 253, 264-265 (1997).

RFRA enactments.[241] Thus, I have not been arguing from the perspective of conventional legal argumentation. Indeed, I have suggested that conventional analysis is unhelpful, at best, and a fatal long-term trap, an invitation to obliteration, at worst. Only by overcoming the current socio-cultural basis of understanding marriage can there be created the sort of basis necessary for the reshaping of law, or the reinterpretation of current legal interpretation. Current law can be useful as a tool to the end, but it does not provide the ultimate solution for same-sex couples seeking social acceptance of that union their communities of faith have solemnized as an expression of their collective faith.

D. *Parting Words*

Sexual non-conformists have existed as the cast-offs of modern religious communities for too long. Like the early Christians, who first struggled to become something than another denomination of Judaism, and who then suffered great oppression before emerging triumphant and an expression of the voice of God in its time, so too must those excluded by the great religions of today struggle to become something other than an unwanted appendage to current religious traditions. Suffering great oppression, such communities of the discarded may someday rise triumphant as beacons of more godly ways of living the divinely inspired life based on the earthly manifestation between people of the love of the divine for all things created.

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[241] *See generally* Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 643 (1999) (arguing that federal constitutional guarantees would prevent interpretation of these state RFRA statutes to provide for mandatory exemptions from content-neutral regulations of speech).