Taking exception: Gay marriage legislation

by Thomas C. Berg in the June 30, 2009 issue

Recent advances for same-sex marriage have raised important issues concerning religious liberty. The four New England states (Con necticut, Maine, New Hampshire and Vermont) that recently recognized same-sex marriage have all had to consider how broadly to protect churches, organizations and individuals that object to participating in or facilitating such marriages. A national TV ad against gay marriage sounded alarms about religious liberty and triggered parodies from gay rights groups (and Stephen Colbert).

The issue of religious liberty should not be mocked. It is significant. It is also manageable. A state that decides to implement same-sex marriage can and should craft provisions that protect religious dissenters without erecting any substantial obstacles to gay couples marrying.

What are the threats to religious liberty? The possibility often raised—that a church or clergyperson will be forced to host or solemnize a same-sex wedding—is very unlikely. But other threats exist. For example, a Methodist meeting ground in Ocean Grove, New Jersey, has already been stripped of its property tax exemption—and hit with a bill for $20,000 in back taxes—because it made its pavilion available for opposite-sex but not same-sex weddings. Catholic Charities was barred from conducting adoptions in Massachusetts because it declines to place children in same-sex households. A religious college that provides married-student housing might now be seen as violating state law if it refuses to house a same-sex married couple.

Marriage ceremonies also affect a host of small businesses—wedding planners, photographers, caterers. In Al buquerque, New Mexico, a photographer named Elaine Huguenin was fined more than $6,600 in legal fees and costs for declining to photograph the commitment ceremony of Vanessa Willock and her partner.

Several of these cases arose under already existing laws against discrimination on the basis of sexual orientation. Recognizing same-sex marriage without allowing religious exemptions will multiply the number of conflicts and place objectors at greater legal risk.

Protecting objectors generously is consistent with America's long tradition of free exercise of religion. People from many perspectives—religious progressives as well as traditionalists—should affirm the principle that the exercise of religion does not stop at the church door, but carries over into organizational works of charity and justice motivated by faith. Religious exercise also extends into the workplace. The argument "Don't impose your personal moral beliefs when you enter the commercial world" should ring especially false in the wake of recent financial scandals. Legal rules should not discourage people from relating their conscientious beliefs to their business, except for strong reasons.

It must be emphasized that in none of the cases above was there evidence that same-sex couples had the slightest trouble obtaining services from other providers. In Massa chusetts, multiple adoption agencies assist same-sex couples. In New Mexico, it was conceded that Willock incurred no costs in finding another wedding photographer. This will likely be true in the great majority of cases in which objections are made to same-sex marriages. Urban areas, where more than 80 percent of same-sex couples live, almost always have willing commercial providers; ordinary market incentives will handle the problem.

In rural areas, where providers are fewer and cultural attitudes more conservative, access to services might sometimes be effectively denied. The solution is to include in any conscience-protection provision the qualifier that the conscientious refusal may be overridden if a same-sex couple would suffer significant hardship from an inability to obtain services. Hardship qualifiers have been used in numerous other contexts to strike a balance between religious liberty and the interests of others.

Denials of service do affect gay couples by causing them disturbance and offense. While acknowledging that harm, one must also acknowledge that the harm to the objector from legal sanctions is typically far greater. In most cases, the offended same-sex couple can go to the next entry in the phone book or Google listing. Individuals or organizations held liable for discrimination, by contrast, must either violate the tenets of their faith or leave the field or profession in which they gain their livelihood and have invested their time, effort and money.

The hardship to the same-sex couple sufficient to override a conscientious objection should be more than that of taking offense or encountering a minor inconvenience. A state official who refuses to sign a marriage certificate can block the marriage altogether and should be prohibited from doing so unless another official is immediately available. A large motel chain that refused service would likely cause hardship because of its greater market power. Even a small bed-and-breakfast could trigger a hardship for travelers who relied on its availability—which is why some observers have suggested that such accommodations post notices or otherwise make their policies clear from the beginning.

Giving meaningful protection to conscientious objectors is not only right in principle; it is also a sensible strategy for supporters of same-sex marriage. It answers a significant objection to such marriage. Every story about objectors to same-sex marriage being coerced to support it provides ammunition for those who oppose same-sex marriage altogether. A leading academic defender of same-sex marriage, who also supports religious exemptions, remarked to me that the proponents of gay marriage have told their horror stories about gay couples being harmed by denials of marriage benefits, but without conscience exemptions allowed in the law, opponents will have horror stories to tell too.

It’s sometimes argued that government should treat discrimination against same-sex couples the same way it treats discrimination against interracial couples. But one can support same-sex marriage and acknowledge that there has been bigotry against gays and lesbians without labeling all traditionalist believers as bigots or equating the discriminatory treatment of gays with America’s unique legacy of race discrimination, which includes slavery and a bloody Civil War and led to three landmark constitutional amendments. That history has led us to penalize race discrimination in virtually every context, with few conscience exemptions.

Treating same-sex orientation as entirely analogous to race would mean that a vast range of evangelical, Catholic, Orthodox Jewish and even mainline Protestant nonprofits with some rule against same-sex conduct—in employment policies, college-student behavior codes, married-student housing restrictions—could be fined or stripped of their tax exemptions. The result would be years of unnecessary conflict, with people and organizations suffering for their beliefs.

So far the states that have recognized same-sex marriage have been grudging in exempting dissenters. Connecticut, Maine and Vermont protect only religious

nonprofits and (for the most part) only in direct connection with the wedding or solemnization. (Connecticut also protects adoption agencies not receiving government funds.) In New Hampshire, after a veto threat by the governor, the legislature passed a broader exemption also covering various benefits that religious organizations offer to married couples—counseling, retreats, housing—thus protecting religious colleges' housing policies. But none of these laws would protect wedding photographers or other small business owners.

States considering same-sex marriage in the future will have the chance to offer more meaningful religious liberty protections. Mainline Christians could play a crucial role in supporting a balance under which both same-sex couples and traditionalist religious believers can live out their deepest beliefs in public settings, not just at society's margins.

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