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How to Think About Discrimination: Race, Sex, and SOGI

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within Conscience Protection, Politics, Sexuality

FEBRUARY 14TH, 2017

Sexual orientation and gender identity (SOGI) antidiscrimination laws are unjustified, but if other policies are adopted to address the mistreatment of people who identify as LGBT, they must leave people free to engage in legitimate actions based on the conviction that we are created male and female and that male and female are created for each other.

In a new report for the Heritage Foundation, "How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom," I argue that current proposals to create new LGBT protections with varying types of religious exemptions will not result in what advocates claim is "Fairness for All." Instead, they will penalize many Americans who believe that we are created male and female and that male and female are created for each other—convictions that the Supreme Court of the United States, in *Obergefell* v. *Hodges*, recognized are held "in good faith by reasonable and sincere people here and throughout the world."

As I explain in the report, current SOGI laws, including "Fairness for All," lack the nuance and specificity necessary for cases they seek to address. They take the existing paradigm of public policy responses to racism and sexism and assume that this paradigm is appropriate for the policy needs of people who identify as LGBT. This is misguided for both conceptual and practical reasons. Conceptually, sexual orientation and gender identity are unlike race and sex in important ways, as detailed in the report. And practically, the nature and extent of SOGI discrimination in the United States today are unlike racism and sexism when antidiscrimination laws were enacted (and unlike racism and sexism even today).

Put another way, the legal response that was appropriate to remedy the legacy of slavery and Jim Crow is not appropriate for today's challenges. Simply adding SOGI to far-reaching antidiscrimination laws and then tacking on some exemptions is not a prudent strategy. The policy response to the legitimate concerns of people who identify as LGBT must be nuanced and appropriately tailored. Antidiscrimination laws, however, are blunt instruments by design, and many go beyond intentional discrimination and ban actions that have "disparate impacts" on protected classes. Policymakers therefore need to rethink how to

formulate and implement policy in this area.

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LGBT Policy Needs

In responding to the legitimate needs of people who identify as LGBT while also respecting the religious freedom rights of all, policymakers must first assess the nature and extent of the problem and then determine whether governmental intervention is required and, if it is, what the appropriate remedy should be.

Once a legitimate need has been identified, policymakers must ask two questions:

> - Is a governmental response appropriate? Are the needs of such a magnitude and extent as to warrant government attention?
>
> - Is a government response required? Are social, economic, and cultural forces sufficient to address these needs on their own?

I discuss these questions in greater detail in the report. Unfortunately, many proponents of "Fairness for All" assume that adoption of SOGI laws in some form is both a good thing and inevitable, and their arguments focus largely on how to mitigate the religious liberty harms of such laws. They do not argue the need for SOGI laws robustly, with facts and studies, and thus elide the question of whether that need requires SOGI laws to address it as opposed to some less drastic measure or measures.

So if a government response is judged necessary, it must be tailored to address the documented need at the appropriate level of government (federal, state, or local) while doing everything possible to avoid burdening such rights as the freedoms of contract, conscience, religion, and speech.

Scope of Coverage: The Case of "Public Accommodations"

Any policy response to a legitimate need must be appropriately tailored. If a policy is justified by a housing or employment need, the scope of who counts as an employer or what counts as relevant housing must be defined accurately so that it can address the problem without unnecessarily burdening others. One problem with current SOGI laws, however, is that they apply to too many sectors of life and employ unreasonably expansive definitions. The scope of coverage—areas where the law applies, penalizes, and coerces—is far too broad.

For example, the Equality Act, the centerpiece of the Human Rights Campaign's Beyond Marriage Equality Initiative, would add "sexual orientation" and "gender identity" to virtually all federal civil rights laws covering race—"Public Accommodations, Education, Federal Financial Assistance, Employment, Housing, Credit, and Federal Jury Service"—and expand them beyond their current reach. Moreover, it is explicitly designed to shrink existing religious liberty protections. It also would stretch the scope of "public accommodations" quite far. The Civil Rights Act of 1964—the purpose of which was to integrate half of the continental United States after centuries of race-based slavery and Jim Crow—covered entities such as hotels, restaurants, theaters, and gas stations. The Equality Act would cover almost every business serving the public.

Another proposal, a 2014 SOGI law passed by the Houston City Council—but later repealed by a supermajority of the city's voters—would have covered "every business with a physical location in the city, whether wholesale or retail, which is open to the general public and offers for compensation any product, service, or facility." No inch of the public square would have been spared its costs to conscience, pluralism, and speech.

By contrast, at common law, the term "public accommodations" is used to refer to public utilities, common carriers, and other natural monopolies that have a general duty to serve the public. Likewise, the federal Civil Rights Act of 1964 does not apply to bakeries. Yet racial discrimination is not rampant at Dunkin' Donuts, not least because all incentives are aligned against it. Because "sex" is not a protected class for federal antidiscrimination law for public accommodations, federal law allows restaurants of any size to refuse to admit women. It also allows theaters and stadiums to turn away Democrats just for being Democrats and Republicans just for being Republicans. Yet culture and commerce prevent these and other forms of discrimination without any help from the law.

Thus, the first step to finding an appropriate policy solution is to consider the scope of coverage. A policy response must be tailored to the need that justifies it in the first place. This entails defining key terms such as "public accommodations" appropriately.

Definition of Key Terms: "Discrimination

The second step is to define "discrimination" accurately. The biggest problem with current SOGI laws, including "Fairness for All," is that they do not appropriately define what counts as discriminatory. To illustrate this, consider several different cases of putative "discrimination." The law must be nuanced enough to capture the important differences in these cases.

Invidious and Rightly Unlawful Discrimination. Racially segregated water fountains were one form of discrimination that took race into consideration—in a context where it was completely irrelevant—and then treated blacks as second-class citizens precisely because they were black. The entire point was to classify on the basis of race in order to treat blacks as socially inferior. As a result, such actions were rightly described as invidious race-based discrimination, and—given the entrenched, widespread, state-facilitated nature of the problem—they were rightly made unlawful.

Likewise, throughout much of American history, girls and women were not afforded educational opportunities equal to those available to boys and men. This form of discrimination took sex into consideration and then treated girls and women poorly precisely because of their sex, barring them from education in certain subjects or at certain levels despite being otherwise qualified. As with invidious racial discrimination, such treatment took a feature (in this case, sex) into consideration precisely to treat women as less than men. The law rightly deemed such actions invidious sex-based discrimination, and—again, given the entrenched, widespread, and state-facilitated nature of the problem—Title IX of the Education Amendments was enacted to ensure that girls and women received equal educational opportunities.

Appropriate and Rightly Lawful Distinctions That Are Not Classified as Discrimination. When Title IX was enacted in 1972 and its implementing regulations were promulgated in 1975, the law made clear that sex-specific housing, bathrooms, and locker rooms were not unlawful discrimination. Such policies take sex into consideration, but they do not treat women as inferior to men or men as inferior to women. They treat both sexes equally because they take sex into consideration (they "discriminate"—in the nonpejorative sense of "distinguish"—on the basis of sex) precisely in a way that matters: by appreciating the bodily sexual difference of men and women in things such as housing, bathroom, and locker room policy.

Would we really be treating men and women equally in anything but an artificial way if we forced men and women, boys and girls, to undress in front of each other? Justice Ruth Bader Ginsburg, in her majority opinion for the Supreme Court forcing the Virginia Military Institute to become co-ed, wrote that it "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements." Yet we certainly would be treating people unequally if access to intimate facilities were based on factors wholly unrelated to privacy, such as race.

As a result, policymakers did not consider sex-specific intimate facilities as discriminatory in the first place, and laws explicitly reflected that commonsense understanding while rightly declaring racially segregated facilities to be unlawful. The lesson here is that not all distinctions in fact should be deemed unlawful discrimination.

Not Discriminatory at All. If sex-specific intimate facilities are an example of lawful, legitimate policies that take sex into consideration, pro-life medical practices are examples of policies that are legitimate and lawful because they do not take sex into consideration at all. That only women can get pregnant has no bearing whatsoever on the judgment of the conscientious doctor or nurse who refuses to kill the unborn. The insistence of LGBT activists that men actually can become pregnant highlights the point: Pro-life medical personnel refuse to do abortions on pregnant women and "pregnant men" (i.e., women who identify as men).

Thus, we can identify three different types of cases:

> - Cases of invidious discrimination, in which an irrelevant factor is taken into consideration in order to treat people poorly based on that factor, as with racially segregated water fountains;
>
> - Cases of distinctions without unlawful discrimination, in which a factor is taken into consideration precisely because it is relevant to the underlying policy and people are not treated poorly, as with sex-specific intimate facilities; and
>
> - Cases with neither distinctions nor discrimination, in which a particular factor simply does not enter into consideration, as with pro-life doctors.

Any proposed policy intended to address the documented needs of people who identify as LGBT must take these categories into account without conflation. [1]

SOGI Discrimination: Real and Imagined. Consider a florist who refused to serve all customers who identify as LGBT simply because they identified as LGBT. That would be a case of invidious discrimination because the mere knowledge that they identify as LGBT should have no impact whatsoever on the act of the florist selling flowers, because there is no rational connection between the two.

Now consider Baronelle Stutzman, the 71-year-old grandmother who served one particular gay costumer for nearly a decade but declined to do the wedding flowers for his same-sex wedding ceremony. The customer's sexual orientation did not play any role in Stutzman's decision. Her belief that marriage is a union of sexually complementary spouses does not spring from any convictions about people who identify as LGBT. When she says she can do wedding flowers only for true weddings, she makes no distinctions based on sexual orientation at all.

This is seen most clearly in the case of Catholic Charities adoption agencies. They decline to place the children entrusted to their care with same-sex couples not because of their sexual orientation, but because of the conviction that children deserve both a mother and a father. That belief—that men and women are not interchangeable, mothers and fathers are not replaceable, the two best dads in the world cannot make up for a missing mom, and the two best moms in the world cannot make up for a missing dad—has absolutely nothing to do with sexual orientation. Catholic Charities does not say that people who identify as LGBT cannot love or care for children; it does not take sexual orientation into consideration at all. Its preference for placing children with mothers and fathers is not an instance of discrimination based on sexual orientation—and the law should not say otherwise.

Purported gender identity discrimination presents similar problems. The *Washington Post* recently reported on a woman who was suing a Catholic hospital for declining to perform a sex reassignment procedure on her that entailed removing her healthy uterus. In that report, the *Post* captures the conflation of real and imaginary discrimination:

> "What the rule says is if you provide a particular service to anybody, you can't refuse to provide it to anyone," said Sarah Warbelow, the legal director for the Human Rights Campaign. That means a transgender person who shows up at an emergency room with something as basic as a twisted ankle cannot be denied care, as sometimes happens, Warbelow said. That also means if a doctor provides breast reconstruction surgery or hormone therapy, those services cannot be denied to transgender patients seeking them for gender dysphoria, she said.

The two examples given, however, differ in significant ways. A hospital that refuses to treat the twisted ankles of people who identify as transgender simply because they identify as transgender would be engaging in invidious discrimination, but a hospital that declines to remove the perfectly healthy uterus of a woman who identifies as a man is not engaging in "gender identity" discrimination. The gender identity of the patient plays no role in the decision-making process: just as pro-life physicians do not kill unborn babies, regardless of the sex or gender identity of the pregnant person, doctors do not remove healthy uteruses from any patients, regardless of how they identify themselves.

As for the Human Rights Campaign spokesperson's claim that emergency rooms "sometimes" refuse to treat the twisted ankles of transgender patients, there is no evidence—including on the HRC's website—that it or anything similar in fact happens. Furthermore, insofar as this "sometimes happens," it seems reasonable to think that the media would focus so much attention on it that the hospital would reverse course within hours. It therefore seems highly unlikely that this alleged problem merits a governmental response.

In any event, if analysis of the scope and extent of a need and of the cultural and social forces at play indicates that people who identify as LGBT have a legitimate need that justifies governmental action, then the government's response must be limited to the proper scope and must accurately define what counts as "discrimination."

Need for Policy Shapes the Nature of Policy Response, Definitions, and Protections

"How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom" provides a framework for thinking through how to (1) identify the needs of people who identify as LGBT that government must address, (2) tailor the scope of any policy remedy appropriately, and (3) carefully distinguish which circumstances count as discrimination and which do not. If all of those steps are accomplished, another consideration comes to the fore: Any legal remedy must not penalize valid forms of action and interaction or burden the rights of conscience, religion, and speech.

Because there was such widespread, entrenched systemic and institutional racism throughout American society in the 1960s, for example, and because social and market forces were not sufficient to remedy the problem, it was appropriate for government to respond. That response was properly tailored to meet this need. It defined discrimination to include racially segregated accommodations, places of employment, and housing providers while providing thin religious liberty protections. Because the justification for antidiscrimination laws based on race was so strong and the need was so great, the law was appropriately broad with limited exemptions.

By contrast, consider laws that address discrimination based on sex. Because the nature of sex and the history of sexism did not represent an exact parallel to racism, the law did not treat them in entirely the same ways. To this day, for example, sex is not a protected class for federal antidiscrimination law as applied to public accommodations. Discrimination was legally defined so as not to include sex-specific intimate facilities, and much broader—and in some cases total—religious liberty exemptions were included. In other words, because the justification for laws against sex-based discrimination was weaker than the justification for laws against race-based discrimination, the legal response was more modest: It covered less terrain, defined discrimination more narrowly, and provided greater protection for religious liberty.

Any proposed policies intended to meet the needs of people who identify as LGBT would need to be crafted in a similar manner. Without greater evidence of the justification for specific policy responses—greater documentation of what the needs truly are—it is hard to be specific. In general, however, the need clearly seems weaker than the need for policies designed to deal with discrimination on the basis of race and sex. A policy response would therefore need to cover less ground, target discrimination more narrowly, and avoid undermining the rights of conscience, religion, and speech.

Policy Responses Matter Because of the Messages They Send

Getting public policy right matters both because the law is binding and because the law is a teacher. A law that burdens and penalizes nondiscriminatory actions and violates the rights of conscience, religion, and speech is purely and simply unjust, and an unjust law that supposedly applies to all Americans while exempting a select few from its provisions hardly represents "Fairness for All."

"Fairness for All" advocates who believe the truth about marriage, human nature, and human embodiment should consider how the law would teach future generations that this truth is a lie and that a lie is the truth. Any good that an exemption from the law preserves for religious communities will pale in comparison to the damage that the law does in its pedagogical function.

Some LGBT activists express concerns about the message that religious exemptions send. They claim that such laws teach that people have a "license to discriminate." But their criticism proves the point: SOGI laws will teach that legitimate conduct and judgments discriminate, are morally wrong, and should therefore not be given a "license." Much better, then, not to have the law define such actions as discrimination in the first place.

In the aftermath of the judicially imposed legal redefinition of marriage, the law should not be used to punish and hound those who continue to believe that marriage unites husband and wife. The law should respect their full and equal status as citizens. If *Obergefell* was about respecting the freedom of people who identify as LGBT to live as they wish, as LGBT activists claim, then that same freedom should be respected for Americans who believe in the conjugal understanding of marriage as the union of husband and wife. The law should not force these Americans into the closet.

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Notes:

1. There is a fourth category of "discrimination": nonmalicious oversight or neglect. Consider the type of discrimination the Americans with Disabilities Act is meant to combat. Before enactment of the ADA, many movie theaters, for example, did not have wheelchair ramps. This was the result of an oversight with respect to the needs of people with disabilities, not because of any hostility toward them. Because such oversights were so widespread and contributed to the exclusion of people with disabilities from

full participation in society, Congress acted. ↩