Becoming Free

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Becoming Free: Autonomy and Diversity in the Liberal Polity.


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6. Sexuality, Neutrality, and Autonomy in the Liberal Polity

The subject of sexual orientation and practice differs in several ways from other issues in this book. First, sexuality is typically viewed as a private matter. Like cultural or religious affiliation, it may be deemed of no concern to public authority; even more than culture or religion, it falls within the sphere of the intimate life of the individual. Thus, it is doubly private. Second, this attribution of privacy to sexuality admirably suits people who would preserve the traditionally dominant consensus that nonconformists can comfortably exist on the fringes of the polity and need not and should not be the subjects of legislation that appears to constitute approval of their practices. It is sometimes forgotten, however, that public authority does take notice of sexuality not only by confining civil marriage to contracts between men and women but also through legislation that in many states makes consensual oral and anal sex a crime even behind closed doors. Finally, my focus on the capacity for autonomy may seem to accord poorly with the topic of sexuality. People who champion the right of homosexuals to equal recognition typically ground these claims on the unchosen nature of sexual orientation, arguing that individuals should not suffer disadvantages because of unchosen constituents of their identities. I shall maintain, however, that although sexual orientation, like one’s initial cultural or religious identity, is unchosen, how one handles or responds to that orientation is chosen or affirmed. Like cultural membership and religious affiliation, sexual orientation should be respected in a liberal polity not because it is unchosen but because it is a central constituent of personal identity.

“It is only a slight exaggeration to say that the two main opinions in Bowers v. Hardwick make the case look like a battle between Yahoos and perverts.” In the case to which Mary Ann Glendon refers, the Supreme Court upheld the constitutionality of a Georgia statute criminalizing sodomy in the home of the man convicted. The conflicts that develop about how to frame the debate about a community’s shared conceptions of the good are well exemplified in this case. Glendon’s comment exemplifies a widely held view that “Yahoos” and “perverts” share equal moral status in their efforts to influence the stance
of the liberal polity on matters of sexuality in general. This conviction is shared by William Galston, who with regard to Bowers suggests that “public recognition of private conduct is no less a part of American history than is the quest to cast off public restraints.” Therefore, the recognition of cultural differences among the states by upholding antisodomy laws suggests the value “of honoring and accommodating the claims of both juridical liberalism and moral traditionalism.” Whatever its intrinsic value, he concludes that the function of moral traditionalism is that of promoting the stability of the liberal political order as a community with its own set of defining beliefs and values. The subtext of views like Glendon’s and Galston’s is that a compromise exists that, if not strictly neutral, gives equal consideration and respect to strongly held convictions on each side of a disagreement that arouses strong emotions.

I have maintained that political arrangements are not strictly neutral. To the extent that they are aimed at neutrality, they do so within a context that weighs a particular set of social facts in deciding whether specific policies embody civil harm or benefit. As we saw in the case of Sabbath observance, whether one considers this a choice or a duty determines one’s conclusions as to what policy serves neutrality. To the extent that a degree of neutrality can be achieved, this extent must be measured or judged by a standard independent of neutrality itself. In my view, this standard should be that of the promotion of the capacity for autonomy, and the goal should be that of autonomy-based neutrality. Theorists who value diversity over autonomy, however, suggest that the principle of equal respect does not allow a privileged position for personal autonomy, which is simply one of many conceptions of the good. Therefore, they argue, if neutrality is to be measured by a standard independent of neutrality, diversity-based neutrality, rather than autonomy-based neutrality, best exhibits equal respect for individuals with divergent conceptions of the good. But for theorists like Will Kymlicka, David McCabe, and me, “The central thing worth respecting in human beings is their capacity for rational self-government and for shaping their lives as they see fit.” The norm of equal respect, like that of neutrality, then, does not conflict with the centrality of autonomy but is in fact grounded in the capacity for autonomy.

On this interpretation, it is not individuals’ conceptions of the good that merit equal respect but the individuals themselves who hold these conceptions. Liberals respect individual conceptions of the good because they are central to these individuals’ self-understandings. “The state’s obligation to respect conceptions of the good derives from its obligation to respect individuals” (73). The norm of equal respect then does not privilege a specific conception of the good but allows the liberal polity to promote or endorse virtues that enhance indi-
viduals' abilities to pursue self-chosen activities and ideals and to identify or determine the values that most merit their allegiance (77).

This account of autonomy-based neutrality reinforces the argument that culture, religion, and sexuality, because of their centrality to individual identity, belong in the realm of constitutive choice. If these affiliations are undertaken or maintained in a context of critical reflection on one's projects and goals, they are expressions of autonomy. On this interpretation, I cannot agree with scholars like Glendon and Galston that policies respecting moral traditionalism offer an acceptable compromise. Although they recognize a diversity of opinion between traditionalists and nontraditionalists, where such compromises hold sway they sacrifice the autonomy of nontraditionalists to the comfort of traditionalists.

I have maintained that the liberal polity's hospitality to diversity does not mean that it must accept all cultural and religious practices, including those that are illiberal. For me, illiberal practices are those that interfere with the development of the capacity for and the exercise of personal autonomy. In the area of sexuality, unacceptable practices would include but might not be limited to pederasty, incest, rape, and female genital alteration. In my view, however, most sexual practices among consenting adults—whether homosexual, bisexual, or, for that matter, heterosexual—do not interfere with the development of the capacity for autonomy or with the exercise of it; instead, they may be expressions of autonomy. Many states have not legislated against homosexual practices, some have removed prohibitions, and still others do not enforce such laws as do appear on the statute books. This indicates that on some level, homosexual conduct is considered acceptable, at least in the sense that it is tolerated.

Individuals who engage in or defend an acceptable practice, I believe, should receive the same public consideration and respect as those who espouse other acceptable practices if we are to accord equal respect to varying expressions of personal autonomy. Otherwise, we are according greater consideration to those who would judge others' ways of life than to those who simply wish to form and pursue their own conceptions of the good without interference. I believe that a liberal community in particular should be open to consideration of diverse beliefs and practices, some of which over time contribute to the shared values of the community. Public distinctions between “better” and “worse” among acceptable practices impoverish the community both by foreclosing debate and possible revision of its shared understandings and by foreclosing to individuals sources of self-criticism that may enlarge their own understandings.
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The subject of sexual orientation provides an interesting contrast with that of religious belief. Most people would accord equal consideration and respect to all individuals who engage in religious practices considered acceptable in a liberal polity. They would agree that religious practice is a matter of personal obligation or choice. They would not argue that respect for diversity requires that public policy treat the convictions of those who dislike certain manifestations of religious belief as worthy of equal consideration with the convictions of those who simply wish to engage in the practices dictated by their beliefs without loss of respect or civic standing. Yet on issues of sexuality, many people move in the opposite direction. They suggest that although individuals with distasteful sexual practices should be accorded grudging toleration, they should adopt a low profile and need not receive respect equal to that accorded to other practices. They argue that although sexuality is a personal matter, it is also a fitting subject of public regulation even when its manifestations affect only consenting adults. Finally, they argue that liberal hospitality to diversity means that persons who find sexual practices distasteful or think them wrong possess an equal entitlement to shape public policy that governs them as do those individuals whose practices they are.

Because sexual orientation, like cultural membership and religious faith, is critically important to personal identity, I believe that individuals who engage in acceptable practices in all these areas should be accorded the same measure of consideration and respect. Moreover, because of its centrality, the degree to which homosexuality is a choice does not really matter in the end. Religious conservatives may accept my argument that manifestations of identity can exemplify constitutive choice with regard to faith but may reject its applicability to sexuality. Progressive secularists, on the contrary, may accept this point with regard to sexuality but may resist its application to matters of faith. That is, conservatives may be more tolerant toward sexual orientation they understand as unchosen, whereas progressives may be more sympathetic toward religious faith that does appear to be chosen, as in some conversion experiences. I hope, however, that the parallel may help those of each viewpoint to better understand the other. If religious faith is the area in which the liberal polity is often most willing to accord equal consideration and respect to divergent practices, homosexuality is currently an area in which according this same consideration and respect is particularly controversial. If we respect religious identity as potential expressions of autonomy, we should respect sexual identity similarly. Toleration requires respect, not simply bare permission, for ways of life frowned on by the majority.
Toleration and Respect

The idea that the liberal polity should accord equal respect to homosexuality may be grounded either on a substantive argument from personal autonomy, or on a more strategic argument that grudging toleration does not promote the stability that proponents of this stance desire. The opposing positions in the substantive argument once again demonstrate the point that conflicting interpretations of civil harm and benefit stem from conflicting views as to which set of social facts is the correct measure of these effects. One moral view of sexuality embeds it in doctrines that valorize procreation and the perpetuation of traditional gender roles; a second view accords to sexual expression an intrinsic value in the context of intimate associations. Legitimating the latter view, whether by the repeal of antisodomy laws or by the recognition of homosexual marriage, threatens not only the conventional understanding of the good of sexuality but also the traditional assumption that this conventional understanding is a shared one. Nevertheless, on an argument from personal autonomy, individuals must be able to scrutinize and to reflect critically upon the meaning of sexuality and intimate association in the context of their projects and goals, as they do in other areas.

Karen Struening expresses this view by suggesting that freedom in intimate association is analogous to freedom of religion and expression; the process of forming our own judgments in these areas is a central constituent of self-definition. For her, "The regulation and repression of non-coercive and consensual sexual practices between adults is a direct assault on moral pluralism."

The dominance of social convention sacrifices our ability to determine both what we do and who we are or who we become. In Kymlicka's terms, we sacrifice not only our capacity to pursue self-endorsed lives but also our capacity to examine, question, and revise—or reaffirm—our current projects and goals. Although admitting the legitimacy of competing understandings of the good can complicate the efforts of the cultural or religious traditionalist to perpetuate his own mode of life, "we do not take from him what he needs to live his life" (512), as we would be taking from the dissident by censoring his practices concerning his own life. I concur in Struening's avowal that one's sexuality belongs to oneself and that sexual expression toward consenting adults should not be regulated by others, regardless of majority opinion (513). "Sexuality, like religious and moral beliefs, is our own in the sense that without it our ability to be self-determining and self-defining is seriously compromised" (522).

Many people will disagree with this sort of argument. Some who agree with it, on the other hand, suggest that for strategic reasons, liberals should not insist
on equal respect for dissenters, and that in doing so, they too often conflate toleration with approval. Steven Kautz, for example, asserts that liberals tend to request not only permission but also esteem, and to bestow not only toleration but also respect and praise, on unpopular ways of life. But for Kautz, this tendency in effect denies that private choices and pursuits are indeed private. The vindication of the right to equal concern and respect requires "that the community undertake to teach each citizen what to think: 'sensitivity' is the new liberal cousin to republican 'virtue.'" Although Kautz does not explicitly address the issue of sexual orientation and practice, his argument fits it well. For him, one of liberal politics' "most splendid achievements" is its protection of liberal individualists who are "moral strangers" to the community, even when these strangers are neither understood nor admired. These individuals should reciprocate by refraining from demanding more than grudging tolerance, thus honoring ordinary citizens "by refusing to repay this respectable generosity with contempt." Some ways of life may be privately tolerated or even admired, without being openly praised.

On the surface, Kautz may appear simply to be arguing against extremities of political correctness, wherein some people advocate not only acceptance of but also enthusiasm toward most manifestations of diversity. He criticizes a communitarian emphasis on constitutive attachments in defining the individual (621), suggesting that liberal individualists or "moral strangers" do not need praise but only permission. A community that offers only grudging tolerance "is consistent with self-respect though not a right to equal respect" (628). The individualist seemingly has recourse to an extracommunal standard of judgment outside the dominant consensus, which standard underpins self-esteem and obviates the need for self-definition by a community standard. This stance initially appears compatible with my conviction that individuals should live their lives from the inside and engage in critical reflection on their projects and goals, revising or reaffirming these so that they are self-endorsed. If the circumstances of toleration combine the existence of disliked practices with voluntary noninterference in these practices, grudging toleration would seem to meet this test.

I believe that a stance of grudging toleration, however, implies that individuals who choose or affirm unpopular ways of life and their supporters should simply be grateful for this modicum of toleration and should withhold potential demands for measures that would end public discrimination and prevent private discrimination. The hard work of liberal citizenship requires the equal and civil treatment of others in the public square, whatever our private
sentiments. Those who are different should not be pressured to conform by their silence any more than by their behavior. Individuals should be recognized or respected as whole persons, even when their practices are disliked, not encouraged or pressured to sacrifice the conditions of their own autonomy to the comfort of the majority.

Kautz, on the other hand, relies on a consensus wherein individuals measure their beliefs and practices by the standards of choiceworthiness espoused by the community, being accorded full social acceptance for some but only grudging permission for others. From a strategic standpoint, Kautz argues, many liberal interests are best defended not through direct arguments for liberal equality or autonomy, but indirectly, by persuading advocates for both democratic equality and republican virtue to leave liberals—dissenters from the dominant consensus and their supporters—alone. It is both dangerous and futile, he argues, to attempt to instantiate a liberal orthodoxy grounded in moral autonomy or equal respect. "Acrimonious fights, now called culture wars, will be evaded only if liberals do the evading." That is, because dissenters and their supporters will lose, they had best avoid the fight altogether. More specifically, "The law at issue in *Bowers v. Hardwick* is surely illiberal; but it does not follow that every failure of respect . . . would be illiberal, even if these failures were to find their way into some of the laws of the community" (74). To Kautz, it seems that to protect unpopular practices is to legitimate them, and publicly to legitimate them is to praise them. In sum, Kautz believes that civil peace requires a degree of hypocrisy. Ordinary citizens and nonconformists should collude in a settlement in which dissenters exchange silence for toleration, with the unspoken acquiescence of both parties.

Although every political community, as we have seen, ranks some values above others, the essential question is how this hierarchy is to be determined. Alasdair MacIntyre emphasizes that one cannot seek the good only as an individual. Notions of worth and merit vary from one community to another, along with the practices, institutions, and traditions of these communities. These notions become determinate for an individual only within the context of that individual's social identity, functioning, in Kymlicka's terms, as the social context or context of choice that grounds the individual's subsequent affirmations and choices. The difficulty is that communally determined notions of worth and merit too easily allow individual worth to be judged primarily in terms of how well one upholds these apparently constant norms, which in turn are grounded "within the dominant understanding of a particular community's traditions." On this view, argues William Lund, "citizens need to discuss and
decide on a substantive conception of the common good and then use it to measure the legitimacy of their private beliefs and desires.”

Reliance on current norms does not suggest neutrality on a basis of autonomy or diversity toward individual definitions of the good but suggests that “we treat people as equals when we hold their beliefs and conduct up to currently accepted understandings of our traditions and shared purposes.” This latter practice, first, raises, “perhaps to prohibitive levels, the costs of citizens revising their conceptions of the good away from a recognized consensus.” And second, it also makes it “difficult for the community as a whole to have enough experience with, or to hear arguments about, alternatives that might cause it to revise or even reject its current understandings” (588). Rights claims by unpopular groups and their supporters, for instance, pose a threat for those who would enshrine current norms. “Rights talk . . . may lead them away from publicly recognized modes of flourishing” (591). In other words, enshrining the current context of choice not only does not encourage but positively discourages critical reflection on individual or collective projects and goals.

These observations introduce a contradiction in views like Kautz’s. His worry about a political entitlement to equal concern and respect is based on the fear that this entitlement calls on the community to teach citizens what to think. That is, if public policies mandate equal treatment for those who adhere to unpopular beliefs and practices, the community is inculcating values that promote equal respect. Yet is not the purpose of exchanging toleration for silence to inculcate and reinforce dominant understandings of our traditions? The distinction certainly functions to teach citizens what to think, even though this teaching is indirect. It inculcates values that can be used to measure the legitimacy of our private beliefs and desires against the communal consensus, eliciting and rewarding some beliefs and practices but discouraging and stigmatizing others. Thus, the distinction between grudging tolerance and equal respect, if not praise, conveys a message with consequences for both individual and collective understandings of the good.

Moreover, as we have seen, Kautz believes that self-esteem springs most properly from sources beyond the community. But in that case, how can either approbation or its absence influence beliefs and practices in the ways that he desires? He cannot have it both ways. Either communal attitudes shape behavior, in which case he should admit that citizens are properly being taught what to think, or else individuals look to transcendent sources of affirmation beyond communal efforts, in which case the distinction between grudging permission and affirmation will mean little. As it is, he conveys the impression that teaching citizens what to think is abhorrent when it inculcates equal respect for
beliefs and practices repugnant to the majority. But teaching citizens what to think is apparently acceptable or desirable when it promotes beliefs and practices that reinforce the current consensus on these matters.

Accounts of toleration that would defer to the dominant understanding like Kautz’s appear to result from an overlapping consensus but constitute in reality a modus vivendi: we praise worth and merit as defined by the current consensus, whatever its content, and accord grudging permission to others, in order to preserve civil tranquility. The community’s shared general conception of the good is based on the dominance of some reasonable comprehensive doctrines and the self-censorship of others, rather than on a truly overlapping consensus to which all participants are equally welcome to contribute. A modus vivendi model of the political order is not intrinsically illegitimate. Patrick Neal, for example, proposes a resurrection of “vulgar” Hobbesian liberalism, noting that neutrality theorists tend to overestimate both the instability of the modus vivendi model and the stability of their own models. In the face of pluralistic conflict, those attempting neutrality toward comprehensive conceptions of the good ignore the importance of a rough equality of power among competing groups to check both each other and the state. “Is it really the case that the continued stability of existing liberal regimes is in any way whatsoever dependent on a professor of philosophy’s ability to define the terms of an overlapping consensus among alternative conceptions of the good life?”

Rawls, however, suggests that an overlapping consensus is characterized by greater stability than is a modus vivendi, as people’s moral commitments to the consensus itself will outweigh any tendency for their support to vary in proportion to the strength of their own views in society. Yet if respect, even civic respect, consisting in equal and civil treatment of those whose practices are unpopular, is a reward only distributed in accordance with the individual’s conformity to the dominant consensus, one of two conclusions follows. First, individuals unable to secure a commitment to equal respect for their own identities will demand this if and when the strength of their own view or the balance of power—that is, what appears to be the dominant understanding—makes this practicable. Second, if the balance moves to weaken unpopular groups still further, the ostensibly overlapping consensus may be interpreted to require even less respect for them than before. And because the consensus is interpreted in terms of the current understanding, the likelihood is great that the dominant view will gain support over time. Thus, what appears to be an overlapping consensus turns out to operate as a modus vivendi, rooted in the actual convergence of interests at given points in time. To put this differently, the stability of an overlapping consensus may be secured by a modus vivendi at the
metatheoretical level, whereby certain conceptualizations of concepts of the
good command insufficient support to become part of the dominant consen-
sus and therefore remain hidden behind a veil of ignorance where prudence
dictates that they remain.

Moreover, even if citizens do arrive at a consensus that they will continue
to support, regardless of the relative strengths of differing viewpoints, in a lib-
eral polity this consensus is better developed by forthright debate among indi-
viduals who are accorded equal respect than by the covert shaping of beliefs
and practices by communal attitudes that both emanate from and reinforce the
already dominant consensus. We maintain the right and the desire to influence
the terms of the way of life to which we subscribe. For some, our history and
tradition point in the direction not only of liberty of association but also of
equal respect. In the case of sexual orientation, liberty may be exemplified by
protecting intimate relationships from unwarranted state interference, and
equal respect may be interpreted to require protection against discrimination
on the basis of the sort of intimate relationships in which one engages. But
these interpretations must be reflected on and discussed. In sum, there will
always be a dominant consensus, but its construction should be both an ongo-
ing and an interactive process. As Brian Walker writes, “Fighting for tolera-
tion is not a matter of attempting to align other groups with a preexisting order,
but a form of dialogue in the course of which the picture of what toleration is
and requires becomes clear. By attempting to build my ideal of toleration on
the terrain of the other, I am myself affected by new and alien ideas, and per-
haps my own view is changed.”

Autonomy, Affirmation, and Choice

If we practice toleration by refraining from using the power we possess to
interfere with practices we dislike or of which we disapprove, most minimally,
suggests Andrew Murphy, toleration “denotes forbearance from imposing
punitive sanctions for dissent from prevailing norms.” Although we often
associate punitive sanctions with actual legal prosecution and punishment, even
engagement in legal practices that are unpopular may threaten social, eco-
nomic, or political disadvantage to their practitioners. And critics of unpopu-
lar practices, both religious and sexual, sometimes have implied or do imply
that practitioners willfully choose their ways of life and may perhaps be reed-
ucated through social pressure. Public affirmation of one’s religious or sexual
identity may have serious implications for one’s civic status. Although one
strategy would be to resist social pressure by arguing that sexual orientation or
religion is unchosen and therefore not to be penalized, a more promising strategy, I think, is to assert that these manifestations of identity are constitutive choices and should not be penalized because they are expressions of autonomy.

PROHIBITIONISTS AND LIBERATIONISTS: THE PROCRUSTEAN BED

For some commentators and social critics, the question of whether homosexuality is an innate or a chosen condition has no meaning. To people who would discourage, penalize, or prohibit it, observes Andrew Sullivan, homosexuality is simply a deviation that perverts the essentially complementary natures of male and female. Human identity is basically heterosexual, and homosexual behavior is an aberration in which some are trapped, out of conformity with their true natures. On this view, homosexual orientation is a contingent quality or a behavior, like lying, wasting money, or smoking, from which individuals may and should properly be diverted.17

The reverse image is that of the liberationists, for whom also homosexuality is not a naturally defining condition. It is instead a social construct of relatively recent vintage that should be cast off if individuals are "to be liberated from the condition of homosexuality into a fully chosen form of identity, which is a repository of individual acts of freedom" (57). Persons understand themselves as homosexuals only because of the social construct into which they are born and come of age (62). In other words, where prohibitionists would address deviant acts by proscribing them, liberationists would remove the label of deviance, which is itself a social construct. Where prohibitionists view these acts of aberrations from the normality of heterosexuality, liberationists see the labels themselves as aberrations in terms of a range of bodily pleasures that defy stringent classification.

Both the prohibitionist and liberationist interpretations of homosexuality involve contradictions. Sullivan himself recognizes the objective existence of a homosexual orientation independent of whether or how it is expressed, composed of sexual desire and emotional longing, central to individual identity, and as involuntary in most cases for homosexuals as a heterosexual orientation is for heterosexuals (17). The Roman Catholic Church in 1986 acknowledged that because homosexuality is an innate predisposition or unchosen condition in some people that is not itself a sin, the dignity of these individuals should be protected. Human beings in the likeness of God cannot be reduced to their sexual orientation (38). Yet the Church maintains that a tendency toward a morally evil practice is itself an objective disorder, although apparently not of
the sort, like Down syndrome or epilepsy, that renders actions following from the condition blameless. Analogies to other disordered conditions do not help prohibitionists, Sullivan argues. Although the renunciation of “alcoholic acts” liberates the individual’s true nature and potential for self-giving as in marriage, the renunciation of homosexual acts only liberates the homosexual “into sacrifice and pain, barred from the act of union with another that the Church holds to be intrinsic to the notion of human flourishing in the vast majority of human lives. Homosexuality is a structural condition which, even if allied to a renunciation of homosexual acts, disbars the human being from such a fully realized life” (44). The prohibitionist weakness is that homosexuality is an unexpungeable trait that recurs in each generation. A liberal culture that endorses moral autonomy can view homosexuality as a pathology that merits compassion. But if “sickness” is permitted, homosexuality can be neither prohibited nor stigmatized (49–50).

The liberationist weakness involves a different contradiction. Although sexual orientation may be viewed as an oppressive social construct, human beings always possess some separation from their cultures and some control over their identities, including a space within which they can operate as they will. Thus, suggests Sullivan, they “are not social constructions all the way down” (75). Individuals properly resist the established heterosexual order, but they should also resist the contemporary orthodoxy of liberationist outers who would reveal the sexual practices of others to destroy the tyranny of the closet, and for whom the aim of subverting the structure obliterates personal rights (75–83). The contradiction is that outers are enforcing their ideology with the same zeal that many prohibitionists use in enforcing their own. Sullivan is implying, then, that individuals should be self-defining in their sexuality as well as in other facets of their lives. It is as asphyxiating to be defined by others in the cause of sexual liberation as in the name of preserving traditional categories of sexuality.

Both prohibitionists and liberationists, I believe, teach us something about contexts of choice. Although the prohibitionists ricochet between viewing homosexuality as a blameless natural condition that nonetheless bars individuals from true self-fulfillment, and as an immoral activity that therefore should be proscribed, neither perspective allows for the exercise of autonomy. As a blameless condition, homosexuality is outside the individual’s control. As an immoral activity, it is presumably a matter of choice. But because its immorality leads to its discouragement or prohibition, it is then not among the range of options the existence of which is a precondition of autonomy. Although the liberationists, on the other hand, ostensibly promote autonomous choice
through their rejection of confining strictures and categories, they end up subordinating the value of individual self-interpretation to the goal of subverting oppression as they define it. Liberationists want to destroy the closet by emptying it. But, suggests Sullivan, “Most homosexuals are not, of course, in or out of the closet; they hover tentatively somewhere in between.” Because untimely self-revelation can “actually limit freedom ... this merely intensifies the desire to control the moment when that identity is revealed” (80–81). Patricia Boling explains that “coming out is a recurrent, never-finished process since all of us are constantly meeting new people, encountering new social and work situations, and thus having to confront over and over again how much of ourselves we wish to reveal.”18

Homosexuals, then, face essentializing pressures similar to those confronting women. If women are to be self-interpreting, they must possess the ability to reject traditional roles and self-definitions, choosing other projects and goals. But they must also be able to affirm traditional roles, after questioning and examining them in a context of choice that presents them with genuine alternatives. Homosexuals likewise should be afforded the opportunity to step out of the closet without penalty but also to remain there if this course appears consonant with individual projects and goals. The actual choice is less fundamental than is the necessity of engaging in critical reflection while one is making it. We can admit the importance of difference without essentializing it. As Boling suggests, “Assuming an essentialized identity based on intimate affiliations or decisions likewise renders the diversity of people’s experiences invisible and places normalizing pressures on different or dissenting group members” (79).

Pressure to conform to the prevailing orthodoxy exists, whether we are discussing the heterosexual community that would prohibit, discourage, or ignore homosexuality or the liberationist community that would publicize and celebrate homosexuality, even against the wishes of those who, living their lives from the inside, would endorse a different course of action. Self-interpretation means deciding for oneself how to be a homosexual, and it is in making and living out this decision that one exercises autonomy.

CONSERVATIVES: PRIVATE TOLERANCE, PUBLIC DISAPPROVAL

Although they support individual liberties and pluralism, conservatives approve of public attempts to inculcate desired forms of behavior, thus, as Sullivan puts it, “protecting the fabric of society that makes such liberties possible in the first place.”19 Unlike prohibitionists and liberationists, they recognize homosexuality as a constitutive condition. But like Kautz, they combine private
tolerance or even respect with public disapproval. The public affirmation of homosexual behavior is not “a neutral event.” Rather, “It creates a social norm that says that sex is about personal gratification and not about marital procreation.” Because “it devalues the social meaning of sex,” it “in itself is an assault on heterosexual union” (99-100). Thus, conservatives would preserve social and familial stability and discourage waverers by refusing to acquiesce in the idea that homosexual and heterosexual lives are morally equivalent. “They mean by ‘a homosexual life’ one in which emotional commitments are fleeting, promiscuous sex is common, disease is rampant, social ostracism is common, and standards of public decency, propriety, and self-restraint are flouted” (106).

Sullivan responds, however, that the absence of social incentives, institutions, and guidelines with respect to homosexual behavior renders this description of homosexual life a self-fulfilling prophecy. The simultaneous celebration of both the traditional family and the stable homosexual relationship might in fact valorize heterosexual marriage as a model for commitment, a co-optation that conservatives should welcome as much as liberationists would abhor (112). Because the denigration of homosexuals is often expressed by people who also denigrate women and femininity in general, greater public respect for homosexuals might accompany greater respect for women, resulting both in more stable heterosexual marriages and in a more stable pluralist society that instantiates equal respect. To disapprove of homosexuality because of the ostracism and loneliness that often accompany this way of life is to ignore the fact that these consequences flow from the very disapproval that conservatives recommend (107-116).

Sustaining the distinction between private tolerance and public disapproval, argues Sullivan, rests on a sharper demarcation between private and public than is currently feasible. Maintaining a hidden identity is as difficult for a homosexual as it would be for a heterosexual to avoid public mention of a spouse or children, or of any activity that might reveal a heterosexual involvement (125). The quintessential example of this hypocrisy, of course, occurs in the current “don’t ask, don’t tell” policy of the armed forces, which requires discretion from homosexuals and self-restraint from heterosexuals (127-128). Many homosexuals now want to claim a public identity of homosexuality as a constitutive condition or orientation, without an inference by others of any particular practices, just as one cannot infer about a heterosexual either that she is promiscuous or a virgin. In this newly emerging distinction between public and private, “homosexuals claim publicly that they are gay, but seek privacy for whatever they may actually do in private” (130). Conservatives must then approve this public identity, on this argument, if they are to avoid discrimina-
tion for what they see as an unchosen constituent of identity. But they may express their private dismay at practices of which they disapprove, in a reversal of the traditional stance of private tolerance and public disapproval.

On Sullivan's account, I believe that the conservative politics of homosexuality allows for the development of the capacity for and the exercise of autonomy. Although homosexuality may be an objective experience, orientation, or structurally constitutive condition, the response to this experience is within the control of the individual homosexual. In the context of this book, we do not choose our culture or belief system of origin. These background conditions, however, provide a context of choice on the basis of which we may question, examine, and revise or reaffirm our projects and goals. We do not choose the conditions that ground us. But we may subsequently define the scope of their influence on us. We may affirm or reject this influence or revise its imperatives, arranging our projects and goals within the path of our original trajectory, or initiating new trajectories that encompass alternative projects and goals. With respect to sexuality as with other facets of our existence, then, we are or can be self-interpreting, thereby engaging in the exercise of autonomy. This suggestion may appear risky, playing into the arguments of those who declare that homosexuality is a willful choice of a perverse form of sexuality and that therefore we can legitimately encourage its rejection. Evidence that sexual orientation is innate, however, is unlikely in itself to engender equal respect for homosexuals. Although race and sex are biologically determined characteristics, this knowledge has not prevented historical judgments that African Americans or women are inferior to Caucasians or to men.

Advocates of conversion therapy or reparative therapy that would turn homosexuals to heterosexual relationships do not necessarily argue that homosexuality is voluntary. Whether genetically or environmentally determined, sexual orientation constitutes for them as for prohibitionists both a core feature of personal identity, yet also a psychological disorder or pathology. Because homosexual behavior reveals the presence of a pathological compulsion, such behavior for prohibitionists cannot result from a true choice or the exercise of autonomy. The only way in which a psychologically homosexual individual can act autonomously, apparently, is to refuse to remain in thrall to this condition and to embrace heterosexuality through an act of will. Those who refuse to resist or reject this compulsion cannot be regarded as engaging in the critical self-reflection that is the hallmark of autonomy. They are instead either in the grip of a compulsion that prevents critical reflection or are willfully rejecting the opportunity to embrace health over disease, freedom over enthrallment.
I accept the judgment that sexual orientation is an objective condition, but reject the conservative distinction between private tolerance and public approval. I also accept the argument made by advocates of conversion therapy that sexual behavior or practices involve a choice, but reject their argument that only the pursuit of heterosexuality represents a true or legitimate choice. One’s sexual orientation suggests a predisposition to engage in certain sorts of behaviors. A heterosexual experiences emotional and physical attraction to those of the opposite sex, a homosexual experiences attraction to those of the same sex, and a bisexual is attracted to those of both sexes. One may choose, however, either to act upon or not to act upon these attractions. Whether one chooses to affirm one’s basic sexual orientation or repudiate it, the choice, when it results from an engagement in rational deliberation and critical reflection, represents an exercise of autonomy. As with choices involving culture and faith, choices involving sexuality do not change the historical fact of our original affiliation or orientation.

Moreover, whether our cultural, religious, or sexual allegiance is original or acquired, I believe that the liberal polity should protect us in our allegiances and in the practices that flow from them, as long as these practices are not unacceptable in a liberal polity. As I have maintained, observant Jews who wish to keep the Sabbath or to wear yarmulkes in the workplace have chosen to be observant, and their choices should be protected and accommodated whether they were born as Jews or converted to Judaism. Cultural and religious membership can either be affirmed or chosen anew, but in either case it may become constitutive of identity. As Yael Tamir states, “Cultural choices, like religious ones, belong in the category of constitutive choices, which due to their importance to individuals, should be granted special weight.” I would extend this same protection to sexual choices.

The relationship between sexual orientation and sexual behavior may be elucidated by considering individuals who choose a celibate life. Celibacy may be a function of chance or circumstance, as in the loss of a spouse or partner. It may also result from choice, as in decisions to join religious orders that require celibacy, or to foreswear intimate relationships for any number of personal reasons. But the decision to live a celibate life does not indicate that these individuals possess no basic sexual orientation. It may be that they possess weaker emotional or physical longings than do those who are not celibate, or they may experience typical longings but hold other values in higher regard than they do the value of intimate relationships. In fact, either of these contingencies itself facilitates both the choice and the living out of a celibate life. But the strength of their desires for intimacy is a quantitative matter, not a qualitative one. That
is, overwhelmingly, the orientation of these individuals will be heterosexual, homosexual, or bisexual. But they have decided not to engage in the behaviors or practices of which their orientation is a precondition. Again, although their sexual orientation is an innate and objective condition, their deployment of this orientation in practice is a matter of choice.

If we are willing to protect practices that flow from religious belief as long as these practices are not illiberal, we ought also, I believe, to respect and protect practices that flow from sexual orientation as expressions of autonomy, as long as these practices involve only consenting adults. If we respect celibates, who choose not to act upon their sexual orientations, whatever these may be, we should also respect both those who affirm their orientations, heterosexual or homosexual, and those who decide to repudiate or disclaim their orientations, like homosexuals who seek conversion therapy. As Sullivan asks, "If someone genuinely feels he cannot live with himself as a gay man and decides to submit to grueling therapy and join a particular sect of American Protestantism to be able to live a heterosexual life, then who am I to stand in his way?" The corollary, however, is that individuals who affirm their sexual orientations deserve the same respect as those who attempt to choose behaviors and practices counter to their orientations. Autonomy-based neutrality requires that we respect seekers of conversion therapy, rather than accusing them of pathological fear of homosexuality. But we should also respect homosexuals who act on their orientations, rather than classifying them as victims of pathology or psychological compulsion and as therefore incapable of autonomy. Although we cannot guarantee that critical reflection grounds these decisions rather than impulse, equal respect for individuals in their diverse identities requires that we make the prima facie assumption that their choices are autonomous ones. Moreover, the choice of how one is to live out one's sexual orientation is more likely to be one's own in the absence of social pressure and its consequences, thus increasing the likelihood that critical reflection is present.

Proponents of conversion therapy would undoubtedly respond that if celibates can foreswear their sexual orientations to pursue a life of celibacy, so then can homosexuals foreswear homosexuality to pursue a heterosexual life—or even a celibate one, which such proponents would prefer to homosexuality. Certainly homosexuals may do this; otherwise, conversion therapists would have no clients. The difficulty is in the implication that conversion to heterosexuality should constitute a second-order desire, that homosexuals ought to want the desire to convert, if they are not to be considered victims of pathology. Moreover, even if it could be demonstrated that celibates are in fact asexual and experience no sexual longings whatsoever, this would not prove that
engaging in practices toward which one’s sexual orientation is a predisposition is not an exercise of autonomy. The existence of seemingly asexual individuals no more suggests an absence of moral or personal autonomy in those who do experience particular longings than the existence of agnostics or atheists suggests an absence of autonomy in those who do experience spiritual longings and a desire for religious commitment. Just as we would not say that “cradle Episcopalians” exercise personal autonomy only if they seek instruction as Presbyterians, neither should we suggest that those of homosexual orientation exercise personal autonomy only when they seek conversion to heterosexuality. The affirmation of sexuality, like its rejection, is a constitutive choice, regardless of the “denomination,” heterosexual or homosexual, that is the object of this choice. The affirmation of one’s deepest emotional commitments, like the affirmation of one’s deepest beliefs, is capable of reflecting both the capacity for and the expression of autonomy.

The equation of sexuality with culture and faith easily gives rise to objections. James Button, Barbara Rienzo, and Kenneth Wald note that sexual orientation may be hidden in ways that race, for example, cannot be concealed. Moreover, “Race is not normally viewed as a behavioral characteristic.” African Americans often fear that the limited resources available for pursuing discrimination complaints will be further diluted as more groups become objects of protection. “The claim that gays ‘choose’ a lifestyle often resonates with black critics, who pointedly emphasize that they had no choice about their race or the way they were treated by the white majority.” Critics of my argument may suggest that if specific behaviors and practices may be chosen for oneself, homosexuals need only change their behavior if they wish to avoid potential discrimination, or, as Kautz advocates, behave as they wish but with discretion and circumspection.

Alternatively, writes Sullivan, though homosexuality is a mixture of innate identity and behavior, it “does not fall, either, into the category of protected religious faith, since few people . . . regard it as simply and only a matter of choice. . . . Protecting it is not so easy when it isn’t even clear what ‘it’ is.” I have maintained that conscience contains a larger element of voluntarism than some imagine, although it cannot be equated with the entirely contingent choice represented by a selection of wearing apparel. Under the English Test Act of 1673, repealed only in the nineteenth century, individuals were barred from holding public office who “would not renounce Catholicism or affirm the Trinity.” If matters of conscience were subject to completely unfettered choice, those dissatisfied with the legal disability could, once again, simply alter their beliefs to meet such tests. But because we must be able to endorse our proj-
ects and goals as we live our lives from the inside, we must scrutinize and reflect critically on them, making honest judgments about what we can or cannot sincerely endorse. Once we have made this decision, protection or accommodation may be justified not because these are unchosen constituents of identity but because of their centrality or critical importance to the nature of this identity. In other words, the degree to which homosexuality is a choice does not really matter in the end. What does matter is its centrality as a feature of personal identity. And this centrality characterizes heterosexual orientations as well as homosexual ones.

If we maintain the distinction between innate condition or orientation, on the one hand, and outward practices or behaviors, on the other, why do many homosexuals want to claim their orientation as a public identity? Ingrid Crep­pell's conception of "public privacy" in Locke is relevant to issues of sexuality, I believe. When beliefs and practices are private, they are hidden from public view, whereas that which is public displays or presents what is affirmed for public recognition. The public expression of religious identity tends to legitimize belief, to protect it from interference, and to create a buffer zone that is neither purely private nor public in which the particular manifestation of conscience can exist, thus promoting the toleration of seemingly alien beliefs. Moreover, institutionalizing spheres of public privacy creates contingencies that encourage the distancing of oneself from one's beliefs and the development of enough detachment to understand alternative ways of thinking. This exposure promotes the recognition of the legitimacy of other ways of life in particular and fosters the expectation that multiple allegiances are not incompatible with communal integrity in general.

To apply this useful framework to sexuality, behavior and practice are private, but orientation is public. One's specific practices as a Roman Catholic, like one's specific behaviors as a homosexual, are hidden from public view. But one's claimed identity as a Roman Catholic or a homosexual is deployed in explicit self-presentation as a Roman Catholic or a homosexual before the political community as a whole. The openness of a communal forum provides general recognition and respect even for ways of life with which many may disagree. As Boling suggests, "Our privacy is not always empowering or protective. Keeping something private—our preference for same-sex partners, for example—may keep others from finding out about something we do not want them to know. But it may also make it more difficult for us to claim that the ability to choose sexual partners freely is a matter of legitimate public and political concern. Privacy is protective, but it can also deprive issues of public significance." The ability to be public about one's private identity confers
legitimacy on that identity. One may decide that what formerly seemed merely a personal dilemma is arguably an appropriate candidate for collective action (100, 104). This trajectory is presumably recognized and therefore discouraged both by prohibitionists, who want to deny that compulsive or pathological behavior could be legitimate, and also by conservatives, who want to maintain the distinction between private tolerance and public disapproval. That is, neither group wants to accord publicity to homosexuality because this publicity in turn lends it legitimacy.

Liberals and Libertarians: Two Concepts of Accommodation

Liberals tend to reject the conservative stance of private tolerance combined with public disapproval, but they often disagree on the proper strategy for promoting full acceptance for homosexuals. Some liberals favor antidiscrimination measures such as the inclusion of homosexuals in civil rights legislation; others, whom I shall call libertarian, would simply eradicate all vestiges of public discrimination against homosexuals, maintaining that the simplest measures often have the most profound effects. As an exemplar of the libertarian camp, Sullivan objects that antidiscrimination legislation may render society more inclusive, but it also attempts in paternalistic fashion to inculcate in citizens more virtuous attitudes and behavior. Yet liberals by this stance not only abandon the distinctiveness of their traditional neutrality toward different ways of life, but they also embark on a culture war that prohibitionists will too often win (159). If conservatives resemble Kautz by advocating bare toleration without full acceptance, on this interpretation many liberals resemble Kautz in his warning that according a right to equal respect requires teaching citizens what to think and that serious social conflict can be avoided only if it is liberals who practice avoidance.

The civil rights revolution, on this view, flowed from the idea that state neutrality constituted acquiescence in some groups' oppression by others. But by augmenting the goal of public equality through close involvement in private life or civil society, liberals have subordinated free association and speech to the mitigation of adverse effects on others that these activities may cause, Sullivan suggests, thereby “undermining liberalism in order to strengthen it” (145). Prohibitionists portray antidiscrimination laws as the granting of special rights, and debate deteriorates into a contest between “perverts” and “bigots” (160). But liberty is for everyone, including bigots, and we all lose when liberty is curtailed for anyone (162). When liberals abandon state neutrality in order to identify the liberal tradition with a particular way of life, they surrender the unique
appeal of liberal politics as a bridge that can transcend otherwise irresolvable conflicts.

Sullivan himself would combine a libertarian emphasis on liberty of action in civil society with persuasion that may indirectly change public opinion. He recommends simply the end of public discrimination against homosexuals and the according of rights and responsibilities to homosexuals that heterosexuals routinely enjoy (171, 163). We should replace political attempts to teach tolerance or respect for different ways of life, he maintains, by ending sodomy laws that single out homosexuals and through equalization of the legal age of consent, the teaching of objective information about homosexuality in government-funded schools, enforcement of antidiscrimination policies in public bodies, equal opportunity in the military, and legal marriage and divorce. An end to the military ban would facilitate acceptance of equality for homosexuals more surely than any antidiscrimination laws that regulate individual actions, in the eyes of both others and themselves (171–178). Equal access to civil marriage represents public recognition of the integrity of a private commitment (179), and conservatives should welcome the emotional security and economic stability that marriage affords (184). Moreover, because many homosexuals are biological or adoptive parents, the government should acknowledge a compelling interest in stable homes by allowing same-sex marriage, as many states permit adoption regardless of parental sexual orientation. Although these changes would be politically difficult, a properly liberal neutrality neither compels particular behaviors by heterosexuals nor seeks to infuse compassion and tolerance. But it does set an example that may exert an indirect influence.

If the end of public discrimination influences individuals and groups in civil society to alter their own attitudes, this is indeed commendable. But is the state not still teaching citizens what to think, even by indirection? If the state perpetuates public discrimination against homosexuals, it implies that they are second-class citizens, indirectly sanctioning private discrimination against them also. If, however, it ends public discrimination, it also sends a message, this time one in which I entirely concur with Sullivan, that homosexuals are entitled to the same privileges and responsibilities that apply to heterosexuals. But either way, a message is sent. Moreover, if the state does this by ending public discrimination, it should also be able to legislate against discrimination in civil society.

The state, once again, cannot be neutral in the abstract. It may be nonneutral, as it is now, by implying that a way of life affirming homosexuality is less worthy than one that endorses heterosexuality exclusively, a stance to which
Sullivan objects. Alternatively, the state may be nonneutral in the eyes of prohibitionists and conservatives by a stance that places homosexuality on an equal footing with heterosexuality. That is, those who believe that homosexuality is wrong are no more likely to view an end of the military or marriage prohibitions as an instantiation of neutrality than those who believe abortion is wrong are likely to see the broad availability of abortion to those who want it as a manifestation of neutrality.

Libertarians like Chandran Kukathas believe that liberalism should promote no particular interests, attachments, character, identity, projects, preferences, or interests but should only uphold the framework within which individual and group interests are determined and pursued. But the framework itself cannot be neutral, because any given legal structure is by definition nonneutral in its effects on the various interests within it. The dilemma is parallel to that regarding exemptions for Sabbath-observant workers, which policy on one interpretation embodies neutrality by securing equal opportunities for both the observant and the nonobservant, but on an alternative interpretation is nonneutral because it takes notice of an interest in Sabbath observance at the expense of those with other interests. Moreover and by extension, if political arrangements cannot even be neutral regarding the public sphere, they cannot be neutral regarding civil society or the private sphere of associations and individuals. By refusing to pursue any explicit goal, the state is nevertheless determining which set of social facts counts for purposes of deciding whether particular policies constitute civil injury or benefit. That is, by refusing to intervene in the “free market” of associations, the state is exercising power by withholding its influence, thus playing a role by default.

If the legal framework of the liberal state cannot itself exhibit neutrality toward all conceptions of the good, then it can only be neutral within the limits of some vision of the good at the level of metatheory, or according to a standard independent of neutrality itself. Because diversity-based neutralists accord equal respect to all conceptions of the good, they would have to accord equal respect both to those who favor and those who do not favor policies that place homosexuality on an equal footing with heterosexuality. Depending on one’s viewpoint, either stance may be regarded as nonneutral. Thus, diversity-based neutralists possess no traction allowing them to break the tie, as it were. Autonomy-based neutralists, however, favor both the pursuit of our own projects and goals in ways consistent with values that are self-endorsed and the formation of our own conceptions of the good, regardless of others’ opinions. An autonomy-based model of neutrality, then, requires that homosexuals receive treatment equal to that of heterosexuals. Homosexuals, like heterosexuals, are
self-interpreting. They must decide what is entailed in the living out of this orientation. If they are to live their lives from the inside in ways they themselves can endorse, they must be accorded the same liberty as heterosexuals to pursue the projects and goals that critical reflection has impelled them to choose or affirm.

To put this point differently, liberals who are autonomy-based neutralists do indeed view the state as endorsing a conception of human well-being. Yet they also exhibit suspicion of circumstances in which some individuals judge the lives of other individuals. Their concern is the context of choice that structures both the availability of options and also the process by which these choices are made. Where diversity-based neutralists perceive a threat when government structures the choices of individuals, autonomy-based neutralists view choices as already structured externally by existing institutions and entrenched attitudes. Thus, the context of choice can impede critical reflection. The breadth of the range of options and the likelihood that individuals will engage in critical reflection may either be enhanced or threatened by government action, and specific instances must be decided by debate. But if government action can broaden the range of options and promote the capacity for autonomy in particular instances, I believe that measures to combat private discrimination on the basis of sexual orientation, like those applicable to race, are as legitimate as those that may be used to end public discrimination.

Homosexual Intimacy: *Bowers v. Hardwick*

*Bowers v. Hardwick*, in which the Supreme Court upheld the Georgia statute criminalizing sodomy, exemplifies divergent ways of framing the debate about a community’s shared conceptions of the good. Writing for the majority and relying on the shared goods of family relationships and of acquiescence in long-standing majority beliefs, Justice Byron White frames the issue as that of whether the Constitution confers “a fundamental right to engage in homosexual sodomy.” Because this case involved none of the fundamental rights recognized in previous cases concerning family relationships, marriage, or procreation, White concludes that the defense of sodomy is not warranted under the rubric of a fundamental right.

In his dissent, Justice Harry Blackmun suggests that we need to look not only at the types of rights that have been classified as fundamental but also at the reasons why these practices have been so designated. When we protect rights to family relationships, we do so neither because of their direct contribution to the public welfare nor because we prefer traditional households but because these
rights are so central to individual life and happiness. "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting these relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds" (204–205). Courts can distinguish private and consensual sexual conduct that injures no other parties from other sorts of sexual conduct (209). Moreover, historical and traditional condemnations of sodomy do not justify using the law to endorse private biases (210–212). Overall, "Depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do" (214).

Not only do majority and minority diverge in Bowers on the basis of what values are to be defended, but also interpreters diverge on the proper grounds for defending them. Blackmun's argument focuses on individual autonomy as the justification for freedom in intimate relationships, a focus emblematic of a general historical shift. Although the Supreme Court first invalidated laws against contraceptives because interference in their use violated the privacy of the marital relationship, subsequent decisions, explains Boling, protected such privacy not to secure a valued social practice like marriage but to secure individual choice free of governmental intrusion. She suggests that where the earlier arguments portrayed procreative choice as fundamentally important because it is private, or central to an intrinsically valuable and private relationship, the later argument views procreative choice as private because it is fundamentally important. But this does not explain why some values concerning sexuality are of such fundamental importance as to deserve constitutional protection, when others, like those expressed in incest or spouse battering, are not. In Bowers, White applies privacy arguments to traditional obligations such as marriage and family relations, but Blackmun extends them to intimacies that contribute to an individual sense of self. "Is privacy," Boling asks, "an essentially conservative idea or value, used in the service of powerful interests to reinforce traditionally condoned relationships and forms of intimacy, which we have long recognized as 'private' and deserving of protection? Or is privacy a liberatory value, crucial to allowing people the freedom to develop manifold relationships, forms of intimacy, and notions of happiness?"

Michael Sandel would answer these questions by suggesting that an autonomy-based defense of privacy is itself problematic. He argues that specific practices are better defended for their "intrinsic value or social importance" than as
instances of autonomy and individual choice." One might argue with respect to homosexual unions not only that intimate associations should be matters of individual choice but also "that much that is valuable in conventional marriage is also present in homosexual unions. On this view, the connection between heterosexual and homosexual relations is not that both are the products of individual choice but that both realize important human goods" (104). Both provide opportunities for mutual support and self-expression in ways that other relationships do not. Sandel concludes that the neutral or procedural case for toleration, what McCabe calls autonomy-based neutrality, is inadequate. First, the voluntarist or choice-based justification of autonomy rights "is parasitic—politically as well as philosophically—on some measure of agreement that the practices protected are morally permissible." Second, precisely because they are not based on substance, voluntarist justifications of autonomy rights may secure merely "a thin and fragile toleration. A fuller respect would require, if not admiration, at least some appreciation of the lives homosexuals live" (107).

Sandel's claim that basing rights on the value of autonomy alone may restrict the range of reasons for protecting them, however, does not always hold true. First, although the range of possible defenses may expand if we can demonstrate the intrinsic value or social importance of tolerating a practice, we might correspondingly withdraw toleration from a practice with no perceived value or importance, which would then restrict the scope of toleration. If the definition of the common good—Sandel's intrinsic value or social importance—is rooted in the dominant understanding of a particular community’s traditions, it will be used, as we have seen, to measure the legitimacy of individuals' private beliefs and desires. Thus, although privacy is currently a human good in the context of the dominant understanding of the goods of intimate association, if this changed we might find little protection for privacy on the grounds of autonomy or anything else.

Second, a community whose notions of the common good are circumscribed by the dominant understanding will have little incentive to rethink this understanding and possibly to interpret accepted human goods in new ways. And those who lose out in the search for approval on substantive grounds will lose their claim to equal respect. As Lund argues, "Grounding coercive or even merely hortatory legislation on contested accounts of what is 'intrinsically good' inevitably puts into play a publicly backed appraisal of citizens and their conceptions of the good. In the absence of various liberal constraints, those will be used to justify unequal distributions of the opportunities and costs of various lives, and they will be so used whether or not those who are penalized actually accept the worth of the 'good' in question." With a constitutive conception of
community, we cannot be completely constituted by today's community without losing the possibility of critical purchase, the ability to distance ourselves somewhat from today in order to contemplate what notions of right or intrinsic goodness we want the community to embody tomorrow. Moreover, if we are each constrained by our membership in terms of the current consensus on values, then this constitutes us with our differences as well as our similarities. How can the community make a distinction between what merits full social acceptance and what merits only grudging toleration if the beliefs and practices considered are all alike products of our membership and constitutive of our personhood?

My wariness about requiring substantive justification for specific practices does not mean, however, that we must retreat to a procedural case for toleration, as Sandel implies. Referring to practices such as incest, prostitution, and polygamy, Philip Selznick observes that "to say that there are many 'right' ways [of conducting intimate relationships] is not to say that any way is right... Not every intimate association is defensible, nor is every one so fundamental as to merit constitutional protection." I believe that in a liberal polity, the question is one of deciding which ways are "right" without our becoming completely submerged in, and therefore constituted by, the current consensus. Perhaps the fact that the toleration of certain practices protects autonomy itself functions to impute intrinsic value or social importance to the ways of life so justified. I hope, therefore, that debate about the validity of beliefs or practices where this influences public policy or social attitudes would center on the implications for individual autonomy of either their toleration or curtailment, and that participants in this debate would recognize both the intrinsic value and the social importance of this autonomy.

Sandel's justification of homosexual intimacy, deriving as it does from the human goods achieved by all intimate relationships, suggests that the toleration of sexual relationships and expressions varies directly with the extent that these resemble heterosexual marriage. A defense grounded in privacy or individualism for him equates homosexual relationships with the enjoyment of obscene materials, in which "the only intimate relationship at stake... was between a man and his pornography." But on this interpretation, Bonnie Honig argues, Sandel upholds intimacy rather than marriage or reproduction as the new test of acceptable sexual behavior, still relegating the consumer of pornography to the status of other and therefore outside the communitarian ideal. We may be defining deviancy down, as it were, in that behavior formerly regarded as deviant is no longer regarded thus. But the category still exists, and it functions to exclude some individuals as alien or other, because their attempted participation in the community is on terms that the latter will not accept.
Although Honig may be thought to imply that any sort of intimate association or erotic activity is defensible, I infer a warning instead. Because any political community must be grounded in certain determinate principles and commitments, as I have maintained, the community can be too quick to make judgments as to which desires should be repressed. The only preventive is a commitment, both individual and collective, to question, examine, and possibly to revise our beliefs about what gives value to our lives, both individually and collectively. As Honig states, “It turns on a commitment to live life without the assurance that ours is the right, good, holy, or rational way to live” (194). Living out this commitment requires the capacity for narrative imagination, as described by Thomas Bridges, which recognizes the possibility of commitment to different ideals from those to which one is committed, or of giving different narrative readings to the same series of life events. It requires, as described by Eamonn Callan, an emotional generosity and imagination that recognizes that “our inescapable rootedness in history shapes but does not undermine our critical scrutiny of that history” and that “the relevant consensus cannot be complacently identified with the one we happen to have at this moment in history.”

These formulations suggest the importance of sympathetic and imaginative engagement with other ways of life. Although Sandel is using the test of the intrinsic value and social importance of relationships to move the line of demarcation between acceptable and deviant behavior to a different place from where it has traditionally been drawn, he is actually suggesting an argument from autonomy in spite of himself. That is, he is deploying narrative imagination, with Bridges, to give a narrative reading to homosexual relationships that accords them the intrinsic value of heterosexual unions. He is recognizing, with Callan, that the relevant consensus is not necessarily the current or dominant consensus. But the sympathetic and imaginative engagement with another way of life that Sandel embraces is grounded in his own implicit recognition that homosexuals as well as heterosexuals must be able to live their lives from the inside, in accordance with self-endorsed conceptions of the good, and that those who participate in the dominant consensus should be persuaded to question, examine, deliberate, and possibly revise their own conceptions of the good. This imaginative engagement requires the sort of critical scrutiny that is the developed capacity for autonomy. Although arguments like Sandel’s maintain a particular distinction between intrinsically valuable and deviant behavior about which for present purposes I shall remain agnostic, they nevertheless imagine life events within the framework of an alternative narrative structure, both broadening our sympathy for diversity and enhancing our capacity for autonomy.
From a different perspective, perhaps intimacy between homosexuals and heterosexuals may be defended both for its intrinsic value and social importance and for its instantiation of autonomy and individual choice. Ferdinand Schoeman writes that the value of privacy connotes both privacy from intrusion or control and privacy for participation in various associations and relationships. "Privacy is meant not to secure isolation from social pressure but to facilitate social involvement and intimacy." Conceptualizing privacy as a positive good, not simply as a negative right, may appear vulnerable, like Sandel's defense, to the vagaries of the community's dominant understanding of the values of self-expression and intimate association. But if, like Struening, we interpret these values as a process through which individuals wrestle with and develop their own moral judgments in an ongoing attempt at self-determination and self-definition, this outcome is less likely. Even if privacy is viewed as a positive good, we must still determine what it means to us as individuals in terms of social involvement and intimacy. Once again, we must be self-interpreting if we are to live our lives from the inside, and this in turn requires that we engage in critical reflection on our current projects and goals. Intimate association carries intrinsic value and social importance in general, but the determinate nature of this value and importance must be defined by each of us, not by the dominant consensus.

Returning then to Bowers, we should note that like White's majority opinion, Blackmun's dissent also singles out certain aspects of family relationships and of values deeply rooted in our history and traditions. Yet on Blackmun's view, when we look to history and tradition, we need to look not simply at what specific rights or practices have been protected but at the broader purposes that family relationships and traditional values might serve. From this perspective, he finds them essential to and instrumental in individual self-development, which in turn requires reflection and choice. "A necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices."

In sketching the value of interpersonal relationships, Blackmun cites without comment Roberts v. United States Jaycees. For present purposes, we should take note of two points. First, the Court in Roberts stated that unlike the Jaycees, an intimate association deserves special protection for its members' freedom of association, which "reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." Second, in her concurring opinion, Justice Sandra Day O'Connor stated that both
intimate associations and others that are instrumental in the effective exercise of First Amendment freedoms fall under the rubric of expressive associations, the formation of which "is the creation of a voice and the selection of members is the definition of that voice" (633), and which merit greater constitutional shelter than other types of association that are commercial in nature (635).

Although in *Bowers* Blackmun relied on Fourth Amendment guarantees of domestic privacy rather than on the First Amendment (207–208), the language of *Roberts* nevertheless illuminates issues discussed in *Bowers*. An intimate association is an expressive association. The sexual component that inheres in certain intimate associations, including but not limited to that of marriage, is a species of free expression that might be interpreted to fall under First Amendment protection. As a type of expressive association central to individual development, a consensual intimate association between adults that includes sexual expression would not be subject to state regulation of its membership or of its other associational activities—that is, of the form that sexual expression might take. Engagement in homosexual sodomy is not itself a fundamental right. But engagement in an intimate association that may or may not include that practice is such a right, carrying both intrinsic value and social importance, and as such it and its components are constitutionally protected.

Both the majority and the minority in *Bowers*, then, are adducing arguments that take into consideration the intrinsic value and social importance of particular practices. It is not that the majority is defending shared goods of a determinate sort and that the minority is making a merely procedural case for toleration. Rather, each is adducing a different conception of what these shared goods are or what an overlapping consensus should embody. The majority defends a traditional definition of the good or of intimate relationships and a historically sanctioned interpretation of traditional values; the minority adopts a broader definition of the goods served by intimate relationships and by our history and tradition. Practices may be defended by looking at their intrinsic value and social importance, as Sandel suggests, but we are often confronted with conflicting interpretations of what meets these tests. It is for this reason that I have suggested that we look to the relationship between the toleration of particular practices and the promotion of autonomy as engagement in critical reflection on one's projects and goals, concluding that the protection or promotion of autonomy is itself a source of intrinsic value or social importance. Autonomy-based neutrality provides a context within which neutrality may be measured without abandoning the value of substantive goods, and on this basis the privileging of one particular sexual orientation over others violates both neutrality and the promotion of equal respect.
I am not suggesting, however, that autonomy-based neutrality is then independent of competing conceptions of the good. Although metatheoretical neutrality is unachievable on a second-order level or at the level of metatheory, we can still strive for neutrality at the first-order level when this is defined within the framework of a particular second-order conception of the good, whether this is autonomy, diversity, or some other value. Autonomy-based neutrality represents for me an accurate approximation of liberal values as I understand them, and I therefore feel entitled to advocate it for the reasons I have discussed. In this sense I am in agreement with Neal that neutrality theorists are in error to suggest that further refinements can render their models truly neutral or impartial. What is needed, rather, is a frank assertion that although comprehensive neutrality on all levels is unattainable, neutrality within the boundaries of some particular context is a goal worth pursuing. The context for some individuals may be diversity or some other value. For me, the proper context is that of autonomy, even as I recognize the importance of diversity as a broad range of options for choice.

Civil Rights: Romer v. Evans

Because I support autonomy-based neutrality, I support the creation of a context of choice that promotes individuals’ capacities to live self-endorsed lives on the basis of critical reflection on their projects and goals. Therefore, I must also support antidiscrimination laws that encompass sexual orientation. The absence of such laws in a context of discrimination conveys a message as surely as does the presence of them. Autonomy-based neutrality in my view requires not only the termination of policies that function as encumbrances on some individuals’ pursuits of their projects and goals but also the initiation of positive actions when individuals are disadvantaged solely because of their sexual orientation. From my perspective, so-called “special rights” are special only in the sense that their beneficiaries need them if they are to enjoy the opportunities that others do without these rights.

In Romer v. Evans, the Supreme Court upheld the action of the Colorado Supreme Court in striking down a 1992 constitutional amendment known as Amendment 2, passed by referendum in reaction to antidiscrimination ordinances addressing sexual orientation passed by Aspen, Boulder, and the city and county of Denver. Amendment 2 not only repealed these ordinances but also prohibited the enactment, adoption, or enforcement by any state entity or political subdivision of any legislation granting protected status on the basis of sexual orientation. The Colorado Supreme Court ruled that the trial court must
subject the amendment to strict scrutiny, because only a compelling state interest would justify depriving homosexuals of the fundamental right to participate in the political process, requiring them and their supporters to amend the state constitution to enact future antidiscrimination legislation instead of arguing for it directly. The trial court on remand found no compelling state interest at stake, and the Colorado Supreme Court then affirmed its earlier ruling. 

Supporters of measures like Amendment 2 asserted that antidiscrimination laws represent a governmental seal of approval on homosexuality, and opponents responded that these laws do not compel people to hold any particular opinions about homosexuality.

In his opinion for the six-justice majority, Justice Arthur Kennedy of the U.S. Supreme Court adopts a broad interpretation of the implications of Amendment 2, reasoning that homosexuals under it could become a solitary class denied legal protection from both private and public discrimination. Because Colorado law prohibits discrimination in state employment on the basis of specified traits or “nonmerit” factors, for example, even a hiring decision implying that homosexuality is irrelevant would itself appear invalid under Amendment 2. More generally, the rights withheld under Amendment 2 are not special rights but “are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”

Amendment 2 imposes a broad disability on one particular group, the reasons for which seem “inexplicable by anything but animus toward the class it affects,” therefore failing to meet even the test of a rational relationship to legitimate state interests (632) and constituting “a denial of equal protection of the laws in the most literal sense” (633). Despite Colorado’s argument that without Amendment 2, the freedom of association of employers or landlords with objections to homosexuality is threatened, in reality “Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws” (634–635).

Justice Antonin Scalia’s dissenting opinion argues that Amendment 2 should be narrowly interpreted, as the Colorado Supreme Court stated that it should not affect Colorado laws against arbitrary discrimination; it only attempts to preserve traditional moral values (636–639). First, if a state may criminalize homosexual conduct as in Bowers, “surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct,” especially in view of the fact that Amendment 2 disfavors no conduct but simply prohibits the bestowal of special protections. “If it is rational to criminalize the
conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual ‘orientation’ is an acceptable stand-in for homosexual conduct” (641–642).

Second, certain communities contain disproportionate numbers of homosexuals. With relatively high disposable incomes and greater interest in homosexual rights issues than the general public, “quite understandably, they devote this political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality” (646). They are entitled to do this, but others are also entitled to use the democratic process to counteract these efforts. The Eighteenth Amendment illustrates this sort of activity through constitutional amendment at the national level. Moreover, the constitutions of five states singled out a sexual practice by prohibiting polygamy, four of them because Congress required this as a condition of statehood, and the fifth as a territory, when the Supreme Court upheld a statutory provision depriving polygamy of the franchise (647–651).

Overall, the Court should not take sides in this culture war, in which “Amendment 2 is designed to prevent piecemeal deterioration of the sexual morality favored by a majority of Coloradans. . . . Striking it down is an act, not of judicial judgment, but of political will” (653).

Kennedy’s key conclusion, in my opinion, lies in his statement that antidiscrimination laws afford “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society” (631). I have argued that although individuals must possess the freedom to form associations on the basis of their convictions and to exclude those who do not share them, other individuals must be accorded ordinary civil enjoyments despite their beliefs and practices, which may be offensive to some.

Because public policy even in a liberal polity is always expressive of a common moral standpoint, whether directly or by default, the liberal commitment to diversity not only requires some freedom for associations that are not themselves inclusive internally but also allows for greater encouragement of those that are inclusive. The greater the number of opportunities, the broader the context of choice or the forum within which individuals may exercise their autonomy through critical scrutiny of their projects and goals.

With Amendment 2, if enough potential employers or landlords, for example, held parallel beliefs objecting to homosexuality, this would curtail the existence of job opportunities or living situations, or the number and variety of alternatives that constitute the context of choice within which individuals exercise their autonomy. If citizens should not be excluded from the public process or from opportunities because of religious differences, neither should they be
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excluded because their sexual orientations are different from that of the majority. Both religious conviction and sexual orientation are in a sense objective conditions, in that one cannot arbitrarily choose them as one might a suit of clothes. But they each involve choice in another sense, in that they may be affirmed or denied, acted on or not, through specific practice.

The decision to live one's life in accordance with one's religious convictions or sexual orientation is central, in Struening’s terms, to the “positive goods of self-expression, self-determination, self-definition, and intimate association.” One should not be forced to conceal one's religious beliefs or sexual orientation in order to be accorded ordinary civil enjoyments that are open to others, either in the public sphere or in the private realm of civil society. Although homosexuals excluded from employment opportunities or living situations could start their own businesses that employ only homosexuals, or cooperate in buying properties that rent only to homosexuals, for example, these opportunities directed towards homosexuals would still constitute a minority of opportunities. Moreover, I cannot in principle condone the exclusion of heterosexuals from these opportunities any more than I agree with the exclusion of homosexuals from more conventional civil enjoyments. A nightclub in Port Richey, Florida, that fired two bartenders and two cocktail waitresses, all of whom were straight women, when it became a gay bar caused a loss of opportunities and resulting economic hardship as surely as if it had been a straight bar firing gay employees.

To put the matter differently and in the language of *Roberts*, if *Bowers* was wrongly decided, in my view, because intimate relationships are expressive associations and therefore are protected by the First Amendment, *Romer* was rightly decided because individuals with personal or religious objections to homosexuality are not such associations. If the formation of an expressive association “is the creation of a voice, and the selection of members is the definition of that voice,” persons who provide employment or housing to others rarely conduct business for the specific purpose of creating a voice that expresses a point of view. Although certain businesses may become known for expressing a particular business philosophy, this is incidental to the primary purpose of providing goods or services in exchange for remuneration. Open housing laws designed to prevent racial discrimination often exempt properties below a minimum number of units, as in the case of a family home. But even here, landlords do not rent space in order to create a voice or express a viewpoint; their doing so is incidental. And according to *Roberts*, any association not predominantly of these types is a commercial association, “and therefore subject to rationally related state regulation of its membership and other
associational activities” (635), enjoying only minimal constitutional protection even if regulation does alter the message conveyed by the group. Although the expressive function or business philosophy may be important to each individual employer or landlord and deserving of respect, in the aggregate, the commercial element becomes predominant in the cascade of cumulative effects on potential employees or tenants who may be excluded, according to Kennedy in *Romer*, “from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”

With respect to Scalia’s dissent in *Romer*, I cannot agree, first, with his argument that the criminalization of homosexual sodomy logically legitimates the disfavoring of homosexual conduct. The majority in *Romer* seeks not to protect homosexual conduct but the civil rights of those who disclose homosexual identity. As Didi Herman argues, “Amendment 2 cannot derive its (un)constitutionality from *Bowers* any more than an initiative to prevent prostitutes or gun lobbyists from seeking civil rights protections can derive its authority from laws that criminalize selling sex or firing guns.” More centrally, because I have argued that although sexual orientation is unchosen, one’s response to one’s orientation is a matter of constitutive choice, I cannot agree with Scalia that orientation is properly classified as a stand-in for conduct. Some individuals with a homosexual or bisexual orientation may, as prohibitionists wish, refrain from acting on the basis of this orientation.

More specifically, however, when Scalia declares that it is rational to deny protection to those with a “self-avowed” homosexual tendency, policies such as that embodied in Amendment 2 reinforce the power of the closet. One cannot be denied an employment opportunity or housing situation if one conceals one’s nonheterosexual orientation, but simultaneously, one should not have to conceal a matter like sexual orientation that is central to identity any more than one should have to conceal one’s religious convictions. Jeffrey Rosen suggests that “in some ways, Amendment 2 is a civil, statewide version of ‘Don’t Ask, Don’t Tell.’ It recognizes that homosexuals exist, even tolerates their private lives, but refuses to grant them any public recognition as equal citizens.” Equal rights are fine, “as long as the rights aren’t demanded too obviously. It’s the anti-discrimination law that dare not speak its name.” This interpretation fits Kautz’s formulation that “individualists” in the liberal community should refrain from demanding more than tolerance from the majority, out of gratitude for the generosity betokened by that tolerance.

Commentators such as Jonathan Rauch, on the other hand, believe that homosexuals should “junk the oppression model,” which portrays them as pitiable, and work against ostracism through public criticism and moral example
rather than by seeking antidiscrimination measures. But without such legislation, the price of self-exposure may be too high for many. A case in point is that of Robin Shahar, from whom the offer of a staff job was withdrawn by Georgia Attorney General Michael Bowers when he learned that she planned a religious marriage ceremony to another woman. When Shahar sued, the federal court of appeals ruled that although she had a protected First Amendment interest in her intimate relationship, this was outweighed by Bowers’s contention that her staff position “might lead the public to question his office’s credibility and its commitment to enforce the law against homosexual sodomy.” He did not express concern, however, about staff members’ possible fornication or heterosexual sodomy, although he admitted the hypocrisy revealed by the disclosure that he himself had carried on a decade-long adulterous affair when adultery is also against Georgia law. Because homosexuality can be hidden, and in the views of theorists like Kautz should be hidden, many homosexuals may be tempted to remain hidden if the price of becoming moral exemplars appears too high.

Scalia’s second point in dissent focuses on the disproportionate political influence of homosexuals, due to their relatively higher incomes, interest in civil rights issues, and geographic concentration in particular communities. In a survey of five criteria that measure the extent to which homosexuals are victims of oppression, Rauch concludes that only that of direct legal or governmental discrimination is met. Homosexuals are denied neither the political franchise nor education. With respect to human rights violations, gay bashings may have increased, but so has crime in general. Finally, homosexuals not only do not suffer relative impoverishment, but surveys have shown a higher level of both education and income for homosexuals than for heterosexuals. Sullivan notes that because homosexuals, like heterosexuals, are born into every generation, race, and class, they do not suffer from cumulative economic disadvantage, unlike members of some other groups.

Moreover, a number of observers differentiate the situation of homosexuals from that of other beneficiaries of civil rights. Writes columnist Vernon Jarrett in comparing homosexuals with African Americans, “I consider it offensively disrespectful of the recorded and unchronicled sufferings of millions of my people who were kidnapped, chained, shipped and sold like livestock, brutalized, branded and castrated when caught seeking freedom, and then publicly lynched for trying to enjoy the simple justice won on many a battlefield... Gays were never declared ‘three-fifths’ human by the U. S. Constitution... Never did the Supreme Court tell gays that they ‘have no rights’ that others are bound to respect.” Some observers fear a dilution of resources for combating discrimination if more groups are added to the roster of those claiming a right to such
and some conservative African Americans have seen “gays as practicing a sinful lifestyle by choice and believed that gays had therefore forfeited any claim for legal redress” (89).

Herman, however, perceives “a fundamental instability” between the conviction that the immensity of gay economic and political power makes rights unnecessary, on the one hand, and that sexual behavior is mostly willful choice and therefore undeserving of protection, on the other. “To overstate the case, why not choose ‘the gay lifestyle’ and get rich quick?” Concerning economic and political influence, Kenneth Sherrill notes, exit polls and other demographic surveys indicate that homosexuals “are as likely to be earning incomes under $15,000 as to be earning incomes over $50,000, and that . . . respondents are overrepresented in income categories below $30,000 and underrepresented at incomes over $50,000. This hardly is the picture of affluence.”

Furthermore, homosexuals are “born into a diaspora” and thus do not enjoy cumulative advantages. That is, they are not born into geographically concentrated communities, and homosexual identity is not transmitted within families (469). American National Election Study quadrennial surveys show that feelings of coldness and distance toward homosexuals come close to being rivaled only by cold feelings toward illegal aliens (470). A 1994 study by the Los Angeles County Commission on Human Relations found that in 1993, gay men were both the largest victim group and also the one most violently victimized, typically by physical assaults. Fear affects the openness of both homosexuals and heterosexual support, and the absence of these elements functions in turn as “both a source and a consequence of gay people’s powerlessness” (471). Finally, 1992 exit polls indicated that except for an above-average concern with health care, self-identifying gay, lesbian, and bisexual respondents are similar to the rest of the electorate in the priority they accorded to a variety of issues affecting their presidential votes in that year’s election. To Sherrill this indicates an absence both of a collective political identity and a “distinct gay agenda” (472). Overall, these findings seem to refute Scalia’s contention that homosexuals command an inordinate level of political power that necessitates countermeasures like Amendment 2.

Third, although Scalia cites the prohibition of polygamy as the singling out of a particular sexual practice, Sullivan argues that even those who object to homosexuality view it as occupying “a deeper level of human consciousness than a polygamous impulse. . . . Polygamy is an activity, whereas both homosexuality and heterosexuality are states.” In his view, monogamy is central to all marriage. Allowing homosexuals access to this institution would not open the door to polygamy, as some fear, but would set before them, as before het-
erosexuals, the ideal of monogamy. Analogously, we could say that the state or condition of the human body is such that the health of most individuals requires the consumption of vegetables but that the consumption of artichokes in particular is an activity the pursuit of which is not necessary to health. Offering vegetables to those currently deprived of them will improve individual health, but we might still have legitimate public policy reasons for prohibiting the consumption of artichokes. Overall, the longing for emotional and physical intimacy is widespread if not universal. Where the unavailability of polygamy deprives no one of the long-term emotional commitment that marriage represents, the unavailability of marriage to homosexuals does deprive them of the possibility of a commitment that is routine for heterosexuals.

Scalia's final point is that the Court is taking sides against the majority of Coloradans, who want to prevent the "piecemeal deterioration" of the sexual morality that they favor. Initially, I would note that in matters of faith and sexuality that are central to individual self-definition, regulation or prohibition exerts greater impact on those principally concerned than the lack of it exerts on those offended by particular manifestations of faith or sexuality. According to John Stuart Mill, "There is no parity between the feelings of a person for his own opinion, and the feelings of another who is offended at his holding it; no more than the desire of a thief to take a purse, and the desire of the right owner to keep it." As is well known, Mill criticizes the theory of collective or social rights, according to which it is one's right that every other person "act in every respect exactly as he ought" (89), and scorns the "belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested" (91). To those who suggest that because sexual orientation is indubitably a private matter, it should be kept private, Mill would reiterate that the doctrine of social rights "acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them" (89). This returns us to the tyranny of the dominant consensus and to "don't ask, don't tell."

Scalia's final point nevertheless raises a significant issue. As put by T. M. Scanlon, this is the extent to which "all members of society are equally entitled to be taken into account in defining what our society is and equally entitled to participate in determining what it will become in the future." A public policy of toleration not only requires an institutional equality of legal and political rights but also extends to "the informal politics of social life," which involves the right to participate in defining the social ethos. Scanlon himself desires that others appreciate the literature and music he does, for example, and will be distressed if religion becomes central to public discourse. But although such concerns are
legitimate, he objects to “the attempt to restrict individuals’ personal lives as a way of controlling the evolution of mores. Legal moralism is an example of intolerance, for example, when it uses the criminal law to deny that homosexuals are legitimate participants in the informal politics of society” (230).

Although measures like Amendment 2 do not criminalize homosexuality, singling out one group and its advocates on the basis of sexual orientation and assigning to it the necessity of extraordinary procedures for the passage of antidiscrimination laws in my view denies that homosexuals are equal participants in both the formal politics of institutions and the informal politics of society. Although in many private associations the actual meaning of particular goods, like religious sacraments or party labels, is dependent on the acceptance of certain beliefs, the goods of the larger, political society “do not lose their meaning if they are extended to people with whom we disagree about the kind of society we would like to have, or even to those who reject its most basic tenets” (233). That is, although it is a risky practice with high stakes, true toleration requires not only that we accord to other ways of life the grudging toleration of benign neglect but also that we respect their proponents as fellow citizens enough to allow them to participate in defining the contours of our society. Everyone should have access to the same sorts of opportunities in this regard. Romer does not mandate the passage of antidiscrimination laws; it does prohibit efforts to make more difficult for some groups than for others the attempt to pass such laws.

The Importance of Context: Religion, Sexuality, and Moral Slavery

I have argued that because both religious belief and sexual orientation are forms of conscience central to self-expression and self-definition, discrimination grounded in sexual orientation is as illegitimate as that based on religious beliefs. It does not comfort traditionalists, however, to suggest that if they disapprove of homosexuality, they simply should not themselves engage in homosexual practices any more than it comforts opponents of abortion to be told that they simply ought not to have abortions or directly enable others to have them. While advocates of antidiscrimination laws may claim a right against discrimination on the basis of sexual orientation that is central to identity, opponents of these laws may argue that their right to discriminate is sanctioned by their religious beliefs and therefore must not be infringed. I argue that a right against discrimination and a right to discriminate are not morally equivalent.
According to Samuel Marcosson, just as liberal rights can admit no "generalized liberty-based right to discriminate," neither may they admit "a specific religious liberty-based right to discriminate."68 That is, the killing of others would be no more permissible because it stemmed from a religious conviction concerning the imperatives of human sacrifice than it is permissible because one might have a taste for human flesh. The right not to be killed is not a "special right," despite the fact that its enforcement infringes on the liberty of those who want to kill. And the right of individuals to be accorded ordinary civil enjoyments outweighs the right of others to deprive them of such.

Moreover, suggests Marcosson, we must consider the social context of a measure if we are properly to assess its legitimacy. First, if homosexuals do wield a disproportionate amount of political power in some locales, as Scalia maintains, this suggests that just as whites fled to the suburbs to escape the perceived threat of central cities, homosexuals have fled to the cities in pursuit of safer existences. Scalia’s opposition to homosexual efforts towards self-protection declares that “the very majoritarian animus directed at you—from which you fled in the first place—may reach across geographic lines and strike at you and remove even the localized protections you have managed to carve out. You are not safe; we will come and get you.”69 Second, although Scalia argues that the criminalization of sodomy endorsed by Bowers legitimates the “mere” disfavoring of homosexuality instantiated in Amendment 2, for Marcosson, Romer provides a context that clarifies the illegitimacy of Bowers. Bowers, like Amendment 2, has denied homosexuals the “equal protection of the laws across a wide range of transactions” (233), a result now repudiated in its effects by Romer.

Finally, the denial of legal recognition to same-sex marriages must also be placed in context. Marcosson views exclusively heterosexual marriage as “an enclave that preserves the separateness and presumptive superiority of the group that has shut the door behind it” (244), in this case that of heterosexuals, in the same way that the exclusivity of white suburbs and the until recently single-sex character of Virginia Military Institute have symbolized white and male identity and privilege (243–250). If we place these issues in context, we encounter once again an effort to preserve the dominant consensus and to avoid the critical reflection that necessarily accompanies the exercise of autonomy, both individually and collectively.

The context within which we find discrimination grounded in race, sex, and sexual orientation is described by David A. J. Richards as that of moral slavery, which abridges human rights of conscience, speech, association, and work that constitute individual and cultural resources in a class of persons. Moral
slavery is sufficient to ground suspect classification, thereby triggering strict scrutiny, he maintains, apart from traditional tests of the immutability or salience of particular traits, or the political powerlessness of groups characterized by such traits. The evil of prejudice and discrimination is its irrationalist marking not of a feature that cannot be changed or hidden but of features that are central to moral personality. “Moral slavery, thus understood, reflects the illegitimate degradation of classes of persons to a servile status based on the unjust deprivation of culture-creating rights. Its essential evil is an unjust moral paternalism that dehumanizes one class of persons from their status as bearers of rights to servile dependents of another class of persons.”

The moral harm of disowning traits that could be concealed entails the loss of familial and communal ties and “an unreasonable sacrifice of basic resources of personal and ethical identity” (270). The silence of those subject to moral slavery that is often mistaken for consent or complicity has been “itself the product of moral slavery. Deprivation of such culture-creating rights enforced social death, a vacuum of the cultural resources through which persons express in public and private culture their reasonable moral powers as free and equal persons and shape public and private culture accordingly” (274).

On Richards’s interpretation, it is clear why members of unconventional groups should not be satisfied with grudging tolerance from the more conventional majority. Although Kautz suggests that exchanging silence for toleration means “refusing to repay this respectable generosity with contempt,” there is nothing generous about an exchange that requires abrogation of honesty about one’s personal identity as the price of toleration. By acquiescing in this bargain, individuals are giving up both their present integrity and their ability to participate in defining the contours of society in the future. As David Johnston suggests, “Individuals need real recognition from the other members of their society as whole persons, not merely in their role as citizens, in order to pursue their values effectively.” Where antisodomy laws and the Bowers majority threaten expressive association in private culture, in Richards’s terms, Amendment 2 and the Romer minority threaten expressive association in public culture.

Rather than relying on race and sex as bases for comparison to sexual orientation, however, Richards, like Struening and me, regards “political homophobia” as “a constitutionally illegitimate expression of religious intolerance,” arguing that laws embodying this prejudice are suspect as a violation of religious toleration. The selective enforcement of traditional moral values against claims by homosexuals to equal respect suggests an equation of gay and lesbian identity with traditionally despised religions, accompanied by the same
implication that adherents should either convert or remain silent. A measure like Amendment 2 directed against the specific protection of Jews would be condemned "as an unconstitutional expression of religious intolerance because such laws serve precisely the forms of majoritarian religious intolerance that constitutional guarantees of religious toleration condemn as a basis for law" (389). Yet demands for recognition of the legitimacy of devalued conscientious convictions when these concern sexual orientation are interpreted as claims on special rights.

In a liberal culture, however, whether with regard to religion or to sexuality, all persons must possess "the cultural resources that enable them critically to explore, define, express, and revise the identifications central to free moral personality" (366). I have maintained that sexual identity, like religious belief, results from conscientious conviction about who one is and what is centrally defining in the context of thought and experience. Both are matters of constitutive choice. Because this process requires conscientious scrutiny and critical reflection, it perhaps describes the experience of homosexuals even better than it does that of heterosexuals. Because heterosexuality is typical, young people mature under the initial assumption that they are heterosexual. Those who turn out to be homosexual or bisexual experience emotional attachments that cause them to engage in internal deliberation and critical reflection about who they really are and on how to apply this new knowledge to their own lives. In essence, they are questioning, examining, and revising what they had initially thought to be their projects and goals.

The difficulty with the equation of sexuality with faith is that this interpretation will itself be considered a sectarian one by adherents of traditional moral values. From one perspective, humanistic views, particularly what detractors call secular humanism, themselves function as a religion when this is broadly defined as a belief system or worldview concerning ultimate values, although secular humanism is popularly defined as nontheistic. I say "popularly defined" because there are persons with theistic religious convictions who also believe that the faculty of human reason is God-given and that human beings are endowed with the responsibility of developing it, honing it, and engaging in critical reflection about alternatives in arriving at one's convictions, projects, and goals.

Nevertheless, I have maintained that there can be no assurance that on every question subject to public decision, a neutral resolution can be found that will offend the interests and conscientious convictions of no one. As we have seen in the case of Sabbath observance, whether one considers this a choice or a duty determines one's conclusions as to what policy serves neutrality. Because there
is no neutral criterion in the light of which to define neutrality, I have argued that a liberal polity must espouse a criterion that is admittedly nonneutral as a basis for judging neutrality. I have argued that in my view, this criterion is that of autonomy-based neutrality. We can make judgments regarding neutrality on a first-order level only if we select a criterion on the second-order level that gives us a reference point for making these judgments. I have suggested throughout that with autonomy as a criterion, individuals should engage in critical reflection as they select, question, examine, and revise or reaffirm their projects and goals. The liberal polity should uphold and support its citizens in this endeavor, and it should do so not because these projects and goals are unchosen constituents of their identities but because they are centrally important to these identities. I have favored the expression of cultural membership and religious belief as central to individual identity, and I have now extended this interpretation to sexuality.

Autonomy-based neutrality toward homosexuals means not only that public policy should not favor heterosexuals at homosexuals’ expense, as in antisodomy laws, the military ban, and the marriage exclusion. It also means that beyond the fact that homosexuals are a numerical minority, it should not be harder to be a homosexual than to be a heterosexual, just as it should not be more difficult to be Sabbath-observant than to be Sabbath-nonobservant. We may circumscribe the available range of options and opportunities not only by eliminating alternatives but by raising the costs of unconventional and unpopular choices to heights that are unacceptable in a liberal polity. Collective deliberation will always be necessary to decide which among many practices are inimical to liberalism. But this goal is best achieved by forthright debate, not by subscription to the current orthodoxy. Moreover, when we do allow practices that we could forbid, we should accord full respect to individuals who engage in these practices, even if we continue to disagree with their views. We should not make a group pay reparations for our “generosity” through the back door, through a toleration that is only a grudging one, for costs that we did not extract through the front door.

Liberals, as opposed to communitarians, tend to defend moral norms like that of fundamental human equality as right in a universalizable sense, rather than as local customs in accord with the dominant consensus. This means that liberals often defend toleration not simply because of its potential contribution to political stability but because there is something about toleration that inherently conforms to the demands of liberal principles. People will differ about what does so conform. But in a liberal polity, toleration should be less a matter of acceding to a given or current consensus than a commitment to deliber-
ation among equals about the meaning of liberal principles when these are applied to specific issues. Such deliberation requires that each of us has the opportunity to engage in critical reflection as we examine, question, and revise our projects and goals and to be forthright without legal or social penalty about where this critical reflection is leading us.