7. Excluding same-sex couples from civil marriage as a contested human rights issue

In this chapter, I continue to pursue the implications of the human rights to, respectively, moral equality and moral freedom; here I pursue their implications for a policy that, like the other two policies we have already considered, capital punishment (Chapter 5) and the criminalization of abortion (Chapter 6), has been, and remains, greatly controversial in the United States and throughout much of the world: the exclusion of same-sex couples from civil marriage. Does that policy—"the exclusion policy"—violate either the human right to moral equality or the human right to moral freedom (or both)?

The exclusion policy obviously disadvantages some same-sex couples—those who want access to civil marriage—and the more extreme the policy, the more severe the disadvantage. The most extreme version of the policy: refusing to grant to same-sex couples any of the legal benefits that accompany access to civil marriage. A less extreme version: granting to same-sex couples some but not all of the legal benefits that accompany access to civil marriage. The least extreme version: Granting to same-sex couples all of the legal benefits that accompany access to civil marriage but refusing to honor the same-sex union—refusing to dignify it—with the title "marriage." However, that the exclusion policy disadvantages same-sex couples does not entail that the policy violates the human right to moral equality; whether the policy violates the right depends on whether the policy is based on the demeaning view that gays and lesbians are morally inferior human beings. Is the policy based on that view? Government action is based on a view if but for the view government would not be doing what it is doing. Is the demeaning view that gays and lesbians are morally inferior a "but for" predicate of the exclusion policy?

The view that gays and lesbians are morally inferior is sadly familiar. Judge Richard Posner, writing about the “irrational fear and loathing of” gays and lesbians, has observed that they, like the Jews with whom they “were frequently bracketed in medieval persecutions[,] .. are despised more for what they are than for what they do …” The Connecticut Supreme Court has echoed that observation, noting that gays and lesbians are often “‘ridiculed, ostracized, despised, demonized and condemned’ merely for being who they are …” Legal scholar Andrew Koppelman has rehearsed some grim examples, including

the judge’s famous speech at Oscar Wilde’s sentencing for sodomy, one of the most prominent legal texts in the history of homosexuality, [which] “treats the prisoners as objects of disgust, vile contaminants who are not really people, and who therefore need not be addressed as if they were people.”

Koppelman continues:

From this it is not very far to Heinrich Himmler’s speech to his SS generals, in which he explained that the medieval German practice of drowning gay men in bogs “was no punishment, merely the extermination of an abnormal life. It had to be removed just as we [now] pull up stinging nettles, toss them on a heap, and burn them.”

So we should not discount the very real possibility that some laws that disadvantage gays and lesbians do indeed violate the human right to moral

---

2 Richard Posner, *Sex and Reason* 346 (1992). As history teaches, the “irrational fear and loathing” of any group often has tragic consequences. The irrational fear and loathing of gays and lesbians is no exception. There is, for example, the horrible phenomenon of “gay bashing.”

The coordinator of one hospital’s victim assistance program reported that attacks against gay men were the most heinous and brutal I encountered. A physician reported that injuries suffered by the victims of homophobic violence he had treated were so “vicious” as to make clear that “the intent is to kill and maim”...


[As a] federal task force on youth suicide noted[,] because “gay youth face a hostile and condemning environment, verbal and physical abuse, and rejection and isolation from family and peers,” young gays are two to three times more likely than other young people to attempt and to commit suicide.

Id. at 149.


equality. But that some laws that disadvantage gays and lesbians violate the human right to moral equality does not entail that every law that disadvantages gays and lesbians violates the right. It is questionable whether in the contemporary United States, for example, the view that gays and lesbians are morally inferior is a “but for” predicate of the exclusion policy. In the United States, this is, for many and perhaps most who support the exclusion policy, the dominant and sufficient rationale for the policy: Same-sex sexual conduct is immoral. Admitting same-sex couples to civil marriage would legitimize—“normalize”—immoral conduct. This we must not do. However, the claim that same-sex sexual conduct is immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings, any more than the claim that, say, theft is immoral asserts, implies, or presupposes that those who steal are morally inferior human beings. By contrast, “the very point” of laws that criminalized interracial marriage was “to signify and maintain the false and pernicious belief that nonwhites are morally inferior to whites.”

This is not to deny that some “of the antigay animus that exists in the United States is just like racism, in the virulence of the rage it bespeaks and the hatred it directs towards those who are its objects.” Again, some laws that disadvantage gays and lesbians violate the human right to moral equality. But “[n]ot all antigay views … deny the personhood and equal citizenship of gay people.” As legal scholar Robert Nagel has emphasized, “[t]here is the obvious but important possibility that one can ‘hate’ an individual’s behavior without hating the individual.” The pope and bishops of the Catholic Church insist that same-sex sexual conduct is immoral and are prominent—indeed, leading—opponents of “legislative and judicial attempts, both at state and federal levels,

5 An ugly example: Under a previous version of the Florida Adoption Act, “[n]o person eligible to adopt … may adopt if that person is a homosexual.” § 63.042(3), Fla. Stat. (2006). Ex-felons of all sorts, even convicted child abusers, were eligible to adopt a child, but no “homosexual” could do so. The Florida judiciary was right to rule that the exclusion—which is fairly described as homophobic—violated the right that “[u]nder the Florida Constitution, each individual person has … to equal protection of the laws.” Florida Department of Children and Families v. In re: Matter of Adoption of X.X.G. and N.R.G, Third District Court of Appeal, No. 3D08-3044 (Sept. 22, 2010).


8 Id.

to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”

Nonetheless, the pope and bishops also insist that all human beings, gays and lesbians no less than others, are equally beloved children of God. “[Our teaching] about the dignity of homosexual persons is clear. They must be accepted with respect, compassion, and sensitivity. Our respect for them means that we condemn all forms of unjust discrimination, harassment or abuse.”

Predictably, many will be quick to claim that government may not adjudge—that it is no part of government’s legitimate business to adjudge—


same-sex sexual conduct to be immoral. However, if it is true that, as a matter of the morality of human rights, government may not adjudge same-sex sexual conduct to be immoral, it is not because government’s doing so violates the human right to moral equality: Again, adjudging same-sex sexual conduct to be immoral does not assert, imply, or presuppose that those who engage in the conduct are morally inferior human beings. Therefore, if government may not exclude same-sex couples from civil marriage, or otherwise disadvantage gays and lesbians, based on the premise that same-sex sexual conduct is immoral, it is because government’s doing so violates a human right other than the right to moral equality.

Does the exclusion policy violate the human right to moral freedom? That the policy implicates the right is clear: A core aspect of the freedom covered by the right—the freedom to live one’s life in accord with one’s religious and/or moral convictions and commitments—is the freedom to live one’s life in an intimate association with another person—an intimate association, that is, of the sort many \(^{12}\) regard as marital. \(^{13}\) As the Massachusetts Supreme Court emphasized in 2003, “the decision whether and whom to marry is among life’s momentous acts of self-definition.” \(^{14}\)

The freedom protected by the right to moral freedom obviously entails freedom from government action punishing one for making a particular choice in exercising one’s religious/moral freedom. But it also includes freedom from government action discriminating against one for making a particular choice in exercising one’s religious/moral freedom—in particular, by withholding from one benefits that are bestowed on others who make a different choice in exercising their religious/moral freedom. So, by withholding benefits from a same-sex couple who choose to live their lives in an intimate association (of the sort many regard as marital) with one another while bestowing benefits on a heterosexual couple who choose to live their lives in an intimate association with one another, the exclusion policy implicates the human right to moral freedom.

However, that the exclusion policy implicates the right of moral freedom does not entail that the policy violates the right, which is not unconditional (absolute), but conditional: A policy that implicates the right does not violate the right if the policy achieves, and is necessary to achieve, a legitimate and

---

sufficiently weighty government objective. Does the exclusion policy satisfy that condition?

The government objectives that have been asserted in defense of the exclusion policy are of two sorts: Morality-based and non-morality-based. By “non-morality-based” objectives, I mean objectives whose pursuit by government does not presuppose that same-sex sexual conduct is immoral.

As I noted earlier, the dominant defense of the exclusion policy, in the United States and elsewhere, involves a morality-based government objective: Same-sex sexual conduct is immoral. Admitting same-sex couples to civil marriage would legitimize—“normalize”—immoral conduct. This we must not do.15 For example, in 2003, the Vatican—specifically, the Congregation for the Doctrine of the Faith, whose Prefect at the time, Joseph Cardinal Ratzinger, later became Pope Benedict XVI—argued that admitting same-sex couples to civil marriage would signal “the approval of deviant behavior, with the consequences of making it a model in present-day society …”16

Excluding same-sex couples from civil marriage obviously serves the government objective of not taking a step that would legitimize conduct that many believe to be immoral: same-sex sexual conduct. The serious

15 In his letter “to Congress on Litigation Involving the Defense of Marriage Act,” Feb. 23, 2011, U.S. Attorney General Eric Holder stated: “[T]he legislative record underlying DOMA’s passage contains … numerous expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships …” In a note attached to that sentence—note vii—the Letter states:

See, e.g., H.R. Rep. at 15–16 (judgment [opposing same-sex marriage] entails both moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality”); id. at 16 (same-sex marriage “legitimates a public union, a legal status that most people … feel ought to be illegitimate” and “put[s] a stamp of approval … on a union that many people … think is immoral”); id. at 15 (“Civil laws that permit only heterosexual marriage reflect and honor a collective moral judgment about human sexuality”); id. (reasons behind heterosexual marriage—procreation and child-rearing—are “in accord with nature and hence have a moral component”); id. at 31 (favorably citing the holding [of the U.S. Supreme Court in Bowers v. Hardwick, 478 U.S. 186 (1986)] that an “anti-sodomy law served the rational purpose of expressing the presumed belief … that homosexual sodomy is immoral and unacceptable”); id. at 17 n.56 (favorably citing statement in dissenting opinion in Romer v. Evans, 517 U.S. 620 (1996)) that “[t]his Court has no business … pronouncing that ‘animosity’ toward homosexuality is evil”).

question is whether that government objective—that morality-based government objective—qualifies as a legitimate government objective, much less a weighty one, under the human right to moral freedom. The answer depends on the reason or reasons lawmakers have for believing that same-sex sexual conduct is immoral. If the only reason lawmakers have is a religious reason—for example, and in the words of one evangelical minister, “[same-sex sexual conduct] is in direct opposition to God’s truth as He has revealed it in the Scriptures”\textsuperscript{17}—then the government objective is clearly not legitimate. Although government’s acting to protect public morals is undeniably a legitimate government objective, government’s acting to protect sectarian morals, as explained in Chapter 4, is not a legitimate government objective. The human right to moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct, such as contraception, based on a religious or otherwise sectarian belief that the conduct is immoral.

Of course, a religious reason is not the only reason lawmakers have for believing that same-sex sexual conduct is immoral. Indeed, the path of reasoning runs in the opposite direction for many religious believers, whose position is not that same-sex sexual conduct is immoral because it is contrary to the will of God, but that same-sex sexual conduct is contrary to the will of God because it is immoral.\textsuperscript{18}

Again, the pope and bishops of the Roman Catholic Church—the “magisterium” of the Church—are leading opponents of “legislative and judicial attempts, both at state and federal levels, to grant same-sex unions the equivalent status and rights of marriage—by naming them marriage, civil unions or by other means.”\textsuperscript{19} The magisterium’s reason—its rationale—for believing that same-sex sexual conduct is immoral is a nonreligious reason: a reason that does not assert, imply, or presuppose that God—or any other transcendent reality—exists.


\textsuperscript{18} It is not always clear which of two different positions one is espousing when one says that X is contrary to the will of God: (1) X is contrary to the will of God and therefore immoral. (2) X is immoral and therefore contrary to the will of God. According to the first position, the reason for concluding that X is immoral is theological: “X is contrary to the will of God.” But according to the second position, the reason for concluding that X is immoral is unstated and not necessarily theological, even though the “therefore” is a theological claim.

\textsuperscript{19} See n. 10.
According to the magisterium, it is immoral not just for same-sex couples but for anyone and everyone—even a man and a woman who are married to one another—to engage in (i.e., pursuant to a knowing, uncoerced choice to engage in) any sexual conduct that is “inherently nonprocreative,” and same-sex sexual conduct—like contracepted male-female sexual intercourse, masturbation, and both oral and anal sex—is inherently nonprocreative. Because “[w]hat are called ‘homosexual unions’ … are inherently nonprocreative,” declared the Administrative Committee of the U.S. Conference of Catholic Bishops, they “cannot be given the status of marriage.” As Joseph Cardinal Ratzinger stated in 2003, speaking for the Congregation for the Doctrine of the Faith: Because they “close the sexual act to the gift of life,” “homosexual acts go against the natural moral law.”

The pope and bishops’ position that inherently nonprocreative sexual conduct is, as such—as inherently nonprocreative—immoral is a conspicuously sectarian moral position. It bears emphasis, in that regard, that the position is extremely controversial even just among Catholic moral theologians, not to mention among the larger community of religious ethicists.

---


The United States Catholic Bishops have adopted particularly pointed public advocacy positions on … resistance to gay marriage and public acceptance of the legitimacy of same sex relationships. The Bishops’ 2007 statement Forming Consciences for Faithful Citizenship was a formal instruction by the U.S. hierarchy covering the full range of the public dimensions of the Church’s moral concerns. In this document, … echoing the affirmation by the Catechism of the Catholic Church that homosexual acts “are contrary to the natural law” and that “under no circumstances can they be approved,” the bishops oppose[d] “same-sex unions or other distortions of marriage.”
In the United States, the exclusion policy, now defunct because of the Supreme Court’s decision in Obergefell v. Hodges, was based on—the policy almost certainly would not have remained on the books in those states where it remained on the books but for—the affirmation by many citizens of a religious (e.g., biblical) rationale and/or the bishops’ nonreligious rationale for holding fast to the belief that same-sex sexual conduct is immoral. But, again, the human right to moral freedom leaves no room for the political-powers-that-be to ban or otherwise impede conduct based on a sectarian moral belief. Recall from Chapter 4 what Catholic moral theologian John Courtney Murray wrote, in the mid-1960s, in his Memo to [Boston’s] Cardinal Cushing on Contraception Legislation:

[T]he practice [contraception], undertaken in the interests of “responsible parenthood,” has received official sanction by many religious groups within the community. It is difficult to see how the state can forbid, as contrary to public morality, a practice that numerous religious leaders approve as morally right. The stand taken by these religious groups may be lamentable from the Catholic moral point of view. But it is decisive from the point of view of law and jurisprudence ...

We may say about the exclusion policy much the same thing Father Murray said to Cardinal Cushing about Massachusetts’s anti-contraception policy:

Same-sex marriage has received official approval by various religious groups within the community. It is difficult to see how the state can refuse to countenance, as contrary to public morality, a relationship that numerous religious leaders and other

[a] report by Washington-based Public Religion Research Institute found that 74 percent of Catholics favor legal recognition for same-sex relationships, either through civil unions (31 percent) or civil marriage (43 percent). That figure is higher than the 64 percent of all Americans, 67 percent of mainline Protestants, 48 percent of black Protestants and 40 percent of evangelicals. National Catholic Reporter, Apr. 1, 2011, at 16.

What’s more, even among Catholics who attend services weekly or more, only about one-third (31 percent) say there should be no legal recognition for a gay couple’s relationship, a view held by just 13 percent of those who attend once or twice a month and 16 percent of those who attend less often.


24 See Chapter 4, n. 31.
morally upright people approve as morally good. The stand taken by these religious
groups and others may be lamentable from the Catholic moral point of view. But it
is decisive from the point of view of the human right to moral freedom.

Is there a non-morality-based government objective—an objective whose
pursuit by government does not presuppose that same-sex sexual conduct is
immortal—that fares better, under the right of privacy, than the foregoing
morality-based government objective? The principal such objective that has
been asserted in defense of the exclusion policy is this: Excluding same-sex
couples from civil marriage serves to decrease the number of future children
who will be born and raised in single-parent families (where typically the
single parent is a mother), which, as a general matter, is not the optimal way
for children to be raised. The idea here is that the exclusion policy diminishes
the continuing erosion of the institution of traditional (i.e., heterosexual)
marriage, an institution that benefits society in numerous ways, but most
importantly by decreasing the number of future children who will be born and
raised in single-parent families.26

Granting that, under the human right to moral freedom, decreasing the
number of future children born and raised in single-parent families is not
merely a legitimate government objective but a sufficiently weighty one,27 this
fundamental problem remains: the absence of evidence—evidence, as distinct
from speculation about possible future scenarios—to support the proposition
that there is a cause-effect relationship between excluding same-sex couples
from civil marriage (cause) and decreasing the number of future children
who will be born and raised in single-parent families (effect).28 And given the
absence of any evidence to support that proposition, how can we reasonably

26 For an elaboration (and critique) of the argument, with citations to and quota-
tions from prominent writings making the argument, see Andrew Koppelman, “Judging
the Case against Same-Sex Marriage,” 2014 University of Illinois Law Review 431,
434–44. For a recent variation on the argument, see Helen M. Alvaré, “A Children’s
(accessed January 19, 2023). Professor Alvaré’s paper also appears as a dissenting
opinion in Jack M. Balkin, ed., What Obergefell v. Hodges Should Have Said: The
Nation’s Top Legal Experts Rewrite America’s Same-Sex Marriage Decision (2020).

27 See Koppelman, “Judging the Case against Same-Sex Marriage,” n. 26, at
437 (referencing “data that shows … that single motherhood is especially hard on
children”).

28 See id. at 440: “The causes of these patterns [increasing single motherhood]
are not well understood. One survey concludes that the most widely cited papers are
“those that disprove a popular explanation, not those that support one.” The “survey”
Koppelman cites: David T. Ellwood and Christopher Jencks, “The Uneven Spread of
Single-Parent Families: What Do We Know? Where Do We Look for Answers?,” in
conclude that the exclusion policy serves the non-morality-based objective it is claimed to serve?

Other non-morality-based objectives that have been asserted in defense of the exclusion policy fare no better. Consider, for example, the case, *Varnum v. Brien*,29 in which the Iowa Supreme Court ruled that Iowa’s exclusion policy violated the Iowa Constitution. After considering several non-morality-based objectives—including “promotion of optimal environment to raise children,” “promotion of procreation,” and “promoting stability in opposite-sex relationships”30—the court concluded: “We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective.” 31 The court then went on to say:

Now that we have addressed and rejected each specific interest advanced by the County to justify the [exclusion policy], we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County’s silence reflects, we believe, its understanding [that] this reason cannot, *under the Iowa Constitution*, be used to justify a ban on same-sex marriage.32

Nor can that reason—religiously based moral opposition to same-sex marriage—justify the exclusion policy *under the human right to moral freedom*, as I have explained.

The answer to the question posed at the beginning of this chapter: Excluding same-sex couples from civil marriage violates the human right to moral freedom.

**ADDITIONAL READING**

I have addressed, in this chapter, the question whether the exclusion of same-sex couples from civil marriage violates the morality of human rights. I have elsewhere addressed the question whether that exclusion policy violates the United States Constitution—and have concluded that it does: Michael J. Perry, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* 156–64 (2017).

In the context of a book-length discussion of the proper role of religious convictions in the politics and law of a liberal democracy, I have discussed

---

29 763 N.W.2d 862 (Iowa 2009).
30 See id. at 897–904.
31 Id. at 906.
32 Id. at 904 (emphasis added). See id. at 904–06.