

Book Reviews

Debating Religious Liberty and Discrimination. By John Corvino, Ryan T. Anderson, and Sheriff Girgis. New York: Oxford University Press, 2017, 262 pp., \$21.95 Paper.

In 2015, the United States Supreme Court, in a 5-4 decision, redefined the institution of marriage by ruling that same-sex couples possessed the “right” to marry. At the time, many cultural observers believed that the marriage debate had finally been settled. However, in the two years since the decision, the opposite has proven true.

Rather than resolving the twenty-first century’s most hotly debated culture war issue, *Obergefell* merely expedited the new frontier of the culture wars: the inevitable collision between erotic and religious liberty. In fact, the confrontation between these liberties—the former, championed by LGBT revolutionaries, and the latter, enshrined and protected by the United States Constitution—has been at the center of several high-profile and contentious legal battles across the country over the last two and a half years, particularly in wedding-related professions, as Christian photographers, florists, bakers, and custom service professionals have faced fines, lawsuits, and even jail time for refusing to participate in ceremonies that violate their religious convictions.

This ideological conflict was foreseeable. During *Obergefell* oral arguments, Donald Verrilli, President Obama’s Solicitor General, conceded that legalizing same-sex marriage would present a challenge to religious liberty. When pressed by Justice Alito on whether Christian colleges would be forced to provide housing to same-sex couples if marriage were redefined Verrilli replied, “It’s certainly going to be an issue. I don’t deny that.”

Prophetically, Verrilli’s remark foreshadowed the post-*Obergefell* political and legal landscape increasingly antagonistic to institutions and professionals guided by sincere religious convictions. This includes private adoption agencies, hospitals, charities, and universities. Despite Justice Anthony Kennedy’s assurance that Americans holding traditional

beliefs about marriage and human sexuality based on “decent and honorable premises” would be treated with respect and not “disparaged,” the intervening years have proven otherwise. LGBT advocates, not content with “marriage equality,” are now campaigning for SOGI (sexual orientation and gender identity) laws that would abrogate the liberty of those with religious convictions. Conservative Christians have responded with pleas for tolerance and an open public square that respects a diversity of opinion.

In the clash between erotic and religious liberty, emotions are raw and tensions are high. Conflicts surrounding religious liberty and discrimination touch on a plethora of issues that meet at the intersection of morality, law, and public policy. Unfortunately, debate on these issues rarely moves beyond soundbites and talking points and often devolves into personal attacks. It’s in this context that *Debating Religious Liberty and Discrimination* presents a welcome and refreshing entry into the discussion. Clear, compelling, and civil, the authors discuss legislation such as the Religious Freedom Restoration Act (RFRA) and the First Amendment Defense Act (FADA), antidiscrimination laws, the nature of dignity, the significance of conscience, and offer a needed model for debating society’s most contentious issues.

On one side is John Corvino (PhD, University of Texas at Austin), a philosopher and longtime LGBT rights advocate, who argues in favor of SOGI laws, questions the need for exemptions from neutral laws of general applicability, calls for demoting RFRA religious liberty claims from “strict scrutiny” to “intermediate scrutiny,” and offers a defense of antidiscrimination laws. He also advances an expansive view of dignitary harm. Corvino is the Chair of the Philosophy Department at Wayne State University in Michigan.

On the other side, Ryan T. Anderson (PhD, Notre Dame), a Roman Catholic philosopher and Sheriff Girgis (JD, PhD candidate, Princeton), a conservative legal scholar, construct an ethical and philosophical framework in support of broad religious liberty protection, argue against SOGI legislation, and show through recent examples (such as Hobby Lobby and Kim Davis) how the basic good of religion can be protected without compromising socially progressive policy goals. In short, they present a vision for how both sides of the debate can co-exist. Anderson is

a senior research fellow at The Heritage Foundation and Girgis is finishing his PhD in philosophy at Princeton.

In chapter 1, Corvino presents his argument. He begins by contending that current law (mainly the Religious Freedom and Restoration Act [RFRA]) goes beyond safeguarding religious liberty but instead protects “majority religious privilege” (30). He argues that RFRA was an “unnecessary overaction” to *Employment Division v. Smith* (1990), a Supreme Court decision that ruled against Native Americans denied unemployment benefits for testing positive for a drug used in a religious ritual. Although he does not advocate for RFRA’s repeal, he argues that RFRA should be modified to require “intermediate scrutiny” (instead of “strict scrutiny”) for incidental burdens on religion. In short, Corvino believes that in a religiously diverse nation, “any system requiring strict scrutiny for laws burdening religious beliefs is ‘courting anarchy’” (50). Due to the wide variety of religious beliefs in the United States, Corvino questions the wisdom of a “widespread exemption regime” which—borrowing language from *Reynolds*— would effectively allow every citizen to “become a law unto himself” (47).

Although Corvino believes some exemptions to generally applicable laws are acceptable, he believes that current exemptions unnecessarily favor religious people. He argues that exemptions from antidiscrimination laws “place burdens on the very minorities whom the law is intended to protect” (66). Strikingly, he concludes his lengthy discussion on exemptions (52-68) by noting, “Just because people’s religious beliefs *can* be easily accommodated, it does not follow that they *should*” (68). In Corvino’s view, some religious beliefs are so inherently offensive that they must be repudiated rather than accommodated.

Another important aspect of Corvino’s argument is his discussion of antidiscrimination law. In Corvino’s view, antidiscrimination laws provide necessary protections for LGBT people. He contends that existing laws should be expanded to cover the contested categories of sexual orientation and gender identity. Remarkably, he extends his argument further and posits that the law should take into account “dignitary harm,” a concept which he defines expansively as “(1) treating people as inferior, regardless of whether anyone recognizes the mistreatment; (2) causing people to *feel* inferior, intentionally or not; and (3) contributing to systemic moral

inequality, intentionally or not” (74). Dignitary harm involves the negative experience of being treated as morally inferior. Because dignitary harm can lead to material harm (discrimination that limits access to goods and services), Corvino argues that the law should address both material and perceived dignitary harms. Corvino contends that these laws are necessary to ensure LGBT people “have a place at the table in public life” (77). However, as Anderson and Girgis note in their reply, Corvino’s proposal comes close to codifying into law the curtailment of moral judgement which would have the unintended effect of nullifying religious liberty as well as free speech protections.

In chapter 2, Anderson and Girgis advance an ethical and philosophical framework in defense of religious liberty. They begin by making the case for the presence of basic human goods which they define as “ways of being and acting that it makes sense for us to want for their own sake” (125). These goods constitute the elements requisite for human flourishing. Anderson and Girgis argue that in a free society citizens must be free to pursue these goods unencumbered. In fact, the sole purpose of the state is to empower people to adequately pursue basic goods. They then make the case that religion should be considered a basic good. As the locus of efforts to achieve harmony with the ultimate source(s) of meaning, religion deals with man’s perennial quest to answer transcendent questions about reality. Thus, achieving harmony with the transcendent—whoever or whatever that is determined to be—produces integrity. Thus, religion is a basic human good, and as such, deserves protection; all impositions on religion should be avoided whenever reasonably possible (131).

Even if religion is recognized as a basic good why should we protect religious liberty over and above other civil liberties? Why are laws like RFRA necessary? Anticipating these questions, Anderson and Girgis make the case that the underlying good of religion is more fragile than other civil liberties (134). Religion is fragile because it requires choosing particular options to avoid deficiency. For example, a devout Sikh man would experience deficiency if he were prohibited from wearing his Dastar, a Sikh-specific head-covering. It would not be enough to provide him with a baseball cap to cover his head. The analogy illustrates the underlying principle: one is deficient in the basic good of religion if he acts against what he judges to be his religious obligations. This fact is what separates

religious and conscience claims from other civil liberties. As Anderson and Girgis explain, “Of no other civil liberty can we say that an easily identifiable burden on it would pressure you into deficiency in a whole basic good” (136).

From this basis, Anderson and Girgis argue in favor of laws such as RFRA and the proposed FADA (First Amendment Defense Act) legislation that provide broad exemptions from laws that curb religious exercise unless enforcing the law is the least restrictive means of serving a compelling government interest (153). They argue that the burden of proof should favor religious claims due to religion’s inherent fragility. Thus, a substantial burden on religious exercise is one that prevents or unreasonably raises the cost of living by religious convictions. This principle was recognized by the majority in the *Burwell v. Hobby Lobby* decision (In 2015 the Supreme Court ruled for-profit corporations could be exempt from a regulation that violated its owners’ religious convictions if there is less restrictive means of furthering the law’s interest). Whereas Corvino regrets the *Hobby Lobby* decision, Anderson and Girgis commend the ruling as a faithful application of the law in step with the spirit of the Constitution.

Anderson and Girgis devote the last section of their chapter to antidiscrimination laws. Although they oppose SOGI laws, they argue that antidiscrimination laws are appropriate when the need for the ban is high and the cost of enforcement is low (179). They argue that the Civil Rights legislation in the 1960’s meets these standards but the current gay-rights movement does not because unlike African Americans in the mid-twentieth century, LGBT people today do not face systemic, widespread material and dignitary harms. Comparing the movements, they note, “The most important difference between laws on SOGI and race... is this: over and over, SOGI laws impose gratuitously on important personal and social goals ... they’re designed and applied to needlessly penalize conscientious refusals to participate in morally controversial actions to which many people reasonably object” (185). Because LGBT people are not locked out of markets or denied basic services, SOGI laws are unnecessary and worse, do not avoid needlessly burdening other interests (such as religion).

Chapter 3 contains Corvino’s reply to Anderson and Girgis. Notably, he responds to his counter-point authors’ discussion of religion as a basic good. Although he agrees with them to a point, he argues, “My claim is

that integrity . . . may lack value when the underlying belief is *badly* wrong” (211). He adds, “In addition to caring about people’s internal harmony, we should also care about their getting things right” (212). However, as Anderson and Girgis point out in their reply, such a position comes precipitously close to making the government an arbitrator of theological truth claims. Finally, Corvino reveals one of his chief concerns—LGBT sensibilities—in his closing section when he defends himself against Anderson and Girgis’ charge regarding the curtailment of free speech. Corvino explains, “The answer to that question is that in general, actions pose greater risks than speech . . . the speech/action distinction is thus a reasonable if necessarily imperfect place to draw a legal line with respect to dignitary harms” (226). Corvino concludes by affirming his support for religious liberty but betrays abiding suspicion concerning the actual motivations of those with traditional and religious convictions related to marriage and sexuality.

Concluding the book, Anderson and Girgis reply to Corvino by articulating their earlier positions, specifically relating to the basic good of religious integrity and antidiscrimination laws. They respond to what they perceive is Corvino’s mischaracterization of the *Hobby Lobby* decision and offer a rejoinder to Corvino’s SOGI-race analogy.

In short, it is difficult to think of authors better equipped to write a book on this topic. *Debating Religious Liberty and Discrimination* provides readers with a remarkable opportunity to learn about the relevant issues surrounding the religious liberty debate from top scholars on both sides of the ideological spectrum. A helpful introduction to the issue, the book focuses on the most significant issues related to current public policy discussions. Admirably, the book helpfully applies potentially abstract topics such as the purpose of government and the nature of basic human goods to the current debates concerning religious liberty and discrimination.

Although at points the discussion (particularly Anderson and Girgis’ framework) requires reflection on philosophical principles, the authors are careful to explain each concept and the technical terminology in a way that non-specialists can understand. Overall, the book is clear and easy to follow. The final chapters (where the authors respond to one another) offer readers a parting glimpse into the significant yet complex arena of public

policy by revealing areas of agreement as well as points where further dialogue is needed. Intellectually rigorous, provocative, and civil, *Debating Religious Liberty and Discrimination* is the best, most up-to-date book on a subject that Christians should care about and be informed on.

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