Shields, Not Swords

Ryan T. Anderson

Public debates about sensitive issues of culture, identity, and sexuality often get tangled up in terms and concepts. In particular, we confuse "rights" and "needs" in ways that in turn confuse our understanding of the appropriate role of government in these arenas. Untangling this knot is a first step toward fruitful debate of these sensitive issues.

There are certain rights that all people possess irrespective of their identity. Among these are the rights to life, liberty (including religious liberty), and the pursuit of happiness. Government exists to protect, not violate, these rights. At the same time, there are certain needs that everyone has, regardless of their identity. Government, in some cases, has an obligation to help people meet those needs, and in other cases, has an obligation to allow people to meet them on their own, by prohibiting others from preventing any person from meeting his own needs. So, for instance, government directly meets the needs of the poor through certain welfare programs, and it also prevents private entities from blocking people from meeting their own needs through certain antidiscrimination statutes.

Some people argue that citizens who identify as lesbian, gay, bisexual, or transgender (which I will describe here as LGBT) are being blocked from meeting their needs, and that a governmental response is necessary. But if a governmental response is indeed the necessary remedy, any such response to help citizens meet their needs must not unduly impede other people's basic rights, including the freedoms of speech, association, and religion. As Americans continue to disagree about sex and marriage, we

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must find ways to help citizens meet their needs without weaponizing the redefinitions of marriage, sex, and gender in ways that would prevent other citizens from exercising their rights and meeting their own needs.

In other words, if an anti-discrimination policy is needed in a certain context to protect citizens from mistreatment that hampers their full participation in civil society, such policies ought to be understood as shields, not swords. But sexual-orientation and gender-identity (SOGI) policies are now often being used as swords to "punish the wicked," as Tim Gill (their biggest financial backer) has put it. Lawmakers, public-interest firms, civil-rights commissioners, and judges seem to agree with Gill. For many, it isn't sufficient that same-sex couples can marry in the state's eyes: Their relationships must count as marriages in the eyes of their fellow citizens, who must be compelled to facilitate such unions. Likewise, not only must citizens be free to adopt transgender identities, but others must be compelled to recognize and accept them.

In short, policies intended to allow people who identify as LGBT to meet their needs are being used illiberally, to impose a new sexual orthodoxy on the nation. But as the Supreme Court acknowledged in *Obergefell v. Hodges*, the conviction that male and female are created for each other "has been held — and continues to be held — in good faith by reasonable and sincere people here and throughout the world." Indeed, the Court added, many "reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." Any fair policy will take heed of this point; it will address the particular needs of LGBT individuals without punishing other reasonable citizens for acting on decent and honorable beliefs.

Thus, we shouldn't simply assume that the best policy for protecting LGBT individuals is to add the phrase "sexual orientation and gender identity" to existing laws crafted to respond to racism and sexism, as SOGI laws do. Rather, lawmakers must carefully specify what constitutes "discrimination" on the basis of "sexual orientation" and "gender identity," so as to avoid punishing innocent actions and interactions. They should carefully consider which entities to regulate, so as to keep burdens to a minimum. And they should accommodate freedoms of speech, association, and religion.

On each of these dimensions, our law has treated racial discrimination differently from sex-based discrimination, and with good reasons. Our laws have also drawn complex and sophisticated distinctions in

protecting religious liberty. Thinking through these differences can help us draw some distinctions that will be useful to thinking about SOGI laws, and help us reverse and avoid some key mistakes.

Anti-gay and anti-transgender bigotry exists and should be condemned. But support for marriage defined as the union of husband and wife isn't anti-gay. Nor is the conviction that sex is a biological reality anti-transgender. Just as we've combatted sexism without treating pro-life medicine as sexist, we should make sure that any public policy necessary to help people who identify as LGBT meet their needs is crafted in a way that respects the consciences of reasonable people acting on good-faith beliefs about marriage and gender identity. Not every disagreement is discrimination. And our law shouldn't suppose otherwise.

defining discrimination

Discrimination in the broad sense — the making of distinctions — is inevitable. In the moralized, pejorative sense, discrimination involves mistreatment based on irrelevant factors. For clarity, I use "distinguish" as a neutral term and "discriminate" to refer to wrongful distinctions — those based on irrelevant factors.

We can distinguish *or* discriminate based on X when we take X as a reason for treating someone differently. Of course, there might be some traits on which we both distinguish and discriminate, and disentangling the two can take work: A school distinguishes based on sex when it creates male and female bathrooms; it discriminates based on sex when it allows men to study economics while forcing women to stick to home economics. But doctors neither distinguish nor discriminate based on sex when they decline to perform abortions, as the sex of the pregnant person plays no role in their reasoning.

One problem with current SOGI laws is that they fail to specify appropriately what constitutes discrimination based on sexual orientation and gender identity. These laws can be over-enforced because of this failure to establish clear boundaries between invidious and appropriate distinctions. We can better understand such boundaries by considering how they manifest in some specific cases of putative "discrimination" based on race and sex. Public policy is nuanced enough to capture important differences in these cases; it should do the same with regard to SOGI.

Invidious discrimination is rooted in unfair, socially debilitating ideas about individuals' abilities or proper social status. Racially

segregated water fountains are a clear example of race-based discrimination; the creators of those laws took race into account where it was utterly irrelevant, in a way that treated blacks as socially inferior. That's what made them forms of invidious race-based discrimination. Given that such discrimination was entrenched, widespread, and state-sponsored, Congress rightly stepped in.

Likewise, throughout much of American history, girls and women were not afforded educational opportunities equal to those available to boys and men. This form of discrimination took sex into consideration; it treated girls and women differently — and worse — precisely because of their sex, depriving them of educational opportunities for which they were qualified. That's what made this invidious discrimination. Its entrenchment justified Title IX of the Education Amendments.

These are clear examples of invidious discrimination. Yet Title IX's implementing regulations made clear that sex-specific housing, bathrooms, and locker rooms did not constitute unlawful discrimination. Such policies take sex into consideration, but not invidiously. They treat both sexes equally because they take sex into consideration (they "discriminate" — in the non-pejorative sense of "distinguish" — on the basis of sex) only where it's relevant; they respect the fact that bodily sexual differences raise legitimate privacy interests in some settings.

It would serve equality only in the most artificial (and unimportant) sense to force men and women, boys and girls, to undress in front of each other. Indeed, Justice Ruth Bader Ginsburg, in her 1996 opinion for the Supreme Court explaining why the Virginia Military Institute had to become co-ed, took it for granted that the Court's decision "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."

Likewise, when critics decades earlier had argued that the Equal Rights Amendment, a failed predecessor of Title IX, would have required unisex intimate facilities, Ginsburg (then a Columbia law professor) dismissed this claim in a *Washington Post* op-ed: "Again, emphatically not so. Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy. Individual privacy, a right of constitutional dimension, is appropriately harmonized with the equality principle."

While concern for privacy requires separate facilities for males and females, it can't justify race-specific facilities, which is why the latter

really would undermine equality — and discriminate invidiously. Hence our civil-rights laws abolished separate facilities for blacks and whites, but not for males and females. The key point to notice is that policymakers did not treat sex-specific intimate facilities as discriminatory in the first place. It was the regulations themselves that allowed for sex-specific facilities, not exemptions for a mere subset of regulated actors. The lesson is that we can't assume that different protected statuses — in this case race and sex — should have exactly the same legal implications. Each requires tailoring in light of when the status in question is and isn't relevant, and what scope of protections is required to restore a group's equal opportunities. Unfortunately, SOGI laws have not been carefully tailored in their drafting or application.

Pro-life doctors offer a different kind of case: If sex-specific intimate facilities take sex into account in a legitimate way, pro-life medical practices make nothing hinge on sex at all. That only women can get pregnant has no bearing on the judgment of the conscientious doctor or nurse who refuses to kill the unborn, a judgment based on respect for prenatal life. This point is only reinforced by the insistence of LGBT advocates that men can become pregnant: Even in such cases, pro-life medical personnel would refuse to perform abortions. So it would be a gross misapplication of sex anti-discrimination laws to say that a Catholic hospital refusing to perform abortions is discriminating based on sex. Even those who support abortion access needn't support coercing pro-life doctors or hospitals, since any disparate impact created by pro-life practices doesn't prevent people from obtaining abortions elsewhere.

Thus, we can identify three different types of cases, based on different sets of conditions. First, there are cases of invidious discrimination, in which an irrelevant factor is (wrongfully and harmfully) taken into consideration, as with racially segregated water fountains. Second are cases of distinctions that should *not* count as unlawful discrimination, in which a factor is taken into consideration precisely because it is relevant, and no one is wronged or harmed, as with sex-specific intimate facilities. And in a third category are policies that don't involve distinctions based on a given trait at all (even if they have a disparate impact on one particular subset of the population), which our law can tolerate without hampering the affected group's participation in civil society, as with pro-life medicine.

To avoid unduly burdening sensible and often crucial practices, any policy proposal to address the needs of people who identify as LGBT must, as a prerequisite, be warranted on the basis of the first set of conditions.

DISCRIMINATION AND DISAGREEMENT

Applying such distinctions to the kinds of cases for which SOGI laws are crafted can help us tell the difference between actual discrimination and reasonable disagreement.

Consider a florist who refused to serve all customers who identify as LGBT simply because of their LGBT status. He would be discriminating on the basis of sexual orientation or gender identity because he takes these into consideration precisely so that he can treat those customers differently. Such discrimination would be invidious because it is irrational — not simply mistaken, but altogether unreasonable — to see any connection between the decision to sell flowers and a customer's gender identity or sexual orientation.

Jack Phillips, by contrast, didn't discriminate — or even distinguish — based on sexual orientation when he refused to design and bake a cake for a same-sex wedding. He didn't take his customer's sexual orientation into consideration at all. He declined to use his artistic abilities to create a custom cake to celebrate a same-sex wedding because he objected to same-sex marriage, based on the common Christian belief that such partnerships (along with many other relationships — sexual and not, dyadic and larger, same-sex and opposite-sex) aren't marital. Nowhere need Phillips's reasoning have even referred to the partners' sexual orientation, much less any ideas or attitudes about gay people as a class (good or bad, explicit or not).

Both Justices Samuel Alito and Anthony Kennedy seemed to grasp the importance of this point during oral arguments in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. When Phillips declined to create a cake for a same-sex wedding, Colorado wouldn't even recognize — let alone issue — same-sex marriage licenses. Justice Alito observed that Phillips's customer couldn't get the state of Colorado to recognize his relationship as a marriage, "[a]nd yet when he goes to this bake shop, and he says I want a wedding cake, and the baker says, no, I won't do it, in part because same-sex marriage was not allowed in Colorado at the time, he's created a grave wrong. . . . How does [all that] fit together?"

Indeed, Colorado should have never declared Phillips guilty of discrimination in the first place. And — in what might prove to be the most important comment made during oral arguments — Justice Kennedy appeared to reject the ACLU's argument that opposition to same-sex marriage *just is* discrimination against people who identify as gay. Kennedy explained Phillips's beliefs: "Look, suppose he says, 'I have nothing against gay people,' he says. 'But I just don't think they should have a marriage because that's contrary to my beliefs. It's not their identity; it's what they're doing.'" In response to the ACLU's claim that this is sexual-orientation discrimination, Kennedy responded, "Your identity thing is just too facile."

It wasn't his customer's identity that motivated Phillips at all. It is even clearer that Phillips's reason for refusing to bake the wedding cake was not the invidious purpose, essential to Jim Crow, of avoiding contact with others on equal terms. As Phillips said to the same-sex couple, "I'll make you birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same-sex weddings." He sought only to avoid complicity in what he considered one distortion of marriage among others — as shown by his refusal to create divorce cakes as well.

By and large, such refusals simply reflect what the Supreme Court has recognized as a disagreement about marriage among people of good faith motivated by honorable premises. Applying anti-discrimination policy here amounts to an enforcement of sexual orthodoxy on reasonably disputed questions: It punishes people for acting on reasonable views of marriage.

This is seen most clearly in the case of Catholic Charities adoption agencies. They decline to place the children entrusted to their care with same-sex couples not because of the partners' sexual orientation, but because of the conviction that children deserve both a mother and a father. These agencies believe that men and women are not interchangeable, that mothers and fathers are not replaceable. Catholic Charities does not think that people who identify as LGBT cannot love or care for children, but that the two best dads in the world cannot make up for a missing mom, and the two best moms in the world cannot make up for a missing dad. This policy doesn't take sexual orientation into consideration at all. It simply reflects a reasonable disagreement about the importance of both mothering and fathering.

The contrast with opposition to interracial marriage proves that the latter did discriminate, invidiously, based on race. Anti-miscegenationists

opposed interracial marriage *precisely* because one of the spouses was black, and therefore supposedly incompetent, impure, or threatening to whites (especially women). This opposition rested on the idea that blacks were inferior and thus shouldn't interact with whites on an equal plane, least of all in marriage. Thus, a baker refusing to bake for an interracial wedding discriminates invidiously on the basis of race. He takes that factor — race — into consideration, and does so where it is irrelevant.

His behavior thus perpetuates damaging myths about blacks that impede their full participation in society. This is only confirmed by the fact that anti-miscegenation laws (and beliefs) are outliers in history, having arisen only in cultures that had race-based caste systems. For all these reasons, when the Supreme Court struck down bans on interracial marriage, it did not and could not say that opposition to miscegenation "has been held — and continues to be held — in good faith by reasonable and sincere people here and throughout the world."

Meanwhile, support for marriage as the conjugal union of husband and wife has been a human universal until just recently, regardless of a culture's views about sexual orientation or same-sex relations. This view of marriage is based on the capacity that a man and a woman possess to unite in a conjugal act, create new life, and support that new life with both a mother and a father. Whether ultimately sound or not, this view is reasonable and disparages no one.

If *Obergefell* was about respecting the freedom of people who identify as gay to live as they wish, the law should respect the same freedom for Americans who believe in the conjugal understanding of marriage. No doubt many people oppose the conjugal view of marriage. But, to quote the Court in *Obergefell*, when that "personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied." Anti-discrimination law should be a shield to protect, not a sword to demean, stigmatize, and deny liberty to traditional Muslims, Jews, Christians, and other believers.

Charges of discrimination based on gender identity often suffer from similar problems. The *Washington Post* recently reported on a woman suing a Catholic hospital for its refusal to perform a sex-reassignment procedure on her that entailed removing her healthy uterus. Comments in that *Post* report exemplify the common conflation of real and invidious discrimination with reasonable disagreement:

> "What the rule says is if you provide a particular service to anybody, you can't refuse to provide it to anyone," said Sarah Warbelow, the legal director for the Human Rights Campaign. That means a transgender person who shows up at an emergency room with something as basic as a twisted ankle cannot be denied care, as sometimes happens, Warbelow said. That also means if a doctor provides breast reconstruction surgery or hormone therapy, those services cannot be denied to transgender patients seeking them for gender dysphoria, she said.

The two examples given, however, differ crucially. A hospital that refused to treat the twisted ankles of people who identified as transgender simply because they so identified would be discriminating invidiously, but a hospital that declined to remove the healthy uterus of a woman identifying as a man would not be engaging in gender-identity discrimination.

In the first case, the hospital takes a patient's transgender identity into consideration where it is utterly irrelevant and then treats the patient worse precisely because of it. But in the second case, the gender identity of the patient doesn't play a role in the decision-making at all: Just as pro-life physicians do not kill unborn babies, regardless of the pregnant person's gender identity, some doctors refuse to remove healthy uteruses from anyone, regardless of their gender identity. Their decision simply reflects reasonable disagreement over the best medicine for gender dysphoria and indeed the nature of medicine altogether, including whether it can ever allow for the removal of healthy organs. We shouldn't use anti-discrimination policies to enforce political orthodoxy on reasonably disputed questions of medical care. That would make them swords, not shields.

As for the Human Rights Campaign spokesperson's claim that emergency rooms "sometimes" refuse to treat the twisted ankles of transgender patients, there is no evidence — including on the HRC's website — that this or anything similar has in fact happened.

Just as reasonable medical treatments for gender dysphoria do not discriminate based on gender identity, neither do reasonable policies on sex-specific facilities. The bathroom, locker-room, and housing policies at stake in this debate make reasonable — and explicitly lawful — distinctions based on *sex*: anatomy, physiology, biology. These policies do not take gender identity into account at all, let alone in an invidious way.

The fact that some people wear suits and ties and others wear dresses is not the reason we keep separate bathrooms and locker rooms for men and women. The existence of sex-specific intimate facilities is explained not by our internal sense or social expressions of gender but by the external manifestations of our biology.

By contrast, it would be invidious discrimination based on gender identity to say that students who identified with their biological sex could use one water fountain, while others had to use another. This would involve taking transgender status into account, and doing so where gender identity was irrelevant.

Thus, lawmakers shouldn't use SOGI laws to punish actions rooted in the conjugal view of marriage, medical practices rooted in reasonable views about medicine and bodily integrity, or policies about intimate facilities that reflect reasonable views of privacy. Just as bans on sex-based discrimination don't force pro-lifers to perform abortions, these reasonable actions shouldn't be banned under SOGI laws at all. Rather than grant exemptions from SOGI laws to allow some regulated actors to have these policies, we shouldn't ban them in the first place.

CORRECTING BAD ANALOGIES

Some argue that it's inconsistent to support religious liberty but not SOGI laws, or to support bans on discrimination based on religion but not based on SOGI. Both objections miss striking and telling differences between these pairs of policies. Neither shows an inconsistency in those who oppose SOGI laws.

First, under anti-discrimination laws, the government coerces some citizens on behalf of others; by contrast, civil liberties *limit* government to protect the personal freedom of all. Thus, anti-discrimination laws force some to live by the majority's values; religious-liberty laws protect the interest of all to live by their own beliefs. And while there can be good justifications for certain anti-discrimination policies in certain circumstances, there is no human right to them, as there is to religious liberty.

Second, SOGI anti-discrimination laws are used not simply as shields to protect citizens from unjust discrimination, but as swords to punish reasonable people for acting on honorable beliefs — in a way that religious (and other) anti-discrimination laws are not. That is, bans on religion-based discrimination are not used to force religious organizations to violate their sincere religious beliefs, nor are they used to force

secular organizations to violate their deeply held convictions. Religious anti-discrimination policies have not been used, for example, to force Planned Parenthood to hire pro-life Catholics. No one filed a legal complaint claiming it was unlawful, religion-based discrimination when Mozilla Firefox forced out CEO Brendan Eich because he had donated to California's marriage initiative — even though his donations were rooted in his religious identity and its constitutive beliefs. Likewise, when A&E suspended Phil Robertson from *Duck Dynasty* because he expressed support for Biblical views of sexuality, Americans who objected to this decision did not allege that it violated religious anti-discrimination policies. Religious anti-discrimination laws simply do not seek to impose religious orthodoxy on the country.

But again, SOGI anti-discrimination policies *are* used to impose *sexual* orthodoxy. They're used to try to force Catholic schools to employ people who undermine their sexual values, and to force evangelical bakers to lend their artistic talents to support messages about marriage with which they disagree. Religious anti-discrimination laws are not used to punish those the majority considers wrong on religion. Just the opposite, in fact; these protections are equally available to all religions, including minority faiths.

This difference flows partly from differences in how SOGI and religious anti-discrimination laws are interpreted. SOGI laws are read to protect not only gay, lesbian, or bisexual orientations and transgender identities, but also to protect forms of conduct taken to flow from these statuses. But the laws themselves never address which conduct counts. This leaves human-rights commissioners and judges free to decide (as they often do) that it is gender-identity discrimination for Planet Fitness to base locker-room access on biology, not identity; and that it is sexual-orientation discrimination for Catholic Charities to seek out a mom and a dad for every child in need based simply on the conviction that kids benefit from both fathering and mothering.

But the law is much more nuanced regarding when it does or doesn't protect conduct (in addition to status) under other anti-discrimination laws. Religious anti-discrimination laws apply to status and certain religiously inspired conduct, but not to such an extent as to impose a religious orthodoxy — they do not force other actors to undermine their own missions. Planned Parenthood can't refuse to hire a pro-choice Jew because he wears a yarmulke, for example, but it can refuse

to hire a pro-life Jew, even when his pro-life convictions flow from his Jewish status and identity. This leaves Planned Parenthood free to make reasonable distinctions based on its mission, even when living by that mission has a disparate impact on people with a certain religious identity and conduct.

Likewise, even if same-sex relationships flow from gay and lesbian identities, supporters of conjugal marriage shouldn't be coerced under SOGI anti-discrimination laws — and yet they are. Even if cross-dressing flows from transgender identity, a policy against biological males' entering a women's locker room shouldn't be viewed as discrimination based on gender identity. Indeed, as noted, sex anti-discrimination laws already allow for such reasonable policies. As for race anti-discrimination laws, they apply almost exclusively to status, because there is no conduct that flows from race. And so, while race anti-discrimination laws *do* impose an orthodoxy on the nation — color-blindness — that's justified because there's no reasonable, decent, and honorable alternative view.

Thus, SOGI anti-discrimination policies are fundamentally unlike civil-rights laws that protect against discrimination on the basis of race, sex, and even religion. The latter reflect nuanced understandings of what constitutes unlawful discrimination and do not squeeze other fundamental values. They are not used as swords to enforce orthodoxy against people's reasonable, decent, and honorable disagreements, but as shields to protect people from unjust discrimination that prevents their full participation in society and their ability to flourish.

THE GOALS OF POLICY

Thus, to craft any policy necessary to protect people who identify as LGBT and enable them to meet their needs without undermining the common good, lawmakers must precisely identify the need to be met, tailor the scope of any policy remedy appropriately to that need, and carefully distinguish which circumstances count as discrimination and which do not. And they must avoid gratuitous burdens on conduct flowing from reasonable disagreement or on the rights of conscience, religion, and speech. Of course, what counts as a gratuitous burden will depend on the needs being addressed.

When the Civil Rights Act of 1964 was enacted, blacks were treated as second-class citizens. Individuals, businesses, and associations across the country excluded blacks in ways that caused grave material and social

harms without justification, without market forces acting as a corrective, and with the tacit and often explicit backing of government. So resort to the law was necessary. And because race is almost always irrelevant, and discrimination on its basis was so firmly entrenched, the law was appropriately broad and allowed only very limited exemptions.

Contrast to that the case of sex-based discrimination. The law treated it differently because the nature and history of racism are different from those of sexism. The scope of federal anti-discrimination laws was narrower in the case of sex, and allowed broader exemptions. Thus, for example, federal law even today doesn't ban sex discrimination in public accommodations. It expressly allows for sex-specific intimate facilities. And it offers broader exemptions for religious-liberty claimants. In other words, the scope of regulation and the definition of discrimination were broader in the case of race than that of sex. These two realities are different and gave rise to different needs.

Likewise, the case of SOGI is different from both sex and race. We never had an analogue of Jim Crow for people who identify as LGBT. There are no denials of the right to vote, no lynchings, no signs over water fountains saying "Gay" and "Straight." Of course, bigotry against those who identify as LGBT exists, and our communities must fight it. But it would be too crude — and too burdensome on important interests in religion, speech, and the like — to adopt for SOGI anti-discrimination laws that were written to respond to Jim Crow and then tack on some exemptions.

That becomes clear when one considers the cases to which SOGI laws are most controversially applied. These involve an astonishingly small number of business owners who cannot in good conscience support same-sex wedding celebrations. Most, like Jack Phillips, treat people who identify as gay with respect while simply declining to help celebrate or facilitate same-sex weddings. Professor Andrew Koppelman, a longtime LGBT advocate, acknowledges as much:

> Hardly any of these cases have occurred: a handful in a country of 300 million people. In all of them, the people who objected to the law were asked directly to facilitate same-sex relationships, by providing wedding, adoption, or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people.

There is no movement to deny people who identify as LGBT access to markets or goods and services. Indeed, there is a reason why there have been "no claims of a right to simply refuse to deal with gay people": No faith teaches it. Take it from legal scholar, religious-liberty expert, and longtime same-sex-marriage supporter Douglas Laycock: "I know of no American religious group that teaches discrimination against gays as such, and few judges would be persuaded of the sincerity of such a claim. The religious liberty issue with respect to gays and lesbians is about directly facilitating the marriage, as with wedding services and marital counseling." In this vein, as noted by Robin Fretwell Wilson, another religious-liberty scholar, "The religious and moral convictions that motivate objectors to refuse to facilitate same-sex marriage simply cannot be marshaled to justify racial discrimination."

In a word, the refusals of bakers like Phillips have nothing like the sweep or shape of racist or sexist practices. They don't span every domain — or even the professional sphere — but focus on marriage and sex. They're about refusing to communicate certain messages about marriage, not avoiding contact with certain people. Barronelle Stutzman, who declined to create floral arrangements to celebrate the same-sex wedding of her client whom she had served for nearly 10 years, clearly didn't think gay people vicious, incompetent, or unproductive. She didn't think they mattered less or deserved shunning. She employed them and served them faithfully as clients, gladly creating anything else they requested. As Professor Koppelman writes, "These people are not homophobic bigots who want to hurt gay people."

The few cases of refusals that have garnered media attention — cases involving cake designers, a florist, and a photographer — hardly diminish a single person or couple's range of opportunities for room, board, or entertainment. If businesses started to refuse service specifically to individuals who identify as gay, it is hard to imagine a sector of commerce or a region of our country where media coverage would not provide a remedy swift and decisive enough to restore access — or shutter the business — in a matter of days. The LGBT community's political influence is immense and still growing. When corporate giants like the NBA, the NCAA, Apple, Salesforce, Delta, and the Coca-Cola Company threaten to boycott states over laws that merely give believers their day in court, it's hard to see the case for penalizing the one baker in the state who concludes he can't make same-sex wedding cakes.

Finally, progressives like Professor Koppelman have noted that cultural pressures fast at work weaken the case for legal coercion: "With respect to the religious condemnation of homosexuality, this marginalization is already taking place. That does not mean, however, that the conservatives need to be punished or driven out of the marketplace. There remains room for the kind of cold respect that toleration among exclusivist religions entails." Elsewhere he expands: "The reshaping of culture to marginalize anti-gay discrimination is inevitable. To say it again: The gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory."

a better model

In 1993, in *Bray v. Alexandria Women's Health Clinic*, the Supreme Court resolutely rejected the argument that pro-lifers are inherently discriminatory: "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women."

The same is true when it comes to marriage as the union of husband and wife: There are common and respectable reasons for supporting it that have nothing to do with hatred or condescension. But this is not true when it comes to opposition to interracial marriage — and this is where the analogies to racism break down. When the Supreme Court struck down bans on interracial marriage, it did not say that opposition to interracial marriage was based on "decent and honorable premises" and held "in good faith by reasonable and sincere people here and throughout the world." It did not say it, because it is not true.

As a result, following *Obergefell*, our policy toward supporters of the conjugal view of marriage should mirror our policy toward pro-lifers after *Roe v. Wade* — not our policy toward racists after *Loving v. Virginia*. After *Roe*, Americans didn't use the new court-mandated legal regime around abortion as a sword to punish pro-lifers. They did just the opposite: They enacted legislation at the local, state, and federal levels to protect the rights of pro-life Americans not to be punished by government for living out their beliefs. The Church and Weldon Amendments have protected the conscience rights of pro-life medical personnel to refuse to perform or assist with abortions, and the Hyde Amendment and Mexico City policy prevent the use of taxpayer money to support abortion.

Likewise, governments must avoid penalizing people for acting on their view that marriage is the union of husband and wife, that sexual relations are properly reserved for such a union, or that maleness and femaleness are objective biological realities. Protections for such citizens need not undermine the valid purposes of laws meant to protect LGBT individuals — such as eliminating the public effects of anti-gay bigotry — because support for conjugal marriage isn't anti-gay. Protecting the right to religious freedom here sends no message about any supposed inferiority of gay Americans; it sends no message about sexual orientation at all.

Rather, such protection says that citizens who support the historic understanding of sex and marriage are not bigots. It ensures their equal social status and opportunities. It guards their ability to provide for their own needs, by protecting businesses, livelihoods, professional vocations, and (perhaps eventually) professional licenses in fields like medicine and law. And it benefits the rest of society by allowing traditional people of faith to continue offering social services and education in good conscience.

In short, pro-life conscience protections do not undermine *Roe v. Wade* or women's equality. Neither do conscience protections for conjugal-marriage supporters undermine *Obergefell* or LGBT equality. Both protect the human dignity and human rights of those who dissent from prevailing social norms. Both promote the common good as shields, not swords.