Edited by

Timothy Samuel Shah

Thomas F. Farr

Jack Friedman

RELIGIOUS FREEDOM AND GAY RIGHTS

Emerging Conflicts in North America and Europe

Religious Freedom and Gay Rights

Religious Freedom and Gay Rights

Emerging Conflicts in the United States and Europe

EDITED BY TIMOTHY SAMUEL SHAH,
THOMAS F. FARR,
and
JACK FRIEDMAN

WITH AN INTRODUCTION BY MATTHEW J. FRANCK
and
AN AFTERWORD BY ROGER TRIGG

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

CIP data is on file at the Library of Congress
ISBN 978–0–19–060060–0 (hbk.); 978–0–19–060061–7 (pbk.)

1 3 5 7 9 8 6 4 2

Printed by Webcom, Cananda

CONTENTS

ACKNOWLEDGMENTS

Virtually all of the contributions to this volume were originally presented at a conference on "Religious Freedom and Equality: Emerging Conflicts in North America and Europe," which took place at Magdalen College, Oxford on April 12, 2012. The conference was organized by what was then the Religious Freedom Project, and is now the Religious Freedom Research Project, of the Berkley Center for Religion, Peace & World Affairs of Georgetown University.

For their contributions to the success of the conference or to the subsequent organization and completion of this volume, we gratefully acknowledge the following individuals: Kyle Vander Meulen, Roger Trigg, Julia Trigg, Thomas Banchoff, Michael Kessler, Michael Gerson, Peter Petkoff, Christopher McCrudden, Christopher Sugden, Karen Taliaferro, Matthew Quallen, Cynthia Soliman, Cole Durham, Steven Smith, Matthew Franck, Claudia Winkler, and Nicholas Fedyk. We also thank our editor at Oxford University Press, David McBride, and Oxford's two anonymous reviewers for their time and comments.

The John Templeton Foundation deserves a special note of thanks. Of course, as is always the case, the opinions expressed in this publication are those of the authors and do not necessarily reflect the views of the Templeton Foundation or of any of our other supporters. Nonetheless, we wish to take this opportunity to underscore that without the Templeton Foundation's generous funding in 2011, there would have been no Magdalen College conference and no volume of outstanding essays. In fact, there would have been no Religious Freedom Project at all. The decision to bet on the Religious Freedom Project with a major start-up grant ultimately rested with Dr. Jack Templeton, President of the John Templeton Foundation. It was thus a blow to us and to the visionary philanthropy the Templeton Foundation uniquely embodies that he passed away on May 19, 2015 as this volume was being completed. We take this opportunity to record our unpayable debt of gratitude to Dr. Jack Templeton. And we take this opportunity to pray: Eternal rest grant unto him. . . . Long may his work continue.

LIST OF CONTRIBUTORS

Rocco Buttiglione, Professor of Political Science at Saint Pius V University (Rome)

John Finnis, Biolchini Family Professor of Law at Notre Dame University and Professor of Law and Legal Philosophy at Oxford University

Matthew J. Franck, Director of the William E. and Carol G. Simon Center on Religion and the Constitution at the Witherspoon Institute

Richard W. Garnett, Paul J. Schierl/Fort Howard Corporation Professor of Law at the University of Notre Dame

Maarit Jänterä-Jareborg, Professor of Law at Uppsala University (Sweden)

Stephen Law, Senior Lecturer in Philosophy at Heythrop College, University of London

Linda C. McClain, Professor of Law and Paul M. Siskind Research Scholar at Boston University School of Law; Laurance S. Rockefeller Visiting Faculty Fellow, University Center for Human Values at Princeton University, 2016–2017

Andrea Pin, Associate Professor of Comparative Public Law at the University of Padova (Italy)

Steven D. Smith, Warren Distinguished Professor of Law at the University of San Diego School of Law

Archbishop Philip Tartaglia, Archbishop of Glasgow

Roger Trigg, Senior Research Fellow at the Ian Ramsey Centre, University of Oxford

Robin Fretwell Wilson, Roger and Stephany Joslin Professor of Law and Director, Family Law and Policy Program, University of Illinois College of Law.

THE RELIGIOUS FREEDOM RESEARCH PROJECT

This volume is the fruit of research conceived and supported by the Religious Freedom Research Project (RFRP) of the Berkley Center for Religion, Peace, and World Affairs at Georgetown University. Under the leadership of Director Thomas Farr and Associate Director Timothy Samuel Shah, the Religious Freedom Research Project is the world's only university-based program devoted exclusively to the analysis of religious freedom, a basic human right restricted in many parts of the globe. The RFRP is made possible by significant grants from the John Templeton Foundation, a partnership with Baylor University's Institute for Studies of Religion, and the generous support of numerous other individuals and foundations.

The goal of the RFRP is to deepen scholarly understanding, inform policy deliberation, and educate the wider public concerning the meaning and value of religious freedom. It achieves this goal through publications such as this one, as well as conferences, workshops, media appearances, a vigorous web presence, and a blog, *Cornerstone: A Conversation on Religious Freedom and Its Social Implications*. Find out more at www.berkleycenter.georgetown.edu/rfp.

Introduction

Religious Freedom, Same-Sex Marriage, and the Dignity of the Human Person

MATTHEW J. FRANCK

I.

Like many ideas both good and bad that resonate throughout the entire world today, the idea of religious freedom is a product of that world-colonizing project called western civilization. Other cultures, in their history or at present, may have practiced *toleration* of diverse religious views. But toleration *is* a practice, a gift from the powerful to the powerless—and a revocable gift, at that.

Religious freedom, by contrast, is an idea, or the product of an idea. Or it may be better to say it is invariably the reflection of a principle, and principles, unlike practices, must have an intellectual underpinning. Practices may be based on principles; they may also be wholly unprincipled—mere habits, or mere accommodations reached between necessity and desire. Toleration can be like that, a practice responding to the necessities of power or peace, in competition with the desire to live in a way unfettered by such necessities. Or it can be more, if an attempt is made to articulate an underlying principle—but even then there is likely to be a *more* important principle demarcating and subordinating toleration to itself.

But religious freedom *must* be more than a mere practice, or a gift from the powerful to the powerless.[1] Its very name gives it away. The noun is *freedom*; the adjective *religious* indicates a particular species of the larger genus. What sort of idea is freedom?

The achievement of truly free societies—characterized by limited constitutional government, the rule of law, and popular control of political institutions, with a premium placed on individual liberty—seems to be a relatively recent achievement, if by "recent" we mean the last two or three centuries. Is

this achievement therefore to be laid entirely to the credit of modern political philosophy?

One might be forgiven for thinking so. Liberal, constitutional democracy, in theory as in historical reality, seems peculiarly to be the project of modern thinkers such as John Locke and Baruch Spinoza—thinkers who set themselves to varying degrees in opposition to both classical political philosophy and the biblical traditions of Christianity and Judaism, respectively, as those traditions were understood in their day. Both Locke and Spinoza are famously advocates of religious freedom in particular, and both are commonly read by some of their most influential interpreters as impious, even iconoclastic thinkers, if to varying degrees esoteric ones.[2]

Does it follow that the politics of freedom—even or especially the politics of religious freedom—rests on a foundation of impiety or iconoclasm? Or, to put the matter more pointedly, is the free society necessarily the impious, irreligious, or anti-religious society, while the pious society is necessarily the unfree one?

By no means. We may fully acknowledge the contributions of modern political philosophers such as Locke (to take the stronger example where influence on succeeding generations is concerned) to the subsequent development of free institutions as both successful in practice and stable over time. And at the same time we must say that men such as Locke turned their intellects on a subject bequeathed to them by the whole tradition of western thought: the needs and aspirations of the free human person.

As for *that* subject, with all due respect to the Socratic tradition in political philosophy, the free human person is an idea that belongs decisively to the Judeo-Christian tradition. It might even be said to be the theme of that tradition. That is to say, in the famous tension, sometimes fraught and often fruitful, between Athens and Jerusalem in the generation of western culture, the palm must be awarded to Jerusalem—and to Christian Rome—for introducing the idea of the free human person, and of the equal dignity of every human individual.[3]

The dignity of the individual is traceable to the first chapter of the first book of the Hebrew Bible, in which men and women are said to be made in the image of God (Gen. 1:27). And as though it were the opposite bookend, St. Paul's Letter to the Galatians (3:28) tells us that "[t]here is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female, for you are all one in Christ Jesus." The fallen character of all, and the promise of redemption for each: these make for a common denominator more important than any differences of class, tribe, nation, or culture.

Notwithstanding the intellectual liberation achieved by Socratic philosophy, the pagan world remained largely a world of near horizons, bounded by the gods of the hearth, the traditions of the tribe, and the *nomos* of the city. Socrates and his followers may have discovered the idea of natural right, as Leo Strauss argued

decades ago.[4] But it was only in the Christian worldview that every man, not just the philosopher, found it possible to transcend the *nomos* and live in the light of the *logos*. "In the beginning was the Word" or *Logos*, as the Gospel of John opens, and the Word was that same God in whose image we are made.

Like the God who made us, we, though his mere creatures, are beings with *logos*—reason—and a free will. It is given to us, each and every one, to reason about the good, and to choose, and to act. And philosophic wisdom, the light of unaided reason, is from the Christian point of view an untrustworthy guide to our choosing and acting, for most men in most times and places. (Even from the perspective of classical political philosophy, the activity of philosophy is the province of very few.) Faith is thus the sine qua non for the right use of reason in general, and faith is accessible to all, not just to the philosopher. The Christian faith thus democratized the freedom of the will and the range of the intellect, pushing back a near horizon and enabling a longer, farther view, of time and history, of human limitation and possibility, of our relation to eternity and the whole.

Central to the Christian idea of freedom is the freedom of faith itself—religious freedom. From very early in the Christian era, we find thinkers such as Tertullian and Lactantius advancing the view that faith must be free and uncoerced. Our duty to God is identical to our duty to the truth: we must go whither the evidence of reason and faith leads, not according to the will of others, but of our own free will.[5] We can begin to see, then, how the larger genus "freedom" begets a distinct species called "religious freedom." In order to be truly authentic, religion must be engaged freely and uncoercedly. Freedom is a necessary condition of religion, when religion is understood as the "effort of individuals and communities to understand, to express, and to seek harmony with a transcendent reality of such importance that they feel compelled to organize their lives around their understanding of it, to be guided by it in their moral conduct, and to communicate their devotion to others," both in public and in private.[6]

Thus at the base of our modern, liberal commitments in western (and western-influenced) societies to the freedom of the individual—an individual of dignity and worth equal to every other—is a fundamental Judeo-Christian conception of the free, rational, choosing human person, fallen but redeemable, above all freely answering to the evidence that impels a response to the God who made him. And from this Judeo-Christian conception of the human person we get a comprehensive guiding notion of religious freedom.

Here we encounter the sticking point for the controversy taken up by the various authors in this book: namely, the potential impediments to religious freedom that arise when society conceives and enacts equal rights, especially regarding marriage, for gay and lesbian men and women.

Before it became the subject of this book, this controversy was the focus of a major international conference held at Magdalen College, Oxford University

on April 11–13, 2012 and sponsored by the Religious Freedom Research Project of Georgetown University's Berkley Center for Religion, Peace and World Affairs. The conference, entitled "Religious Freedom and Homosexual Equality: Emerging Conflicts in North America and Europe," convened leading scholars, politicians, and religious leaders to explore how the conflicts between gay rights and religious freedom are currently unfolding within the United Kingdom and Ireland, the United States and Canada, and continental Europe.

This book is the product of that April 2012 conference. Its chapters are, almost without exception, the papers initially presented at the conference, revised and updated as much as possible to reflect the cascade of recent developments affecting gay rights and religious freedom in the United Kingdom, the United States, and continental Europe.

The cultural and political landscape has changed dramatically indeed in the period between the April 2012 conference and the completion of this book. In a 2013 case, *United States v. Windsor*,[7] the US Supreme Court ruled it unconstitutional for the federal government to define marriage in a way that excludes those same-sex couples recognized as married in particular states. And in its 2015 *Obergefell v. Hodges*[8] ruling, the Court declared a constitutional right of same-sex marriage nationwide. The controversy surrounding these landmark cases was punctuated by a wave of opposition to religious freedom laws passed in Indiana and Arkansas in spring 2015.

The situation on the other side of the Atlantic has been equally fluid and, in many cases, controversial. In 2013 the UK Parliament passed legislation legalizing same-sex marriage in England and Wales, and the next year the Scottish Parliament followed suit with legislation legalizing same-sex marriage in Scotland. In the courts, religious freedom experienced a setback with *Bull v. Hall* (2013),[9] heard before the UK Supreme Court, and in three of four cases consolidated in *Eweida and Others v. United Kingdom* (2013),[10] decided in the European Court of Human Rights (ECtHR). Among sundry other complex legal and philosophical issues, these cases dealt with balancing freedom of religion and freedom from discrimination, where the courts demonstrated a resolve to protect the latter.

Meanwhile, in continental Europe the ECtHR found in *X. v. Austria* (2013)[11] that Austria cannot withhold from same-sex couples the right to joint adoption of a biological child when that right is available to heterosexual couples. But significantly, the Court upheld the precedent that European states are not obligated to grant a right to same-sex marriage. The ECtHR set a parallel precedent when it ruled in *Oliari and Others v. Italy* (2015)[12] that Italy must offer some form of legal recognition to same-sex couples, even if that recognition does not involve "marriage."

These recent events suggest that the present moment is one of increasing urgency. Today more than ever, there is a need to grapple with tensions between

gay rights and religious freedom. Yet despite these rapidly unfolding developments, the substance of the controversy remains essentially unchanged: the conflict between gay rights and religious freedom is but another (yet profound) iteration of the classic tension in political philosophy between equality and liberty. While the modern project of democratic government was inspired by the idea of liberty, it was also imbued with a commitment to the principle of equality. As we have just seen, this dual commitment to liberty and equality reflects a historically prior conception of innate human dignity rooted in a Judeo-Christian theological and philosophical anthropology: to be created in God's image presupposes that all humans possess a fundamental dignity, one that renders them naturally free *and* equal.

Today, however, modern liberalism has engineered a novel reconceptualization of equality, generating a burgeoning field of heretofore-unrecognized rights. Central to this new logic of equality are rights that would extend to homosexuals across different sectors of society, including housing, employment, and private enterprise. Among these, greatest attention has been paid to the prospect of establishing an equal right to marriage—often referred to as "same-sex marriage" or "marriage equality"—that would enable individuals to marry a person of the same sex. Proponents of this right argue that, in order to be fully equal to their heterosexual counterparts, homosexuals must be granted equal access to the institution of marriage. They argue that to deny them this equal access is to discriminate against them unlawfully; it is to withhold from gay couples recognition of their fundamental and equal dignity.

It is important to recognize here that the issue of same-sex marriage does not hinge on a wholesale acceptance or rejection of equality. Opponents of same-sex marriage typically do not object to equality per se, but to a specific understanding of what equality entails. Their underlying premise is that claims to "marriage equality" are based on a claim of identity—regarding sexual orientation—that is factually dubious and morally misleading, and entails a misunderstanding of the nature of marriage. Moreover, such an equality claim threatens to impinge on other fundamental rights, such as religious freedom. At this point we reach a virtual impasse of intractable conflict.

To appreciate why this is so, let us turn again to the core teachings of Christianity that did so much to shape western societies. For the Christian vision of the human person, freely responding in faith to a loving Creator, is a package deal. And part of the package concerns the Christian ethic of marriage and chastity—that is, of sexual relations being licit only within the bonds of marriage, and of marriage being the ground from which family and community spring. This sexual ethic is not an adventitious and dispensable part of Christian humanism. It is, strictly speaking, inseparable from it, and historically has not been even *apparently* separated but by the most strenuous efforts to reinterpret

the Christian message in post-liberal, postmodern societies of recent decades, which are the first societies to witness the advent of churches that may properly be called post-Christian.

What looks today, to many, like historic Christianity's bondage to outmoded norms of morality, hopelessly retrograde in our enlightened age, is actually, from the perspective of historic Christianity itself, the mark of an ancient liberation from forms of sexual bondage and degradation that pervaded pagan antiquity.[13] The elite classes, or, to be more precise, elite *men* of the pagan Mediterranean in late antiquity were sexually continent only within the bonds of family and class, with the shame of stained honor being the only powerful restraint on sexual coupling. With slaves and the laboring classes and prostitutes—social groups with extremely permeable boundaries between them—these elite men were libertine exploiters, using the members of both sexes in such "inferior" groups for sexual pleasure without restraint or shame.

In this ancient milieu, the Christians were an astonishing phenomenon. They condemned and abhorred abortion and infanticide, adultery and divorce, and sexual libertinism of every kind. It was not shame (an offense against social norms and class roles) but sin (an offense against God) that moved them to cabin human sexuality entirely within the walls of marriage, and monogamous marriage at that. Sexual relations between persons of the same sex were perforce out of the question, but so too was all premarital and extramarital sex, or the taking of multiple wives.

Nor was this Christian revolution in sexual morality merely a form of reactionary repression. It was understood to be woven inextricably into the fabric of the Christian tapestry of freedom. Christian moral norms regarding sexuality, however imperfectly followed through, attempted to honor the equal dignity of both sexes, however different their familial and social roles; to safeguard the innocence of children and assure their decent upbringing; to distinguish erotic relationships from friendships and partnerships of other kinds; and to do justice to the poor and the marginalized. At bottom, this morality sprang from a recognition that *eros*'s great power in human relationships could only be tamed and made safe by *agapē*—one love being made subject to the sovereignty of the other, greater love.

II.

This Christian moral revolution in the ancient sexual economy was, it must be repeated, inseparable from the larger theme of the free human person. Thus the Christian sexual morality, and the emerging Christian argument for religious freedom, were stalks from a common root. The question today — a strictly

empirical question — is whether the second stalk can survive if the first is severed. We are in early days yet in discerning an answer to this question. But the chapters of this book suggest that religious freedom in full may not have an easy time surviving the decline, in law, public policy, and mainstream culture, of Christian sexual morality and the Judeo-Christian conception of human dignity in which it is embedded.

Chapter One—the first of three in Section I on developments in the United Kingdom—underscores this likely reality. In "Equality and Religious Liberty: Oppressing Conscientious Diversity in England," John Finnis details a recent string of judicial rulings in UK courts and the ECtHR in which efforts to root out discrimination (against homosexuals) have instead resulted in discrimination against religious persons. The courts, he argues, have failed to develop a reasonable doctrine of accommodation for individuals who make conscientious religious objections to generally applicable (typically anti-discrimination) laws. Instead, the courts have applied disproportionate restrictions on religious freedom, as when it was ruled that a British Airways employee could not, in violation of company policy, wear a visible religious symbol (a cross), or that the owners and operators of a hotel could not, for religious reasons, deny a single-bedded room to a homosexual couple, even when this rule applied to all unmarried couples.

However, for the next author, Stephen Law, these court rulings represent a justifiable effort to apply anti-discrimination laws equally. In "Gay Rights versus Religious Rights," Law argues that the state should not grant religious exemptions to generally applicable laws. To do so, he insists, would be to confer special privilege upon religious individuals and their religious claims. The crux of the disagreement between Finnis and Law, then, is what a fair balance between competing claims of gay equality and religious freedom looks like. For Law, a fair balance does not involve showing preference to religious objections, however sincere they may be, by virtue of their religious nature and grounding. The implication is that the imperative to promote the equality of homosexuals outweighs the need to accommodate religious objectors.

In Chapter Three, Philip Tartaglia, Archbishop of Glasgow, observes that in recent years religious freedom has been whittled down to an impoverished notion of "freedom of worship" wherein one's religious freedom stops, as it were, at the "door of the temple." The effect has been to restrict a significant field of religious activity—public religious expression, in civil society, in the marketplace, and in the political life of the nation. This constriction of religious freedom to a marginalized sphere of private "worship" has grave implications, he warns, for the role of the democratic state. Properly understood, the state exists to facilitate society's most basic institutions, such as the family and the Church, not to absorb them within its all-encompassing authority.

Section II turns to the tension between gay equality and religious freedom in the United States. It should be noted that because these chapters were written and revised over a period from late 2012 to early 2015, they do not include detailed analyses of the Supreme Court's landmark *Obergefell* decision (released June 2015) establishing a constitutional right to same-sex marriage. In a matter of months, this ruling has given way to a new moral and political calculus centered around fresh and intensified tensions—tensions that figure to define a new era of American life, to which future work must respond with novel insight and solutions. Yet because many of the core issues in these tensions remain essentially unchanged, the four chapters in this section are instructive nevertheless, offering a prospective framework for grappling with religious freedom in a post-*Obergefell* world.

In Chapter Four, Richard W. Garnett proposes that in order to make sense of the tensions between religious freedom and gay equality, we need greater conceptual clarity about "discrimination." Discrimination is not wrong in and of itself, he points out.[14] Rather, *wrongful* discrimination is wrong. And sometimes our most basic freedoms require the latitude to discriminate. This is often the case, he suggests, with the right to religious freedom. Looking at three US Supreme Court cases—*Bob Jones University, Christian Legal Society*, and *Hosanna-Tabor*—Garnett delineates the boundaries between unjust and just discrimination by religious individuals and communities. Discrimination is just, he argues, when a "compelling state interest" is not at stake, or when denying one's ability to discriminate violates one's equal dignity or fundamental rights. For example, in the United States religious institutions are free to discriminate in their internal affairs under the "ministerial exception," such as when the Catholic Church excludes women from the priesthood. To deny religious organizations the freedom to discriminate in this sense is to impose an unjustified burden on their constitutionally guaranteed religious liberty.

In "Civil Marriage for Same-Sex Couples, 'Moral Disapproval', and Tensions between Religious Liberty and Equality," Linda C. McClain observes that objections to same-sex marriage often hinge on the assumption that laws and policies should reflect the religious virtues and values of citizens. There should be a *congruence*, in other words, between civil society and government, between traditional religious conceptions of marriage, on the one hand, and a legal definition of marriage, on the other. When these two are forced out of alignment—as when the Supreme Court struck down same-sex marriage bans in *Obergefell*—it often precipitates a fierce debate about religious liberty versus gay equality. But religious liberty and gay equality need not be at odds, McClain argues, so long as we recognize the distinction between "civil marriage," which obtains in the public sphere of secular law, and "religious marriage," which is limited to the private sphere of moral and religious values. Understood in this binary frame,

she suggests that moral disapproval of homosexuality based on private religious values is, by itself, an insufficient basis for enacting and implementing laws that discriminate against homosexuals. Any moral disapproval must correspond to a compelling state interest, a *public* interest, one that is not ultimately reducible to a particular religious doctrine or value. Chronicling constitutional jurisprudence on liberty and equality over the past few decades, McClain observes that this understanding of the role of moral disapproval is, in fact, repeatedly borne out in the courts.

In "The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom," Robin Fretwell Wilson urges an approach of mutual accommodation for opponents and supporters of same-sex marriage. Although *Obergefell* took same-sex marriage off the bargaining table, it did not eliminate the urgent need for compromise. On the one hand, those who object to same-sex marriage on religious grounds still seek religious liberty protections. But with same-sex marriage now legal in 50 states, and with public support for marriage equality growing alongside an increasing public acceptance of the lesbian, gay, bisexual, and transgender (LGBT) community, the window for securing these protections may be closing. On the other hand, though same-sex marriage supporters emerged from *Obergefell* victorious, discrimination against members of the LGBT community in housing, employment, and public accommodations is still lawful in most states. To successfully enact bans against such discrimination, Wilson argues, same-sex marriage supporters would be wise to concede religious liberty protections; likewise, to secure religious liberty protections, opponents of same-sex marriage should be willing to concede LGBT nondiscrimination measures. Unpalatable though it may be to both sides, Wilson maintains that only compromise will yield adequate protections for conscientious religious objectors *and* the LGBT community.

To round out the section on religious freedom and gay equality in the United States, "Die and Let Live? The Asymmetry of Accommodation" by Steven D. Smith critiques the "accommodationist" approach advocated by Wilson and others. According to Smith, the approach relies on two mistaken assumptions of symmetry: first, that the negotiated outcomes—such as the legalization of same-sex marriage and accommodations for religious objectors—will be symmetrical in their fairness and balance to both sides; and second, that both sides are equally intransigent and eager to oppress the other side by enforcing their own views. Regarding the first assumption—called "prescriptive symmetry"—Smith argues that the compromise that accommodationists prescribe nevertheless favors same-sex marriage supporters because it privileges their view of marriage as the official position of the state, thereby casting religious objectors as "outsiders" to be "accommodated." Regarding the second assumption—called "critical symmetry"—Smith points out that it presupposes both sides face equally

serious threats and thus respond with proportional and equally justified vigor. In reality, however, religious objectors face the far graver dilemma of having to choose between violating their conscience and convictions or being relegated to the margins of society. Their resistance is thus motivated not by intolerance or an impulse to impose their values on others, but by a legitimate fear of being stranded in a subordinate position in which they are at best tolerated, and at worst disadvantaged under a new hegemony.

The volume's final section (Section III) is an appraisal of the situation in continental Europe. In Chapter Eight, Rocco Buttiglione seeks clarification of the central concepts that fuel tensions between gay equality and religious freedom: What is the "nature" and "cause" of homosexuality? What do we mean when we invoke the word "discrimination"? How do we reconcile expanding definitions of tolerance and rights? Buttiglione argues that homosexual relationships, especially marriages, are not the same as heterosexual ones, and advises that we differentiate between the two. This differentiation is not based on animus or a desire to harm, he maintains, but on an understanding of homosexuality as a lifestyle, and of marriage as an institution whose central function is to bring children into the world, and to provide them with a healthy upbringing. Since homosexual couples are incapable of fulfilling this social function, Buttiglione concludes it is necessary and justified to deny them the right of marriage. Although this involves discrimination in the sense of "differentiation," it does not, he insists, involve an *unjust* denial of rights, for our rights derive from our status as human beings, not our sexual orientation. To deny gay couples marriage is thus not to deny the authenticity or significance of their love, but properly to situate their love outside the "social" reality of marriage.

In "Same-Sex Partnership and Religious Exemptions in Italy: Constitutional Textualism versus European Consensus," Andrea Pin criticizes the Italian Constitutional Court for employing a strict originalist reading when it ruled that the Italian constitution does not guarantee same-sex marriage. In so doing, he says, the Court avoided addressing important substantive questions, such as the justification for marriage (religious or otherwise), how to balance conflicting rights, and how properly to conceive of "self-determination." Moreover, Pin argues that religious communities should have a proactive role in the process of crafting gay rights legislation *before* such legislation is introduced. They should not be expected to wait until those rights are enacted before weighing in with their own interests and concerns, such as on the need for "conscientious objection."

In the final chapter, Maarit Jänterä-Jareborg presents a Scandinavian outlook on homosexuality, equal rights, and freedom of religion. She views religious freedom as being free to practice one's religion, but not to assert one's beliefs as a ground for shirking one's civil or legal obligations (as in the case of civil servants who refuse to

register same-sex marriages on religious grounds). This view, she argues, enables us to reconcile two competing claims: the religious proscription against same-sex marriage, on the one hand, and the right of equal access to the institution of marriage by same-sex couples, on the other. In any case, Jänterä-Jareborg notes that in Scandinavia today it is individual freedom and rights, not religious values, that dictate legislation. And since there are various concepts of morality, the state must be neutral toward them. In practice, this means that religious beliefs that do not recognize the validity of same-sex partnerships, marriages, and adoptions are outweighed by an individual's right to equality before the law.

Concluding the volume in his Afterword, Roger Trigg inquires into whether much of the conflict's seeming intractability may stem from a widespread opinion that religious belief is "subjective" and therefore subject to marginalization and the ascendancy of other values held to be more objective in nature. If so, Trigg observes, the prospects for accommodation of religious freedom on a principled basis, recognizing its claims in full, are not very good.

III.

As one can see in the descriptions above and the chapters that follow, the contributors to this volume offer an array of different perspectives, reflecting their differing expertise and prior moral and philosophical commitments. Nevertheless, they tend to converge around a forecast in which society—for better or worse depending on which author you ask—increasingly moves *away* from a Christian sexual morality and *toward* a diminished tolerance of religious freedom.

The beginning of understanding this more-than-possible future is in considering the metamorphosis of the notion of dignity. As Ronald Osborn has recently written:

> Even if the language of "rights" was not explicitly or formally used, the New Testament invested every person with a previously unimaginable worth. Instead of struggling to attain *dignitas* as a scarce commodity in competitive rivalry with others, all persons were now summoned to live in generous solidarity with their neighbors as persons of dignity and worth equal to their own. Dignity, in the Christian revaluation of values, could not be earned, because it was bestowed as a gift from God, although the gift could be lost or squandered precisely by transgressing the dignity of the Other, whether through violence or by indifference to the Other's welfare—by denying that that person too was the privileged bearer of the divine image, the divine image now being of a man broken, tortured, and executed by the state.[15]

All men and women, in the Christian teaching, are possessed of an inherent and incalculable dignity inseparable from their humanity itself, which is carried with them from conception until death—and beyond. All are fallen, all are sinners in need of redemption—but no one may claim a superior status to another, by nature or by divine right, for all, as Osborn points out, have the same unearned dignity.

To Osborn's remark on how this inherent dignity may be "lost or squandered precisely by transgressing the dignity of the Other," we may offer a partial demurral and clarification. Neither the transgressor nor his victim, strictly speaking, "loses" his inherent dignity, for that is impossible. The victim of injustice may have his dignity *denied*, but it remains steadfastly his own and is not *lost*. Neither does the perpetrator lose his own dignity through his own unjust actions—but in acting to call into question another's dignity, he succeeds only in revealing his disbelief in *anyone's dignity, including his own* (this may be what Osborn means by "squandered"). The harm he does redounds thus to his own discredit.

Thus much the demurral; now for the clarification. The effective denial of one's own dignity can manifest itself in every kind of sin, even the kind that appears to have no "victim" beyond oneself. (Consider how many of the seven deadly sins may be committed entirely or chiefly in solitude. The person offended by these sins is God Himself.) So the Christian sexual ethic has never turned decisively on questions of violence, coercion, or victimization of another; sins falling under this rubric may involve such open assaults on others' dignity, but may be more subtle in their denial, or even appear to have nothing to do with any other beyond the self. The decisive thing is God's bestowal of dignity upon each of us on His terms, not our own. The willful spoliation of that God-given dignity is evident in the rebellion against God that every sin represents.

Now consider the contrast between this notion of equal dignity and the notion of dignity the US Supreme Court advanced in its recent case proclaiming a constitutional right of same-sex marriage. Justice Anthony Kennedy, writing for the narrow majority in *Obergefell v. Hodges*, makes "dignity" the recurring theme of the Court's opinion. It first appears in this way:

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity.[16]

The characterization of what "many persons did not deem" others to have is highly interesting. The common view in predominantly Christian societies (but not only them) that certain sexual acts were immoral—whether the acts were

criminalized or not—did not amount to a denial of the dignity of those who engage in such acts. To the contrary, from the Christian (but again, not only the Christian) point of view, the moral norm against such acts was an affirmation of the dignity of the human person. The denial or spoliation of such dignity was constituted by the immoral act, and only by the immoral act.

Justice Kennedy's view here has echoes of what Osborn calls "the very moral and humanistic categories introduced into the West by Christianity itself."[17] But as everyone knows, an echo often carries a significant distortion of the original sound. Here the distortion can be heard in Kennedy's reference to "their own distinct identity." From the Christian perspective, none of us has any "distinct identity" except as an individual, a free human person made in the image of God. There is no *group* identity of any class of persons, and certainly no such "identity" can be "distinct" on the basis of the acts, inclinations, or desires of the members of a self-identified class. But what Christianity has historically denied is plainly affirmed by Justice Kennedy here, when he ties a claim of dignity (as though it were, in Osborn's description of the ancient pagan view, "a scarce commodity in competitive rivalry with others") to a self-assertion of a "distinct identity."

If there were any doubt that for Justice Kennedy "identity" and therefore "dignity" are crafted by the autonomous self, rather than recognized as the gifts of a God who made us in His image, it is dispelled a few pages later in his *Obergefell* opinion. Writing of the protection cast about the individual's liberties by the Due Process Clause of the Constitution's Fourteenth Amendment, he says that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[18] It is sometimes difficult to discern Justice Kennedy's meaning, but it seems clear enough here that the real progression of his logic is from autonomy (a power of lawgiving or norm-assertion for oneself) to identity (self-made) to dignity (self-defined and self-asserted). All the work of this self-lawgiving, self-making, self-assertion rests squarely on the shoulders of the individual self, a self that from the perspective of historical Christianity is scandalously independent of (which is to say, rebellious against) God, the proper source of all these things.

Justice Kennedy concludes his opinion by saying, of the petitioners seeking a right of same-sex marriage, "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[19]

From this as well as much else in Kennedy's rhetoric of dignity, Justice Clarence Thomas, dissenting in *Obergefell*, plausibly inferred that for Kennedy and the majority, dignity is a prize that is in the power of government—or at least the judicial branch—to bestow, as the reward for the self-assertion of the autonomous, identity-making individual. How else is a self-made dignity, suspended as it were in midair with no other basis than the individual's self-legislation for an

identity that is not so much *given* as manufactured, to be made good against others who may be inclined to deny it? The remit of one's self-legislation can extend no further than one's own reach. To legislate *for others* will require more, and this is what the Kennedy majority supplied.

Speaking for an older view that was shaped by the Christian revolution in favor of universal dignity, Justice Thomas said the majority led by Kennedy "rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government."[20] He continued:

> Human dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that "all men are created equal," and "endowed by their Creator with certain unalienable Rights," they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.
>
> The corollary of that principle is that human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.[21]

The majority in *Obergefell* had similarly misconstrued liberty, argued Thomas, when it rested a right of same-sex marriage chiefly on the principle of liberty in the Due Process Clause. Liberty, said Thomas—again speaking for an older view—is the realm of free action on the part of individuals: "In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement." But the petitioners in *Obergefell*, already free to act as they will on whatever notions of autonomy, identity, and dignity they please, answerable only to their consciences, were insistent on the government's recognition of those notions in binding new legal norms, so that their fellow citizens could be said to share them. An inverted idea of liberty, Thomas argued, had been made to serve an erroneous understanding of dignity.

And the foreseeable future victims of these inversions and errors, Justice Thomas and his fellow dissenters argued in *Obergefell*, will be those whose consciences cannot countenance their acceptance. In the United States as in the rest of the western liberal democracies, these will be chiefly (though not exclusively)

Christians who align themselves with the historic teachings of their faith. As Chief Justice John Roberts said in his dissent:

> Today's decision . . . creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.[22]

Likewise Justice Thomas remarked:

> In our society, marriage is not simply a governmental institution; it is a religious institution as well. Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples.[23]

Last of all the dissenters, Justice Samuel Alito noted that the Court's opinion in *Obergefell* would no doubt be "exploited by those who are determined to stamp out every vestige of dissent," and continued:

> Perhaps recognizing how its reasoning may be used, the majority attempts, toward the end of its opinion, to reassure those who oppose same-sex marriage that their rights of conscience will be protected. . . . We will soon see whether this proves to be true. I assume that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.[24]

These are remarkable warnings from justices of the Supreme Court, in a case that in itself had nothing whatever to do with issues of religious liberty. What can account for this felt sense of urgency about religious liberty on their part? Why indeed did Justice Kennedy feel compelled to offer assurances that there was no threat to religious freedom lurking in the logic of the Court's ruling?

The answer, I think, is that the adoption of same-sex marriage in the laws of the United States and the other western democracies is different in kind from previous developments that had relaxed or abandoned the legal enforcement of Christian (but not uniquely Christian) norms of sexual morality. When most of the Christian churches other than the Roman Catholic abandoned the historic condemnation of artificial contraception beginning some 80 years ago, and the

laws gradually followed suit in dropping proscriptions of it, there was no inroad on the freedom of those who clung to the ancient teaching to continue following their consciences, as individuals or in their institutions. (Lately this has changed in the United States, with the Health and Human Services mandate for employer provision of contraception under the Affordable Care Act of 2010.)

Likewise, when adultery was decriminalized, or when sodomy laws fell into desuetude, no one who believed in the sinfulness or immorality of such acts was harmed in his own freedom to live conscientiously by such moral or religious norms. The American people's right of self-government—an underappreciated part of their liberty of acting together in community—was arguably harmed by the Supreme Court's invalidation of all sodomy laws in *Lawrence v. Texas* (2003), but religious freedom as such suffered no blow.

Even *Roe v. Wade* (1973), viewed by all who hold life sacred from conception to natural death as a legal horror, a grievous injustice against basic human rights, was not by the force of its own logic a threat to the religious freedom of the ruling's opponents. To be sure, there were medical institutions and others in need of a shield against any coerced complicity in abortions they conscientiously opposed, but in the main (while there were and still are flashpoints here and there) such a shield was ungrudgingly provided by legislators.

The redefinition of marriage, extending the civil status of the institution by law to same-sex couples, propels us into very different territory. As Justice Thomas noted, the claim that was victorious in *Obergefell* was not really, in the logic of the law, a "liberty" claim at all. It was a demand for government recognition and inclusion in an institution whose definition has always included some and excluded others. And marriage is an institution both civil and religious, as Justice Thomas also noted.

More than that, marriage's meaning permeates civil society generally—the economy, education, the structures and activities of intermediate associations generally, all of which are subject in varying degrees to the law's understanding of marriage and family relations. From schools to hospitals to social service agencies to charitable institutions to workplaces to market transactions of myriad kinds, any modern society presents countless micro-environments where conscience, moral choice, and claims of dignity regarding the meaning of marriage can potentially clash in ways that erupt into litigation, prosecution, and/or public administration of where the right should prevail.

As I have noted above, the chapters that follow do not give us cause to be sanguine that terms of peace acceptable to both sides in the coming struggle can be fashioned. Indeed, the authors who contribute to this book appear, for all their other highly interesting differences, to be mostly in a curious state of agreement about this. Those who express sympathy with the traditional understanding of marriage as the conjugal union of a man and a woman, and wish to defend

as well the tradition of religious freedom that grew out of the Christian idea of the dignity of the human person (such as Archbishop Tartaglia and Professors Smith, Finnis, and Buttiglione), are understandably very worried that as the first of these traditions is defeated, the second will fall with it in due course. Even the one author in this camp who powerfully argues that there is no necessary conflict between same-sex marriage and religious freedom "in principle," Professor Garnett, is inclined to take a somewhat dyspeptic view of how things will work out in practice.

On the other side, the authors who are friendly to the cause of gay rights and same-sex marriage range from one, Professor Wilson, who strives to accommodate the rights of conscience within a new legal order whose assumption is that they represent carve-outs from a general principle and have the greatest importance on the wedding day, to those (like Professors McClain, Jänterä-Jareborg, and Law) who are entirely heedless of any claims religious freedom might make to a special status in the law of any democracy committed to modern notions of equality.

Thus we see that the probable failure of religious freedom and same-sex marriage to coexist peaceably in the future, on terms satisfactory to actual claimants on both sides, is a matter of virtual consensus among our authors. What remain of keenest interest are the arguments, in the chapters that follow, regarding the best ways for the American and European democracies to navigate through these inevitable controversies, responding justly to the needs and aspirations, the rights and the dignity, of the human beings caught up in it.

For what appears now to be happening in the western democracies, under the pressure of new understandings of "dignity," is a rapid collapse of the principled case for religious freedom—a case whose construction was the work of many centuries—and a reversion to mere toleration. But the hallmark of toleration, as we remarked at the outset, is that it is at best a halfway house on the way to religious freedom in full, a second-order principle subordinate to something of presumptively greater value. And at worst toleration is unprincipled, a merely arbitrary practice: the granting of space as is felt to be either necessary or convenient by those who occupy the seats of power. If we are witnessing the retrogression of religious freedom into toleration, this would be a momentous change indeed. And the frontier marking the spaces accorded, respectively, to conscience claims and to new-style dignity claims will be contested terrain for years to come.

PART I

THE UNITED KINGDOM

1

Equality and Religious Liberty

Oppressing Conscientious Diversity in England

JOHN FINNIS

When these analyses and reflections were first drafted, in 2012, the stories they focused upon outlined a situation ominous for conscience, religion, and civil liberty. By the time they were supplemented and completed in 2015, the stories had almost all ended badly, and the outlines of an oppressive new settlement had been etched deeply into English law and civil society. Oppression in the name of equality and diversity sharply attacks those very values, even as it deepens the other wounds it inflicts on the substance of our common good and the sustainability of our people.

I. The Situation in 2012: An Employment Vignette

A couple of vignettes from recent litigation in or involving England will take us to the heart of the matter. In July 2011, the Equality and Human Rights Commission, a body (established under the Equality Acts 2006–2010) which, in its self-description, "enforces equality legislation on age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, [and] sexual orientation, and encourages compliance with the Human Rights Act,"[1] announced that it was seeking to intervene in four cases that had proceeded from English appellate courts toward imminent hearing in the European Court of Human Rights (ECtHR).[2] According to its announcement, the Commission was going to argue, in all four cases, (A) that the English courts were taking too narrow a view of the kinds of restrictions which engage the right to freedom of religion,[3] by holding, for example that the right is *not* engaged at all if the relevant individual's desired manifestation of belief is one

not *required* by that person's religion, or is one that others of that faith who are employed in the same business do not insist on being allowed to manifest, or is one that the individual could manifest without restriction by moving to another more accommodating place of employment, or school or other relevant environment; and (B) that where the right is engaged and the question of the restriction's justification is therefore the issue, the courts should—but do not—adopt a principle that where practicable there should be "reasonable accommodation" of manifestations of religious belief, wherever that can be managed with minimal disruption of the relevant operation (business, school, public service, etc.).

The four cases were these: (i) *Eweida*[4] and (ii) *Chaplin*[5] each involved a claim to be allowed to wear a small cross or crucifix on a necklace made visible by British Airways' (BA's) change from high-necked to V-necked female uniform. The claim was in each case refused at the relevant time by BA and the employment tribunals, and in *Eweida* by the appeal courts,[6] but before long was accepted without difficulty by BA under the pressure of newspaper campaigns. (iii) *Ladele*[7] and (iv) *McFarlane*[8] each involved requirements imposed by employers set upon prohibiting discrimination against same-sex couples. Both cases went up to the Court of Appeal, but in every way, *Ladele* is the more significant and revealing—indeed the most important of the whole set of four.

Lillian Ladele was a registrar employed since 2002 in Islington Council's registry of marriages who, when "civil partnerships" were introduced in 2005, was unwilling on Christian religious grounds of conscience to officiate (with or without ceremonies) at the contracting of such partnerships (which are entered upon with a view to or in recognition of same-sex sex acts).[9] The Council did not deny that it could without difficulty have used its other registrars to officiate instead of Ms. Ladele, and have done so without imposing disparate burdens on those other registrars or unfairly lightening her load. But the courts held (in the Equality Commission's accurate summary) that the legitimacy of the Council's aim in imposing a policy of equality for practicing homosexuals "automatically means" that its requirement that she conduct these ceremonies was proportionate; no question of accommodation between homosexuals' non-discrimination rights/interests and Ladele's religious *or other conscience rights*/interests could arise.[10]

The phrase "automatically means" is the Commission's, but it communicates the substance of the court decisions in *Ladele* and *McFarlane*. The Court of Appeal in *Ladele* (per Lord Neuberger MR) put it like this:

> As the Employment Appeal Tribunal said [in this case] in paragraph 111 of Elias J's judgment, "[o]nce it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate . . . it must follow that the council were entitled to require all registrars to perform

> the *full* range of services." As the EAT went on to point out, permitting Ms Ladele to refuse to perform civil partnerships "would necessarily undermine the council's clear commitment to" what the EAT described as "their non-discriminatory objectives which [they] thought it important to espouse both to their staff and to the wider community."[11]

Lord Neuberger MR then added:

> [T]he fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be *allowed to implement its aim to the full*, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimize, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was *causing offence to at least two of her gay colleagues*; Ms Ladele's objection was based on her view of marriage, which was *not a core part of her religion*; and Islington's requirement *in no way prevented her from worshipping as she wished*.[12]

Neither passage even begins to confront either the issue of accommodation, or the "no-more-than-necessary adverse impact" element in the test of the proportionality[13] or reasonableness of the limitation on freedom of religion and conscience, defined in Article 9 of the European Convention on Human Rights (ECHR) as the freedom "in public or private, to manifest [one's] religion or belief, in worship, teaching, practice and observance."[14] Rather: each passage brushes aside the argument for accommodation with languid indifference if not studied tacit contempt.

Gary McFarlane was employed as a relationship counselor for a charity called Relate, and on Christian religious grounds was unwilling to provide psychosexual therapy advice to same-sex couples when that became required; again there was no suggestion that the charity could not have reached a reasonable accommodation with him by using others of its counselors for such couples. But the very senior and scholarly judge who disposed of the final appeal application concluded: "There is no more room here than there was [in *Ladele*] for any balancing

exercise in the name of proportionality. To give effect to the applicant's position would necessarily undermine [the charity's] proper and legitimate policy."[15] In short, the corporate aim of having a no-accommodation policy (whether in Islington or within Relate) was treated by the courts as automatically excluding any legal requirement of accommodation.

I return to the Equality and Human Rights Commission and its July 2011 statement of intent to argue in the ECtHR for reasonable accommodation between religious beliefs and gay rights policies.[16] Within six weeks of announcing that intention, the Commission—after who knows what controversies or even internal power struggles—publicly reversed itself and announced that its submissions to the ECtHR in *Ladele* and *McFarlane* would now be in support of the English courts' decisions. In fact, when the Commission's submissions were published in September 2011, they were found (A) to argue rightly and effectively (in relation to all four cases) that the English courts were being far too restrictive about when the right to religious freedom is engaged (at stake, in issue). But (B) there was no plea for a doctrine of reasonable accommodation. The Commission almost (but not quite) endorsed the position of the courts that (as the Commission summarized it) "the refusal to accommodate discriminatory religious beliefs would always be proportionate." It put its position thus:

> In the Commission's view, it will generally be proportionate to refuse to make an accommodation in cases where a public sector employee seeks to be exempted from providing a public service on discriminatory grounds. Very strong arguments and evidence are required to prove the employer has acted disproportionately in cases such as these. State services must be provided on an impartial basis and employees cannot expect their public functions to be shaped to accommodate their personal religious beliefs.[17]

(Whether these remarks applied to *McFarlane* and the private sector was left in shadow.) The real ground of the Commission's stance, and of its September U-turn, is indicated in the immediately preceding paragraph of the Submission:

> In the words of Judge Tulkens in *Sahin v Turkey* (2007) 44 EHRR 5, §4: "it is necessary to seek to harmonise the principles of secularism, equality and liberty, not to weigh one against the other." Nonetheless, this Court [ECtHR] has recognised that *interfering with some rights will require particularly strong justification. The right to equal treatment on the grounds of sexual orientation is one such right*.[18]