

Sexuality, Religion, and the Right of Conscience

For "Religion and Constitutionalism," University of Maryland, Feb. 27-28, 2009

Emily R. Gill, Bradley University, Peoria, IL 61625

In this paper I shall argue that the freedom of gay, lesbian, bisexual, and transgendered persons would be enhanced if sexual orientation were treated as a core constituent of personal identity in a manner similar to religious belief. First, I shall briefly sketch David A. J. Richards's development of this thought. Second, I shall argue, contra Andrew Murphy, that controversy concerning sexual orientation manifests the characteristics of conscience politics. Third, I shall explain why belief is a better fit than ascription or immutability as a basis for public policy in this area. Moreover, conscience politics may require not only noninterference but also positive public support. I conclude that the inclusion of same-sex couples in the institution of civil marriage is analogous to support for the free exercise of conscientious belief.

Richards's analogy between sexuality and religion

For Richards, neither the immutability or salience of particular traits, nor the political powerlessness of groups characterized by such traits, most properly triggers strict scrutiny of distinctions based upon them. The true evil of discrimination grounded in race, sex, religion, or sexual orientation, rather, is the cultural dehumanization of the individual that he terms moral slavery. "This structural injustice is marked by two features: first, abridgment of basic human rights in a group of persons, and second, the unjust rationalization of such abridgment on the inadequate grounds of dehumanizing stereotypes that reflect a history and culture of such abridgment" (Richards 1999, 53; see also 3-4, 17-18, 22, 50, 55, 84, 86, and Richards 2005, 39-40, 105-106). That is, the dominant culture devalues some human beings as bearers of rights, and then justifies this devaluation on the basis of history and experience that themselves bear the marks of this original dehumanization. These individuals thus lose the ability to define their own identities because they are culturally constructed by the dominant culture, a form of intolerance that Richards describes as a violation of "the inalienable right to conscience, which I identify as the free exercise of the moral powers of rationality and reasonableness in terms of which persons define personal and ethical meaning in living" (Richards 1999, 18). The fundamental right to an intimate life, like the right to conscience, "protects intimately personal moral resources . . . and the way of life that expresses and sustains them in facing and meeting rationally and reasonably the challenge of a life worth living" (74).

Although moral slavery did not consign individuals to a servile social status, it traditionally exiled individuals from any conception of a moral community by the unspeakability of the sexual expression by which they were defined. This silencing "rendered homosexuality into a kind of cultural death, naturally thus understood and indeed condemned as a kind of ultimate heresy or treason against essential moral values" (Richards 1999, 90). The aim of Colorado Amendment 2, banning antidiscrimination laws protecting sexual orientation and overturned in *Romer v. Evans* (517 U.S. 620, 1996), "was decisively that advocates of gay and lesbian identity should be compelled to

abandon their claims to personal and ethical legitimacy and either convert to the true view or return to the silence of their traditional unspeakability” (Richards 1999, 92; see also 70, 90, 126-127, and Richards 2005, 107-108). Opposition to identity claims as a form of conscience suggests that this identity “is as unworthy of respect as a traditionally despised religion like Judaism; the practice of that form of heresy may thus be abridged, and certainly persons may be encouraged to convert from its demands or, at least, be supinely and ashamedly silent” (Richards 1999, 93; see also Richards 2005, 108-109). Like conventional assertions of religious orthodoxy, suggests Richards, this opposition is unrelated to the immutability or saliency of dissenting views and is itself a sectarian form of moral orthodoxy (Richards 1999, 91-93; see also Richards 2005, 118-119).

In essence, Richards is arguing that the experience of same-sex attraction is a core feature of one’s personal identity, just as religious allegiance may be for believers. The living out of these features propels one to engage in particular practices. Denial of the ability to do so openly, or in some cases even to admit such an allegiance, amounts to a denial of values that are central to one’s ethical identity. For Richards, in the American constitutional tradition “the right to intimate life is as much a basic human right as the right of conscience; conscience is so personally engaged with the issues of intimate sexual life because both involve the resources of thought, conviction, feeling, and emotion at the heart of the ultimate concerns of moral personality” (Richards 2005, 110; see also 79, 103-104).

Although rights of conscience may be abridged under some circumstances, Richards suggests that such abridgment must be “justified on compelling secular grounds of protecting public goods reasonably acknowledged as such by all persons” (Richards 1999, 18), or “a compelling public reason, not on grounds of reasons that are today sectarian (internal to a moral tradition not based on reasons available and accessible to all)” (78; see also 50, 86, 97, and Richards 2005, 135-136). He does not believe that such grounds exist. Because those who would regulate sexual expression for their own moral reasons differ on the proper scope of the political community, a paternalistic approach could potentially justify intervention in people’s sexual *and religious* lives, notes David Erdos, insofar as the state might determine that their sexual and religious practices were grounded on false reasoning or reflected false beliefs. “State attempts to extinguish a person’s right to an intimate sexual life rest, not on a judgment about the morality of such a sexual life, but rather on a perfectionist understanding of the state which in its logic undermines not only sexual freedom but also other freedoms including religious freedom” (Erdos 2005, 22; see 19-23).

Conscience and identity

The equation of sexual orientation and its expression with religious allegiance and its practice does not, however, lack controversy. On Andrew Murphy’s view, Richards’s “expansive view of toleration and conscience” equates conscience with personal autonomy, and therefore requires a much broader conception of the private sphere than did traditional interpretations of toleration. Theological individualism “has no necessary connection with religious toleration because it does not rule out a strong sense of

communal authority in a whole host of other spheres” (Murphy 2001, 29; see also 33-37, 41, 43). For early tolerationists, “disputes fall within either the sphere of conscience *or* the civil sphere, and issues having a deleterious effect on civil peace leave the realm of conscience in their very essence” (52). Tolerationists simply desired the negative liberty of noncoercion and state neutrality. They praised autonomy “only in contexts in which it enabled one to act in religiously responsible ways to secure the ultimate good of personal salvation” (240), or in which it created “a public space in which individuals and groups of differing persuasions could live out their own conceptions of religious truth and the demands it placed on human life” (242). Conscience was not subject to coercion, because it was interpreted as “a faculty of the understanding and not of the will” (Murphy 2001, 228; see also 112). Liberty of conscience, as Murphy explains, thus became grounded in religious voluntarism, or the conviction that one should not only worship correctly but also do so voluntarily. Moreover, “Voluntarism is not the same thing, strictly speaking, as *choice*: in other words, tolerationists did not claim that one *chose* one’s beliefs, but rather that the understanding was persuaded, inexorably so, of the truth of a given faith” (229; see also 254).

Murphy’s conscience paradigm includes both the extension of the notion of conscience to nonreligious standards of morality, as in conscientious objection to military service, and also its increasingly subjective character. “Conscience remains a term denoting the belief structures (whatever their source or foundation) by which individuals decide upon and judge their actions” (278). Despite changes, “conscience-based politics boils down to the claim that states must recognize individuals’ beliefs and values about truth and the good . . . as sacrosanct. . . . Within the parameters of civil peace and social order, governments must grant liberty to act on those values, as a necessary corollary to the free workings of the human mind” (279). In my view, this conception of conscience is broad enough to encompass not only religious convictions, but also other core facets of moral personality such as culture and sexuality.

Murphy argues, however, that contemporary issues concerning race, gender, and sexual orientation belong under the rubric of identity politics rather than liberty of conscience. Where the conscience paradigm requires equal treatment before the law and the removal of barriers implicit in the concept of negative liberty, identity politics “instead argues for a positive commitment to equal respect between social groups and even the affirmation and celebration of difference *per se*” (281). The concerns for authenticity and respect that characterize identity politics, often grounded on ascribed characteristics, do not, Murphy suggests, fit well into a conscience paradigm based on freedom to believe (282). The conscience paradigm valorizes neither neutrality nor the pursuit of self-respect, “but instead the promotion of a pacific public space in which citizens can live out their deepest beliefs” (287).

Murphy admits, however, that because beliefs about ultimate truth, religious or not, are foundational in one’s sense of self, “conscience contains within it at least a latent notion of identity” (281), although the two concepts for him imply distinct sociopolitical agendas. Regarding sexuality, Murphy writes in 2001 that the reversal of the Supreme Court’s 1986 decision to uphold Georgia’s criminalization of sodomy (*Bowers v.*

Hardwick, 478 U.S. 186, 1986) would represent a minimal baseline of toleration from which further discussion about the requirements of liberal citizenship might proceed (288). This reversal has now occurred (*Lawrence v. Texas*, 539 U.S. 558, 2003). Therefore, I shall extend this discussion by maintaining that the desire of same-sex couples to participate in the institution of marriage comprises *both* the search for toleration rooted in conscience politics *and* the search for recognition and equal respect that Murphy associates with identity politics.

First, I believe that Richards and Murphy are both correct to deemphasize the importance of ascribed characteristics regarding sexuality and religion respectively. Although African Americans and women can sometimes pass as whites or as men, we know that they have been objects of discrimination because of, rather than despite, their ascribed identities. Therefore, arguing for respect for same-sex relationships or for same-sex couples' desire to marry on the basis of ascribed characteristics beyond individual control is not particularly helpful. Moreover, the defense of identity on grounds of immutability implies an apology, Kenji Yoshino observes. If, as Richards argues, same-sex attraction has been regarded as akin to a despised religion from which adherents should convert or else about which they should keep silent, the immutability defense "resists the conversion demand by saying 'I cannot change,' rather than by saying 'I will not change.'" It suggests electroshock treatment for homosexuals is wrong because it does not work. But such treatment would be no less wrong if it did" (Yoshino 2007, 48). The relationship between ascription and choice, however, is more complex than I have yet indicated.

As we have seen, Murphy suggests that identity politics' emphasis on ascribed characteristics is ill-suited to the conscience paradigm, which is based on religious voluntarism. Yet he also states that religious voluntarism should not be understood to denote one's choice of beliefs, but, rather, one's understanding that is persuaded that a particular set of beliefs is true. A fault line exists here that I believe impacts discussions of both religious belief and sexuality. Sexual orientation is currently understood by most knowledgeable people as an innate predisposition, a particular type of attraction and a corresponding disposition to engage in certain kinds of behaviors. Whatever one's sexual orientation, however, one may choose either to act upon or not to act upon the attractions one experiences. Consider individuals who may choose a celibate life. Although celibacy may be a function of circumstance, it may also result from choice, as in decisions to join certain religious orders or to forswear intimate relationships for any number of personal reasons. But the decision to live a celibate life does not indicate that these individuals possess no basic sexual orientation; they may simply hold other values in higher regard than they do the value of intimate relationships, and they choose to uphold these other values. When individuals do not opt to live celibate lives, on the other hand, their sexual practices will most likely flow from their basic orientations, whether opposite-sex attraction, same-sex attraction, or both as in bisexuality. In Murphy's terms, one's understanding is inexorably persuaded of the truth that one type of sexual orientation rather than another is definitive of one's selfhood. Choice then need not mean opting from a menu of ice cream flavors from which one is detached. Instead, choice is the affirmation of an understanding of which one is inexorably persuaded, whether in the

realm of religion or that of sexuality.

Constitutive choice

The tension that Murphy highlights between choice and understanding resonates with Michael Sandel's distinction between the voluntarist self who chooses and the cognitive or knowing self who understands. For Sandel, because the self is made up of past reflections and experiences, it cannot experience freedom from constitutive ends and interests without being disempowered and actually dissolved (Sandel 1982, 57-58, 172, 153). As I have argued elsewhere, however (Gill 2001, 19, 37), this simply means that we cannot constantly start afresh as we approach life decisions, uninfluenced and unencumbered by past reflections and experiences. When Sandel's self heeds the claims of its constituent attachments, it possesses a reality apart from its apparently constitutive ends. Otherwise, its attachments would be fixed, unable to be ranked or ordered. The voluntarist and cognitive dimensions of human agency, then, are not competitive, but complementary, necessary both to individual self-definition and the individual exercise of human moral powers. Moreover, the two dimensions of agency reinforce each other. Projects and goals endorsed or affirmed by an agent have in some sense been chosen. Yet once affirmed, they become constitutive of the agent, although potentially subject to reexamination, and thus become the ground or standpoint from which subsequent choices are made.

In her identification of conscience with what she terms constitutive choice, Yael Tamir implicitly draws on this distinction yet complementarity between the choosing and the knowing self. Cultural or religious membership may initially be chosen, or it may be affirmed as the result of a particular and persuasive understanding; yet we subsequently view such membership as imposing particular duties or imperatives on us (Tamir 1993, 39-40; see 35-42). Either way, we would expect our religious practices that have not been deemed harmful to others to be respected, and perhaps even accommodated. They have become constitutive of our personhood. It is for this reason, Tamir argues, not because they are innate or inborn, that religious belief and the practices flowing from it carry special weight. I am suggesting that sexuality plays a role analogous to religious belief in the constitution of our personhood.

On Tamir's interpretation, cultural membership, religious belief, and by extension sexual orientation should be accorded protection not because *they* are ascribed or unchosen constituents of identity, but because minority *status* in living out these central features of identity is unchosen (Tamir 1993, 37; see also 7-8, 41-42). Accordingly, these may require protection in the form of positive action by the state to enable individuals to live in accordance with their choices, that is, with their conscientiously chosen or affirmed convictions about how they should live their lives. Richards suggests that "The constitutional protection of religion never turned on its putative immutable and salient character (people can and do convert, and can and do conceal religious convictions) but rather on the traditional place of religion in the conscientious reasonable formation of one's moral identity in public and private life." The protection of core features of moral identity should be directed both against laws that unreasonably burden the free exercise

of one's conscientious convictions and also against laws that encourage conversion to some form of sectarian orthodoxy (Richards 2005, 107-108; see 107-109). In fact, for Richards the First Amendment's free exercise and antiestablishment clauses are grounded on different but complementary aspects of equal respect for human moral powers. The free exercise clause protects current conscientious belief against state coercion concerning the observance or expression of beliefs already held, while the antiestablishment clause focuses on "the formation and revision of conscience," protecting the forming and changing of such conceptions" (Richards 1986, 140; see also Richards 2005, 108).

Tamir's conception of constitutive choice encompasses both of these aspects of conscientious belief, that of realizing or understanding the nature of one's ethical identity, and also that of determining or choosing how that identity should be lived out. To culture and religion, I would add sexual orientation as constitutive of identity and as therefore in some contexts worthy of positive protection as a manifestation of conscientious belief. In arguing for the intrinsic value of religious capabilities, Martha Nussbaum states, "The liberty of religious belief, membership, and activity is among the central human capabilities. To be able to search for an understanding of the ultimate meaning of life in one's own way is among the most important aspects of a life that is truly human." Because this search frequently involves religious belief and practice, "to burden these practices is thus to inhibit many people's search for the ultimate good" (Nussbaum 2000, 342). As we have seen, Richards overtly equates intimate life and conscience when he suggests that the right to both protects "personal moral resources . . . and the way of life that expresses and sustains them in facing and meeting . . . the challenge of a life worth living" (Richards 1999, 74). Finally, Murphy states that in conscience-based politics, individuals' beliefs about truth and the good should be regarded as "sacrosanct," and that within the boundaries of the social order government should allow us the liberty to act on these values (Murphy 2001, 279). Because sexual expression also may implicate personal beliefs about truth and the good, it may also fit under the rubric of conscience-based politics.

Just as some individuals wish to bear witness to their religious beliefs by engaging in the practices that flow from them, some same-sex couples wish to bear witness to their personal commitments by marrying on the same terms as opposite-sex couples. As voluntary organizations, religious groups may decide for themselves which unions to celebrate. The Roman Catholic Church, for example, does not preside at the marriages of divorced persons unless they have first secured church-approved annulments. By depriving same-sex couples of the ability to participate in the *civil* institution of marriage where opposite-sex couples may do so, however, I believe that the state is conferring on them a mark of second-class citizenship and abridging the free exercise of the dictates of conscience. Moreover, excluding same-sex couples from marriage is a mark of second-class citizenship in part *because of* the abridgment of free exercise of the dictates of conscience. Civil marriage is a public institution, and as such it is sanctioned and encouraged by the state. As described by Amy Gutmann, "Discriminatory exclusion is harmful when it *publicly* expresses the civic inequality of the excluded even in the absence of any other showing that it *causes* the civic inequality in question" (Gutmann

2008, 97).

If freedom of conscience means freedom in belief and practice, it also implies freedom to be open about what one's beliefs and practices are. As put by Yoshino, "So long as there is a *right to be* a particular kind of person, I believe it logically and morally follows that there is a *right to say what one is*" (Yoshino 2007, 70). Skeptics about marriage view same-sex marriage as a kind of assimilation, because it makes same-sex couples more like straight couples. For Yoshino, however, advocating for or participating in same-sex marriage can be a type of flaunting, an assertion that same-sex couples can publicly claim the same rights and entitlements as traditional couples (91; see also 18). Support of or participation in same-sex marriage is therefore a protest against the civic inequality that exclusion represents. In my view, civil marriage is for same-sex couples the ultimate act of "saying what one is." When the state is complicit in this act by sanctioning the marriage of same-sex couples, moreover, it confers the "*Good Housekeeping* seal of approval" that defines civic equality.

In this context, civil marriage is an instance of the practice of what Ingrid Creppell terms "public privacy." When Locke became convinced that the implementation of religious toleration would mitigate the dangers of religious identification, he suggested that the public presentation of one's private beliefs before the larger community would legitimate the individuation of religious belief. It would protect public presentation or open worship from interference, and it would create a buffer zone between the purely private and purely public that would combine communal expression and recognition with distance and protection (Creppell 1996, 227-229). Similarly, the participation of same-sex couples in the civil institution of marriage is, as for straight couples, a public presentation of identity, belief, and commitment. Marriage creates a buffer zone that shields couples from interference in their private relationships, but it does so through the public affirmation of commitment in the eyes of the community. Public recognition is a precondition for the protection of the private aspects of religious belief and practice, as well as sexual orientation and practice.

If, as I have argued, the deployment of one's sexuality may be considered a matter of adhering to one's conscientious beliefs, how much more so is the personal decision to undertake the ideally lifelong commitment of matrimony? Typically, one's understanding is persuaded, "inexorably so" in Murphy's terms, of the truth that only life with another particular person will fulfill life's ultimate meaning, will sustain one in the challenges or a worthwhile life, and will allow one to live out one's values about truth and the good. For same-sex couples, whether conventionally religiously inclined or not, the desire to participate in marriage as a civil institution may be a desire for the free exercise of their religious or broader conscientious beliefs. In typical conscience-based politics, dissenters wish to practice religious beliefs that are different from those enshrined in and endorsed by the dominant consensus. Here, however, the dissenters wish to practice their beliefs in exactly the same way that the majority does. If, in Murphy's terms, the conscience paradigm promotes "a pacific public space in which citizens can live out their deepest beliefs" (Murphy 2001, 287), the quest for same-sex marriage in my view qualifies as conscience-based politics. Moreover, it is a type of conscience-based politics the aims of

which require not only freedom from interference, but also positive action through the admission of same-sex couples to civil marriage.

References

Bowers v. Hardwick, 478 U.S. 186, 1986.

Creppell, Ingrid. 1996. "Locke on Toleration: The Transformation of Constraint." *Political Theory* 24 (May), 200-240.

Erdos, David O. 2005. "Questions of Tolerance and Fairness." *The Future of Gay Rights in America*, ed. H. N. Hirsch. New York: Routledge, 15-35.

Gill, Emily R. 2001. *Becoming Free: Autonomy and Diversity in the Liberal Polity*. Lawrence: University Press of Kansas.

Gutmann, Amy. 2003. *Identity in Democracy*. Princeton, NJ: Princeton University Press. *Lawrence v. Texas*, 539 U.S. 558, 2003.

Murphy, Andrew R. 2001. *Conscience and Community: Revisiting Toleration and Religious Discourse in Early Modern England and America*. University Park, PA: The Pennsylvania State University Press.

Nussbaum, Martha C. 2000. "Religion and Women's Equality: The Case of India." *Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracy*, ed. Nancy L. Rosenblum. Princeton, NJ: Princeton University Press, 335-402.

Richards, David A. J. 1986. *Toleration and the Constitution*. New York: Oxford University Press.

Richards, David A. J. 1999. *Identity and the Case for Gay Rights: Race, Gender, and Religion as Analogies*. Chicago, IL: University of Chicago Press.

Richards, David A. J. 2005. *The Case for Gay Rights: From Bowers to Lawrence and Beyond*. Lawrence: University Press of Kansas.

Romer v. Evans, 517 U.S. 620, 1996.

Sandel, Michael J. 1982. *Liberalism and the Limits of Justice*. New York: Cambridge University Press.

Tamir, Yael. 1993. *Liberal Nationalism*. Princeton, NJ: Princeton University Press.

Yoshino, Kenji. 2007. *Covering: The Hidden Assault on Our Civil Rights*. New York: Random House.