LIKE A HOLE IN THE HEAD

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I'd rather be a Christian in a den of lions than a lion in a den of Christians.
--attributed to George Bernard Shaw

The Devil is the absence of doubt. He's what pushes people into suicide bombing, into setting up extermination camps. Doubt may give your dinner a funny taste, but it's faith that goes out and kills.

--John Updike, *Roger's Version*

Pride goes before destruction, and a haughty spirit before a fall. --*Proverbs* 16:18

Argument

As its title suggests, this essay argues that any attempt to find a constructive place for religion "in"--as opposed to explicitly "distinct from"--constitutional democracies should be counted as a fool's errand. Unless, for the sake of political correctness, we seriously distort the definitions of "religion" and "constitutional democracy," this effort at reconciliation cannot meet basic tests of internal coherence, of evidentiary credibility, and therefore of normative persuasiveness.

Despite the understandable urge to do so, the challenge to reconcile religion and constitutional democracy faces at least three fatal obstacles.

- --Considered as ideal types, the properties underlying the term "religion" (a concern with things that are not visible or otherwise knowable in the universe, which concern depends on faith, not reason) and "constitutional democracy" (a form of government that conforms to legal commands and pursues policy choices derived from the consent of the governed) are no more commensurate than are the properties of, say, "broccoli" and "manual transmissions." We detect and measure their presence in distinctly different ways.
- --The internal characteristics of concrete religious practices contradict (more than do the characteristics of vegetables and machines) those of constitutional democracies. These internal contradictions parallel those between "science" and "religion." Science depends

on open-minded skepticism, rigorous methods of empirical validation, and an eagerness to find new knowledge that will displace the old. Similarly, democratic systems necessarily entail crude empirical tests of whether policies succeed or fail (public opinion polls and voter choices in electoral politics and various rationality tests in due process and equal protection jurisprudence) and methods by which to change them. Religion, on the other hand, necessarily entails faith in received doctrine and an acceptance of mysteries that "passeth all understanding." When "true believers" encounter political rejection of their positions, e.g., in the teaching of evolution in public schools or the permissibility of adoption by same-gender couples, they react dogmatically and often angrily. When a religious order like the modern Episcopal Church in the United States moves, in accordance with its own legal and political processes, to change its rules and policies, say those regarding the place and relevance of gender and sexual orientation in its system, true believers have rebelled and then exited.

--Third and most fatal of all, the external consequences of religious behaviors directly undercut those of constitutional democracies, and vice versa. If the pattern of brutal conflict across human history is any guide, religion's insistence on the collective truthfulness and righteousness of a single received way of life as against all others has, both as a pretext for leaders and as a motivation for their followers, routinely provoked and facilitated human brutality and warfare. In clear contrast, constitutional democracy, which may be said to have evolved in reaction to Europe's religious wars, strives to keep the peace by replacing substantive truthfulness and righteousness with procedural correctness, i.e., the rule of law, and an explicit encouragement of substantive compromise. Compromise and fluidity in politics offset the violent tendencies of religious commitment and certainty. Indeed, political compromise cannot happen until the contending parties agree about what they are compromising. In short, constitutional democracy needs religion (and religion needs democratic politics, though not constitutional protections), as the common phrase goes, "like a hole in the head."

Defining Terms

Like all arguments, mine depends on definitional choices. After all, we need not define religion as a sectarian commitment to received doctrine. Religion can refer to

personal and individualized understandings about the "meaning of life," perhaps as a means of affirming the commitment to living in the face of one's certain death. "Religion" in this definition (though this definition necessarily includes such conventionally amoral beliefs as "I'll only go around once in life, so I'm going to take everything I can get as I go.") presumably becomes a nearly universal feature of human cognition, a personal frame that maintains illusions of certainty in the face of the evident chaos in the universe. And since humans are not naturally equipped to philosophize on such matters in isolation, institutions including religious ones that help individuals function well in the face of chaos presumably do good, or at least no harm. Constitutional democracies thus properly "place" religion so conceived, along with, say, the security of a home, or protection against ex post facto laws, in the category of private things that government must it "keep its hands off."

On the other hand, when religions demand collective political action based on the commitment to the correctness and acceptability of one and only one received belief system—the source of religion's historical pattern of human brutality—there is then no significant observable difference between sectarian commitments to "true gods" and secular commitments to, say, "true" Leninist-Stalinist Marxism, which enabled the slaughter of peasants, or to the unquestioned commitment to Aryan supremacy under the Nazis, or to "freedom," which served to justify the Bush/Cheney invasion of Iraq.

Even the cleverest feats of definitional craftiness will likely leave us concluding that phrases like "constitutional theocracy" are inherently oxymoronic. Of course some political systems claim to be guided only by the "word of God" revealed through the Koran or the Holy Bible, so that such texts become constitutions, but no known method of interpretation can apply such abstract, general, and often internally contradictory words to resolve concrete and unique cases without replacing the word of god by the word of popes, ayllotalahs, and other interpreters. If the universe and the human mind were such that humans could demonstrate objectively that their interpretations were singularly and universally correct, such a theocracy might meet a standard of constitutionality. But mind and universe work—as best we can thus far tell—in the opposite direction, toward infinite numbers of contexts and hence plausibly correct answers, just as mathematical principles such as Cantor's theorem (there are always more

ways of classifying the objects in a set than there are objects in the set) and calculus suggest. In other words, the antiessentialist quality of reality (again, as best we know it so far) means that interpretations necessarily flow either from the will and might of rulers or from justifications that must comport with popular, and therefore shifting, standards of justificatory performances. Neither interpretations based on the autocratic principle "because I, your ruler, say so," nor on the liberal principle "because this is what the law does and does not permit" can credibly count as theocratic rule in the name of God.

If the deepest purpose of government is to minimize the conditions in which humans brutalize other humans via mass murder, rape, genocide, and other forms of indiscriminate aggression, then religion, as we conventionally distinguish it from science, politics, and other social phenomena, should have **no** place "in," as opposed to "distinct from," constitutional democracies. Like broccoli in a transmission, religion just gums up the political works of constitutional democracies. Thus the First Amendment, regardless of the more limited specific understandings of its establishment clause at the time of its creation, rightly puts robust separation of church and state at the very beginning of our Bill of Rights.

Elaboration

The argument as set forth here depends on accepting the empirical claim that religion as a particular way of knowing and acting is, in its political form, inherently prone to violence. It also depends on the normative claim that the primary objective of political systems ought to be that of minimizing human violence, minimizing at the very least wanton human brutality against other humans. Since the antiessentialist nature of reality prevents anyone, including me, from demonstrating that such normative claims (and really *all* truth claims—scientists only believe they can falsify) are objectively and universally correct, I leave it to readers to initiate objections, if any, to my normative claim (and the antiessentialist epistemology on which it rests) and confine myself to elaborating the empirical one. Readers should note, however, that if philosophers like Rorty, Quine, and Fish express the most accurate understandings of reality that Western philosophy has so far achieved, then all claims to have reached universal and objective certainties, including religious ones, are philosophically untenable.

The following short item appeared in the September 12, 2001, issue of CHRISTIAN CENTURY:

Found guilty of blasphemy by a Pakistani criminal court, Dr. Younus Shaikh has been sentenced to death by hanging. Dr. Shaikh, a medical school lecturer, had stated that until Muhammad received revelations from Allah at age 40, the prophet was not a Muslim, and that Muhammad and his family did not pursue Muslim practices prior to his founding of Islam. How stating such obvious facts could constitute blasphemy was not entirely clear. Shaikh, who says he is a devout Muslim, is appealing his sentence.

In November, 2007, Ms. Gillian Gibbons, a British teacher working with children at the Unity High School in Khartoum, Sudan, was jailed on charges of "insulting Islam's Prophet" after she encouraged her students to choose the name of a teddy bear and the students by vote chose the name Muhammad. "Fellow teachers . . . feared for Ms Gibbons' safety after receiving reports that men had started gathering outside the police station where she was being held." Her school closed for fear of reprisals. ['Muhammad' Teddy Teacher Arrested, BBC NEWS, Nov. 26, 2007, http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/7112929.stm.]*

These stories illustrate at the micro level a historical pattern that I described in *Law and Politics as Play*. [83 Chicago-Kent Law Review 1333, 2008. Contact the author for an emailed copy of the text as published, lhcarter@coloradocollege.edu .] There (p. 1350, n. 76) I provided the following list of human atrocities and then describe a pattern I see in these cases: Some perceived insult to a group's sense of righteousness, purity, and entitlement, insults, that is, to some symbol or belief system that a group deems objectively true and correct, seems to enable these violent instances.

*In the week I began to assemble this essay, *The New York Times* ran a story (January 21, 2009, A18) whose headline and first two paragraphs read:

Trials Loom for Parents Who Embraced Faith Over Medicine
Weston, Wis. – Kara Neumann, 11, had grown so weak that she could not walk
or speak. Her parents, who believe that God alone has the ability to heal the sick,
prayed for her recovery but did not take her to a doctor.

After an aunt from California called the sheriff's department here, frantically pleading that the sick child be rescued, an ambulance arrived at the Neumann's rural home on the outskirts of Wausau and rushed Kara to the hospital. She was pronounced dead on arrival.

—The Crusades	—The slaughters of the Aztecs and the Incas
—The genocides of North	—The Inquisitions
American Indians	
—The Holocaust	—The slaughter of the Parisian
The Holocuust	Huguenots
—The genocide of the	—The Khmer Rouge genocide
Armenians	The Rimer Rouge genociae
—"The Troubles" in Northern	—Israel/Palestine
Ireland	—Israel/1 alestine
—The Balkans	—Stalin's "cleansings"
—Chechnya	—Rwanda
East Timor	
	—The Rape of Nanking
—The Sepoy Mutiny	—The Columbine High School
	massacre
—The Red Brigades in Italy	—The Shining Path in Peru
—The Taliban's overthrow of	—Waco and the subsequent
the Soviet Occupation of	Oklahoma City bombing
Afghanistan	
—Al Qaeda's 9/11/01 attack	—The slaughters of Muslims
on the World Trade Center	and Hindus over the temple site
	in Ayodhya
—Christian/Muslim battles in	—The U.S. occupation of Iraq,
Nigeria, Somalia,	the resistance to this occupation,
Sudan/Darfur, etc.	and the sectarian conflict in Iraq
—"The Lord's Resistance	—The American lynching of
Army" in Uganda	"uppity Negroes"
—The stoning to death of	—The Baader-Meinhof
sexually transgressive women	Gang/Red Army Faction in
in the Middle East	Germany
	<i>J</i>

Four categories of righteousness seem particularly likely, when threatened, to trigger the sense of humiliation and the brutal overreactions which follow.

--The perception of rightful dominance in a status hierarchy by both individuals and groups. NYPD officer Joseph Volpe anally reamed Abner Louima with a broomstick, nearly killing him, after Volpe (mistakenly) believed that Louima had insulted him. Mob lynching of "uppity Negroes," particularly in the segregated American south, illustrate the same reaction at the group level.

--The perception of rightful possession of turf. The continuing conflict in Israel/Palestine illustrates both at the tangible level and at the symbolic level. Palestinians reacted angrily when the Zionist state initially occupied their land, and again after the expansion

of Israel in 1967. Rockets from Gaza landing in Israel provoked a massively destructive counter-assault from Israel at the beginning of 2009. The symbolic value of the holy sites in Jerusalem to Jews and Muslims seem incapable of compromise.

--The perception of a group's ethnic, sexual, physical, and moral purity. Racist and sexist examples of course abound. Barrington Moore's MORAL PURITY AND PERSECUTION IN HISTORY (2000) tersely notes how frequently those who define themselves as pure proceed to despeciate, i.e., define as sub-human, the "other." In the 1994 Rwandan genocide, Hutus labeled their Tutsi victims "cockroaches." Nazis and Stalinists regularly referred to Jews and Kulaks as "vermin." American soldiers in Abu Ghraib prison seemed to delight in getting its captives to act like dogs.

--Commitments to principles of justice perceived as objectively true and therefore, like religious principles, beyond compromise. Timothy McVeigh bombed the Oklahoma City Federal Building on the anniversary of the deaths of the Branch Davidians in their private compound in Waco, Texas, because the injustice of the government's murder of these innocent believers outraged him. Frans de Waal, (e.g., 2004) has found the same phenomenon in experiments with higher primates. When adjacent capuchin monkeys, used to getting the same modestly tasty food rewards, were then treated unequally, the ones getting the now comparatively less desirable food reward reacted angrily and refused to eat at all.

Objections

My argument thus boils down to the claim that civilizing the human species requires us to move deliberately away from truth-based habits of thinking, be they sectarian or secular, and toward open, skeptical, and ironic (and therefore, I would argue, scientific) ways of thinking. At least three objections come readily to mind. First, polities, like individuals, may need a common "reality framework" that their members believe to be normatively true and beyond question in order to survive external threats. Second, political and social systems must inculcate some common moral order in their members before internal cooperation—civilization rather than the war of all against all—is possible. The late Rev. Richard John Neuhaus, in such books as *The Naked Public Square*, holds that democracies depend on sharing specifically Christian morality (or

something very much like it). But of course Islamist and Leninist-Stalinist Marxists and Nazis have made comparable claims for their faiths. The better objection, then, holds that nations, if they are not Christian, or Islamic or Nazi or communist must still have *some* civil-religion equivalent before internal cooperation can happen. Third, human cognition in both its public and private arenas is inherently religious, not scientific. John Updike put the point this way on NRP (ALL THINGS CONSIDERED, April 18, 2005):

Cosmically, I seem to be of two minds. The power of materialist science to explain everything — from the behavior of the galaxies to that of molecules, atoms and their sub-microscopic components — seems to be inarguable and the principal glory of the modern mind. On the other hand, the reality of subjective sensations, desires and — may we even say — illusions, composes the basic substance of our existence, and religion alone, in its many forms, attempts to address, organize and placate these. I believe, then, that religious faith will continue to be an essential part of being human, as it has been for me.

The first two objections are, at least as I have worded them, without merit. Tribes presumably need some common markers to define "who is with us and who is against us," but there is no anthropological evidence that these markers need to be anything more than such visible markers as flags, uniforms, logos, hair and body-paint styles, and so on. People easily identify themselves as Buckeyes or British soldiers or citizens of France or Texans without resorting to theologies or abstract moral frameworks for doing so.

I can illustrate with a personal example. I was for many years an active member of a small and progressive Episcopalian parish church in Athens, Georgia. Having come to the church as an adult, and a wonky one at that, I occasionally asked my fellow parishioners, many of whom became good friends, what they really believed. Most were either incapable of or uninterested in translating the liturgy and the teachings of the church into any personal belief system. The few who did were all over the lot. One might say, "I'm a sinner, but I'm forgiven.", while another would emphasize something close to the opposite, "I believe in giving my wealth to the needy." No common value beyond the not inconsiderable value of belonging to this group of friends could be said to unite the group. I suspect that replications of my informal experiment would produce similar results. Research in political attitudes and opinions, from Phillip Converse in the 1960s to Drew Westen's THE POLITICAL BRAIN (2007) confirms the same phenomenon in political life.

Furthermore, the factors that promote interpersonal cooperation within groups do not seem necessarily rooted in any kind of moral norm that obligates one to cooperate. The utilitarian benefits from cooperation—e.g., the obvious efficiency of transactions, greater predictability of the future, and reduced stress levels that follow from trust—are well documented. Atheists who have never heard of the Kantian imperative cooperate just as well as do theists. (One is tempted to compare the greediness of Bernard Madow, who was active in his synagogue, to the generosity and honesty of the presumably less religious Warren Buffett.)

However the third objection does accurately describe human cognition. Here, briefly, is a summary of what research findings seem consistently to confirm:

- 1. Physical experiences of vivid primal things, e.g., thunder and lightning, drive human thought. The human brain is deeply imaginative. Some process must narrow down its range of choices, and the brain simplifies its work by building on the concrete physical images it knows from personal experience. Thus the human brain is not a binary digital processor. As Steven Winter put it (2001, p. 5), "It follows that cognition is not principally representational, propositional, or computational, but rather involves processes that are imaginative, associative, and analogical." Professor Bruce Hood's experiments find that the human brain is wired for religious and related ways of thinking that "see" things that, judged by the observational methods of science, do not exist. He particularly attributes "magical thinking" to normal dopamine levels in the brain. [Sharon Begley, The Ghosts We Think We See, Newsweek, Nov. 5, 2007, at 56; James Randerson, Humans 'Hardwired for Religion', Guardian Unlimited, Sept. 4, 2006, http://www.guardian.co.uk/science/story/0,,1864748,00.html.] The death threats provoked by the public cartoon images of the Prophet Muhammad published in Denmark in 2006 and then in Sweden in 2007 are consistent with this pattern. [See Michael Kimmelman, A Startling New Lesson in the Power of Imagery, N.Y. Times, Feb. 8, 2006, at E1, E8.]
- 2. In THE BLANK SLATE (2002) Steven Pinker noted that humans are loyal first to their families and that nepotism is natural; sharing with non-family members requires reciprocity; humans have a drive for dominance and use violence to attain it; ethnocentrism and xenophobia are common; the self-serving biases of most humans lead

them to think that they are freer, wiser, and more honest than they are; moral sensibilities are linked to ideas of purity, beauty, and rank. Psychologists Daniel Kahneman and the late Amos Tversky and their followers have generated an increasingly robust empirical refutation of rational models of economic man. In October of 2002, Kahneman received the Nobel Prize in economics for describing conditions in which rational choice models do not predict how humans make choices. Kahneman and Tversky determined "that losses loom larger than gains, that first impressions shape subsequent judgments, that vivid examples carry more weight in decision making than more abstract—but more accurate—information." [Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 Econometrica 263, 263 (1979).]

In an interview on National Public Radio's Weekend Edition Sunday, Kahneman described three psychological dynamics that play a central role in human conflict:
--Humans inevitably tend to see themselves and their motives as well meant. If hostility

- arises, it is because "the other side" is acting out of malice and hostility. Each side in a conflict sees the other in just these terms.
- --When conflicts start, there are always "optimistic generals on at least one side . . . and very frequently on both sides [S]omebody must be overestimating their likelihood of victory."
- --Humans are overly reluctant to make concessions for two reasons, both of them related to human "loss aversion." First, the research findings, according to Kahneman, show that "losses are weighted at least twice as much as gains." A concession the other side makes to one side is a gain to that side, but that side will weigh the concessions it makes to the other side by twice the value of the gain. Second, faced with two bad choices, either cutting one's losses and admitting defeat or gambling that some miraculous event will save them, most people will double down, that is "most people will gamble. Admitting that you're losing is extremely difficult. . . ." January 7, 2007]
- 3. In 1961, Stanley Milgram's simulated electrical shock experiments found that most people, given authoritative but uncoerced orders to inflict potential harm on another human, would do so. In his 1971 Stanford prison experiment, Philip Zimbardo concluded that people, given unlimited power over others, will, as in the case of Americans operating the Abu Ghraib prison in Iraq, routinely abuse the powerless. [Milgram,

OBEDIENCE TO AUTHORITY 3–5 (1974); Zimbardo, THE LUCIFER EFFECT 18–23 (2007).]

4. Emotions and feelings, not rational calculations, drive human choices. Specific regions in the frontal lobes interact with the deeper areas of the brain that store emotional memories. Brain studies by Chris Frith, professor of neuropsychology at University College, London, show "a 'bottom up' decision making process, in which the ventral palladium is part of a circuit that first weighs the reward and decides, then interacts with the higher-level conscious regions later, if at all." "Free will," a premise about human nature on which many conventional liberal prescriptions depend, appears in these findings as a relatively weak cognitive force, a kind of veto power that people only occasionally call upon to alter a decision made first in the subconscious. [Benedict Carey, Who's Minding the Mind?, N.Y. Times, July 31, 2007, at F1, F6 (paraphrasing Dr. Chris Frith); see also Frith, MAKING UP THE MIND, 186–88 (2007); Westen, THE POLITICAL BRAIN, 35–44 (2007), and Lehrer, HOW WE DECIDE, 2009.] Thus the critical question for modern political theory becomes this: If liberalism's assumptions about man's capacity for reason fail empirically, all the while both research and daily experience reaffirm the appeal of destructive and irrational political forms, how can we humans ever achieve liberalism's pacific goals?

As the title *Law and Politics as Play* suggests, that essay rescues liberalism via a three-step argument about play. First it describes the qualities of "good sports and games," qualities that people (and primarily young men) across cultures understand not as abstract moral theory but simply by virtue of taking part in zero-sum sports. These characteristics include a rough equality of resources among opponents, a recognition that either side can win, transparency, and the various features of the rule of law, e.g., known rules and impartial referees and umpires. Second, the essay explains how these characteristics short circuit the righteousness-humiliation-brutality cycle. This happens in no small part because competitive sports remove the stigma of losing. Indeed, the very process of trying to win undercuts a mentality of moral righteousness. There is nothing extrinsically moral about sports rules like "three strikes and you are out." No one, if they seek to win, selects a pitch or chooses a play because the choice is the righteous one. Third, the essay suggests that both Anglo-American common law and western democratic

political forms have, for roughly two centuries now, visibly moved in the direction of replicating the characteristics of good games. In law, key developments like *Gideon v. Wainwright* and the *Carolene Products* footnote 4 can be read simply as steps toward equalizing the chances that each side can win the adversarial legal contest. The Bush administration was roundly criticized for its secrecy and for its extra-legal activity. The Obama administration openly and repeatedly praises the importance of governmental transparency and the rule of law. Thus, in a nutshell, I argue that constitutional democracy itself aspires to be nothing more than a good game.

Law and Politics as Play describes in some detail how the many evident failures of the Bush administration were rooted in moralistic and magical thinking rather than in the smart thinking of a competitive player, but I won't rehash such details here. (As noted above, I will happily email readers the entire essay.) However, I must mention here one more significant piece of its puzzle. The cognitive and neurological brain science research that seems to present such fatal difficulties for conventional liberal theory in fact does no such thing. The human mind has a remarkable capacity for modification. Cognitive Behavioral Therapy, the psychological techniques developed independently by Albert Ellis and Aaron Beck, confirm the remarkable plasticity of the human mind. These techniques, known colloquially as "the talking cure," have now become standard psychological treatment for most non-psychotic mental dysfunctions. The human brain contains few if any hard-wired patterns toward either peacefulness or violence. Just as Cognitive Behavioral Therapy succeeds by inducing people to examine their thoughts and thus substitute positive neural pathways for neural patterns that reinforce discouragement and depression, people can learn to engage in intense conflicts and yet hug each other once the conflict ends. When the conditions of good games occur, men can and do become the skeptical and open rational actors that liberalism requires.

Afterthought: First Amendment Legal Tests

By taking the antiessentialist quality of reality as a given, I obviously can't in good faith turn around and argue for any single and demonstrably correct "proper interpretation of the religion clauses." I'm deeply skeptical that any abstract rule or legal doctrine can wisely resolve the nearly infinite context-specific varieties of fact situations

that can, at least mathematically, arise in law and life, and I believe that the genius of the common law lies in its ability to accommodate and thrive in such realities without foundations. Instead, in the spirit of the good competitive play of ideas, I suggest the following First Amendment guidelines and encourage readers to counter them.

First Amendment jurisprudence should be anchored in that familiar legal tool, the placement of the burdens of proof and persuasion on one side or the other. Using something like the substantive rationality equal protection test of *Craig* (or more recently Justice Stevens' position in *Cleburne*), courts should actively reject any policy choice when its advocates only present religious/moral, and therefore unmeasurable, arguments to support it. Establishment jurisprudence should require proponents of public policies to carry the burden of showing that policies can or plausibly will deliver measurable tangible benefits for people. Policies whose defense rests only on intangible religious and moral beliefs should fail. Under such a test, litigation over same-gender adoption policies would focus on the results of adoption outcome studies, studies that compare two-parent and single-parent outcomes. As I understand the research, same-gender parents produce outcomes much closer to those produced by heterosexual parent couples than those produced by single parents.

With respect to policies that arguably interfere with voluntary private religious and moral practices, whether sectarian or not, courts should take more seriously than they sometimes have, e.g., Justice O'Connor's wildly implausible logic in *Unemployment Division* v. *Smith*, the requirement that proponents of such policies meet the burden of showing that they rest on "clear and convincing evidence of a compelling state interest." The burden would fall on those supporting limitations on private voluntary activity to show substantively rational reasons for doing so. This test, when applied to the Amish, would, I suspect, reaffirm their freedom to end their children's education after the 8th grade. I suspect that policies opposing the civil unions of same-sex couples, just as policies churches to sanctify such marriages, would fail these tests. But all such matters, including whether a state that legally applies the term "marriage" to same-sex and/or polygamous and polyandrous unions tangibly undercuts the quality of marriage for believers, or muddies the legal clarity of paternity or of inheritance, should be litigated not on the basis of what professors write but on good adversarial contests about the facts.