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Faith, Harm, and Neutrality: Some Complexities of Free Exercise Law

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God vs. the Gavel: Religion and the Rule of Law
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I. INTRODUCTION

Professor Marci Hamilton has chosen *God vs. the Gavel* as the title for her new book on the importance, and difficulty, of bringing religious conduct under the rule of law.[2] To appreciate the aptness of her title, we need only look at a snippet of testimony from a recent criminal case in Alabama, a mundane case in most ways, one which didn't make Hamilton's book and won't make the casebooks, but which pits God squarely against gavel and underscores the intractability of the conflict. The defendant, Teresa Ann Archie, killed her teenage daughter with a shotgun and pleaded insanity. Her insanity was manifested, she argued, by her belief that the murder was God's will:

> Q: Why did you pull your gun out?
> A: I had to do the Lord's will, I was led to get rid of her . . . I had to do his will . . . she was worshiping Satan . . . my spirit and soul couldn't be released until I —
> Q: Are you saying you read a part of the Bible that told you what to do?
> A: Yes . . .
> . . . Q: You feel like everything is okay now . . . ?
> A: Yes, I feel that my heart is pure now . . .[3]

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2. MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW (2005).

3. Archie v. Alabama, 875 So. 2d 336, 343 (Ala. Crim. App. 2003).

The reviewing court declined to assess the validity of the alleged duty to kill apostates, commenting that "we are in no position to engage in a theological analysis of Archie's apparent religious beliefs."[4] And to be sure, Archie could have been more precise in her testimony, and pointed to the specific part of the Bible she had in mind. But to even the casual student of religion, the reference is obvious. Archie is talking about Deuteronomy 13:6-10, which instructs the faithful as follows:

> If thy brother, the son of thy mother, or thy son, or thy daughter, or the wife of thy bosom, or thy friend, which is as thine own soul, entice thee secretly, saying, Let us go and serve other gods, which thou hast not known . . . . Thou shalt not consent unto him, nor hearken unto him; neither shall thine eye pity him, neither shalt thou spare, neither shalt thou conceal him: But thou shalt surely kill him; thine hand shall be first upon him to put him to death. . .

The court's reluctance to analyze the theological validity of the alleged duty to kill Satan-worshipers is perhaps understandable, given that the duty is unambiguously set out in the plain language of the text. What is there to analyze? If your child contemplates the worship of other gods, according to this text, you must kill her. There's nothing symbolic, metaphorical, or the least bit opaque in the instruction. To a person who believed, as one-third of all Americans claim to, in the literal truth of every word in the Bible,[5] and the Bible's sovereign authority as the source of morality, there could be no room for debate. Archie's theology, in other words, is completely orthodox. But here's the problem: all five judges on the

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4. *Archie*, 875 So. 2d at 343

5. The most reputable long-term survey data, that of the General Social Survey run by the University of Chicago's National Opinion Research Center, reveals a stable percentage of about one-third (33.7% as of 1998) of Americans who choose "The Bible is the actual word of God and is to be taken literally, word for word," among several descriptive options, including "inspired" but not the literal word of God, and "ancient book of fables, legends, history, and moral precepts." The GSS data is available at http://webapp.icpsr.umich.edu. Other less scholarly and systematic surveys have reported much higher figures. For example, the Rasmussen polling firm found that 63% of respondents answered "yes" to the question, "Is the Bible literally true and the word of God?" *See* www.rasmussenreports.com/2005/Bible.com. I leave it to the reader to hypothesize what percentage of those respondents would also agree that Teresa Archie was right to kill her daughter.

court agreed that Archie's religious beliefs sufficed as a matter of law to establish that she was insane.[6]

Cases like *Archie* are not, it turns out, particularly rare,[7] and they force us to confront an odd cultural juxtaposition: belief in the literal inerrancy of the Bible is a badge of honor and a cultural sine qua non for a huge slice of the American populace, while at the same time sufficing in courts of law to make out a legal determination of mental illness. Hamilton does not discuss religious insanity cases, and in numerical terms they are trivial: hardly anyone pleads insanity, and hardly any of those that do get "not guilty by reason of insanity" (NGRI) verdicts. But as a theoretical matter, the problem demands an answer: Can religious beliefs ever be deemed insane delusions? Can they exempt defendants from criminal liability? Are there constitutional problems with such defenses? I will come back to insanity at the end of this Re-

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6. *Archie*, 875 So. 2d at 344 (majority opinion) ("The record indicates that Archie was unquestionably suffering from a severe mental illness when she killed her daughter; the State does not argue otherwise."); *id.* (Shaw, J., concurring) ("[T]he undisputed evidence presented at trial indicated that Archie was mentally ill when she shot and killed her daughter (a fact the State concedes) and that by virtue of delusions resulting from that mental illness she was unable to conform her conduct to the requirements of the law."); *id.* at 350 (Cobb, J., dissenting) ("The testimony in this record permits only the conclusion that Teresa Ann Archie was insane before she shot her daughter, she was insane at the time of the shooting, and she was insane after she shot her daughter. . . . The jury ignored the overwhelming evidence regarding Archie's mental state that demonstrated that Archie could not appreciate the nature and quality or wrongfulness of her acts. Archie is entitled to a judgment of acquittal.").

The conviction was affirmed, though, on the second prong of the state's insanity test: the court held that the jury could reasonably have found that Archie retained the ability to understand that killing was wrong. *Id.* at 344 ("[T]he law in Alabama is clear. Archie had to prove by clear and convincing evidence that she was unable to appreciate the nature and quality or wrongfulness of her acts. . . . [The record] provided conflicting evidence as to whether Archie was able to appreciate the nature and quality or wrongfulness of her acts.").

7. Of course in absolute terms, insanity pleas are a rare thing in themselves, and successful ones, still more so. But within the universe of insanity pleas, a surprising number of defendants rely straightforwardly on religious beliefs. Recent examples include Deanna Laney, who killed her children, *see infra* Part IV.A; Andrea Yates, who killed her children, *see* Yates v. State, 171 S.W.3d 215 (Tex. Crim. App. 2005); Ron Lafferty, who killed his sister-in-law and niece, *see* Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991); Brian Kelley, who killed his daughter, *see State v. Kelley*, No. M2001-00461-CCA-R3-CD, 2002 WL 927610 (Tenn. Crim. App. May 7, 2002); Wanda Barzee, who kidnapped Elizabeth Smart, *see* Pat Reavy, *Barzee is Unfit for Trial*, DESERET NEWS, Aug. 11, 2004. And defendants rely on religious beliefs in asserting other defenses as well, such as lack of intent to kill, or justification. *See, e.g.*, Shelley Murphy, *Sect Leader Convicted in Starvation of Son*, BOSTON GLOBE, June 5, 2002, at A1 (Jacques Robidoux, who starved his infant son, argued that he believed God would miraculously keep son alive); Jon Wells, *Sniper: The True Story of James Kopp*, HAMILTON SPECTATOR (Ontario), June 1, 2004 (James Kopp, who murdered a doctor, asserted a religious justification defense on the grounds that the doctor performed abortions).

view; I raise these questions here to highlight the complexity of the relationship between religion and rule of law, and thus the need for books like *God vs. the Gavel*.

The religious killing cases are extreme examples of the general problem that motivates and structures Hamilton's book: Religious belief, while often a salutary force in society, can also be a source of great harm. It can incite and justify acts of violence, prejudice, and cruelty, and it can convince believers that they are above the law. Hamilton, the Paul R. Verkuil Chair in Public Law at Cardozo School of Law, came to this realization late, after long propounding what she now sees as a naive free exercise doctrine of broad exemptions for religious activity.[8] Her work as an advocate — she argued, and won, the landmark case *Boerne v. Flores*,[9] and most recently has represented victims of sexual abuse by Catholic priests — slowly opened her eyes to the myriad social harms wrought by the combination of righteous religious belief and legal immunity, and she urges that "[t]he United States must abandon its adolescent belief in the inevitable goodness of every religious entity."[10] In *God vs. the Gavel*, she argues that these harms can be largely negated by the simple expedient of applying the law neutrally and evenly, without allowing exceptions for religiously motivated conduct. The neutrality of law is an ancient ideal, much criticized of late. I can't fault Hamilton for her devotion to it, though her arguments invite a somewhat deeper descent into the theoretical labyrinth buried under the ideal than readers will find in this book.

God vs. the Gavel is divided into two parts. In the first, Hamilton identifies six areas of law in which religious immunity is particularly problematic: children, marriage, land use, schools, prisons and the military, and employment discrimination. In the second, she makes an argument for the unconstitutionality of the Re-

8. HAMILTON, *supra* note 2, at 7-8.

9. 521 U.S. 507 (1997). *Boerne* is one of the most important constitutional law cases of the past fifty years. In 1990, in *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court had held that the Free Exercise Clause did not require strict scrutiny of neutrally applicable laws (in this case, drug laws) when enforced against religious conduct. In response, Congress passed the Religious Freedom Restoration Act ("RFRA"), which purported to overturn *Smith* and set up strict scrutiny as the standard of review for all legislation that burdened religious conduct. In *Boerne*, a Texas town sought to apply its historic preservation laws to a church building, and the church sued under RFRA. The Court held RFRA unconstitutional as applied to the states. In so doing the Court re-asserted its own supremacy in constitutional interpretation: the Court, not Congress, decides what standard of review is appropriate for claims of constitutional violation.

10. HAMILTON, *supra* note 2, at 305.

ligious Freedom Restoration Act ("RFRA") and its state and federal progeny, and more broadly for a "harm principle" interpretation of the Free Exercise Clause.

Hamilton's "harm principle" approach to free exercise connects the factual and theoretical halves of the book. On this view, the state always has the power and the duty to regulate conduct which creates risks of harm to others, and the Constitution does not say otherwise. Religious conduct will be protected only insofar as it does not harm people. Or, put another way, those aspects of religious conduct that harm people fall outside the sphere of First Amendment protection. The factual setting provided in the first half of the book is necessary for meaningful consideration of the theoretical issues, because Hamilton rightly insists that the actual (as opposed to the imagined) effects of a theory of religious immunity must inform debate over whether it is constitutionally required.[11]

This Review proceeds as follows. In Part II, I will discuss some of the problems described in the first half of Hamilton's book, and I will add a few recent cases that highlight the extent to which these areas of law overlap and merge together. In Part III, I will briefly consider Hamilton's response to the arguments of Judge Michael McConnell and others who advocate a much broader view of the Free Exercise Clause. In Part IV, I will return to religiously-based insanity pleas, as an example of the difficult philosophical and doctrinal problems inherent in applying the First Amendment to religiously motivated conduct — problems which will continue to plague regimes of even the strictest neutrality.

II.

A. Children

Hamilton begins the book with a truly disturbing catalogue of recent cases of sexual abuse of children by clergy.[12] As disturbing as the details of the crimes committed — often continuously, over years or decades, and with the knowledge of church leadership, who were interested only in silence — is the role of the First

11. This is true because, first, there is an ineluctable tension between the Free Exercise and Establishment Clauses, *see* Locke v. Davey, 540 U.S. 712, 718 (2004), and second, the meaning of the Free Exercise Clause is largely a function of actual social practices, at the time of the Framing and since.

12. HAMILTON, *supra* note 2, at 14-30.

Amendment as aider and abetter. Religious groups reflexively invoke free exercise to block access to damning documents, to avoid paying settlements, or to challenge the legitimacy of the charges themselves.[13] Hamilton argues that the civil liberties advocacy groups who police the Bill of Rights "have not been focused on the plight of children, unless they were vehicles for larger agendas."[14]

While sexual abuse in the Catholic Church has been most widely publicized, it is rampant in other denominations as well. Widespread sexual abuse within Jehovah's Witness and Mormon communities has also been alleged and documented in recent years. The common denominators appear to be a patriarchal social structure and an authoritarian hierarchy. Always the pattern is the same: the church imbues some men with near-absolute power, over its women or children or both, power which is said to reflect God's will. Disobedience is a sin, and appeal to outside authorities is heresy.[15] The key to breaking the cycles of sexual abuse that are thus begotten is to break the seal separating the religious group from civil society. So long as religious groups can keep their members walled off from "outsiders," those members

13. A representative recent case in this regard is *Richelle L. v. Roman Catholic Archbishop*, 130 Cal. Rptr. 2d 601 (Cal. Ct. App. 2003). The plaintiff, an adult woman, brought several tort claims against a priest and diocese, including emotional distress, breach of fiduciary duty, fraud, and negligent supervision. The plaintiff alleged that the priest manipulated her religiosity and deference to ecclesiastical authority to induce her to engage in sexual conduct. Relying on similar cases involving attorneys and doctors, the plaintiff claimed that the priest "knew [that the plaintiff's] piety made her readily subject to manipulation and control by a pastor, and her judgment and ability to resist . . . his advances [would be] substantially compromised by her religious faith and trust." *Richelle L.*, 130 Cal. Rptr. 2d at 617. The court refused to hear any of the claims: "Appellant's claim that the depth of her religious faith rendered her vulnerable to Reverend Namocatcat could not be adjudicated without reference to the nature of her religious beliefs and the doctrines of her church." *Id.*

Whatever one thinks of the merits of a tort action brought by an adult on the basis of concededly consensual sexual activity, the breadth of the theory of dismissal is stunning. Is there not a real question of fact as to whether the priest abused a position of trust and authority and injured the plaintiff in so doing? Doctors and attorneys are subject to liability in such cases, as the court noted, *id.* at 607. Why not priests? The court's unthinking refusal to hear any claim that would involve "reference to her religious beliefs" is, to many commentators, an abdication of the courts' basic function of factfinding, and this sort of broad "religious question" exemption is coming under increasing academic scrutiny. *See, e.g.*, Jared A. Goldstein, *Is There a 'Religious Questions' Doctrine? Judicial Authority To Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 534-40 (2005) (arguing that courts are perfectly competent, institutionally and constitutionally, to find facts about the content of religious doctrines and beliefs, just as they find facts about the content of contracts or foreign law).

14. HAMILTON, *supra* note 2, at 17.

15. *See* HAMILTON, *supra* note 2, at 14, 25.

will be unable or unwilling to look to the state for help when sexually assaulted by the men in charge.

Consideration of this dynamic, which informs all of the clergy abuse cases detailed by Hamilton, suggests a difficult problem for our education jurisprudence: Is there not a fundamental conflict between, on the one hand, the interest of civil society and democracy of all citizens' interacting with the broader community, and, on the other, the desire of religious organizations to sequester their children from contact with the broader community?

Fundamentalists of all stripes assert a constitutional right to keep their children out of school in order that they may prevent their children from being exposed to influences and ideas which are inconsistent with the tenets of the parents' religion. Homeschooling and religious schooling are also unfortunately frequent sites of two common forms of abuse visited upon children by religious authority figures, including parents: violent assaults in the name of discipline, and denial of medical care.

Conversely, when religious parents send their children to public schools, they often demand exemptions from rules which conflict with their religious practices. These conflicts have been sparked by such apparent mundanities as dress codes and hair-length restrictions, but also by course content and coed instruction.[16] The most dramatic of the cases have involved Sikh boys, who by tradition are required to carry a knife with them at all times.[17] Throughout, Hamilton's point is simple: the task of pursuing the public good while accommodating the preferences of a diverse populace is quintessentially one for the legislature, not the courts.

She puts an interesting twist on this oft-repeated nostrum, by observing that in the school-rules cases, the only parties before the court are the aggrieved religious parents and the school system, and the only issue before the court is the accommodation of the parents' religious preferences. The question of the needs of the *rest* of the school-going public never arises, or does so only indirectly, and in the background. Thus the courts have a narrow and lopsided perspective on the actual social problem of managing a school system. The result of this myopia is occasional rulings ordering elaborate and costly accommodations on constitutional grounds, based on a skimpy factual record, and, sometimes, the judges' own speculations about the ease of accommodation. It is

16. *See id.* at 138-39.
17. *See id.* at 114-18.

tempting indeed for judges to opine that it just can't be that big a deal to let a kid wear a yarmulke in a basketball game,[18] but, Hamilton argues, to yield to that temptation is to commit the worst of modern judicial sins: legislating from the bench. If the legislature wants to waive neutrally-applicable rules for religious groups, it may do so (subject to Establishment Clause constraints), but there is no reason for courts to read broad universal waivers into the Free Exercise Clause.

The same sort of waiver theory is at work much more perniciously in the faith-healing and "discipline" cases. Hamilton cites numerous examples of parents who horribly abuse their children, either by denying them medical care as they slowly die from easily treatable illnesses, or by subjecting them to violent assaults in the name of discipline.[19] Some religious parents beat their children themselves; others hand them over to violent pastors. Hamilton's examples of "disciplinary" violence against children are perhaps — if it is possible — more disturbing than the sexual abuse cases because, in the discipline cases, the church officials were acting openly and claiming explicit biblical authority for their abuse. Hamilton reminds us that "corporal punishment is still a tenet of some religious organizations."[20]

In all these cases, as in the home-schooling cases, the parents want to waive on behalf of their children the state's offer of protection from harm or the benefits of education. "We don't need you," say the parents, "we want to be left alone, in our closed society." And to a certain extent, the Constitution respects that desire. But how far do we want to allow parents to isolate their children from the "corrupting" influence of the world outside the church? It is easy enough to see the harm inflicted when a pastor beats a 4 year-old child to death with a metal carpenter's level for the sin of opening a bathroom door and seeing another child naked.[21] The harms inflicted by social isolation are less easily articulable, but

18. *See id.* at 123-26 (discussing Menora v. Illinois High School Assoc., 683 F.2d 1030 (7th Cir. 1982)).

19. *See* HAMILTON, *supra* note 2, at 31-44. I will say no more here about the cases of physical abuse described in the book, except that they are truly horrifying.

20. *Id.* at 41. And those of us who have lived in Bible Belt communities need no reminding.

21. *See id.* at 40. And here, as always, there is a Biblical text that can be called upon to justify the violence. Recall that Noah's son Ham and all his descendants were cursed for Ham's having opened Noah's tent flap and found his father passed out naked in a drunken stupor. *Genesis* 9:18-25. The story was used for centuries to justify hereditary slavery, with Africans and African-Americans taking the metaphorical part of "children of Ham."

no less real. The harm identified by courts in home-schooling cases is typically the disabilities in employment and social life occasioned by inadequate education.[22] But to specify that harm in any particular case, do we not need to specify the ways in which the specific program in question is *lacking* — in other words, the ways in which the doctrines the child is taught are *not true*? And if so, then the *Ballard* principle[23] — which, I should stress, is judge-made law — is on a collision course with the state's interest in an educated populace. To see the explosiveness of this problem, we need only ask whether a state may constitutionally mandate that all children receive an education in science. A religious sect that refused to teach its children to read and write would presumably not prevail on free exercise grounds. At some point, states may be ready to assert that the refusal to teach children about biology, geology, chemistry, astronomy, and so forth, is similarly unprotected.

The problem here is that the right to home-school only has value *as a right* if it applies in situations in which the home education does not mirror the public education.[24] If we recognize the home-schooling right only when the education offered at home is equivalent to that in the public school, the right is not doing any work as a right; it is needed as a right precisely by those parents who vehemently reject secular society. And if it allows parents to deprive their children of a meaningful education, then we have to ask whether it should be a right at all.

A person's rejection of secular society is, generally speaking, constitutionally protected. But it cannot be indefinitely so. How far can a democracy, which relies at every moment for its continued existence on the public participation of its citizens, allow par-

22. *See, e.g.*, Duro v. District Attorney, Second Judicial District, 712 F.2d 96, 97 (4th Cir. 1983) ("[A] state has a compelling interest in compulsory education, in order to 'prepare citizens to participate effectively and intelligently in our political system' and to 'prepare individuals to be self-reliant and self-sufficient participants in society.") (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)); *id.* at 98 ("Duro refuses to enroll his children in any public or nonpublic school for any length of time, but still expects them to be fully integrated and live normally in the modern world upon reaching the age of 18. . . . Duro has not demonstrated that home instruction will prepare his children to be self-sufficient participants in our modern society or enable them to participate intelligently in our political system, which, as the Supreme Court stated, is a compelling interest of the state.").

23. United States v. Ballard, 322 U.S. 78 (1944) (holding that the state must remain neutral as to the truth or falsity of religious beliefs).

24. For examples of cases holding that home-schooling may be permitted only upon a showing that the curriculum taught roughly mirrors that in the public schools, see *Care and Protection of Charles and Others*, 504 N.E.2d 592 (Mass. 1987), and *State v. Massa*, 231 A.2d 252 (N.J. Super. Ct. Law Div. 1967).

ents to teach their children that the world outside their church is evil and corrupting?[25] Here as elsewhere, the comforting rhetoric of religious freedom can mask some very troubling practices that put children at risk of serious and permanent harms. Further, it can prevent the state from recognizing those harms for what they are, and from defending the children's interests.

I have no proposal to resolve this dilemma, nor does Hamilton. All we can do is insist that our policymakers and courts recognize that there *is* a dilemma here that must be dealt with from case to case. Most people would agree that denying your child food or medical care is going too far. How about denying your child a meaningful education? Is education like food and medical care? How about consenting to your 14 year-old daughter's marriage to a 22 year-old?[26] How about consenting to your 13 year-old daughter's polygamous marriage as the tenth wife of a 54 year-old man?[27] At the very least, the First Amendment cannot be a complete bar to state regulation of such conduct.

B. Gay Marriage

But what, we might ask, is so bad about civil society? Why do so many religious fundamentalists want to keep their children sequestered from the secular world? A large part of the answer — if there remained any doubt after the 2004 elections — seems to be fundamentalists' fear that civil society might grant its imprimatur to same-sex marriage. *Why* this fear looms so large in the psyches of religious fundamentalists is beyond the scope of this Essay, but *that* it does is not in dispute. Hamilton's chapter on marriage analyzes religious opposition to gay marriage, and accuses opponents of gay marriage of trying to legislate from the pulpit. This observation is important for constitutional analysis — because, among other things, legislatures cannot enact religious doctrine as law under the Establishment Clause — but Hamilton's discussion of gay marriage is disappointingly short, and remains at the level of policy debate.

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25. And query whether home-schooling might thus be a context in which the Republican Form of Government Clause could eventually be held to be justiciable. *See* U.S. CONST. Art. 4, Par. 4; Luther v. Borden, 48 U.S. 1 (1849) (holding that clause to be nonjusticiable).

26. *See infra* text accompanying note 55 (discussing such a case).

27. *See* JOHN KRAKAUER, UNDER THE BANNER OF HEAVEN 20-23 (2003) (discussing such a case).

Of course there is a plausible argument that the question of gay marriage *should* be a policy debate as opposed to a constitutional debate. It may be argued, for example, that absent an extension of *Carolene Products*[28] "suspect class" status to gays, legislatures are not constrained by constitutional limits on their definitions of marriage. Hamilton doesn't flesh out any full-blown constitutional arguments with respect to gay marriage. She is simply concerned to establish — and does so effectively — that opposition to gay marriage is a largely (indeed one might say wholly) religious position. From this premise, though, her conclusion, that our "pluralist society is the result of the Constitution's best aspirations,"[29] is strangely anemic. Is that really all there is to say about the constitutionality of the various "marriage definition" laws? To be sure, I agree that in the light of our nation's history as a haven for persecuted religious minorities, it's unseemly for religious groups to try to insert their doctrines into the civil law. But beyond that aspirational proposition, there is also a long history of caselaw on the constitutional dimensions of marriage, and it's all missing from Hamilton's chapter. For a book about religion and the rule of law, this omission is jarring. Hamilton's readers might come away wondering whether the Constitution is implicated in the gay marriage debate at all.

Rest assured, it is, through at least three provisions: the Establishment Clause of the First Amendment, the Equal Protection Clause of the 14th Amendment, and the Due Process Clause of the 14th Amendment. This subject has been widely discussed in the academy in the wake of *Lawrence*[30] and the Massachusetts Supreme Judicial Court's *Goodridge* decision,[31] so there is no need to embark on lengthy explanations in this Essay, except to note that

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28. Carolene Products Co. v. United States, 323 U.S. 18 (1944).

29. HAMILTON, *supra* note 2, at 66.

30. Lawrence v. Texas, 539 U.S. 558 (2003).

31. In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) (holding under the Massachusetts Constitution that providing "civil union" status but not marriage to same-sex couples violated equal protection and due process). Recent commentary includes Nancy K. Kubasek, Alex Frondorf, & Kevin J. Minnick, *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 FLA. J. LAW. & PUB. POL'Y 229 (2004); Mark Strasser, *Lawrence and Same-Sex Marriage Bans: On Constitutional Interpretation and Sophistical Rhetoric*, 69 BROOKLYN L. REV. 1003 (2004); Cass Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005); Laurence Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak its Name*, 117 HARV. L. REV. 1894, 1945-51 (2004); *Same-Sex Marriage Symposium Issue*, 18 BYU J. PUB. L. 273, 273- 662 (2004); *Symposium on Goodridge v. Department of Public Health*, 14 B.U. PUB. INT. L.J. 1, 1-182 (2002).

Hamilton's discussion of gay marriage is incomplete. It establishes that the marriage definition bills are essentially statements of religious doctrine, but it doesn't explain why that might be a *legal* problem. The chapter, thus, would have benefited from reference to some of the following considerations.

A statutory ban on gay marriage might, first of all, be properly seen — given Hamilton's cultural sketch — as an attempt to enact religious doctrine as law. A state cannot enact religious doctrine as law under the Establishment Clause, so the crucial question for an Establishment clause challenge would be whether the legislature had a non-religious basis for the law. This question will often be, in practice, whether the legislators were able to refrain from the kind of explicitly religious triumphalist rhetoric that has been associated with these proposals. If legislators take to the floor and declare that they have fulfilled God's will by enshrining Paul's Letter to the Corinthians in the statute books, Establishment Clause challenges to the law will be that much easier.[32]

Further, all laws are subject to scrutiny under the Equal Protection Clause. Plaintiffs burdened by an allegedly discriminatory law usually lose if they are not members of a suspect (or "quasi-suspect") class, because without that necessary trigger to invoke heightened scrutiny, discriminatory laws need only meet rational basis review, which is highly deferential.[33] The problem for the marriage-definition laws is that it is not always easy to articulate any basis for them other than the religious one, and that one cannot constitutionally speak its name. And just as the legislature

32. This precise dynamic was displayed in the successful Establishment Clause challenge to the Dover, Pennsylvania, school board's adoption of an "intelligent design" science curriculum. *See* Kitzmiller v. Dover Area School Dist., No.04cv2688 (M.D. Pa. Dec. 20, 2005). The board's defense was that "intelligent design" is not a religious doctrine, but the court found to the contrary that the board members had a long record of advocating teaching creationism, and that the "intelligent design" policy was conceived as a means to introduce religion into the schools. *Id.* at 94-132 (page after page of detailed recitation of facts showing explicit religious purpose, harassment of opponents on religious grounds, and so on. Good reading.). *See also* Laurie Goodstein, *In Intelligent Design Case, a Cause in Search of Lawsuit*, N.Y. TIMES, Nov. 4, 2005 (describing the long effort by the Thomas More Center, a group dedicated to "protect[ing] Christians and their beliefs in the public square" to persuade any school district in the country to teach intelligent design so as to prompt a lawsuit, and noting that the school board's counsel advised the board that "opponents would have a strong case because board members had a lengthy public record of advocating 'putting religion back in the schools.'"). The issue may be mooted in Dover, though, because every single member of the school board was defeated in the Nov. 8 elections by a slate of candidates who ran on a pro-evolution platform. Laurie Goodstein, *Evolution Slate Outpolls Rivals*, N.Y. TIMES, Nov. 9, 2005.

33. *See generally, e.g.*, TRIBE, AMERICAN CONSTITUTIONAL LAW § 16 (summarizing caselaw).

may not codify religious doctrine, neither may it legislate solely on the basis of animus toward a group.[34] The no-animus rule applies to all classes, not just the suspect classes, and a law which simply says that men may not marry men and women may not marry women certainly runs the risk of appearing to be based on animus. No one doubts the sincerity of religious conservatives who are outraged by gay marriage. But then no one doubted the sincerity of segregationists, either. The issue in each case is whether those particular preferences may be constitutionally embodied in legislation.

In addition, there remains the very straightforward argument, accepted by the court *Baehr v. Miike*,[35] that what is going on in these laws is just ordinary gender discrimination. If that is the case, then all the Court's gender jurisprudence comes into play, including *United States v. Virginia*, the *VMI Case*, which comes fairly close to requiring strict scrutiny for gender-based classifications.[36] You don't need to argue animus or religious motive if you have the weight of *VMI* behind you.

Finally, you might not even need to argue discrimination of any kind, because the Supreme Court has long held that marriage is a "fundamental right" under the 14th Amendment.[37] The marriage cases are a branch of the same line of substantive due process cases that have articulated the general right to privacy in reproduction and sexual intimacy. This is another irony of the religious outcry over *Lawrence*: *Lawrence* is the fruit of precisely the same doctrinal tree as *Zablocki*. Marriage is sacred to the Constitution

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34. Romer v. Evans, 517 U.S. 620, 634 (1996).

35. CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

36. United States v. Virginia, 518 U.S. 515, 532-33 (1996) ("Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men). . . [C]aselaw evolving since 1971 reveal[s] a strong presumption that gender classifications are invalid. To summarize the Court's current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State. The State must show at least that 'the [challenged] classification serves important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.") (internal citations omitted). For a discussion of the applicability of the VMI standard of review in various contexts, see Valorie Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, BERKELEY WOMEN'S L.J. 68, 80-83 (2002).

37. Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978).

only to the extent that the Constitution embodies some set of substantive due process "fundamental liberties."[38] If the Constitution does not (as Justice Scalia has so often argued), then laws burdening marriage are not presumptively illegitimate as such. For religious conservatives, this is a classic baby-bathwater problem.

In any event, the black-letter law is straightforward: laws which burden the right to marry are subject to strict scrutiny; that is, they must be narrowly tailored to further a compelling government interest. Thus the three constitutional provisions interact to raise the question whether the religious opposition of some sects to *any* same-sex marriage being recognized by the *state* can be a valid state interest, in a society dedicated to the rule of neutral principles of law. And if not, then can the state meet its justificational burden even under deferential rational basis review?

In *Baehr,* for example, the court ruled that the state's opposite-sex-only marriage law discriminated on the basis of gender, and that therefore the state had to overcome strict scrutiny by showing that the prohibition on gay marriage furthered a compelling state interest.[39] On remand, the state argued that its interest was the well-being of the children who might be born into such marriages, and put on expert witnesses who testified as to the fitness of same-sex couples to raise children. After a lengthy trial, the court concluded: "Simply put, Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage."[40] Indeed, this formulation suggests that the state's evidence would have been insufficient to overcome even rational basis scrutiny, let alone the more demanding standard![41]

The question of what can constitute a sufficient state interest has particular force in the gay marriage cases, because the interest actually insisted upon by the public supporters of the laws is almost always articulated in either religious terms or simple animus.[42] If the Constitution rules out animus and religious doctrine,

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38. *See Zablocki*, 434 U.S. at 384-85 (citing Eisenstadt v. Baird, 405 U.S. 438 (1972), Griswold v. Connecticut, 381 U.S. 479 (1965), Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942), Meyer v. Nebraska, 262 U.S. 390 (1923)).

39. Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

40. *Baehr*, 1996 WL 694235, at *18 para. 139.

41. The Hawaii constitution was subsequently amended to expressly give the legislature the power to define marriage. *See* Baehr v. Miike, 994 P.2d 566 (Haw. 1999) (recognizing that the amendment overruled its prior gay-marriage holding).

42. The argument that allowing gays to marry would legitimize homosexuality, for example, is a classic animus argument. If, for example, I protest that "traditional values

then states may be hard pressed to satisfy rational basis review, let alone intermediate or strict scrutiny. Simply put, said the *Baehr* court, the state had put on nothing except the majority's animus, and that's not enough. Same-sex marriage involves people seeking to engage in activity that does not harm third parties, where the only objection is that it offends others' religious sensibilities.

This is also, and more famously (and more to the point, still good law), the reasoning of the Massachusetts Supreme Court in *Goodridge*. I don't want to belabor the argument any further, and I shouldn't have had to: Hamilton should have included these cases in her book, because her harm principle applies perfectly in this context. If courts start recognizing a constitutional right to marry for gay couples, it will be because they apply a meaningful harm principle to rational basis review, and reject the argument that religious outrage constitutes harm. The state may not discriminate against people, or burden their fundamental rights, simply because many religious people think God wants it that way.

Hamilton should also have included these cases in her book because, probably more than any other single issue in the courts today, marriage is where the action is when it comes to neutrality, religion, and the law. From time immemorial — or at least from the 1960s, when these cases started cropping up — courts have consistently held, without much discussion, that the gender component of marriage laws was the very epitome of legal neutrality. It didn't discriminate, it didn't take sides, it simply defined, in neutral terms, an institution that was open to all. When the state denied marriage licenses to gay couples, or refused to recognize their relationships for various legal purposes, that wasn't discrimination, that was simply neutral enforcement of a neutral definition of a neutral institution.[43] But that edifice — or facade,

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will be undermined" if gays are allowed to marry, then you are entitled, even on rational basis review, to an explanation of what those values are and how gay marriage will undermine them. Thus I'll have to give some non-circular account of the content of the relevant values. If my value is simply that gays shouldn't marry, then obviously it will be undermined if gays are allowed to marry. But the value, stated that way, is simple animus, and if I restate it as "Gays shouldn't marry because God ordained marriage as a heterosexual union," or whatever, then it is exposed as a religious concern, also an illegitimate basis for legislation.

43. *See, e.g.*, Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973) (upholding denial of marriage license to two women against constitutional challenge because "appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County

depending on one's perspective — has been shaking of late, and has crumbled completely in some jurisdictions.[44] The furor over marriage suggests that at least on some issues (and issues particularly dear to religion) there is no such thing as legal neutrality — or if there is, no one can agree on what it means.[45]

C. *Statutory Rape and Polygamy*

The principle that public distaste is not a sufficient basis for discriminatory legislation is quite a new development in equal protection law, and is already having some dramatic effects in state courts. *Kansas v. Limon*[46] is the best case in point. It involved a "Romeo and Juliet" exception to the state's statutory rape law which provided for lighter penalties when the older partner was 18 and the younger partner was 14 or over. However, the exception only applied to heterosexual relationships. An 18 year-old who, like Matthew Limon, had sex with a 14 year-old partner of the same gender, faced the full statutory rape penalty.

The Kansas Supreme Court concluded that, although the law faced only rational basis review, *Lawrence* and *Romer*[47] required that it have some justification other than society's moral disapproval of homosexual conduct. *Lawrence* does seem pretty clear about that proposition: the Court adopted a paragraph from Justice Stevens' *Bowers* dissent[48] to the effect that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[49] Lest there be any doubt whether the quoted language is dicta or holding, the Court continued that "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here."[50] The Kansas court, taking *Lawrence* at its word, scrutinized the list of justifications prof-

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Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.").

44. Including South Africa, as of this writing.

45. The same might be said of abortion, an issue which, also somewhat strangely, does not appear in this book at all.

46. State v. Limon, 122 P.3d 22 (Kan. 2005).

47. Romer v. Evans, 517 U.S. 620 (1996).

48. Bowers v. Hardwick, 478 U.S. 186 (1986).

49. *Lawrence*, 539 U.S. at 577.

50. *Id.* at 578.

fered by the state,[51] and found — just as the *Baehr* court had — that they were all lacking.[52] The court concluded:

> The status-based distinction in the Kansas Romeo and Juliet statute is so broad and so divorced from supporting facts that we cannot discern a relationship to the facially legitimate interest of protecting public health, and "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects."[53]

As interpreted by the Kansas court, *Lawrence* provides a way around the suspect class issue: if discrimination against gays based on moral disapproval alone is insufficient for rational basis purposes, then discriminatory laws fall regardless of the classification of gays for *Carolene Products* purposes. In Kansas, after *Limon*, moral disapproval alone cannot support legislation, at least unless the U.S. Supreme Court takes another case and clarifies *Lawrence*. But it's tough to see what else the Court could have meant in *Lawrence*. The Court certainly did not say that gays are a suspect class. And if the *Lawrence* holding is that intimate sexual conduct is a fundamental right under the privacy cases, the *Limon* result might be required as well, because the law's burden on Limon's exercise of that right would need to be narrowly tailored to further a compelling government interest, and as the decision established, it could not meet that test.

One way to extract a rule of law from *Lawrence* but exclude *Limon* from its coverage would be to read *Lawrence* as establishing a fundamental privacy right to consensual intimate sexual conduct,

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51. *Limon*, 122 P.3d at 32-38. For example, public health concerns provided no rational basis for the law, because

> [t]here is a near-zero chance of acquiring the HIV infection through the conduct which gave rise to this case, oral sex between males, or through cunnilingus. And, although the statute grants a lesser penalty for heterosexual anal sex, the risk of HIV transmission during anal sex with an infected partner is the same for heterosexuals and homosexuals.

Id. at 37.

52. *Id.* at 38 ("The Romeo and Juliet statute suffers the same faults as found by the United States Supreme Court in *Romer* and *Eisenstadt*; adding the phrase 'and are members of the opposite sex' created a broad, overreaching, and undifferentiated status-based classification which bears no rational relationship to legitimate State interests. Paraphrasing the United States Supreme Court's decision in *Romer*, the statute inflicts immediate, continuing, and real injuries that outrun and belie any legitimate justification that may be claimed for it. Furthermore, the State's interests fail under the holding in *Lawrence* that moral disapproval of a group cannot be a legitimate governmental interest.").

53. *Id.* at 37 (quoting Eisenstadt v. Baird, 405 U.S. 438, 452 (1972)).

but only between adults, and at the same time to explicitly reject the "no moral condemnation" rational-basis reading. Because, this argument would go, Limon had no protected right to engage in sex with a minor, and his relationship with the minor was not within the protected sphere of privacy, the statute did not burden a fundamental right and thus need not meet strict scrutiny. Furthermore, because *Lawrence* — on this reading — did not rule out moral sentiment as a legitimate grounds for a discriminatory classification, and gays are not a protected class, the statute need only meet rational basis scrutiny, which it survives because its basis, moral disapproval, is a legitimate one.

Whether this reading is viable remains to be seen. Given the Court's explicit adoption of Justice Stevens' *Bowers* analysis, I am inclined to doubt it. If the Court does take up *Limon*, though, it will have to clarify whether *Lawrence* really stands for a robust "no moral condemnation" principle, and *Lawrence*'s holding may end up being narrowed considerably.[54] But *Limon* is not the only case likely to come out of the state courts in the next few years trailing some of *Lawrence*'s loose threads. Consider, for example, the case of Matthew Koso. In 2004, Koso, a 22 year-old Nebraska man, impregnated his 14 year-old girlfriend. When they began their sexual relationship, she was 13, and he was 21.[55] Her parents strongly objected, and got an order of protection against Koso. But the relationship continued, and the girl got pregnant. Her parents then consented to the couple's marriage, so they drove to Kansas, where marriage by a 14 year-old is legal with parental consent, and were married. However, in Nebraska, unlike in Kan-

54. Some commentators have suggested that that is already happening in lower-court applications of *Lawrence*. *See, e.g.*, Note, *Unfixing Lawrence*, 118 HARV. L. REV. 2858, 2858 (2005) ("*Lawrence v. Texas* seemed to herald the dawn of a new era of tolerance for sexual minorities, of government withdrawal from regulation of adult sexual conduct, and even of the Supreme Court's substantive due process jurisprudence. But as a number of state and lower federal courts began to read the opinion narrowly, hope withered for many into frustration, wariness, and even despair. Just two years after the decision, it has already become de rigueur in scholarly and popular writing to reference wistfully what *Lawrence* might have been and to lament what it has become.").

On the other hand, Professor Goldberg has recently argued that *Lawrence* is only the latest manifestation of the Court's discomfort with explicitly morals-based legislation. *See* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233 (2005). Goldberg argues that "[n]otwithstanding its ubiquitous rhetorical endorsements of government's police power to promote morality, it turns out that the Court has almost never relied exclusively and overtly on morality to justify government action." *Id.* at 1235-36.

55. The girl was the younger sister of one of Koso's friends. When they met, she was 8, and he was 16. *See* 20/20, ABC News Transcripts, September 16, 2005.

sas, the marriage was invalid and no defense to rape.[56] Upon the couple's return to Nebraska, Koso was charged with statutory rape. He pled guilty and was sentenced to 18 months in prison.[57]

This case highlights the extent to which the vulnerability of children to severe harm in the name of adults' religious freedom should be a primary factor in any "public good" free exercise analysis.[58] Why, after all, did the girl's parents consent to the marriage? Ought the state to allow parents this power? How can a state give parents the power to waive, on behalf of their daughter, the state's protection against rape? Isn't the whole point of statutory rape law to protect minors against their own immature choices and manipulation by older men? That's why in statutory rape prosecutions, both the minor's consent and the defendant's knowledge of the minor's age are irrelevant: the law requires that men not have sex with children, period.[59] The usual justification for strict-liability statutory rape laws is that children shouldn't be having sex with adults — not that children shouldn't be having sex with adults unless their parents consent. We don't let parents simply waive prosecution of other crimes committed against their children. Parents cannot consent to their children's murder; they cannot even consent to the provision of alcohol to their children. Yet Kansas allows them to consent to their children's rape?

The fact cannot be escaped that people do these things, and many other terrible things, to their children in the name of religion. The neutrally applicable laws prohibiting violence and abuse of others will always, then, create burdens for religious practice, at least at the margins. One could imagine, in a pre-*Boerne* world, a

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56. Marriage is, however, a defense to statutory rape in Kansas. The Kansas statutory rape law provides that "[i]t shall be a defense to a prosecution of aggravated indecent liberties with a child as provided in subsection (a)(1), (a)(2)(A) and (a)(3)(A) that the child was married to the accused at the time of the offense." KAN. STAT. ANN. § 21-3503(a)(3)(B)(b) (2005). One could imagine a range of possible constitutional challenges to the Nebraska prosecution, the effective articulation of which would presumably be dependent on whether any well-funded religious liberty litigation groups choose to involved. The facts could cut either way (pro: her parents' consent; con: her age, the restraining order). Unfortunately, in this case, Koso's guilty plea has mooted the constitutional challenge. No doubt, though, there are many more cases awaiting public attention and prosecution.

57. Gretchen Ruethling, *Nebraska Man Sentenced for Having Sex with Girl, 13*, NEW YORK TIMES, Feb. 8, 2006, at A13.

58. While it is not clear what role religion played in the girl's parents' decision itself, religion has been a theme in public discussion of the case.

59. *See, e.g.*, 65 AM. JUR. 2D (Rape) § 36 ("It is generally held in the absence of statute, that the defendant's knowledge of the age of the female is not an essential element of the crime of statutory rape and therefore it is no defense that the accused reasonably believed that the prosecutrix was of the age of consent.").

RFRA-based challenge to the prosecution of Koso, to wit: Koso's exercise of his religious beliefs (thou shalt marry her once thou hast impregnated her) is being unduly burdened by the application of the statutory rape law. That is certainly the tone of many of the angry letters the Nebraska Attorney General has received.[60] For example, a writer identifying himself as a pastor wrote, "You mean to tell me that after we counsel young couples to do the honorable thing and marry, you want to prosecute? You can't be serious."[61] Another writer asked, "Would you prefer an abortion? An unmarried mother? A mother of 14 with her husband in prison?"[62] To which the Attorney General responded: "We will always prosecute grown men for having sex with children."[63] The answer to both questions, in other words, is that the law would prefer that the grown man not have sex with the child. The justification for statutory rape laws is simple: children cannot meaningfully consent to sex with adults. The "pastor" seems to have missed this point entirely, referring to such situations as involving "young couples," and ignoring the age, maturity, and power disparities entirely.

As Marc Spindelman has argued forcefully in the context of *Lawrence*, the dark side of a broad-sweeping privacy protection for sexual activity is the potential immunization of coercive sex under the umbrella of a benign "intimacy" that makes relationships "more enduring":

> The commonplace that sexual intimacy of the sort *Lawrence* approves should be heralded as the measure of nonviolation has been uncovered as a myth, a way of ignoring and protecting the widespread abuses, including sexual assault, domestic violence, and sexual abuse of children, by more powerful partners in intimate relationships, typically, though not exclusively, men. When sexual intimacy is thought to be normatively good, the basis for relationships "more enduring," as it is in *Lawrence*, how can it (also) be a prison of abuse?[64]

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60. *See* Leslie Reed, *Child-Bride Case in Public Eye: Bruning Gets Earful, Most from Critics of Charges*, OMAHA WORLD-HERALD, Aug. 10, 2005, at 1A.

61. *Id.*

62. *Id.*

63. *Id.*

64. Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH. L. REV. 1615, 1634-35 (2004).

Spindelman's fear is that judicial validation, ex ante, of the constitutional sanctity of sexual relationships, will hinder prosecution of crimes of violence and abuse to the extent that perpetrators can assert that the charged acts took place within a protected intimate relationship. Whether or not *Lawrence* has had such an effect is extremely difficult to say. Spindelman had *Limon* in mind,[65] and it might be thought that the result in *Limon* vindicates Spindelman's worry to some extent, if we read the *Limon* court as having extended some sort of privacy protection to Limon's conduct.

But the Kansas court did nothing of the kind. *Limon* is not a privacy decision at all. It is an equal protection decision. It uses *Lawrence* not for the proposition that intimate relationships are within the sphere of unregulable privacy, but rather for the proposition that majoritarian moral disapproval of conduct cannot in itself be a sufficient justification for any state regulation under rational basis review. The court — and indeed Limon himself — accepts, and casts no doubt on, the legitimacy of criminalization of the sort of private sexual conduct at issue. The *only* question was whether the state could legitimately attach greater penalties to same-sex conduct than to opposite-sex conduct. Thus there was no possibility that — as Spindelman worried — the young boy with whom Limon engaged in sex might lose the state's protection against abuse, coercion, or violence under the rubric of "privacy." The only question was whether that boy would have more protection (in the form of a harsher sentence for Limon) than a similarly situated girl would have had. Nothing in *Limon* questions the validity of statutory rape laws, or calls the "Romeo and Juliet" relationship a "more enduring" one deserving of constitutional protection.

Limon does, though, plant seeds for challenges to other laws that appear to be founded purely on majoritarian disapproval of particular groups or conduct. It is easy to imagine religious groups mounting such challenges, most immediately against polygamy prohibitions. And the expanded privacy protection argument will surely be pressed as well. Thus while *Lawrence*, and its progeny like *Limon*, may seem to be at odds with the immediate policy preferences of religious conservatives, it is also true that sexual practices associated with fundamentalist Christianity — notably early marriage and polygamy — are also the subject of

65. *See id.* at 1645-46.

criminal sanctions and also may be defended (though not yet successfully) on privacy grounds.

Hamilton downplays *Lawrence*'s significance to the marriage cases. "[T]he link between *Lawrence* and polygamy is far more tenuous than it appears at first blush. Consensual practices involving adults constitute a category decidedly distinct from the definition of marriage, which determines legitimacy, inheritance, and numerous other legal consequences."[66] No doubt there is a distinction. But it is probably not quite so clear-cut. *Lawrence* protects intimate relationships, and does so with extraordinarily broad language. Kennedy's "this is not about marriage" disclaimer is dicta,[67] and while Scalia's Chicken-Little dissent might be a bit hyperbolic, *Lawrence*-based challenges to *Reynolds*[68] are not self-evidently frivolous.[69] Is the "intimate relationship" of a polygamous marriage "more enduring" than one involving multiple unmarried partners? Undoubtedly. Whether that extra quantum of intimacy is sufficient to warrant protection under *Lawrence* is, at the very least, a viable question.[70]

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66. HAMILTON, *supra* note 2, at 69.

67. *Lawrence*, 539 U.S. at 578 ("The present case. . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."). Like the *Blakely* footnote in which the Court reminded readers that the Federal Sentencing Guidelines were not yet before it, *see* Blakely v. Washington, 542 U.S. 296, 305 n.9 (2004) ("The Federal Guidelines are not before us, and we express no opinion on them."), the quoted sentence does not say that the considerations underlying the Court's decision in *Lawrence* would not apply in a marriage case. It simply says that *Lawrence* is not such a case.

68. Reynolds v. United States, 98 U.S. 145 (1878)

69. *See, e.g.*, Bronson v. Swensen, 394 F. Supp. 2d 1329, 1334 (D. Ut. 2005). In *Bronson*, the district court granted the government's motion for summary judgment on the married plaintiff's constitutional challenge, under *Lawrence*, to the county clerk's refusal to grant him another marriage license, but the court commented:

> Plaintiffs refer to the dissent of Justice Scalia in *Lawrence*, where he contends that the majority's ruling will call into question state laws against bigamy, among other statutes that are based upon moral choices. . . . *That is likely to be true*. But the Tenth Circuit and Supreme Court precedents cited above remain controlling law for this Court.

Bronson, 394 F. Supp. 2d at 1334 (citation omitted) (emphasis added).

70. *See, e.g.*, Laurence Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak Its Name*, 117 HARV. L. REV. 1894, 1945-46 ("Same-sex marriage . . . is bound to follow; it is only a question of time. For what, after all, could be the rationale for permitting an otherwise eligible same-sex couple to enjoy the tangible benefits and assume the legal obligations of some version of civil union but withholding from them the final measure of respect? . . . As Justice Scalia rightly recognized, "'preserving the traditional institution of marriage" is just a kinder way of describing the State's moral disapproval of same-sex couples.'") (quoting *Lawrence*, 123 S. Ct. at 2496 (Scalia, J., dissenting) (quoting *id.* at 2488 (O'Connor, J., concurring)).

However, the harm principle requires a factual analysis of the actual practice of polygamy; polygamy prohibitions need not be based on simple animus or public distaste. Hamilton does a good job of distinguishing the factual settings of polygamy and gay marriage. The danger of sloppy thinking is particularly acute here, because though the two issues, though drastically different, are easy to run together. Hamilton argues that the polygamy harms are readily, and abundantly, framed in neutral, secular terms: gender inequality, age inequality, frequency of abuse, even abandonment of male teenagers to reduce competition. As Hamilton notes, the United Nations Convention for the Elimination of All Forms of Discrimination Against Women urges a ban on polygamy, because of its myriad harmful effects on women.[71] The actual harms to women of the actual practice of polygamy in this country are clear; there is no need to postulate "speculative" harms because the practice is so widespread.[72] In other words, in Hamilton's terms, the case against polygamy is cognizable solely with reference to the public good.[73] By contrast, when same-sex marriage has been tested on those terms, courts have uniformly found opponents' arguments of social harms to be without merit.

Polygamy, the argument goes, involves people seeking to engage in activity that does harm third parties, where the objections are solidly rooted in neutral principles of equality and the public good. The only sustainable constitutional distinction between gay marriage and polygamy as permissible objects of state regulation is an empirical one. One of the practices, so the argument must go, is harmful and unequal, and demonstrably so; the other is not. American polygamy arose in 19th century Mormonism, and is practiced today solely by fundamentalist Mormons who demand the complete subordination of women to men and the forcible marriage of teenage girls to middle-aged and elderly "patriarchs." The fact, capable of being demonstrated in court, that the actual practice of polygamy in the U.S. is restricted to such communities, is relevant to the constitutional analysis. It is a hallmark of "sky is

71. HAMILTON, *supra* note 2, at 74.

72. *See, e.g., id.* at 73-75; JON KRAKAUER, UNDER THE BANNER OF HEAVEN 5 (2003).

73. It should be remembered, of course, that the polygamy prohibitions probably were when enacted precisely the sort of animus-based legislation that would be invalid under *Romer*. And the early cases upholding them were rife with the sort of moral disapproval justifications that are at least questionable (and illegitimate in Kansas) after *Lawrence*. However, such laws could be sustained today if a public harm case could be made out that did not rely on animus or moral disapproval, and there is ample reason to think that this case is easy to make.

falling" dissents, like many slippery slope arguments, to elide such empirical differences and play up superficial similarities. But on any "public good" jurisprudence such as Hamilton's, the ultimate test of state regulation will be empirical — can the state put on real evidence that the regulated practice is harmful to members of the public? — where the distaste of non-participants is officious intermeddling only, not harm.[74]

Religious conservatives who rail at both *Boerne* and *Lawrence* should note the close affinity between RFRA and *Lawrence*. Under the guise of free exercise and privacy, respectively, each has had the effect of shielding from state prohibition conduct that states might otherwise criminalize. It's hard to see how the aggrieved believers of Nebraska could throw out John Lawrence's bathwater without heaving Matthew Koso's baby along with it.

D. Neutrally Applicable Regulations

The United States has many laws regulating the employment relationship; it also has numerous religious groups, many of which are also large employers. A broad conception of free exercise will have the effect of exempting religious employers from most of the rules that other employers have to follow, and stripping from employees of religious groups most of the protections other employees enjoy. Religious groups have for years been vigorously pursuing this sweeping vision of employment-law exemption in the courts, and have succeeded to a remarkable degree.

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74. Thus in *Gonzalez v. O Centro Espirita Beneficente Unaio do Vegetal*, 126 S. Ct. 1211 (2006), for example, the slippery slope from making an exemption for hallucinogenic tea drunk by 250 members of a Brazilian religion in Santa Fe, New Mexico, to an exemption for bigamy, which was proposed as a hypothetical by Justice Scalia, is slippery only if conceived of as categorical; it has plenty of footholds if treated as an empirical question of actual harm.

> Justice Scalia: I worry about the general proposition we would be adopting if we say, you know, one narrow exception is not a — doesn't contravene a compelling State interest. What about — I assume there is still a Federal law against bigamy that applies in Federal territories. Now, what if, you know, a small religious group comes forward and said, you know, "We — our religion requires bigamy. There are not a whole lot of us. We're just a little tiny group. So, we demand, under RFRA, an exemption from this absolute law. Why does it have to be absolute? It's just a little tiny exception, only a few of us." . . . .
>
> Ms. Hollander [counsel for O Centro]: Your Honor, the analysis would be the same. . . . [T]he Government could come forward with a compelling interest [such as] the sanctity of marriage, the other issues. And those would be issues of fact for a district judge to decide. . . .

O Centro, No. 04-1084, 2005 U.S. TRANS LEXIS 48, 44-45 (Nov. 1, 2005).

Here again, it is striking how interconnected Hamilton's doctrinal areas are. Consider, for example, the rippling ramifications of the sex abuse scandal in the Catholic Church. The church is the biggest religious employer in the country, and the bulk of its employees are teachers at Catholic schools. Those schools have been the site of many of the allegations of sexual abuse and coverup — in particular, claims that priests with histories of abuse reports have been quietly placed in teaching positions.

A typical case might then go as follows. A church employee blows the whistle on a coverup — perhaps the church has quietly placed accused priests in teaching positions at a Catholic college. The church demotes that employee as punishment. She sues under Title VII, alleging gender discrimination and retaliation. The church now claims immunity under the "ministerial exemption." This is a judge-made doctrine that holds churches absolutely immune from legal consequences for any employment decisions relating to their ministers. Title VII does have a provision allowing churches to use religion as a criterion in hiring ministers. But the ministerial exemption as courts apply it is not based the narrow exemption in Title VII. The immunity comes, the cases say, directly from the First Amendment itself. Ordinary state-law contract claims are barred as well.[75] Thus churches enjoy blanket protection for *any* employment-law violations by religious organizations, so long as the victims of those violations do religious work, and no legislature has the power to create remedies for the employees. It is one thing to allow a Catholic college to hire only Catholic priests to serve as its chaplains. But suppose the college then fires one of those chaplains because he reported incidents of sexual abuse by other priests to the police. Should the college really be immune from a retaliation suit in those circumstances? Suppose the college decides to hire only white priests. Is the college immune from a race-discrimination suit? Suppose the college hires a nun as a chaplain, and then fires or disciplines her for reporting sexual assaults by other college employees. Is the college immune from suit? Do religious organizations really have categorical immunity for all employment decisions involving ministerial workers?

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75. *See* David J. Overstreet, *Does the Bible Preempt Contract Law? A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Institution*, 81 MINN. L. REV. 263 (1996).

These are not fanciful scenarios. My hypothetical — the nun demoted for reporting church coverups of sexual assaults by priests — is taken from a recent case, *Petruska v. Gannon University*.[76] Petruska, a nun, was serving as a chaplain at Gannon, a Catholic college in Pennsylvania, when she made public the college's quiet hiring of priests with long histories of alleged sexual abuse, along with patterns of gender discrimination and sexual harassment. She was demoted and threatened with termination if she did not take another position within the university. She resigned, and sued, alleging retaliation, gender discrimination, and breach of contract. The college defended itself on jurisdictional grounds, arguing that once it is determined that the plaintiff served in a ministerial capacity, the courts have no jurisdiction to hear any lawsuit stemming from that employment relationship. This is an extraordinarily broad immunity, covering, *inter alia*, contract disputes, discrimination, labor disputes[77] — the entire universe of generally applicable legal protections that employees can invoke to protect themselves against being wrongfully fired or disciplined. The district court agreed that it lacked jurisdiction to hear *any claims whatsoever* having to do with Petruska's employment at Gannon.

Consider the ramifications of this theory: in the simplest possible hypothetical, a church could sign a contract with a minister

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76. 350 F. Supp. 2d 666 (W.D. Pa. 2004).

77. It may be comical to imagine priests trying to unionize, but consider that Catholic schools employ hundreds of thousands of teachers at poverty wages with minimal benefits. Is teaching "ministerial"? In 1979, the Supreme Court was faced with the question whether the NLRA covered teachers at Catholic schools. The church asserted a blanket exemption from any exercise of jurisdiction by the National Labor Relations Board. The Court, by a vote of 5-4, agreed. No governmental inquiry into labor practices at the schools is acceptable, the Court said, per Chief Justice Burger, because the schools might defend themselves on the grounds that

> their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979). Turning the recently announced Establishment Clause test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), on its head (and taking an ironic swipe at the recently retired William O. Douglas), Burger noted that "Mr. Justice Douglas. . . in his concurring opinion in *Lemon*, not[ed] 'the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith.'" *Id.* at 504. What in *Lemon* had been a reason for barring government funding of religious schools became in *Catholic Bishop* a reason for exempting the schools from neutrally applicable labor law.

stating expressly that he is to give two sermons a week for five weeks, that he is to be paid $100 a sermon, due and payable immediately at the close of each service, and that the church may terminate the contract at any time with severance pay of half the amount remaining due. (If he were terminated after five sermons, in other words, he would get $250 severance.) Absent a broad minsterial exemption of the kind applied by the district court in *Petruska*, the minister could go to court to enforce the contract if, say, he gives a sermon and is not thereafter paid, or if he is terminated with no severance. That is the protection that the basic, generally applicable law of contracts provides to everyone; that's why we sign contracts. But churches have taken to arguing that where their "ministerial" employees are involved, contract law simply doesn't apply to them. They are just not bound by what they agreed to, and their contracts are unenforceable, regardless — here's the important part — of whether the reason for the breach was a religious reason or not. Hamilton is right to be worried about this development.

Zoning laws, too, are the site of exemption claims by religious groups, as are prison security regulations. Hamilton — who represents neighborhood homeowners' associations seeking to enforce zoning restrictions against church expansions[78] — provides a troubling overview of recent litigation in these areas, litigation which has been fueled enormously by passage of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). Zoning and security regulations that would be safe from, or have prevailed against, constitutional challenge now may be attacked on federal statutory grounds, as burdening religious practice without a sufficient showing of state interest.

Once a group has cloaked itself in the mantle of religion, it may simultaneously claim extraordinary state benefits (e.g., tax-exempt status) and resist state oversight of its conduct. Hamilton cites numerous examples of prison gang recruiting and drug dealing carried out under the auspices of provision of religious services, often by groups such as the Aryan Brotherhood, a violent white supremacist gang which recruits nearly all of its members in prisons.[79] Meaningful screening of prisoners' claims for religious accommodation, and of organizations providing services and programs in prisons, would require some sort of criteria for sepa-

78. HAMILTON, *supra* note 2, at 84.
79. *See id.* at 142-144, 154.

rating "legitimate" religious groups from "illegitimate" ones, and those criteria could not avoid some reference to the content of the groups' doctrine. Scrutiny of doctrinal content is a guaranteed lawsuit trigger. Prison authorities lack the resources to defend their regulations against endless RLUIPA litigation, so they often simply accede to any accommodation request couched in religious terms. Hamilton provides an extensive list of such accommodations, from allowing Sikhs to grow beards to providing "Luceferians" with Bibles and matches for ritual burnings.[80]

Some of the stories are comical, such as the "Church of the New Song," which was invented by an enterprising inmate in the 1970s and successfully procured for itself numerous accommodations, such as weekly steak dinners. The Church of the New Song was founded as a "game," but when prison officials called its bluff, the church prevailed in federal district court[81] and then in the Eighth Circuit,[82] which held that the church "is a religion within the ambit of the First Amendment."[83] The district court, citing *Seeger* and *Ballard*, held that it would not attempt to define "religion" because "[i]t is neither for a court or a governmental official to rule on the truth or falsity of a religious faith. Such questions are clearly placed beyond the pale of governmental decision-making by the First Amendment."[84] This is fine reversal-proof rhetoric, and the Church of the New Song was relatively harmless. But Hamilton makes a good case that uncritical accommodation has been disastrous for prison security. Where violence or racial supremacy is an integral part of a religious organization's creed, may the organization invoke the First Amendment to defeat state efforts to restrict its ministry in prisons? At the moment, says Hamilton, the answer is almost always "yes." But why should we take it for granted that the Constitution requires that result? Why must the Free Exercise Clause be read to run roughshod over every corner of law and policy?

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80. *Id.* at 157-62.
81. Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973).
82. Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).
83. *Remmers*, 494 F.2d at 1278.
84. *Remmers*, 361 F. Supp. at 542 (citing United States v. Seeger, 380 U.S. 163 (1965) and United States v. Ballard, 322 U.S. 78 (1944)).

III. WHO'S OUT TO GET RELIGION?

Michael McConnell, now a judge on the United States Court of Appeals for the Tenth Circuit, and formerly a University of Chicago law professor, is the best-known advocate of a reading of the First Amendment that would greatly expand protection for religious conduct under the Free Exercise Clause while weakening the "anti-entanglement" interpretation of the Establishment Clause. McConnell's arguments are largely historical, and have been widely criticized within the legal and historical academies. Hamilton summarizes and adds to this criticism.[85] But Hamilton also points to a deeper problem with McConnell's position: it is "based on a false assumption that this culture is hostile to religion."[86] Special exemptions from neutrally applicable laws may be thought constitutionally necessary if the legislatures passing those laws are out to suppress and persecute religious belief.[87] But the idea that any legislatures, from city councils up through the U.S. Congress, harbor some generalized hostility to religion is, I agree with Hamilton, laughable.[88] On the contrary, legislatures miss no opportunity to trumpet their religiosity and deference to all things sacred. The Terry Schiavo case was just the most recent and most degrading example.

Thus the attacks on *Smith*[89] and the justifications for RFRA were framed in terms of hypotheticals.[90] Blanket exemption was needed, the argument went, because (to take just one example), states might start firing doctors in public hospitals if they refused to perform abortions on religious grounds. But of course not only had that never happened, but the actual legislatures in the actual country we inhabit were passing laws explicitly providing for exemptions for such doctors. Many states have gone even further,

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85. HAMILTON, *supra* note 2, at 219-20, 238-72.

86. *Id.* at 290.

87. *See id.* at 292 ("The basic problem with McConnell's analysis is that it assumes that legislatures are inclined to suppress religious liberty, that religious lobbyists are weak in the legislative process, and that there are strong lobbies to achieve the anti-religion ends he cites. In fact, the contrary is true. Religious entities are uncannily able to obtain what they seek in the legislative context.").

88. The Florida Santeria case, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993), is not to the contrary, I would suggest. Rather than hostility to "religion itself," I think the case demonstrates the ability, and willingness, of the dominant religion to use the legislature to suppress a minority religion.

89. Employment Div. v. Smith, 494 U.S. 872 (1990).

90. *See* HAMILTON, *supra* note 2, at 289-90.

passing laws allowing even pharmacists to refuse to dispense birth control pills if they object on religious grounds to contraception.

But McConnell's arguments dovetailed perfectly with the conservative Christian movement's political mobilization strategy, which relied on convincing its members that they were a weak, marginalized minority whose values and beliefs were under assault by a dominant secular culture.[91] Any failure by the state to maximally accommodate religious beliefs in the public sphere — by, for example, not allowing prayers to be read over the public address system before high school football games[92] — could be a talisman of a nationwide campaign to suppress religion entirely. McConnell has described the supposed modern suppression of religiosity thus:

> Religious freedom is to be protected, strongly protected — so long as it is irrelevant to the life of the wider community. But allow religion to affect the law pertaining to, say, abortion; or allow religion to affect the way we educate our children in our communities' schools; even allow religion to affect the way we celebrate holidays in public, and there is trouble. When these quaint and discredited beliefs spill over into the life of the community, we have crossed the line.[93]

But this argument is deceptive; it is founded on equivocation on two key terms, "public" and "affect." Most Americans would surely agree that religion is a legitimate part of "the life of the wider community." But from that proposition, does it necessarily follow that religious doctrines are a legitimate basis for substantive criminal law? Saying that criminal laws ought not to be based on religious doctrines is simply not the same as saying that religion "has nothing to offer to the public sphere," or that "[w]e will not interfere with solitary hermits in the forest, but they must stay

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91. Examples are legion. I will leave it to the reader to consider the prevalence of this theme in so much of the public discourse as she peruses. A typical example is the Dover, Pennsylvania "intelligent design" lawsuit, in which an attempt to prevent the public schools from teaching this religious doctrine in science classes was glossed by one religious activist as "an attempt to slowly remove every symbol of Christianity and religious faith in our country." Goodstein, *supra* note 32, N.Y. Times, Nov. 4, 2005 (quoting Bowie Kuhn, the chairman of the Thomas More Center, which persuaded the school board to adopt the intelligent design textbook and is paying its legal costs).

92. *See* Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

93. Michael McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 BYU L. Rev. 163, 165 (1993).

out of the public square."[94] Religion "affects" the decision about whether to have an abortion every time a person who is opposed to abortion on religious grounds chooses not to have one, or tries to persuade others not to have one; and it affects the laws governing abortion in the numerous restrictions states have imposed on access to abortion within the limits of *Casey*. Those choices, that debate, and those restrictions, are a loud, obvious, and vital part of public life. If the current state of affairs is unacceptable to some religious commentators, it is not because religion has been shut out of the nation's public discourse about abortion, but rather because certain denominations are unable to use force to compel those who disagree with them to obey their particular doctrines.

Likewise, religion profoundly "affects" the way "we educate our children in our communities' schools" and "the way we celebrate holidays in public" in so many and such obvious ways that it would be pointless to begin enumerating them, and absurd to deny their presence or significance.[95] Not that McConnell does; he doesn't seriously claim that religion has been evicted from public life. What he actually protests is the inability of religion to *dictate* the content of education, or laws, or public celebrations. When "public square" becomes "criminal code" and "curriculum," and "affect" becomes "dictate," the argument looks somewhat different, and somewhat less appealing. Neither McConnell nor the Republican Party wants to go the voters saying, "Let the dominant religious sect in your community write the criminal code and your child's textbooks!" But if that isn't the actual goal, then the current state of First Amendment law is not a problem.

If, on the other hand, we look around at our public life and see it as saturated with religion already, we will be somewhat less in-

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94. *Id.*

95. To take a single, trivial example off the top of my head: As I write this, I look out at a massive, three-story nativity scene being erected in the plaza attached to the U.S. Steel building in downtown Pittsburgh. The giant manger is the descendant of a much smaller nativity scene that had historically been set up in the city courthouse down the street. After *Lynch v. Donnelly*, 465 U.S. 668 (1984), the city thought it advisable to discontinue hosting the manger, and private funds were raised to erect it at the Steel Building. What had been a small display scarcely visible from the street has become a vast installation impossible to miss, at the same time as it has gone from "public space" to "private space." Would McConnell argue that because the plaza is attached to an office building owned by a corporation, and is thus not on city-owned land, it is not part of "public life" — regardless of its physical centrality and openness, and the thousands of people who walk through it every day? And if he would insist that the plaza is actually "private," then it's clear that "private," for him, does *not* mean "what solitary hermits do in the forest," and his use of that metaphor is disingenuous. "Private" and "public" have a variety of meanings, and to slide between meanings in this way does a disservice to good faith debate.

clined to insist on further exemptions for religions from the laws the rest of us have to follow. And we will be even less so to the extent that we question the claim, ubiquitous in public discourse, that enhanced religiosity furthers the public good. It's important to ask whether this is so. Indeed, it may be that the legislatures have already gone too far in the other direction, and crafted too many exemptions. The exemptions for doctors and pharmacists, for example, ought to be rather troubling. Do we really want pharmacists — who, after all, are licensed and regulated by the state — to be in the business of deciding which customers are entitled to have their prescriptions filled?[96] Suppose the exemption statute specifies that the pharmacist's objection must be a religious one. Where exactly is the line between gender discrimination and religious belief if the relevant religious belief is that premarital sex is immoral? A pharmacist claiming an exemption based on that belief is claiming the right to deny prescriptions to women, and only to women, based on his disapproval of their conduct. Suppose the pharmacist is a Southern Baptist, and adheres to the Southern Baptist doctrine that a woman should "submit gracefully" to the will of her husband.[97] Suppose he refuses to fill her prescription without evidence of permission from her husband. Suppose a Southern Baptist doctor, under an equivalent statute, refuses to perform an abortion without evidence of the husband's permission. Presumably if the statute allows the doctor to refuse absolutely, it should allow him to accept conditionally.[98] But precisely such a "spousal notification" provision was invalidated by

96. This issue is far more than theoretical. A number of these exemptions are already in place, and religious pharmacists are taking advantage of them. And in communities with few pharmacies, the effect can be to functionally remove contraception from the market, at least until a non-objecting pharmacist — assuming one is available — comes on duty. For women seeking emergency contraception, for example following a rape, time is of the essence. An Arizona pharmacist, for example, recently refused to dispense emergency contraception to a rape victim, sparking demonstrations outside the pharmacy. *See* David Schultz, *Pharmacists Don't Have a Right To Deny*, ARIZONA DAILY WILDCAT, Nov. 3, 2005.

97. The "Baptist Faith and Message," which is the defining document of the Southern Baptist Convention, provides at Article XVIII, "The Family," that "[t]he marriage relationship models the way God relates to His people. A husband is to love his wife as Christ loved the church. He has the God-given responsibility to provide for, to protect, and to lead his family. A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits itself to the headship of Christ." The Southern Baptist Convention, *The Baptist Faith and Message*, available at http://www.sbc.net/bfm/bfm2000.asp#xviii.

98. To my knowledge, this issue has not been tested in the courts, and it is doubtful that it will be; doctors taking advantage of the exemption typically do not want to perform abortions, period.

the Court in *Casey*.[99] Can states evade *Casey* simply by turning over to individual doctors the power to insist on notification?

One might, from this perspective, respond to McConnell's hypothetical parade of horribles by asking why they are so horrible. Why, at the end of the day, would it be a bad thing for a state hospital to fire a doctor who refused, on religious grounds, to perform a medically indicated, legal abortion? The state hired the doctor to practice medicine, after all: if the doctor finds the practice of medicine to be immoral, he is free to find another line of work; and if he doesn't like the terms of employment at the hospital, he is free to work elsewhere. There are plenty of religious hospitals at which *no* doctor may perform an abortion, even if he deems it medically necessary.

What about religious beliefs that are openly discriminatory? Could a doctor refuse to treat a child of an interracial couple because he devoutly believed that miscegenation violated God's law? And why would it be a bad thing for a public school to fire a gym teacher who refused to allow girls on the field because of the "immodest attire" provided for p.e. class, no matter how sincere the religious belief that motivated his refusal?[100] Could a devout fireman refuse to respond to a natural disaster because he sincerely believed it to be a sign that the Second Coming was upon us and thus that only the ungodly would be affected? If you think these examples are fanciful, how will you distinguish them from the pharmacist exemption? It's impossible, I suggest, to conceive of a limiting principle that will prevent such "exemptions" from swallowing all aspects of professional life that anyone can articulate a religious reason for preferring to avoid.[101] Can it really be the case that the Free Exercise Clause requires employers to create two job categories: one for secular employees, who must do all the work the job requires, and another for religious employees, who must do only as much work as they approve of on religious grounds? The Constitution does not grant to religious believers the right to demand that the social environment around them be restructured to conform to their beliefs.

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99. *See* Planned Parenthood v. Casey, 505 U.S. 833, 898 (1992).

100. *See* HAMILTON, *supra* note 2, at 138-39.

101. *Cf.* Bartleby the Scrivener — suppose his work preferences had been religiously based?

IV. INSANITY

Hamilton's bailiwick is attempts by religious entities to secure blanket constitutional immunity for incontestably bad acts.[102] And for such cases — which undoubtedly make up the vast bulk of the God-versus-gavel docket — little philosophical reflection is required. If the Catholic Church, for example, seeks to defend against a tort suit alleging sexual abuse by claiming absolute immunity for all priest-parishoner interactions,[103] then the lines are squarely drawn. The solution Hamilton proposes — application of neutral laws governing conduct to all actions, religious or otherwise — is one I heartily endorse. But in some cases the lines are less clear, and the legal and philosophical issues much more troublingly gray. These cases include the ones I began with and will now end with: murder[104] defendants who plead insanity based on their religious beliefs.

A. The Deific Decree Defense: Deanna Laney

On May 10, 2003, in Tyler, Texas, Deanna Laney killed two of her children, and attempted to kill the third, by bludgeoning them on the head with large rocks.[105] Laney was a married mother of three who home-schooled her children, did not work outside the home, and had little contact with the community outside her church, the First Assembly of God, where her brother-in-law was pastor. The coming apocalypse, with its widespread cataclysms, death, destruction, and judgment, was a frequent subject of sermons at the church, as was the possibility that God would call on

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102. *See, e.g.*, HAMILTON, *supra* note 2, at 274 ("The hard question . . . is when, if ever, a religious individual or institution should be given freedom from the general law.").

103. Or, as in the case of several Dioceses which have declared bankruptcy, challenged bankruptcy proceedings against their assets as violations of free exercise. *See, e.g.*, Brief of Amicus Curiae, Tort Claimants Committee at 1-2, *Gonzalez v. O Centro Espirito*, No. 04-1084 (discussing *In re Roman Catholic Archbishop of Portland in Oregon*, United States Bankruptcy Court for the District of Oregon, Case No. 04-37154-ELP11 and *In re Catholic Bishop of Spokane*, United States Bankruptcy Court for the Eastern District of Washington, Case No. 04-08822-PCW11).

104. And of course, as in the Elizabeth Smart case, rape and kidnapping. *See supra* note 7.

105. For reporting on the Laney case, see Mark Collette, *Case Could Add Fuel to Insanity Debate*, TYLER MORNING TELEGRAPH, Mar. 27, 2004; Lisa Falkenberg, *Mother Insane When She Killed Sons*, THE ADVERTISER, Apr. 5, 2004, at 25; Lee Hancock, *Laney Told of Devil and Wanting To Die*, DALLAS MORNING NEWS, Apr. 9, 2004 at 1A; E.G. Morris, *Civil Commitment vs. Life in Prison: What Andrea Yates Knew That Deanna Laney Didn't*, TEXAS LAWYER, April 12, 2004 at 27; CourtTV, Texas Jury Deciding Fate of Mother Who Stoned Sons, available at http://www.courttv.com/trials/laney.

the faithful to perform services for him in the coming end times. On several occasions in the months before she killed her children, Laney told other church members that she was experiencing divine revelations, that God was calling her to do the work necessary to prepare for the Second Coming. These reports did not cause alarm in the church community or her family;[106] such experiences were fairly common, and pentecostalism stresses both a personal, communicative relationship with God, and a narrative of the coming judgment with its widespread upheavals. Adherence to God's commands, the church teaches, is the only route to salvation. Obedience to God is the defining quality of a good Christian, and is necessary for salvation. Any deviation from God's commands will result in damnation. Thus religious groups such as Laney's church often counsel home-schooling and other forms of separation from society for their adherents: God's commands are the source of all morality, and may apply to contemporary social and political life in many ways. Disobedience in any form will bring damnation.[107]

On the morning of the murders, Laney told investigators, she heard God's voice in the sky commanding her to sacrifice her children. It was the final test before the apocalypse. If she passed, she would be given an important part to play in the Second Coming, and would then be reunited with her children when the righteous were saved and the unrighteous damned. This was a hard order to follow, she said, but because she "had been taught that you obey God," she brought her two older boys one by one to the back yard and smashed their heads with a large rock, killing them. She then tried to do the same to her youngest son, who was in his crib, but she was unable to complete the act, and the infant was left alive and severely brain-damaged. Immediately after the killings, Laney said, she heard thunder and saw a flash in the sky; throughout the day, she had seen signs to which she gave Biblical interpretations.

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106. Laney's husband testified, for example, that he had seen no evidence of unusual behavior of any sort by his wife prior to the killings. *See* KLTV News, *Deanna Laney's Husband Testifies*, (KLTV News broadcast, Mar. 29, 2004) (footage of Keith Laney's testimony) ("Prosecutor: Did you ever see anything in her behavior that would have led you to believe that this would happen? Laney: Never.").

107. An accessible introduction to evangelical culture in the U.S. is the Columbia religion scholar Randall Balmer's *Mine Eyes Have Seen the Glory: A Journey into the Evangelical Subculture in America* (1993).

At trial, Laney pleaded not guilty by reason of insanity. She adduced the auditory hallucination she experienced — the voice commanding her to commit the murders — as evidence that she was delusional at the time of the murders, and argued that her delusion prevented her from understanding that her act was wrong: if God's commands are the source of morality, then if God orders an act, how can it be wrong? All five psychiatrists who examined her (three for the defense, one for the state, and one for the court) concurred in pronouncing her mentally ill, though she had no history of mental illness, and the jury found her not guilty by reason of insanity. She was committed to a state mental hospital.

Laney was found to be legally insane on the basis of her belief that God ordered her to commit the murder. Unlike many killers, Laney explained herself clearly and forthrightly. She was personally called by God to kill her children as a test of faith. God explained that the end times were upon us, that Laney must demonstrate her faith if she wanted to be saved, and that she would be reunited with her children in heaven, if she passed the test. The message from God that she described constituted the primary evidence that at the time of the murders she was legally insane. Whatever else the case may have been about, then — postpartum depression, or husbands' subjugation of wives, for example — it is, unquestionably, a case about religion.

Laney, a devout fundamentalist for whom religion was the driving force in her life,[108] described the murders as a test of faith.[109] The centrality of tests of faith to the Christian tradition is relevant to the legal analysis of Laney's insanity defense. The legal test for insanity in nearly all U.S. jurisdictions, including Texas,

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108. Lee Hancock, *Laney Told of Devil and Wanting to Die*, DALLAS MORNING NEWS, Apr. 9, 2004, at 1A (reporting that Laney "home-schooled her children and rarely left Smith County, and her friends and family are lifelong members of a Pentecostal church."); *Kill Her! Scream the E-Mails*, YEARBOOK OF EXPERTS, AUTHORITIES, AND SPOKESPERSONS, June 7, 2004 (quoting Dr. Patricia Farrell describing Laney as "isolated.").

109. Hancock, *supra* note 105 (quoting Laney as saying, in her videotaped interview with psychiatrists which was played at trial, "I didn't want to kill my kids at all. . . I felt like I had no choice. . . Because God told me to do that, and I was taught you obey God."); E.G. Morris, *Civil Commitment vs. Life in Prison: What Andrea Yates Knew That Deanna Laney Didn't*, TEXAS LAWYER, April 12, 2004 at 27 (reporting that "psychiatrists testified that Laney's severe mental illness caused her to believe that God had chosen her to kill her children as a test of faith."); Jan Jarboe Russell, *Mental Illness Can Hide Behind the Mask of Religion*, DESERET MORNING NEWS (Salt Lake City), Apr. 10, 2004 (reporting that Laney's attorney described Laney's choice as follows: "Does she follow what she believed to be God's will, or does she turn her back on God?").

requires that because of a mental disease or defect the defendant did not know that her act was wrong.[110] A "delusional" belief can constitute mental disease or defect.[111] It is easy to see how a case like Laney's could raise difficult philosophical and constitutional questions, most obviously: "If the defendant believes that God ordered her to kill her children, how does that belief affect her knowledge that doing so is wrong?" and "Can a court constitutionally find that a religious belief is an insane delusion?" Such questions are occasionally addressed by courts, but rarely — and rarely well[112] — and trial judges are extremely hesitant to instruct juries on such matters.[113]

The meaning of "wrong," like the meanings of the other terms in the test, is subject to much dispute,[114] but at the very least, if a defendant *on her own terms* understood the wrongness of her act at the time she acted, she would not state an insanity defense. Test-of-faith delusions would appear to present just such facts: the believer's knowledge that the commanded act is wrong is *inherent in* the belief that he is facing a test of faith. Laney is a paradig-

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110. Tex. Pen. Code § 8.01 (a) ("It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong."); Bigby v. State, 892 S.W.2d 864, 877 (Tex. Crim. App. 1994). This test derives from an English case, *M'Naughten*, and is often referred to by that name. *See* M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

111. *See* Coffee v. State, 184 S.W.2d 278, 280 (Tex. Crim. App. 1945).

112. The most widely discussed deific decree case, *People v. Schmidt,* 110 N.E. 945, 949 (N.Y. 1915) was authored by then-Judge Cardozo. The opinion, though, has been sharply criticized on a variety of grounds, not least as creating "pseudo-doctrine," insofar as Cardozo's putative legal holding on the meaning of "wrong" for purposes of the insanity defense was based not on the facts of the case, but on a deific decree hypothetical he invented himself. *See, e.g.*, Christopher Hawthorne, *Deific Decree: The Short but Happy Life of a Pseudo-Doctrine*, 33 LOY. L.A. L. REV. 1755, 1775-80 (2000). Hawthorne also criticizes deific decree as internally inconsistent, unworkable, and outdated, and others have called it outright unconstitutional. Grant H. Morris & Ansar Haroun, *"God Told Me To Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973, 1022 ("Although society may wish to characterize the deific decree belief as absurd or false, it cannot, consistent with our Constitution, do so.").

113. As for instance in *Laney*, where the trial judge did not define wrong, and *Bigby*, which had stated explicitly that the insanity defense is as a matter of law not available for a defendant who argues that "regardless of society's views about his illegal act and his understanding that it was illegal, under his 'moral' code it was permissible," *Bigby*, 892 S.W.2d at 878 — a holding which would seem to rule out most deific decree claims — was never brought up. *See* Telephone interview with Buck Files, Laney's attorney, Nov. 15, 2004. Asked whether either side had requested such an instruction, Files laughed and replied, "No trial judge in his right mind is going to define 'wrong.'" *Id.*

114. *See, e.g, Bigby*, 892 S.W.2d at 878; *State v. Corley*, 495 P.2d 470, 473 (Ariz. 1972); *State v. Worlock*, 569 A.2d 1314, 1322 (N.J. 1990); WAYNE LA FAVE, SUBSTANTIVE CRIMINAL LAW § 7.2; Bageshree V. Ranade, Comment, *Conceptual Ambiguities in the Insanity Defense: State v. Wilson and the New "Wrongfulness" Standard*, 30 CONN. L. REV. 1377, 1384-86 (1998).

matic test-of-faith killer. She took the test — "follow what [you] believ[e] to be God's will, or. . . turn [your] back on God?"[115] — and, by its terms, passed: she did what God instructed, and did not turn her back on God's command, even at the cost of her sons' lives. Whatever psychiatrists may say about the mental state of a person who makes such a choice, there is no denying, on the facts of Laney's case, that she understood that she was being asked to do a difficult act — difficult precisely because it was condemned as wrong by the moral rules Laney would normally follow, and the prevailing moral rules of her community. To say that somehow she failed to understand that the killings were "wrong" is *precisely* to trivialize, to misunderstand, the religious act, the act of faith, that she performed. The voice in the sky commanded Laney to kill that which she loved,[116] and she obeyed, not because she loved her sons less, but to prove that her devotion to God was absolute.[117]

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115. Russell, *supra* note 109 (quoting Laney's attorney describing her choice at trial).

116. *Cf.* SOREN KIERKEGAARD, FEAR AND TREMBLING 100 (Alstair Hannay trans., Penguin Books 1985) (1843). Abraham "must love [Isaac] with all his soul. When God asks for Isaac, Abraham must if possible love him even more, and only then can he sacrifice him; for it is indeed this love of Isaac that in its paradoxical opposition to his love of God makes his act a sacrifice." The point, in other words, is that there would be no test, no faith, no supreme act of religious devotion, if in any way Abraham or Laney were unaware of the terrible wrongness, inhumanity, self-negation, and brutality of what they were commanded to do.

117. *Cf.* the whole history of religious fundamentalism. Here are three recent examples, one from each of the three Abrahamic religions.

> Mustafa Jabbar says he and his wife stand ready to be martyrs for Mr. Sadr's movement. If need be, he said, they will volunteer their first born as well, a baby boy, now 45 days old. "I will put mines in the baby and blow him up," Mr. Jabbar said. He has named the baby Moktada.

Somini Sengupta, *In the Ancient Streets of Najaf, Pledges of Martyrdom for Cleric*, N.Y. TIMES, July 10, 2004, at A3 (reporting interview with Iraqi Shiite Muslim parents).

> I raised the question of whether Jewish parents who place their children within range of Palestinian rockets had their priorities in order. Exasperated, Rachel said, "If I believe in holy law, that the commandment of the land of Israel is a commandment of God, and I want my children to be raised as Jews, I have to take them where they're going to fulfill this mitzvah. I have to take my child and physically he has to settle the land with me. I can't say I won't do things because I don't want him to suffer."
>
> Saperstein said, "If I believed that if all the settlers disappeared tomorrow then peace and happiness would reign forever, that we could live in peace as Jews in what's left of our homeland, then I would seriously consider picking up and going somewhere else."
>
> Rachel looked at her husband.
>
> "I wouldn't," she said.

Jeffrey Goldberg, *Among the Settlers*, NEW YORKER, May 31, 2004, at 54 (reporting interview with Israeli Jewish parents).

> In April 1999, [Michelle] Mingo wrote: "Our main desire should be for God's purposes not Samuel's discomfort. We put Samuel in God's hands and leave

B. Delusion and the First Amendment

Taking Laney at her word, then, is her belief a "delusion"? Under Texas law, as in most states, an insane delusion is a belief which is both false in fact, and which no rational person would ever believe.[118]

Under the First Amendment, however, courts may not declare any religious beliefs to be false. The leading case is *United States v. Ballard*.[119] In *Ballard*, the Court reversed the conviction of a religious organization under mail fraud statutes which were directed at "false" statements used to solicit funds. The Court reasoned that religious claims could not fall within the reach of the statute because this would be require courts to make judgments about the truth or falsity of such claims, which would violate the First Amendment. The Court held that the Constitution forbids submission to the jury of:

> the truth or verity of . . . religious doctrines or beliefs . . . Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. [The] miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.[120]

Laney presents the converse scenario: she was spared jail because a jury in a sympathetic environment accepted a defense theory requiring a finding that her beliefs were false. But the legal issue presented is the same: both results offend the Constitution.

> him there. What can we do for Samuel? NOTHING! God is the master. We are his servants." Later that month, Mingo wrote: "We learned how to give Samuel into God's hand. Karen had to learn to receive correction from whoever the Lord chooses."

John Ellement, *Woman Admits Role in Child's Death*, BOSTON GLOBE, Feb. 11, 2004, at B1 (quoting a journal kept by Michelle Mingo, a member of a American fundamentalist Christian sect, who claimed that God had ordered that solid food should be withheld from her 9-month old nephew Samuel; Samuel's parents complied, and Samuel subsequently starved to death).

118. Knight v. Edwards, 264 S.W.2d 692, 695 (Tex. 1954) ("The courts of this state have defined the term 'insane delusion' as being 'the belief of a state of supposed facts that do not exist, and which no rational person would believe.'").

119. 322 U.S. 78 (1944).

120. *Ballard*, 322 U.S. at 87.

If courts cannot declare any religious beliefs to be false, then *a fortiori*, they cannot declare any religious beliefs to be insane delusions, beliefs so bizarre that no rational person could entertain them. The paths of the psychiatrist and the judge diverge. The psychiatrist may be inclined to diagnose as schizophrenic a person who is convinced that God is talking to him and giving him instructions for his mission when the apocalypse comes, even where the person's beliefs are squarely in line with the teachings of his church and mainstream beliefs in his community.[121] But a court cannot constitutionally enter an NGRI judgment based on those delusions.[122]

Consider, for example, what the appellate courts would be faced with if Laney had been convicted, and then appealed on the grounds that the conviction was insufficiently supported by the evidence. The question of law the appellate court would have to resolve is whether a reasonable jury could have found that Laney was sane on the record presented. If the appellate court reversed on this issue, it would have to find that based on the evidence presented, no reasonable jury could have failed to find that Laney's religious beliefs were insane delusions — that as a matter of law, Laney's religious beliefs were both false in fact and so absurd that no rational person could believe them. Henceforth, then, the definition of "delusion" in the Texas Criminal Code would encompass religious beliefs just as surely as did the challenged statute in *Ballard*. In both cases, a court must make the determination that the given proposition is false.

The Laney scenario is, of course, speculative. But the *Kelley* case in Tennessee produced just such an appellate result.[123] On August 14, 1999, Brian Kelley, a married church deacon with no history of mental illness, smothered his thirteen month-old daugh-

121. Though the diagnosis would likely conflict with the psychiatric profession's own published diagnostic criteria as given in the Diagnostic and Statistical Manual ("DSM-IV"). AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 765 (4th ed. 1994) (defining "delusion" as "a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary. The belief is not one ordinarily accepted by other members of the person's culture or subculture (e.g. it is not an article of religious faith)."). *See* Grant H. Morris & Ansar Haroun, *"God Told Me To Kill": Religion or Delusion?*, 38 SAN DIEGO L. REV. 973 (2000) (arguing that the DSM definition of delusion is incompatible with the deific decree defense).

122. *See, e.g.*, Morris & Haroun, *supra* note 121, at 1022 ("Although society may wish to characterize the deific decree belief as absurd or false, it cannot, consistent with our Constitution, do so.").

123. *See* State v. Kelley, 2002 WL 927610 (Tenn. Crim. App. May 7, 2002).

ter Erin, after "receiv[ing] visions of the biblical characters Abraham and Isaac," in which God gave him "instructions to sacrifice his daughter because she was 'perfect.'"[124] Kelley interpreted his actions to the detective who interrogated him as follows: "Oh, yes, sir. What I did, according to the laws of this country, yes, sir, it was wrong. But I don't go by the laws of this land, I go by the laws of God."[125] At trial, Kelley pleaded not guilty by reason of insanity.[126] As the evidence of his insanity, he adduced his belief that he had killed his daughter at God's command "to pave the way for Christ's second coming."[127] On the basis of that belief, four psychiatrists testified that he was mentally ill.[128] The jury convicted nonetheless, and Kelley appealed his conviction on the grounds that no reasonable jury could fail to find that he met the NGRI criteria. The appellate court,while affirming the conviction on the ground that the evidence supported the jury's finding that he knew his act was wrong, *agreed* with Kelley as to the first condition: that he *was in fact* suffering from a mental disease or defect, and further, that *no reasonable jury* could have found otherwise. And the *sole evidence* for that mental disease or defect were Kelley's beliefs about God, the apocalypse, and the second coming of Christ. Thus in *Kelley* a court held as a matter of law that particular religious beliefs are false.[129]

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124. *Kelley*, 2002 WL 927610, at *5.

125. *Id.* at *6. The detective testified that Kelley "appeared alert and able to comprehend was was going on during the interview." *Id.*

126. *Id.* at *1.

127. *Id.* at *18-22.

128. *Id.* at *22.

129. The court could have narrowed its ruling by holding simply that as a matter of law a religious belief is not a mental disease or defect, and that Kelley therefore failed to meet the first *M'Naughten* prong. The court's ruling, by contrast, paves the way not only for reversal of convictions on similar facts, but also for collateral consequences perhaps unanticipated by the court. Suppose, for instance, that there was another child in the family, and that it was uncontroverted that Kelley's wife had precisely the same religious beliefs as did Kelley. Suppose that other relatives, or the state, sought to remove the surviving child from the wife's custody on grounds that she was not mentally competent to raise the child, or to have her committed on grounds that she was mentally ill and dangerous. She would not — probably — be estopped from arguing in opposition that her beliefs are not insane, but it would be a hard argument to win if the state, or the relatives, could rely on the appellate court's ruling to argue that as a matter of law in Tennessee, her beliefs are insane delusions. And given Kelley's crime, the dangerousness prong would not be difficult to make out.

This hypothetical in fact describes the situation in the Laney family, absent the custody action. There is a surviving child, and, so far as can be ascertained from published accounts, Laney's husband shares, in all relevant respects, her religious beliefs. If Laney had been convicted and prevailed on appeal — on at least the mental disease issue, as in *Kelley* — then the state of Texas would have precedent for the claim that as a matter of

Under the *Ballard* line of cases, this result cannot stand, and, I submit, would fall if the issue is ever squarely presented to the Supreme Court.[130] Does this mean that some people who are "objectively" (i.e. in the eyes of examining doctors) mentally ill may face criminal sentences for their acts? Indeed it does, where the "objectively delusional" beliefs are religious beliefs. That is the price we pay for the First Amendment. And it is a worthwhile tradeoff: the cost, on the one hand, is that religiously motivated killers will be sent to prisons, not hospitals; the benefit, on the other, is that all religious doctrines will be on an equal legal footing: the authority and imprimatur of the state will never be lent to a declaration that someone's religious beliefs are false. I suspect that Laney's coreligionists would welcome such a tradeoff. It is the only doctrine, after all, which respects the notion of religious belief as embodying fundamental *choices* made by individuals, choices which are foundational to their sense of self. To permit a religious belief to be judicially declared an insane delusion, factually false and so outlandish that no rational person could believe it, is to demean, trivialize, and chill a central part of many Americans' lives.

Further, seen from Hamilton's perspective — that is, analyzing these defenses as religious exemptions from neutrally applicable laws — the delusion argument creates a defense which is only available to people who belong to religions with bloodthirsty gods. That's a preference pretty clearly at odds with the Establishment Clause. An interpretation of state NGRI laws that permits a *M'Naughten* defense on grounds of divine command is thus unconstitutional insofar as it grants a special privilege to adherents of Judeo-Christian religions, a privilege not available to adherents of nonviolent religions or to the nonreligious.

C. Religion and Mens Rea: Jacques Robidoux

Defendants may appeal to religious beliefs to negate an element of the charged crime even when not pleading insanity. Most serious crimes require a mens rea of purpose, and a defendant may

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law, the teachings of the First Assembly of God are insane delusions. The members of that church should ask themselves whether Laney's acquittal was worth it.

130. I doubt that it will be, for a wide variety of reasons, particularly the state's inability to appeal acquittals. And if a case squarely presenting this issue did arise, an alternative, of course, would be to narrow or reject *Ballard*. Goldstein, *supra* note 13, argues that Ballard is routinely — and necessarily — honored in the breach already in many contexts.

defend on that element by invoking his religious beliefs to argue that he had no intention of harming the victim. However, just as religious beliefs are not as a matter of law delusions, neither should they negate mens rea when knowledge or intent are at issue in non-insanity contexts. The Robidoux case is a good example. Jacques Robidoux purposely deprived his son Samuel of solid food and forced his wife Karen to nurse Samuel while she was pregnant and confined to a restrictive diet. Jacques and the other members of his group — called "The Body" — including his sister Michelle, who first conceived of the idea and reported it as a divine revelation, knew that nursing would not provide Samuel sufficient nutrition. They then watched him starve to death over fifty-one days. Nonetheless, Jacques, when charged with first degree murder, claimed in his defense that he did not intend to cause Samuel's death, because he believed that God would "miraculously" save Samuel.

It is important to recognize the specific beliefs asserted by Jacques and the others who killed Samuel. They believed, first, that their actions were sufficient to cause his death given the realities of physiology as they understood them. Such belief would appear to meet the intent requirement for murder: ordinarily, a defendant who deprives a victim of food, maintains vigilance and control over the victim to ensure that no one else provides the victim with food, and understands that food is required for life, is guilty of murder. Jacques, however, while admitting those acts, claimed that because he believed God would miraculously intervene, he lacked both intent to kill and knowledge that his acts would kill. The jury found him guilty. The state did not rebut Jacques' testimony about his belief that God would intervene, or allege that the belief was insincere.[131] The guilty verdict thus indicates that the jury found Jacques' belief irrelevant: the law must hold people to a standard of rationality that excludes from causal explanation miraculous divine intervention. People are of course free to hold such beliefs, but they will not negate scienter which is otherwise proved. A person may no more starve his son and hope that God will intervene than he may fire a gun at his son, hoping God will deflect the bullet.

Is this what the jury was saying? Juries, of course, typically don't say anything besides their verdict, and as a legal matter

131. *See* Dateline, NBC News, May 16, 2004, for an account of prosecutor's argument at trial. As one juror put it, "he loved his son, he just loved God more."

they don't have to give reasons. But it's worth asking: did the Robidoux jury in effect find that Jacques's religious beliefs were false? Certainly the specific belief that God would intervene and prevent Samuel's death did in fact turn out to be false: Samuel died, and God did not prevent the death. But a *reasonable* belief would have negated mens rea even for a father who watched his son die over several months. A father, for instance, who thought his son had a lingering but non-fatal disease such as mononucleosis or Lyme disease, when in fact the son was dying of some other disease, treatable but undiagnosed, would not be guilty of murder if he had reason to believe that his actions would not cause his son's death. A father who received an initial erroneous diagnosis from a doctor, for example, and did not seek a second opinion would probably not be guilty of any crime. A father who did not seek any medical advice, but relied in good faith on his own and family members' experience (in a way roughly analogous to the Robidoux family's group affirmation of the starvation of Samuel) would be a more ambiguous case and would depend on the jury's evaluation of the competence and reasonableness of the father's and the family's decisions. In such cases, however, the parent is rarely charged with murder, especially given the availability of child neglect laws.[132] The crucial element in the Robidoux case is that there was *no doubt* among the family members as to the physical cause of Samuel's decline and death — starvation — and no doubt as to the available remedy for his condition — feeding him.[133] The Robidoux verdict is best seen as a statement that belief in divine intervention is never sufficient grounds for actions that the actor knows will result, absent divine intervention, in harm to others. The criminal justice system cannot recognize "the strength of the absurd" as a defense.[134]

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132. *See, e.g.*, Zaven T. Saroyan, *Spiritual Healing and the Free Exercise Clause: An Argument for the Use of Strict Scrutiny*, 12 B.U. PUB. INT. L.J. 363, 367 (2003) (discussing charging options when parents refuse to provide needed medical care for children on religious grounds).

133. Indeed, *Reynolds* itself — perhaps the earliest and clearest statement from the Court on the relationship of religious belief to mens rea — uses Robidoux-type facts as a hypothetical: "In *Regina v. Wagstaff* (10 Cox Crim. Cases, 531), the parents of a sick child, who omitted to call in medical attendance because of their religious belief that what they did for its cure would be effective, were held not to be guilty of manslaughter, while it was said the contrary would have been the result if the child had actually been starved to death by the parents, under the notion that it was their religious duty to abstain from giving it food." *Reynolds*, 98 U.S. at 167 (citing Regina v. Wagstaff, 10 Cox Crim. Cases 531).

134. *Cf.* KIERKEGAARD, *supra* note 116, at 75, describing the knight of faith as defined by his ability to believe "on the strength of the absurd":

A person's belief that his acts will not in fact produce the effect that he understands would be produced absent divine intervention is of the same species, for purposes of mens rea, as a person's belief that the moral value of his act which he understands would obtain absent divine intervention (i.e. sanction or command) does not apply because of that intervention. Belief that an act is not wrong is not per se a defense.[135] It is relevant only when the defendant pleads insanity, and in that case the defendant must show not just that she believed her act to be right, but that her belief was produced by a mental disease or defect which rendered her *incapable* of knowing (or "appreciating," depending on the jurisdiction) that the act was wrong. Neither the defect in itself, nor the (lack of) belief in itself will suffice, nor will both suffice if the latter is not causally traceable to the former. A concededly mentally ill defendant cannot win an NGRI acquittal unless his mental illness produces the required cognitive effects relative to the act he committed.

Suppose Laney had defended herself on grounds similar to those raised by Agamemnon in the death of Iphigenia: God's wrath would have been terrible, and if the children had not been killed, many more people would have died. This defense would implicate precisely the same questions as those faced by the Robidoux jury. Here the defense is justification, rather than lack of intent, but the analysis is the same. If the act was reasonably calculated to prevent a greater evil, then it may have been justified. Thus community norms make all the difference: in a community in which belief in victim-demanding, wrathful gods is dominant, child sacrifice, if done sincerely, in circumstances deemed pressing by the community, would be justified.[136] Laney's actual defense, however, and the verdict, is precisely the converse of that sce-

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> [H]e is reconciled in pain; but then comes the marvel, he makes one more movement, more wonderful than anything else, for he says: "I nevertheless believe that I shall get her, namely on the strength of the absurd, on the strength of the fact that for God all things are possible."

135. A defendant may argue that his act prevented a greater evil, but he will be required to establish not just his belief in that prevention, but also the reasonableness of his belief, for example the fact of the prevention. *Cf.* Dudley and Stevens, 14 Q.B.D. 273 (1884) (the famous case of the shipwrecked and finally cannibalistic sailors — but did they really *need* to kill and eat the cabin boy?). And such a defense, in any case, does not assert that the defendant lacked scienter in performing the act (i.e. did not understand that the act was legally wrong, or that it was, abstracted from circumstances, morally wrong); rather it asserts that under the circumstances, the act — judged by the prevailing moral norms of the community — was in fact justified.

136. And thus *not* insane; *see, e.g.*, Morris & Haroun, *supra* note 121, at 1040.

nario: the jury found that her beliefs were so *unreasonable* as to constitute insanity.

What if she had defended herself as Jacques Robidoux did, and instead of pleading insanity, alleged that while she did swing the rocks at her sons' heads, she believed that God would miraculously prevent or reverse the fatal damage, and thus that she lacked knowledge and intent? And what if Jacques Robidoux had pleaded insanity? The facts of Samuel's death would seem to fit deific decree doctrine quite well. Indeed Jacques's defense could be seen as essentially an invocation of the deific decree doctrine. We might parse it in those terms as follows: *because* Jacques believed that his acts were done at the direct command of God, he could not know that they were wrong. And this defense would be available even if Jacques did not believe that God would intervene to save Samuel — if he believed, in other words, that God had simply ordered him to starve his son to death.

Should there be a legal distinction between a defendant who believes that God ordered him to starve his son and believes that the child will die, and one who believes that God ordered him to starve his son, but believes that God will miraculously prevent death? The two defendants perform the same act (denying their children food) and there seems to be little or no distinction in terms of dangerousness. Consider Defendant A, for example, who fires a gun at his child believing that God will deflect the bullet, and Defendant B, who fires a gun at his child believing that God demands a sacrifice. Is there a difference in dangerousness? Suppose each defendant had an auditory hallucination in which a voice from the heavens commanded him to fire. Suppose further that each understood at the time of the act that murder is condemned by law and community norms. Should there be a difference in their respective *M'Naughten* analyses? Note that the relevant beliefs for purposes of the *M'Naughten* "wrong" prong are different: while both A and B lack knowledge, *ex hypothesi*, that their acts are wrong, A lacks that knowledge because he doesn't think his act will result in the death of his child, while B lacks that knowledge because he can't see God's commands as wrong. B intends and believes that his act will result in the death of his child; A does not. Perhaps A believes that what B did is horribly wrong, while B believes that what A did is stupid and naive. Should they be treated the same?

A and B may be equally dangerous, but the criminal law does not reach dangerousness per se.[137] Criminal punishment requires mens rea. What is A's mens rea (assuming we believe his testimony)? It wasn't his purpose to cause his child's death. He didn't believe that his child would die. Was he perhaps reckless, then? Did he knowingly disregard a substantial risk that his actions would kill his child? Here again religious belief interjects itself: How could there be *any* risk, if God was going to intervene? And how could A *knowingly* disregard it, if he believed with all his heart, with the faith of a good Christian, that God was going to intervene? To find that A *knowingly* disregarded the *substantial* risk that God would not intervene, the jury would have to assume — really, to insist — that A actually harbored doubts about God's power, authenticity, or beneficence, that despite his professions of faith, A is secretly an agnostic, at least when it comes to miracles. But on what grounds could the jury make such a finding? In cases like Laney and Robidoux, there are none. There was simply no suggestion that the defendants did not sincerely believe what they said they believed.

This leaves negligence: A *should* have known that his actions would kill his child; any reasonable person *would* have known; A's beliefs were not reasonable. A, in other words, *should* have been a secret agnostic. This analysis is at least plausible on the facts; the jury could find that A's beliefs were sincere, and simply require, as a matter of law, that he refrain from acting on such beliefs on pain of criminal punishment.[138] But negligence will support negligent homicide only,[139] not first degree murder.

B, on the other hand, demonstrates purpose and premeditation. B fully intends to cause his child's death. At first glance, then, one would be inclined to say that B is more culpable; certainly one would be inclined to say that a cognitive deficiency definition of

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137. For example, a defendant acquitted by reason of insanity may only be confined as long as he is both mentally ill and dangerous. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71 (1992) (holding that the state may not confine even a concededly dangerous NGRI acquittee once he is found to be sane).

138. As a constitutional principle, such social insistence makes sense: a secular society of any sort requires a substantive criminal law that does not recognize religious exceptions to criminal prohibitions. Obviously free exercise and establishment values are in deep tension here.

139. Not all jurisdictions recognize negligent homicide; it is therefore conceivable that a defendant in such a jurisdiction, found to have killed negligently, would not be guilty of any crime, if there was no separate underlying criminal act (e.g. drunk driving).

legal insanity is more straightforwardly applicable to A (who did not believe that he was killing his child) than to B (who did).

But A, of course, is Jacques Robidoux, and B is Deanna Laney. Their respective juries found Robidoux to be a murderer, and Laney to be insane. It's true that Jacques didn't plead insanity, but as I've indicated, the questions the jury had to answer in each case virtually identical: Jacques's defense, that he lacked the intent to kill or the knowledge that he was killing, would equally suffice for an insanity acquittal if that lack was caused by a mental disease or defect. And that defect could be shown, as in Laney's case, by the perceived divine command itself. Conversely, conviction of Laney would have required a finding that she did in fact know that her actions were causing the death of her sons and that doing so was wrong. Taking their testimony at face value, Laney intended to kill, while Jacques did not. The clearly *insane* belief, we might say, if there is one in either case, was that Samuel wouldn't die, even while Jacques was denying him food.[140]

V. CONCLUSION

The foregoing discussion of insanity is offered as an illustration of the problems that arise when we try to apply legal categories like delusion to religious beliefs. Where is the "neutral" vantage point from which the law can assess beliefs like Jacques Robidoux's and Deanna Laney's? I have neither the space nor the ability to answer that question here. Nonetheless, such questions — questions about the very meaning of concepts like "neutrality" and "rationality" — should be borne constantly in mind when we survey the terrain on which law and religion collide. They are, however, outside the scope of Hamilton's book. It may be that in Hamilton's work as a litigator, these sorts of philosophical quandaries don't often arise. And *God vs. the Gavel* does not purport to be a philosophical inquiry into the theoretical relationship between religion and the law. This is not necessarily a shortcoming in itself, but given the centrality to Hamilton's arguments of the concept of "neutrally applicable law," the question of what exactly "neutrality" entails when God stands before the bench is one that

140. That is, Jacques had specific falsifiable beliefs about causal relationships in the physical world (Samuel will not eat solid food, but he won't die), beliefs, thus, which do fit the DSM criteria for delusion. Laney's beliefs, on the other hand, were either purely normative (God wants me to kill my sons), or unfalsifiable (God is talking to me) and thus do not.

will have to be faced by other theorists — and by the courts that are confronted with these cases.

But definitional problems, of course, are most acute at the margins. And many of the cases Hamilton details are not at the margins; rather, they can only be described as attempts to exempt religion from the rule of law entirely. Hamilton is right to insist that the expansionist tendencies of Free Exercise activism need to be resisted, lest the Establishment Clause, and indeed the ideal — however contested — of neutral rules of law, be itself evicted from the constitutional landscape.

The margins, however, cannot be overlooked for long. As I hope my discussion of insanity has suggested, the practical question of how to apply law to religious belief will sometimes require descent into philosophy and theology. Sometimes the question is not about explicit legislative or judge-made explicit exemptions for religious conduct, but rather about the conceptual difficulties inherent in applying legal concepts in culturally contested domains.

The rhetoric of neutrality cannot alter, for example, the fact that it is inescapably an element of murder that the defendant believed his action would kill the defendant.[141] Thus the question of how to treat defendants who kill in the sincere belief that their actions will not cause harm because God is involved can be torturously complex. Admittedly these cases arise less often than do, say, zoning disputes involving church expansion. But reflection on how best to address the knottiest problems will provide needed perspective on the seemingly simpler ones. Fundamental constitutional questions can arise in very mundane contexts. Resolving the ongoing disputes between God and the gavel will require contributions from deep thinkers as well as hard-nosed litigators.

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141. Of course, this is not strictly true for felony accomplice murder (e.g. lookout or getaway car driver) and "depraved indifference" murder. But in those cases, the defendant is still punished on the basis of what he knew or should have known. Felony murder will only lie where the murder committed by the accomplice was reasonably foreseeable by the defendant, and depraved indifference murder will only lie where the defendant consciously ignored the great risk that his actions would kill. A depraved indifference charge requires that the defendant *should have known* that his actions were likely to cause death: depraved indifference is just the strongest form of recklessness. So a sincere belief that Samuel wouldn't die would presumably be a defense for Jacques on a depraved indifference theory as well, unless a jury found that any sane person must have known that depriving the boy of food would kill him. The analysis remains the same: to find Jacques guilty, you have to find either that he didn't really hold the religious beliefs he said he did, or that the law does not permit people to take such beliefs seriously as generative principles for action.