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Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender

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Tenth Annual Frank M. Coffin Lecture on Law and Public Service

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I. INTRODUCTION: REFLECTIONS ON THE COFFIN LECTURE AND AN OPPORTUNITY FOR SCHOLARSHIP

It was an honor and a joy to deliver the Tenth Annual Frank M. Coffin Lecture on Law and Public Service and to publish it now in the *Maine Law Review*. I thank you for this opportunity.

I have always believed that a life worth living includes two necessary components: passion and connection.[1] I experience those components both in my work and in my personal life. I love the passion I find in my work—both in my advocacy efforts to advance justice in the world and in the teaching through which I try to pass on to others whatever skills and wisdom I have accumulated over the years. And I love the passion I find in my personal life, in my efforts to explore and commit to the joys and challenges of intimacy and friendship.

The connections that I treasure track my various passions: starting from the connections I experience in an intimate relationship and in personal friendships, to the connections I have with colleagues, students, and mentors.

Judge Frank Morey Coffin is a remarkable and joyous connection in my life. It is the connection of a mentor, of a teacher, and of a friend. And in the example of his life, Judge Coffin has demonstrated his passion for making the world a better place, for imparting wisdom (and jibes and practical jokes) to his students, and for maintaining a full and happy home life.

I have been enriched by this connection with Judge Coffin—both enriched with little pearls of wisdom and with great peals of laughter—and I am everlastingly grateful for those riches.

I can think of no finer way to honor that connection, and to pay back some of the amazing gifts showered on me by Judge Coffin, than to deliver (and publish) the Coffin lecture on law and public service, which encompasses so many of the passions and connections of my life. And on this occasion of the Tenth Annual Coffin Lecture, I feel I stand here as a representative of every former, and current, law clerk of Judge Coffin, all of whom, I know, would echo my gratitude and joy for their connection to the judge.

I particularly appreciate the opportunity to step back from my work and to publish a piece that draws on—but is *distinct* from—the daily work I engage in. In

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1. I owe this insight to Dr. Martha Gross, Washington, D.C., 1998.

most of my life, I operate as a "do-er." As Director of the Federal Legislation Clinic at Georgetown University Law Center, I engage in anti-poverty work, disability rights work, and anti-violence work (together with twelve students and two full-time Teaching Fellows.)[2] As a consultant, I engage in gay rights work on the federal and state level.

The joy and the challenge of being located in an academic setting is that I am also able to engage in forays (albeit intermittent forays) into scholarly analysis. Delivering this lecture, and publishing this piece, provides an excellent opportunity for me to engage in such a foray. This piece, then, is a scholarly reflection on my advocacy experiences. My goal is to use my experiences in advocacy as fertile soil from which to create, I hope, a lovely flower of theory and conceptual thought.

Before setting out on this endeavor, however, I would like to offer two postulates. There are two essential qualities I believe distinguish advocacy (the fertile soil) from scholarly analysis (the flower). First, *in advocacy, one always knows what one's end point will be—and that end point is decided by the client.* Once an end point is decided upon (through the choice of client), the lawyer crafts every legal argument and analysis in the manner that will best achieve that goal.[3] If there is a sticky, annoying problem that stands in the way of the goal—either an annoying problem with the law or an annoying factual problem—the lawyer's job is to try to explain away, or to manage, that problem. An advocate does not respond to a difficult legal or factual problem by deciding the opposition has the better of the argument and dropping his or her client's case. Rather, the lawyer crafts the best possible arguments to convince other relevant parties (a judge, a legislator, or an agency official) of the continued merits of his or her client's position.

In litigation, lawyers for clients on either side argue the merits of their position in front of a neutral third party—a judge, a jury, or a panel of judges. The

2. The clients for the Federal Legislation Clinic in the 107th Congress are Catholic Charities USA, the Family Violence Prevention Fund, and The Judge Bazelon Center for Mental Health Law. The issues we have worked on in the 107th Congress include: responding to new proposed waivers for States under Medicaid; advocating for the retention (and non-dilution) of existing medical privacy regulations; advocating for federal medical privacy legislation; creating a system for better health monitoring and treatment of children in foster care; analyzing the position of states that become representative payees for foster care children receiving SSI; restoring an adoption subsidy removed by new administrative regulation; seeking transitional Medicaid, food stamps, and child care for families leaving the Temporary Assistance for Needy Families program (TANF); eliminating barriers to assistance for two-parent families under TANF; seeking better protection for migrant workers under existing federal labor laws; advocating for a genetic non-discrimination bill; advocating for a fix to the definition of "disability" under the ADA; assisting in an effort to address the Supreme Court decision in *Alexander v. Sandoval*; crafting legislation to ensure people with disabilities are provided greater access to the voting process; working to achieve reasonable accommodations in the naturalization process for immigrants with disabilities; seeking regulations/guidance to implement a statute passed by Congress authorizing the Attorney General to waive the oath for individuals who, because of a disability or impairment, are unable to understand the oath; advocating for better enforcement of existing laws that prevent individuals who have domestic violence restraining orders from owning guns; helping to enact additional laws to close the "gun show loophole" in existing laws; and working on increasing housing production for low-income people, particularly families with children. For more information, see www.law.georgetown.edu/clinics/flc.

3. This is why I tell my students that their first decision will be their most important one. Once they make the decision for whom they will work, almost everything else of importance for their legal work will flow from that decision.

impartial third party is expected to navigate through the respective partisan arguments and to arrive at a decision that bests fits both the law and reality. Judge Coffin's two books, *The Ways of a Judge* and *On Appeal*, are excellent discourses on the challenges and joys of acting in that capacity as a judge.[4]

In the legislative and administrative arena, where I mostly operate, members of Congress (and their staffs) and agency officials rarely assume the role of a neutral third party. Rather, these individuals are themselves part of the game, and tend to align themselves with one side of an issue. Once these individuals have done that, they become either the champions or the opponents of lawyers working for clients on a particular issue.[5]

Lawyers working for clients in the legislative and administrative arenas rarely meet for a one-time, face-to-face "trial-like" proceeding. Rather, these lawyers ordinarily engage in long processes of negotiation that may include many groups concerned with a particular issue. Difficult legal and factual problems usually arise that may undermine the end goal desired by a client. Again, an effective legal advocate does not respond to those difficult problems by abandoning the client's desired end goal and joining the opposition. Rather, those problems are "managed." The legal advocate may decide that certain compromises need to be made or that positions must shift slightly in order to address the legal or factual problem at hand. The key element throughout this process is that *all facts and all legal arguments are filtered through the lens of a pre-determined, client-driven endpoint.*[6]

The second key quality in advocacy, whether one is dealing with litigation or with legislation or administrative rules, is that by the time a certain point is reached—*a lawyer must have an answer.* At a certain point in litigation, a lawyer must decide what position to take in a brief and how to argue on behalf of that position. At a certain point in a legislative battle, a legislative lawyer must recommend to a federal or state legislator how to vote on a particular question (assuming the lawyer's client has a definitive position on how the legislator should vote). A lawyer who says, at that point, "Well, this is a very difficult and interesting issue, I can see two sides to this question and I'm not quite sure how you should vote" is not acting as a particularly effective *advocate* for his or her client.

By contrast, the hallmarks of scholarly reflection are the exact opposite of these two characteristics. First, *in scholarship, there is no client and, hence, no pre-determined end point.* Every scholar presumably begins his or her scholarly endeavor with a set of values. Moreover, each scholar also arrives at the endeavor with a set of ideas about how best to achieve those values in a legal setting. Because there is no client, however, a scholar can also be truly *open* to thinking about, and exploring, alternative points of view, alternative legal conclusions, and

4. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING (1994); FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH (1980).

5. See Austin Sarat & Stuart A. Scheingold, *State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction, in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 3 (Austin Sarat & Stuart A. Scheingold, eds., 2001), for an interesting explication of these roles.

6. See Neta Ziv, *Cause Lawyers, Clients, and the State: Congress as a Forum for Cause Lawyering during the Enactment of the Americans with Disabilities Act, in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 211 (Austin Sarat & Stuart A. Scheingold, eds., 2001), for a fascinating analysis of "who is the client" in public interest legislative lawyering.

alternative means for achieving what the scholar presumes to be a normatively good result.

Rarely have I found that my scholarly endeavors have changed my *values*. That is, rarely have I found that my beliefs about what is *normatively good* have shifted significantly because of my research. I have found, however, that scholarly endeavors have allowed me (indeed, have forced me) *to critique a "party line"* espoused by lawyers for a client (including myself, when I have acted in such a role) on a particular issue. Scholarship both allows for and demands such a result because a scholar does not filter every legal and factual problem through the lens of a client who has already determined a desired end point.

The second defining characteristic of scholarship, which sets it apart from advocacy, is that a legal scholar need not have all the answers at any particular point in time. Because there is no client, and hence no defined end game that will play out at a certain point, the answers to difficult legal and theoretical problems can develop in a slower, more organic fashion. Thus, for example, I explore in this piece a model for dealing with one type of equality conflict—when providing anti-discrimination protection for gay people threatens the beliefs of certain religious people who believe homosexuality is morally wrong. When Congress considered this question in the Religious Liberty Protection Act, there was little opportunity for lawyers representing either gay rights groups or religious groups to consider the complexity of the issue removed from the needs of their clients. By contrast, I hope this piece can help scholars with different values move the conversation forward in a deliberative fashion, without having the pressure of "a client" on either side of the issue.[7]

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7. I believe the legal profession also benefits from the production of what I would term "reflective advocacy writing." In this type of writing, an advocate steps back from the battle fray of practical advocacy experiences, but still retains the mind-set of seeking to achieve a particular legal result on behalf of some imagined client. Thus, unlike the production of an actual advocacy document for a real client (e.g., a brief or a negotiating document), production of a "reflective advocacy document" usually reflects the presence of an imagined client.

Individuals who often produce the best type of "reflective advocacy writing" are clinical legal faculty whose teaching revolves around the practice of showing students how to engage in "self-reflection" of their own work. Thus, for example, a good clinical teacher will supervise students writing briefs or drafting legislation, to advance the goals of particular clients. Given the time and space limitations of those products, however, some difficult legal or factual problems will be managed in a somewhat cursory fashion. Having the opportunity to step back from the development of a particular advocacy document, but still keeping in mind the pre-determined end-goal of the client, allows that individual to develop a more sophisticated and reflective advocacy piece of writing.

Reflective advocacy writing can be useful and influential in moving legal doctrine forward in a systematic, coherent, and creative fashion. But to be effective and accessible to those in the midst of advocacy, such writing must retain the imagined "client" clearly in the background. That is because such writing (like advocacy itself) needs to propose an answer, and that answer must be compatible with the otherwise pre-determined end-goal of others advancing the goal of the actual client(s)—even if the writing now proposes a more interesting and creative way of achieving that client's end-goal.

Given the usefulness and potential creativity of "reflective advocacy writing," the choice of many members of the clinical legal profession to define the work they produce as "scholarship" seems to me both inaccurate and strategically counterproductive. I can only presume the term was appropriated because, as a historical matter, it seemed to offer clinical faculty the best avenue for gaining respect and value within the legal academy. But as a long-term strategy, that approach seems to me to have serious flaws. First, by using a term that does not best describe the writing actually produced, the utility and creativity of reflective advocacy writing becomes obscured. Writing quality reflective advocacy pieces is actually quite difficult—and good advo-

II. THE FERTILE SOIL OF ADVOCACY

The bottom-line of this piece is that a legal mandate to offer reasonable accommodations should be viewed as a form of legislating equality, not a form of legislating "equality-plus." This is not a new idea. Whether one deals with the "sameness-difference" debate in feminism,[8] affirmative action,[9] or the debate concerning English as a second language,[10] the idea that substantive equality requires more than formal equality is nothing new. Nevertheless, what I hope to offer in this piece is a model (and a visual) that can further explicate and apply this principle by drawing on the development of the reasonable accommodation mandate in the areas of religion and disability and in the absence of the development of such a mandate in the areas of sexual orientation and transgender status.

As I note above, my conclusions in this piece will not be pre-determined by any client's established end point. But the fertile soil from which I hope to grow a theoretical flower is filled with practical experiences on behalf of clients. Indeed, it is precisely those experiences that have demonstrated to me that what should be an "old" idea is still an underdeveloped idea in American thought. Moreover, those practical experiences have also lead me to believe that a new model and visual might help the idea to become more accepted and might help opposing parties reach different conclusions as to what may be right or fair when equality claims conflict.

A. Congress' Section 5 Power Under the Fourteenth Amendment

In 2000, I wrote an *amicus* brief on behalf of seven Members of Congress who had been legislative leaders in the passage of the Americans with Disabilities Act (ADA).[11] The brief was filed in the case of *Board of Trustees of the University of*

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cates recognize quality work when they see it. Second, use of this term creates a bizarre dynamic in which those who produce "scholarship" (i.e., largely classroom professors) are asked to judge the quality of a set of writing with which they are largely unfamiliar. Thus, by not naming the writing accurately for what it is, clinical faculty actually lose the opportunity to educate their classroom colleagues regarding the utility, uniqueness, and characteristics of quality reflective advocacy writing.

From my perspective, reflective advocacy writing is as essential to the development of the legal profession as is scholarship. Hence, any legal academy of quality should equally produce (and equally value) reflective advocacy writing and scholarship, should acknowledge that it needs both productive clinical and classroom faculty to produce such different kinds of work, and have the ones who best understand the quality of each kind of work be the ones who primarily judge it for purposes of appointment and tenure. (It should come as no surprise to any reader who has actually finished this footnote that it is a precursor of a piece in percolation: *Quality Written Work from All: Towards a Theory of Appointment and Tenure of Clinical Legal Faculty.*)

8. *See generally* MARTHA MINNOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); *see also* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 368 (1984-85).

9. *See generally* WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION (Charles Lawrence & Mari J. Matsuda, eds., 1997).

10. *See generally* Rachel F. Moran, *Bilingual Education, Immigration, and the Culture of Disinvestment*, 2 J. GENDER RACE & JUST. 163 (1999).

11. Brief for Senators Dole, Harkin, Hatch, Jeffords, and Kennedy, and Representatives Bartlett and Hoyer as *Amici Curia* Supporting Respondents, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240).

Alabama v. Garrett,[12] in which the Supreme Court was faced with the question whether Congress had acted pursuant to section 5 of the Fourteenth Amendment when it subjected states to the requirements of the ADA.[13]

In *City of Boerne v. Flores*[14] the Supreme Court laid out the analysis to be followed for questions such as these. The Supreme Court is the sole arbiter of what it means for a state to deny its citizens the equal protection of the laws.[15] Although three levels of review under the Equal Protection Clause have been developed by the Supreme Court as a means of constraining *courts* in their review of legislative initiatives,[16] the Supreme Court has recently applied those standards of review as a means of constraining congressional initiatives designed to implement the Equal Protection Clause.[17] Thus, in order for Congress to enact a law that legitimately waives a state's sovereign immunity to money damages in a lawsuit, Congress must first identify a pattern of likely unconstitutional conduct on the part of the states.[18] This is conduct that would be ruled unconstitutional under the level of scrutiny the Supreme Court has established for actions based on the characteristic at issue.

Congress also has constitutional authority to prohibit certain additional activities, as long as such prohibitions are "proportionate and congruent" to the likely unconstitutional conduct.[19] Thus, any action that Congress wants to establish as

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12. 531 U.S. 356 (2001).

13. U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 5:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

14. 521 U.S. 507 (1997).

15. *Id.* at 519, 524:

> Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment .... The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States.... The power to interpret the Constitution in a case or controversy remains in the Judiciary.

16. Chai Feldblum, *Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237, 256-57 (1996) (describing separation of powers background for development of strict, intermediate, and rational basis review under the equal protection clause).

17. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84, 86 (2000) (holding that the "Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so" and that "[u]nder the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests"). For the absurdity of applying the standards of review in this fashion, *see* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 383-85 (2001) (Breyer, J., dissenting); Reply Brief for the United States at 4-6, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Nos. 98-796 and 98-791); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 477 (2000).

18. City of Boerne v. Flores, 521 U.S. at 530-31; Kimel v. Fla. Bd. of Regents, 528 U.S. at 89-91.

19. City of Boerne v. Flores, 521 U.S. at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."); Kimel v. Fla. Bd. of Regents, 528 U.S. at 82-83 ("Applying the ... 'congruence and proportion-

illegal under a statute (in which a state will be subjected to money damages in a lawsuit) must be tailored, in a proportionate manner, either to *remedy* past unconstitutional conduct on the part of states or to *prevent* future unconstitutional conduct.

Thus, in *Garrett*, the Supreme Court had to decide whether Congress had identified a pattern of likely unconstitutional conduct on the part of the states prior to passing the ADA, and whether the requirements of the ADA had been a proportionate and congruent response to such likely unconstitutional conduct. The ADA is a law that requires employers both to *ignore* a person's disability in determining whether to hire or promote the individual and to affirmatively take the disability *into account* when determining whether the person is qualified for a job. This latter circumstance arises when an individual with a disability needs an "accommodation"—the modification of a policy, the addition of a device or an auxiliary aid (such as a reader or a sign language interpreter), or a modification in physical space—in order to enable the person to compete and perform equally with others.[20] The ADA's mandate of non-discrimination thus includes affirmative requirements on covered entities to make modifications and accommodations, as long as such actions do not reach a statutorily established limit.[21]

Most disability rights activists and writers have long viewed the ADA's negative and affirmative requirements as equally core applications of "non-discrimination" and "equality."[22] Thus, when I was drafting the *Garrett amicus* brief, I wanted to argue that reasonable accommodation is a form of core equal protection—once equal protection and equality are correctly understood. But, as an advocate, I was compelled to consider whether such an argument would best advance the interests of my clients. In this case, my clients were several Members of Congress who wanted the Supreme Court to conclude that the ADA was an appropriate application of Congress' section 5 power. My colleague, Professor Michael Gottesman, convinced me that my sweeping argument regarding reasonable accommodation would not advance my clients' interests. Professor Gottesman, who was representing the respondent in *Garrett* at the Supreme Court level, believed the Court would view my argument, that a failure to provide reasonable accommodations to

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ality' test in these cases, we conclude that the [Age Discrimination in Employment Act of 1967] is not 'appropriate legislation' under § 5 of the Fourteenth Amendment. . . . [T]he substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act").

20. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12111, 12112(b)(5) (1994); Chai R. Feldblum, *Antidiscrimination Requirements of the ADA*, *in* IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS 35, 44-45 (Lawrence O. Gostin & Henry A. Beyer, eds., 1993).

21. Employers must provide reasonable accommodations, as long as such accommodations do not impose an "undue hardship" on the employer. Other covered entities (such as businesses dealing with customers) must provide modifications, as long as such modifications do not fundamentally alter the nature of the business, and must provide auxiliary aids, as long as such aids do not impose an "undue burden" on the business. 42 U.S.C. §§ 12111, 12112(b)(5). *See generally* Feldblum, *supra* note 20.

22. *See* Feldblum, *supra* note 20; *see also* Chai R. Feldblum, *The (R)evolution of Physical Disability Antidiscrimination Law: 1976-1996*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 613, 614-16 (1996); Donald J. Olenick, Note, *Accommodating the Handicapped: Rehabilitating Section 504 After* Southeastern [v. Davis], 80 COLUM. L. REV. 171, 184-86 (1980); Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 882-84 (1980).

people with disabilities is itself a denial of equal protection as far-fetched.[23]

Professor Gottesman offered, instead, a creative argument that presumed only irrational discrimination based on prejudice was a violation of equal protection, but then explained the reasonable accommodation mandate as *protecting against* such irrational discrimination.[24] Upon reflection, I chose to follow that same tack in the congressional *amicus* brief.[25] But the experience of writing the brief (and

23. It is understandable why Professor Gottesman would assume this reaction would occur. For example, in a recent case, Judge Easterbrook had noted that the ADA's "reasonable accommodation" requirement extended far beyond any concept of "equality" under the equal protection clause. Erickson v. Bd. of Governors of State Colls. and Univs. for Northeastern Ill. Univ., 207 F.3d 945 (7th Cir. 2000). The federal constitution (as interpreted by the Supreme Court) prohibits only irrational discrimination against people with disabilities. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47 (1985). And, as Judge Easterbrook explained:

> [I]t is rational for a university to favor someone with good vision over someone who requires the assistance of a reader. The sighted person can master more of the academic literature (reading is much faster than listening), improving his chance to be a productive scholar, and also is less expensive (because the university need not pay for the reader). An academic institution that prefers to use a given budget to hire a sighted scholar plus a graduate teaching assistant, rather than a blind scholar plus a reader, has complied with its constitutional obligation to avoid irrational action. But it has not complied with the ADA, which requires accommodation at any cost less than "undue hardship."

Erickson v. Bd. of Governors of State Colls. and Univs. for Northeastern Ill. Univ., 207 F.3d at 949.

According to Judge Easterbrook, then, a mandate to provide reasonable accommodations is clearly an "equality-plus" mandate, not a simple equal protection mandate. But if equality is always understood as requiring substantive equality, and not simply formal equality, should Judge Easterbrook have dismissed the reasonable accommodation requirement as so clearly beyond any possible interpretation of equal protection? Obviously, one answer is that Judge Easterbrook does not agree with the proposition that equality means "substantive" equality. Another, equally valid, answer is that the odd imposition of a "rational basis" standard skews the picture so dramatically that it is difficult to use this as a valid example of the lack of belief in the need for substantive equality. But I believe it also possible that reasonable accommodation has simply not been explained to (and understood by) the public, including Judge Easterbrook, as a requirement that establishes equality, rather than as a requirement that establishes some form of equality-plus or special rights.

24. Brief for Respondents at 45-46, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240). Professor Gottesman argued that:

> Congress concluded that the reasonable accommodation provision of the ADA is, along with the disparate impact provision, one of the "pivotal provisions" necessary "to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities . . . ." Given the pervasiveness of prejudice against persons with disabilities, when a state actor fails to do what a civilized and decent society expects, and cites costs that are not an undue hardship as the ground for rejecting the applicant who would otherwise be most qualified, there is every reason to conclude that prejudice and not cost underlies the refusal.
>
> Congress was also persuaded that the reasonable accommodation provision was necessary to assure that false stereotypes about disability not result in false assumptions of what it would cost to accommodate a person with disability and thus in resultant unwillingness to hire.

Id.

25. Brief for Senators Dole, Harkin, Hatch, Jeffords, and Kennedy, and Representatives Bartlett and Hoyer as *Amici Curia* Supporting Respondents at 22-24, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240). I argued that:

> In fact, the reasonable accommodation requirement of the ADA serves both a prophylactic and a remedial purpose that is congruent and proportionate to the underlying

making that particular decision) made me want to explore in a scholarly setting *why* the reasonable accommodation requirement seemed so naturally to be viewed as "special rights," rather than equal rights, to those outside the disability world.

If writing the *Garrett amicus* brief brought home to me the infirmities in the public's understanding of reasonable accommodation in the disability context, representing a gay rights group during congressional consideration of the Religious Liberty Protection Act brought home a different lesson: that it is difficult for civil rights groups to grapple with providing a reasonable accommodation to religious people when providing such an accommodation creates an equality conflict with another group. That experience made me want to explore whether there was a model we could develop that would help civil rights groups and religious groups better grapple with this dilemma.

B. The Saga of the Religious Liberty Protection Act

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in response to the Supreme Court's decision in *Employment Division v. Smith*.[26] In *Smith*, the Court ruled that a neutral government law that results in a burden on religious practices does not violate the First Amendment's guarantee of free exercise of religion. In response, Congress passed RFRA, which required governments to prove that any neutral law that burdened religious practices was narrowly tailored to a compelling governmental interest.[27]

Passage of RFRA was premised on something of a myth—that the Supreme Court had previously and consistently adhered to a "strict scrutiny" standard for

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constitutional obligation. Under the Constitution, a state employer cannot use disability as a proxy for qualification without proffering some rational reason. One "rational" reason an employer may proffer is that employing people with disabilities will be too costly. For example, a state employer may attempt to justify its rule that "no blind people may be teachers" on the assertion that it will cost too much to provide readers for such individuals.

In reality, however, the employer may simply be using the cost concern as a pretext for not hiring individuals with whom the employer is uncomfortable or with regard to whom the employer simply feels, on a "gut level," are not qualified. Establishing a legal reasonable accommodation requirement thus serves a pivotal prophylactic purpose. Once an employer must engage in a good-faith dialogue with a blind applicant or employee to determine what accommodations are actually necessary and what they actually cost (for example, the advent of new technology may obviate the need for readers and be cost-effective), the employer is precluded from using cost as a simple pretextual reason to justify the use of disability as a proxy. . . .

It is impracticable to assume that people with disabilities can become integrated into the mainstream of American society if the barriers that society has erected against such participation are not obviated through some affirmative modifications. The reasonable accommodation requirement of the ADA thus serves a pivotal remedial function. In order to break down the discomfort, stigma, stereotypes, and pity that have given rise to the unconstitutional actions of irrationally using disability in the first place, it is legitimate for Congress to mandate those remedial actions (subject to the "undue hardship" and "undue burden" limitations) that can assist in the integration of people with disabilities into American society.

Id.

26. 494 U.S. 872 (1990).

27. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

any neutral law that burdened religious practices. In reality, the Court had announced a strict standard in an unemployment compensation case, but had applied the standard in a less than strict manner in a range of other cases.[28]

Providing a "strict scrutiny" defense for claims of religious burden proved to be problematic in the area of civil rights. Landlords who wished to deny rental housing to cohabitating, unmarried couples, on the grounds that providing housing to such couples burdened the landlords' religious beliefs that cohabitation prior to marriage was sinful argued the government was required to prove its civil rights law was narrowly tailored to a compelling government interest.[29] Some courts ruled that civil rights laws prohibiting marital discrimination were not a burden on the landlords' religious beliefs in the first place.[30] Others ruled that such civil rights laws did burden the landlords' religious beliefs, but the case law was then mixed on whether such laws were narrowly tailored to a compelling government purpose.[31]

The Supreme Court ultimately invalidated RFRA, announcing in that case (*City of Boerne*) the Court's new restrictive view of Congress' section 5 power. Following the Court's decision in *City of Boerne*, advocates for religious and civil liberties groups prevailed on Members of Congress to introduce the Religious Liberty Protection Act (RLPA). This bill created the same strict standard for governments to meet whenever a neutral law burdened the religious beliefs of those covered under the law—that is, the government had to prove the law was narrowly tailored to a compelling government interest. The only difference was that Congress' asserted constitutional authority to enact the legislation stemmed primarily from its Commerce Clause Power and its Spending Power.[32]

Unlike the uniform religious and civil rights advocacy stand that characterized the effort to pass RFRA, RLPA ran into greater difficulties. Based on the use of RFRA by religious landlords, gay rights groups and some civil rights groups (such as the American Civil Liberties Union) were concerned landlords and em-

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28. *See Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the House Subcomm. on the Constitution, Comm. on the Judiciary*, 106th Cong. (1999) (statement of Lawrence G. Sager, Robert B. McKay Professor of Law, New York University School of Law and Christopher L. Eisengruber, Professor of Law, New York University School of Law); *available at* 1999 WL 304857.

29. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999).

30. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (no substantial burden on religious exercise found).

31. *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) (governmental interest in preventing marital status discrimination was not compelling), *rev'd en banc*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).; Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994) (remanding for further consideration of whether the governmental interest in eliminating discrimination based on marital status was compelling and whether uniform application of the state anti-discrimination law was the least restrictive means of achieving that interest); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Ala. 1994) (the government had a compelling interest in providing equal access to housing, and uniform application of the state anti-discrimination law was the least restrictive means of achieving that interest); State v. French, 460 N.W.2d 2 (Minn. 1990) ("marital status" did not include unmarried cohabiting couples; a plurality of the court also found no compelling governmental interest in preventing marital status discrimination).

32. *See* H.R. 1691, 106th Cong., § 2 (1999) ("A government shall not substantially burden a person's religious exercise—(1) in a program or activity, operated by a government, that receives Federal financial assistance, or (2) in any case in which the substantial burden on the person's religious exercise affects . . . commerce . . . among the several States.").

ployers would use the religious defense created anew by RLPA to again avoid compliance with state and local civil rights laws prohibiting discrimination based on sexual orientation and marital status, and perhaps even race.[33]

In order to avoid this result, the gay rights groups and their allies asked the religious coalition supporting RLPA to exempt civil rights laws from the scope of that law. The problem with that request, of course, is that it was difficult to state a rationale for why *civil rights* laws should be exempted from RLPA's religious defense, but not child abuse laws, or environmental laws, or presumably many other laws passed to advance the public good. If protecting the free exercise of religion was really so important that *any time* a neutral law burdened religious belief or practice the government had to justify its law as narrowly tailored to a compelling governmental interest, then why should civil rights laws be treated any differently from other neutral laws? One answer that civil rights advocates offered was that civil rights laws should be *presumed* to always pass the strict scrutiny test, and thus, exempting such laws from RLPA's scope would obviate the need for unnecessary litigation. But would it always be true that every civil rights law would meet this strict standard? And even if all such laws would presumably always meet this standard, were there really no other laws that presumably would always meet the strict standard as well?

Precisely because it is so hard to draw a coherent line between laws once an exemption from the RLPA defense for any type of law is accepted, the coalition supporting RLPA had decided (several years before) to resist *any* exemptions at all. This was a hard line position that was politically impossible for members of the coalition to deviate from.

A more coherent position for gay rights groups and civil rights groups would have been to question whether a strict scrutiny standard made sense at all as a means of accommodating religious beliefs and practices in this country. But that position, although advanced by various academics [34] was a political non-starter. I advanced a soft version of that position in testimony before the House Subcommittee on the Constitution, although I knew that approach was unlikely to serve as the basis for any resolution of the conflict between gay rights and religious rights.[35] The most compelling fact of this dilemma, however, is that there was no *real* conversation in the advocacy world on the underlying, tough question: i.e., what *should* government's responsibility be to religious people who live in a world in which religious beliefs and practices may be burdened, including burdened by civil rights laws?

Towards the end of the period that I was working on RLPA, I heard the beginnings of one promising conversation on the topic. At the annual conference of the American Association for Law Schools in 1999, the gay rights section and the

33. *See Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the House Subcomm. on the Constitution, Comm. on the Judiciary*, 106th Cong. (1999) (statement of Christopher E. Anders, Legislative Counsel, American Civil Liberties Union); *available at* 1999 WL 304850.

34. *See, e.g., supra* note 28.

35. *See Religious Liberty Protection Act of 1999: Hearing on H.R. 1691 Before the House Subcomm. on the Constitution, Comm. on the Judiciary*, 106th Cong. (1999) (statement of Chai R. Feldblum, Professor of Law, Georgetown University Law Center); *available at* 1999 WL 304854.

religion section of AALS jointly co-sponsored a presentation on RLPA. I was among the four panelists, as was Professor Mike McConnell.

In his talk, Professor McConnell sketched out various forms of non-discrimination based on religion, including the affirmative obligations imposed by a reasonable accommodation mandate. He then addressed the civil rights conflict regarding RLPA in the context of the importance and meaning of reasonable accommodation for religious people.

I completely enjoyed Professor McConnell's talk, even though I arrived at a different policy position than he did. Indeed, when I stood up to speak, I started my remarks by saying: "I love it. You totally understand how the mandate to provide a reasonable accommodation is a form of legislating basic, simple *equality*. We should write an article together about the importance and the meaning of reasonable accommodation."

The fact that I appreciated Professor McConnell's approach did not, however, answer for me the particular question on the table—that is, should there be an exemption for civil rights laws in RLPA? Nor did it answer for me the harder, underlying question—was the strict scrutiny standard the right standard to apply to governmental actions in order to ensure the *appropriate* level of accommodation for religious people? But at least I felt we were in the right *territory* by conceptualizing the question as one of reasonable accommodation for religious people. What was still absent, however, was a better model to help think through the question of what to do when providing such an accommodation undermines equality for *other* groups.[36]

These two experiences in my personal advocacy—one in disability rights and one in gay rights—gave rise to the challenge that the Coffin Lecture has now allowed me to turn my attention to. That is, I want to see if there is a way to explain the reasonable accommodation mandate in a manner that makes it easier for individuals (those in the lay public, as well as in the judiciary) to perceive the mandate as a form of ensuring equality—not as a provision of special rights or equality-plus. I also wonder whether a richer understanding of reasonable accommodation can help steer individuals of good will to a better conversation when faced with the dilemma of providing an accommodation for one group that will necessarily un-

36. In real life, of course, that is not how the dilemma surrounding RLPA was resolved. After a year of trying to resolve the civil rights question unsuccessfully, I and a few other lawyers realized we had a better chance of persuading the religious coalition and Congress to pass a "carve-in" bill, rather than to ask them to accept a "carve-out" for civil rights. The question was how to change the political dynamic sufficiently to make a "carve-in" bill attractive. The answer ultimately lay in the Supreme Court cases regarding congressional power. I testified before the Senate Judiciary Committee in September 1999, recommending that Congress pass a law more narrowly targeted to identified problems of burdens on religious liberty, so as not to create an unnecessary "bulls-eye" target for the Supreme Court to cut back further on Congress' power. *Protecting Religious Liberty: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Chai R. Feldblum, Professor of Law, Georgetown University Law Center); *available at* http://www.senate.gov/%7Ejudiciary/oldsite/9999cfeld.htm (last visited May 18, 2002). A week after the hearing, several religious groups wrote a letter suggesting that a more narrowly targeted law might, indeed, be appropriate. It took another year, but "baby RLPA"—S.2869, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), was ultimately written, passed by Congress, and signed into law in September 2000. *See* Pub. L. No. 106-274, 114 Stat. 803. RLUIPA is not necessarily any more coherent as a matter of public policy, but it resolved the immediate hard issue of reconciling gay rights and religious rights.

dermine the equality rights of a second group.

I call the model I have developed "rectifying the tilt." But before I set forth the elements of that model, I want to tell two stories: the development of the reasonable accommodation mandate for religious people and for people with disabilities and the absence of such a mandate yet for gay people and transgender people. These two stories help establish the foundation on which I build the components of the "rectifying the tilt" model.

III. THE STORY OF REASONABLE ACCOMMODATION

A. Reasonable Accommodation for Religious People

Our story begins during the intense civil rights struggle of the late 1950s and early 1960s. In 1964, Congress finally broke the stranglehold of conservative Southern Democrats and passed a major civil rights law.[37] Title VII of the Civil Rights Act of 1964, which applies to private employers with a certain number of employees, prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex. There has been a fair amount written about the addition of "sex" to the list of protected characteristics offered in a floor amendment in the House of Representatives.[38] But there has been very little written about what Members of the 1964 Congress thought about the inclusion of religion among the list of protected categories.[39] Indeed, I have not found any extended discussion in the legislative record to the 1964 Act concerning either the need for anti-discrimination protection on the basis of religion or what the components of such an anti-discrimination mandate would be.

The job of explicating the non-discrimination mandate of Title VII fell to lawyers working at the newly created Equal Employment Opportunity Commission (EEOC). The analysis for race, color, and national origin seemed pretty straightforward. It meant that employers would have to *ignore* a person's race, color, or national origin whenever the employer made any type of employment decision.[40]

But how should the EEOC deal with an anti-discrimination mandate with regard to religion? Would it be sufficient to require employers to *ignore* the religious beliefs of applicants and employees? That type of rule would be sufficient to invalidate as discriminatory a policy that said: "No Jews or Muslims need apply

37. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-2000h (1994)). For a wonderful description of the story, see CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1984).

38. Katherine M. Franke, *The Central Meaning of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 15 (1995) (noting the rich congressional legislative history concerning the equal rights of women).

39. Religion was included in Title VII of the Civil Rights Act of 1964, covering private employers, and in Title II of the Act, which covers hotels, restaurants, and recreational facilities. It was not included in Title VI, which covers any recipient of federal financial assistance. 42 U.S.C. § 2000e-2 (1994); 42 U.S.C. § 2000d (1994); 42 U.S.C. § 2000a (1994).

40. 29 C.F.R. § 1601-99 (1999). Title VII does allow employers to hire, employ, and classify employees on the basis of their religion, sex, or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2 (1994).

for this position." But consider an employment policy that requires all employees to work a Saturday and Sunday shift every six weeks, and requires all employees to accept mandatory overtime any weekend the employer needs their services. Would it be discriminatory to require an Orthodox Jew or a Seventh Day Adventist, whose religious beliefs prohibit them from working from sundown on Friday night to sundown on Saturday night, to comply with this even-handed, broad employment policy? Such individuals are not helped, in any practical way, by a law that requires employers to *ignore* their religious beliefs. Indeed, it is the very fact that the employer is ignoring these individuals' religious practices and beliefs that such individuals experience as an act of employment *discrimination.*

The EEOC lawyers took two stabs at this question. First, in 1966, the EEOC issued guidelines that required an employer to "reasonably accommodate" a religious person who did not wish to work on his or her Sabbath, as long as the employer could make that accommodation without "serious inconvenience to the conduct of the business."[41] The guidelines also provided, however, that if an employee had established an expected work week, with mandated overtime, and all employees knew beforehand that such a schedule existed, the employer did *not* have to accommodate an employee who wished to avoid work on his or her Sabbath.[42]

A year later, in June 1967, the agency modified its position. In the new guidelines, the agency required that an employer accommodate the religious beliefs of all employees (regardless of the establishment of any pre-existing work schedule), but limited accommodations to those that would not impose an "undue hardship" on the employer's business.[43]

In the meantime, in 1969, Mr. Robert Dewey sued his employer, Reynolds Metal Company, charging employment discrimination based on religion.[44] Reynolds had negotiated a collective bargaining agreement that required all employees to be available for mandatory overtime, including on Sunday.[45] Mr. Dewey, a member of the Faith Reformed Church, believed it was a sin to work on Sunday or to ask others to work in his stead and asked to be exempted from the required overtime. The company refused, and after Mr. Dewey failed to show up on several Sundays without finding a replacement, he was fired.[46]

The district court ruled that the company policy was discriminatory in its effect and in violation of Civil Rights Act of 1964.[47] The appeals court for the Sixth Circuit reversed, concluding that Title VII prohibited only *non-discrimination* based on religion, not the special treatment based on religion requested by Mr. Dewey.[48] As the court explained:

> The fundamental error of Dewey and the *Amici Curae* is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommo-

41. 29 C.F.R. 1605.1(a)(2) (1966), *quoted in* 29 C.F.R. Pt. 1605, app. A (2001).

42. Equal Employment Opportunity Commission, Religious Discrimination Guidelines, June 15, 1966, reprinted in 118 CONG. REC. 713 (daily ed. Jan. 21, 1972).

43. 29 C.F.R. 1605.1(b)(c) (1967), *quoted in* 29 C.F.R. Pt. 1605, app. A (2001).

44. Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (1969).

45. *Id.* at 710.

46. *Id.* at 711.

47. *Id.* at 715.

48. Dewey v. Reynolds Metals Co., 429 F.2d 324, 335 (6th Cir. 1970).

> date each of the varying religious beliefs and practices of his employees.[49]

The appeals court's view of equality was also quite simple and direct:

> The simple answer . . . to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, discriminating against no one.[50]

In June 1971, in a *per curiam* opinion, the Supreme Court affirmed the appeals court decision by an equally divided Court.[51]

Clearly, for religious people who wanted a different meaning for the anti-discrimination mandate of Title VII, a return to Congress was in order. As luck would have it, the Equal Employment Opportunity Enforcement Act of 1971 was proceeding through Congress at the time. The bill primarily included additional enforcement power for the EEOC. In January 1972, the bill reached the Senate floor and Senator Randolph offered an amendment that he suggested Senator Williams, the floor manager for the bill, would find non-objectionable. Senator Randolph's amendment modified the *definition* of "religion" for purposes of Title VII. With the amendment, the definition of "religion" read as follows: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of his business."[52]

The little discussion of the amendment that occurred was primarily personal and anecdotal. Senator Randolph explained that he was a member of a small denomination called Seventh-Day Baptists. Such individuals observe the Sabbath from Friday night to Saturday night, as do Orthodox Jews and Seventh-Day Adventists, and like members of those other denominations, Seventh-Day Baptists believe it is a sin to work on the Sabbath. Senator Randolph bemoaned the fact that employers often refused to accommodate this religious practice, and that indeed, members of the younger generation of Seventh-Day Baptists were abandoning the religion because it was too hard to mesh the religious requirements with work schedules.[53] Senator Randolph explained his amendment would require employers to accommodate religious practices, as a part of the non-discrimination law, unless engaging in such an accommodation would impose an undue hardship on the employer.

Senator Williams posed very few questions to Senator Randolph regarding the amendment.[54] He asked whether it would be an undue hardship for an employer to accommodate an employee who needed one day off on the weekend if the job was located at a resort and took place only on Saturdays and Sundays. It was no surprise that Senator Randolph was able to answer that such an accommodation would, indeed, pose an undue hardship. Senator Williams then pronounced

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49. *Id.*

50. *Id.* at 336.

51. Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971). Justice Harlan did not participate in the case.

52. 118 CONG. REC. 705 (daily ed. Jan. 21, 1972).

53. *Id.*

54. *Id.* 705-06. It is hard to know whether these questions were part of a planned colloquy or not. The dialogue does not seem quite scripted enough to be part of a planned exchange. Thus, it may be that Senator Randolph surprised Senator Williams (and his staff) with this amendment, although that would be quite unusual.

himself satisfied with the amendment and the amendment passed without opposition.[55] There was no discussion as to whether this new provision in the law ensured equality for religious people or created a form of equality-plus for religious people. Nor was there any discussion of how the "undue hardship" limitation would work when the interests of other employees might be at stake.

Congress' reticence in this area ultimately back-fired for supporters of the amendment. In 1977, in the case of *TWA v. Hardison*, the Supreme Court ruled that any change that would create more than a "*de minimis*" cost for the employer would constitute an "undue hardship."[56] Following the Court's ruling, many plaintiffs bringing religious accommodation cases found themselves without practical recourse, as courts almost consistently ruled that the requested accommodation would impose an "undue hardship" on the employer.[57] In 1997, the Workplace Religious Freedom Act (WRFA) was introduced, providing the term "undue hardship" in Title VII with the same definition the term had in the ADA. While hearings have been held on the bill,[58] and the bill has been reintroduced each Congress, there has been no real legislative activity on the bill.

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55. Senator Randolph asked for a roll-call vote, not because he expected any opposition, but because he felt "a rollcall would serve a constructive purpose." The vote was 55-0. *Id.* at 731. It might be that Senator Randolph wanted a roll-call vote to ensure his addition would not be dropped in a conference committee with the House of Representatives.

56. 432 U.S. 63, 84 (1977).

57. *See generally Religious Freedom in the Workplace: Hearing on S. 1124, Workplace Religious Freedom Act of 1997, Before the S. Comm. on Labor and Human Ress.*, 105th Cong. (1997) (statement of Richard T. Foltin, Legislative Director & Counsel, American Jewish Committee). *See, e.g.*, Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68-69 (1986) (holding that once employer has already reasonably accommodated an employee's religious needs in any way, the employer does not need to show that employee's preferred alternative accommodations would result in undue hardship), Beadle v. City of Tampa, 42 F.3d 633, 638 (11th Cir. 1995) (holding that police department not required to accommodate a Seventh Day Adventist who requested shift exceptions in order to observe the Sabbath because accomodation resulted in greater than *de minimis* cost and caused undue hardship); Cook v. Chrysler Corp., 981 F.2d 336, 339 (8th Cir. 1992) (upholding employer's termination of Seventh Day Adventist for absences caused by his refusal to work on the Sabbath because accommodating employee would have infringed on other employees' seniority rights guaranteed by a collective bargaining agreement, and accommodating employee would have resulted in more than *de minimis* cost to employer); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145 (5th Cir. 1982) (holding that while employer has burden to accommodate religious beliefs, employee has "a correlative duty to make a good-faith attempt" to follow suggestions made by the employer such as arranging shift trades with co-workers); Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441, 445 (8th Cir. 1979) (holding that employer was not required to accommodate religious practices of employee who did not want to work on his Sabbath because accommodation would involve the cost of replacement drivers, the cost because of delays and cancellations of trucking runs when replacement drivers were not available, and a violation of seniority system, thus constituting more than *de minimis* cost); E.E.O.C. v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 90-91 (N.D. Ga. 1981) (upholding the refusal of restaurant chain to hire applicant whose religion forbade the shaving of facial hair because there was an industry wide recognition that clean-shaven personnel are necessary in family restaurants).

58 . *Religious Freedom in the Workplace: Hearing on S. 1124, Workplace Religious Freedom Act of 1997, Before the S. Comm. on Labor and Human Ress.*, 105th Cong. (1997).

B. Reasonable Accommodation for People with Disabilities

If the 1990s found the religious community looking to disability laws as a model, the roles were reversed in 1973. Just two years after passage of the Equal Employment Opportunity Enforcement Act, Congress passed the Rehabilitation Act of 1973, reauthorizing a series of grant programs for vocational rehabilitation programs. Staff people for a few Senators decided to add a section to the law that would be modeled on Title IX of the Education Amendments of 1972 (on which several of the staff people had worked as well) and Title VI of the Civil Rights Act of 1964.[59] This section, which became section 504, provided that any entity receiving federal financial assistance could not discriminate against an otherwise qualified person with a handicap.[60]

There was little discussion or analysis in Congress regarding section 504 of the bill.[61] Thus, there was little discussion as to what "non-discrimination" on the basis of handicap would entail. The agency that drafted the regulation was the Department of Health, Education and Welfare (HEW), since that agency provided significant federal funding to a range of entities. The attorneys in HEW's Office of Civil Rights were charged with drafting regulations that would implement the new non-discrimination mandate of section 504.

These lawyers borrowed extensively from the EEOC's guidance regarding reasonable accommodation for religious practices and from Congress' codification of the accommodation concept in 1971.[62] Thus, the section 504 regulations defined "discrimination" as a failure to make a reasonable accommodation for a person with a handicap, as long as making that accommodation would not place an undue hardship on the recipient of federal funds.[63] The regulations did not provide a definition of "reasonable accommodation." Instead, it provided examples of accommodations: building a ramp for someone who uses a wheelchair; modifying a work schedule so someone could go to the doctor; having a sign language interpreter for a deaf person; or having a reader for a blind person.[64] The common theme was that all these modifications gave the individual with a handicap the opportunity to participate equally in a job or in the receipt of services.

The agency also adopted the limitation of "undue hardship," but did not define the term. Instead, the regulations listed a series of factors that were to be considered in determining whether a particular accommodation would impose an undue hardship on the recipient of federal funds.[65]

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59. For a fascinating rendition of the history of Section 504 of the Rehabilitation Act of 1973, see RICHARD K. SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY (1984).

60. 29 U.S.C. § 794 (1994 & Supp. IV 1998).

61. Indeed, the bill was vetoed by President Richard Nixon, but without any mention of the potentially far-reaching effect of Section 504. Rather, President Nixon was concerned that the bill authorized excessive funds for the rehabilitation programs. The bill finally passed, and was signed by President Nixon, after Congress cut down on the amount of funds authorized and the number of new programs created by the bill. There was no particular focus placed on Section 504 during this process. *See* Scotch, *supra* note 59, at 54-55.

62. Feldblum, *supra* note 22 at 613-614 (describing development of the reasonable accommodation concept in the Section 504 regulations).

63. 45 C.F.R. § 84.12

64. *Id.* § 84.12(b).

65. *Id.* § 84.12(c).

When those of us who were involved in the drafting of the ADA addressed the reasonable accommodation provisions of the bill, we made several decisions. First, we decided to use the same term—"reasonable accommodation"—that had been used in the section 504 regulations. We made that decision in spite of the fact that none of us intended the word "reasonable" to *mean* "reasonable." Instead, we intended the term to mean "effective."[66] That is, a reasonable accommodation was one that would *effectively* allow a person with a disability to perform a job or benefit from a service.[67] Despite our best efforts, a number of courts (not surprisingly) have given the term "reasonable" its plain meaning and have imported into the ADA a separate defense to the provision of an accommodation, beyond the "undue hardship" defense established by the statute.[68] In May 2002, the Supreme Court rejected the argument that the term "reasonable," in "reasonable accommodation," grants employers an open-ended additional defense under the ADA, although it allowed the term to be used as a defense in the unique circumstances in which provision of an accommodation would frustrate settled and expected seniority rights of others employees.[69]

Although those of us drafting the ADA did not provide a definition of "reasonable accommodation," we did provide a definition of "undue hardship." That definition stated that an "undue hardship" was something that required "significant difficulty or expense."[70] Moreover, the committee reports explicitly observed that the standard of "undue hardship" in the ADA was different from, and more stringent than, the weak standard enunciated by the Supreme Court for purposes of religious accommodation under Title VII.

The committee reports never explain why, as a conceptual matter, the provision of reasonable accommodation for people with disabilities should benefit from a stricter standard than that accorded religious people who need accommodations. Indeed, it would have been hard to articulate such a justification, had one been demanded from the drafters of the ADA. In the end, the decision to strictly demarcate "undue hardship" in the ADA from its statutory sibling in Title VII was purely pragmatic. None of us believed the Supreme Court had correctly discerned congressional intent when it interpreted "undue hardship" to mean anything more than a "*de minimis*" cost for purposes of Title VII.[71] But it is often hard to get Congress' attention and have it revisit statutory language once a court has mangled a term's interpretation. Thus, advocates advancing the ADA decided to establish the

66. If, prior to my work on the ADA, I had taught the Legislation class I currently teach at Georgetown University Law Center, I do not believe I would have agreed to using the term "reasonable accommodation," or at least, I would not have agreed to using the term without including a definition of the term to mean "effective accommodation." It is truly remarkable how many individuals responsible for drafting legislation have not been exposed to a systematic study of statutory interpretation. The class I currently teach in Legislation is devoted almost entirely to teaching students the "moves" courts make in interpreting statutory text. When I attended Harvard Law School from 1982-1985, no such class was offered.

67. Feldblum, *supra* note 22 at 619.

68. *See, e.g.*, Vande Zande v. State of Wisconsin, 44 F.3d 538 (7th Cir. 1995).

69. U.S. Airways, Inc. v. Barnett, 122 S.Ct. 1516 (2002). The Supreme Court, in an opinion by Justice Breyer, also rejected the notion that "reasonable" means only "effective."

70. 42 U.S.C. §12111(10)(A).

71. Indeed, it is hard to imagine that Senator Randolph would have agreed that such an interpretation accorded with his intent.

correct standard for reasonable accommodations in the disability context, and presumably, hoped the standard would ultimately change for religious people at some point in the future.

C. *Reasonable Accommodation for Religious People—Redux*

If the Workplace Religious Freedom Act (WRFA) were to pass, the standard for "undue hardship" that governs reasonable accommodations for religion in the workplace would be identical to the high standard that exists under the ADA. But even without passage of WRFA, issues of religious accommodation continue to arise under Title VII. Some of these cases pose the precise conflict between religious beliefs and gay rights that Congress averted when it transformed RLPA into "baby RLPA."

Consider the case of *Bruff v. North Mississippi Health Services*, decided in 2001, by the Fifth Circuit.[72] Sandra Bruff was hired as a mental health counselor by the North Mississippi Health Services. The company had contracts with a number of employers in Mississippi to run their employee assistance plans (EAP), which included counseling. Three counselors divided up the work; at different times, one counselor would go out on location to provide the counseling. In 1996, Sandra Bruff counseled a woman through the EAP program. A few months later, the woman returned for another session, explaining she was having trouble in her relationship. This would have been a pretty run-of-the-mill case for an EAP counseling session, except that the woman also explained that she was in a lesbian relationship. Bruff then refused to counsel the woman, explaining it was against her religious beliefs to assist someone in a lesbian relationship.

The employee complained to her employer who subsequently complained to the company. Upon hearing of the complaint, Bruff asked the company to accommodate her religious beliefs by letting her decline to counsel anyone in a gay relationship or anyone in an unmarried, sexual relationship. The company considered whether Bruff could be accommodated by shifting responsibilities among the three EAP counselors. Ultimately, the company decided such an accommodation would not be feasible, given the small number of counselors and the fact that counselors traveled alone to provide counseling across the state.

A jury concluded that Sandra Bruff had been discriminated against on the basis of religion and awarded her $32,000 in back pay, $320,000 in compensatory damages, and $1.7 million in punitive damages.[73] The Fifth Circuit overturned the judgment, ruling that accommodating Bruff would have imposed an undue hardship on the company.[74]

How should we think about the conflict of rights in this case? On one hand, Sandra Bruff now has to seek another job because of her religious beliefs. Clearly, a jury of her peers did not think that was fair. On the other hand, would it have been appropriate to require Bruff's co-workers to travel with her each time, just in case there was a counseling session Bruff could not do? To what extent should the employer be required to bear the costs of greater expenditure of resources because of Bruff's personal beliefs? Moreover, there are costs as well to gay employees.

72. Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495 (5th Cir. 2001).
73. *Id.* at 499.
74. *Id.* at 500-02.

Already sufficiently emotionally distraught to seek EAP counseling, such employees would not run the risk of being told—perhaps after they start a session—that they cannot be counseled by a particular therapist.

There is clearly a conflict of rights here. At the moment, the artificially low standard for "undue hardship" under Title VII may ensure that most religious employees will not be accommodated in the fashion requested by Sandra Bruff. But, as the remainder of this paper will make clear, I believe the standard for "undue hardship" under Title VII should be the same high standard that applies under the ADA. But if such a change is to be made, we need a better way to think through the conflict of rights that will arise under an invigorated "undue hardship" standard for religious accommodation under Title VII.

D. Reasonable Accommodation for Gay People and Transgender People—A Very Short Story

There are still two characteristics that may generally cause an individual to be fired from a job, subjected to harassment, or passed over for a promotion and for which there is no explicit federal anti-discrimination protection: being gay or being transgendered. As a matter of legal doctrine, it is possible to argue that existing sex discrimination laws, properly interpreted, already prohibit such discrimination.[75] Nevertheless, given that most courts have not yet interpreted sex discrimination laws in such a manner, it is probably necessary to enact new laws that explicitly prohibit discrimination based on being transgendered or gay.

Since 1974, a bill has been introduced in every Congress to prohibit discrimination based on sexual orientation in employment, housing, public accommodations, and government services. No serious action has ever been taken on this broad piece of legislation. Since 1994, a more targeted bill has been introduced in every Congress prohibiting discrimination based on sexual orientation by private employers (the Employment Non-Discrimination Act (ENDA)). This bill has received serious attention and failed to pass the Senate by merely one vote in September 1996.[76]

ENDA represents a classic example of the *failure* to include reasonable accommodation as a basic component of equality. If one asked a random sample of gay people in America today whether they face discrimination in the workplace, one would probably receive a range of answers—from people who experience severe harassment and discrimination in their workplaces to those who experience no adverse reactions at all in their workplaces. But if you ask that same random sample if they are treated fairly and equally with their heterosexual counterparts with regard to the *benefits* of employment—most particularly, health insurance benefits—not one person will be able to claim that he or she is treated equally with non-gay workers. Most employers who offer health insurance coverage to the spouses and children of non-gay workers do not offer equivalent coverage to the domestic partners (and children of those partners) of gay employees. Even those employers who do offer such coverage cannot ensure complete equality for their

75. Chai R. Feldblum, *Gay People, Trans People, Women: Is It All About Gender?*, 17 N.Y.L. SCH. J. HUM. RTS. 623 (2000).

76. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, *in* CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 149 (John D'Emilio et al. eds., 2000).

gay employees. Federal tax law requires those employees to pay a tax on the *income equivalent* of the health insurance benefit, something non-gay workers are not required to do.[77]

One would expect that such a glaring example of non-equality would be addressed by a bill titled the Employment *Non-Discrimination* Act. In fact, the bill does the exact opposite. In two separate sections, the bill ensures that any discriminatory acts that might flow from the denial of marriage rights to gay people are left undisturbed in the employment sector. In a section titled "Benefits," the bill explicitly provides that "this Act does not apply to the provision of employee benefits to an individual for the benefit of the partner of such individual."[78] And in the following section, titled "No Disparate Impact," the bill establishes "the fact that an employment practice has a disparate impact, as the term 'disparate impact' is used in section 703(k) of the Civil Rights Act of 1964, . . . sexual orientation does not establish a prima facie violation of this Act."[79] Hence, ENDA will not redress any inequalities with regard to workplace benefits nor will it contest any neutral employment rule based on marriage that results in a disparate impact on gay people.

I do not highlight this point to cast aspersions on either the motivations or legal drafting competencies of the drafters of ENDA. (Indeed, as one of the primary drafters of the bill, that would be quite odd.) Rather, I highlight this point to demonstrate how the need to make ENDA politically palatable and viable required a move *back* from full equality. I hope the section below on "morality and the tilt" will shed some light on why such a compromise was necessary to include in ENDA—or, at least, in the ENDA as originally introduced in 1994.

While ENDA does not offer full equality to gay people, it does at least prohibit certain explicit forms of discrimination based on sexual orientation. Transgender people are not as lucky. Unless ENDA is amended prior to passage to prohibit discrimination based on transgender status (as it should be), transgender people will still be subject to blatant forms of discrimination, with their only recourse being existing sex discrimination laws.[80] Thus, neither the equality of hav-

77. *See generally* Nan D. Hunter, *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565 (2000).

78. S. 1284, 104th Cong. § 6 (1996).

79. *Id.* § 8.

80. Although discrimination against transgender people should logically be understood as discrimination based on "sex," courts have devised various means for avoiding such a result. *See, e.g.*, Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D.Cal. 1975), aff'd, 570 F.2d 354 (9th Cir. 1978); ("[In Title VII,] [n]o mention is made of change of sex or of sexual preference. The legislative history of . . . Title VII nowhere indicate[s] that 'sex' discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof."); Grossman v. Bernards Township Bd. of Educ., No. 74-1904, 1975 WL 302, *4, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J. Sept. 10, 1975) ("it is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex from the male to the female gender") aff'd, 538 F.2d 319 (3d Cir. 1975); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D.Md. 1977) ("The gravamen of the Complaint is discrimination against a transsexual and that is precisely what is not reached by Title VII"); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 286-87 (E.D.Pa. 1993) ("Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism"); Underwood v. Archer Mgmt. Servs., 857 F. Supp. 96, 98 (D.D.C. 1994) ("Because transsexuality is not included in the definition of 'sex,' Ms. Underwood may not sue on that basis"); Doe v. United States Postal Serv., No. 84-3296, 1985 U.S. Dist. LEXIS 18959, at *4-5 (D.D.C. June 12, 1985) ("Especially

ing one's characteristic *ignored*, nor the equality of having one's characteristic taken *into account*, will be available to transgender people, absent the passage of a law that explicitly provides for both types of equality.

IV. "RECTIFYING THE TILT"—A PROPOSED MODEL

A. Equality Means Treating Others "As Equals"

When a legislature passes a non-discrimination law to cover a particular group, I believe it does so in order to achieve a state of *equality* for those covered under the law. If "equality" means that members of the covered group will be treated *equally* (i.e., in the same manner as everyone else in the country) then including a "reasonable accommodation" mandate in such a law would not establish equality. By definition, a reasonable accommodation mandate presumes that members of the covered group will receive differential treatment for some purposes.

But equality can also mean treating members of the covered group "*as equals*." If each member of the covered group is to be treated "as an equal," with the same dignity and respect accorded to any other member of society, then the reasonable accommodation mandate becomes an integral part of achieving equality. Why? Because our society is set up with certain norms that make it impossible to treat minority members of society "as equals," without us as a society also taking some affirmative, corrective actions.

The norms to which I refer are all around us. For example, the religious norm in the United States is that the Sabbath falls on Sunday, not Saturday. And the norm is that most people who are Christians can work on Sunday without violating any religious rule. We have norms in our physical space, our structural arrangements, and our social interactions. Our norm in architecture is to build buildings with steps going up to the entrance. Our norm in language is to have a national language of English, not of English and American Sign Language concomitantly. Our norm for the exchange of information is to use the printed word on paper or to transmit written information electronically. Our norm for according economic rights and responsibilities, both governmental and private, is to use marriage as an organizing mechanism.

These norms have been created by *affirmative actions and decisions* that we, as members of society, have taken over time. Admittedly, these decisions were not taken out of malice or hatred for minority members of society. Our architectural norm was not designed in order to keep people who use wheelchairs out of such buildings; our employment norms were not designed to make it harder for certain religious people to practice their faith; and our marriage norms were not chosen in order to disadvantage gay people. But it would not be fair to characterize these

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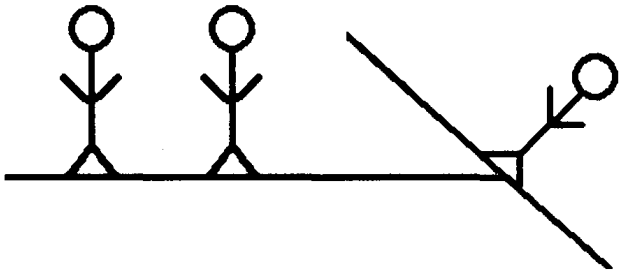
in the absence of legislative history suggesting that Congress intended the word 'sex' to mean anything other than the biological male or female sexes, we agree with the court in Ulane [that discrimination against transsexuals is not discrimination based on 'sex']"). This otherwise uniform trend in the courts is now being seriously challenged. *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (holding discrimination based on transgender status covered under Title VII and the Gender Motivated Violence Act); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000) (holding discrimination based on transgender status may state a claim under the Equal Credit Opportunity Act). *See generally* Feldblum, *supra* note 75.

norms as simply arising from the "facts on the ground"—i.e., from the mere fact that these are practices shared by a majority of the members of society. Rather, these norms have arisen out of the cumulative set of actions and decisions taken by our society over time—with any disadvantages resulting to other members of society largely ignored and unacknowledged during that time.

Assuming this is true, here is the visual I would offer to describe a society that is set up in this fashion. Imagine a world in which the ground is nice and level. This is the level set by the majority norms of society. Most people are happily standing upright on this piece of land.

But now assume there are people whose norms are different. These may be people who use a wheelchair, people who keep the Sabbath on Saturday and cannot work on that day, or people who love others of the same gender. For these people, it will be hard to get into the buildings built by society, work at the jobs created by the society, and benefit from the social systems set up by the society. For these people, the ground is on a tilt—because there is something about the *reality* of their lives that is different from the societal norm.



Being on a tilt is not easy. It is also not "equal," if being equal means being treated "as an equal" in one's society. There is, admittedly, a side benefit: one is able to share stories and comradeship with others who are also on the tilt. But that fact of community is often used primarily as a means of dealing with the hardship of being on the tilt in the first place. Moreover, one should still expect to see communities developing among people who are all standing upright on level ground. Creating a level ground does not mean erasing all differences between people in society. It simply requires that each different person (and each different community) be treated as an equal within that society.

It should be noted that the differential norm *itself* does not inherently create the tilt. In a different world, if that person's norm were also the *societal* norm, that person would be standing upright and everyone else would be on a tilt. For example, in a society in which the Sabbath is celebrated from Friday sundown to Saturday sundown, and all businesses and transportation are shut down during that period, an Orthodox Jew would be standing upright and a secular Jew would be on a tilt. It is the result of the particular society's *pre-existing choices* that determine whether a person with a different norm will be on a tilt.

If we believe that equality means treating every person in our society "as an equal," and if we believe that the different norm that creates a tilt for a person in society is not morally problematic,[81] then any non-discrimination law that pur-

81. *See* discussion *infra* Part IV.D.

ports to establish equality should be required to do something about the tilt.

B. What Should We Do About the Tilt?

There are different ways to approach the phenomenon of various members of society being forced to live on a tilt. Obviously, one choice is to change the societal norm so that the person with the differential norm is able to stand upright. This will be a phenomenally poor policy choice (which would never be adopted) if the subsequent effect were to place everyone else on a tilt.[82] But in certain circumstances, once society becomes *aware* of a particular tilt, it is possible to change the societal norm so that *everyone* is able to stand upright. For example, a society can mandate that all new buildings be built with ramps rather than steps. People who are able to use either ramps or steps will still experience themselves as standing upright in such a society. And people who use wheelchairs will similarly experience themselves as standing upright.

When it is possible to rectify the tilt by changing the societal norm itself (without putting anyone else on a tilt), that usually represents the best means for rectifying the tilt. Such a change not only results in everyone standing upright, it also integrates those with the differential norm into society in a way that best reaches the goal of treating everyone "as an equal."

In many circumstances, however, it will not make practical sense (or may not *seem* to make practical sense) to change the societal norm for everyone. For example, if we changed our societal norm so that every person was taught both English and American Sign Language, at home and in school, there would no longer be a significant tilt for deaf people in our society. Presumably, deaf individuals would still experience a special community with each other because of living in a world of no sound, but they would not experience themselves as un-equals in society.

It is difficult to imagine, however, that our society would choose to engage in such a radical change of the social norm of our common language. Hence, an alternative way to rectify the tilt is to *change the incline under that person and that person only.* This could be achieved, for example, by providing a sign-language interpreter at a conference that a deaf person attends or providing a sign-language interpreter who will accompany a deaf individual on a job. At first blush, such a requirement might appear to be "special treatment" for the deaf person—some form of "equality-plus." But it clearly is not. If one accepts that equality means treating all people in society "as equals," and if one accepts that the reason the deaf person is on a societal tilt is because of an affirmative decision by society not to teach all of its members American Sign Language, then providing the sign-language interpreter to the deaf person is more appropriately viewed as the *minimal* step society is required to take to rectify the tilt.

In order to fully accept this proposition, I believe it is important for majority members of society to acknowledge that the reason they are standing upright is because society has already established a level ground underneath them. A critical, concomitant acknowledgment is that this particular incline of the land has not

82. For example, if a range of societal benefits were tied to being coupled with someone of the same gender, that would successfully rectify the tilt for gay couples. But that change would create a tilt for a new group in society—heterosexual couples.

"just happened." Rather, the incline has resulted from a series of affirmative actions and decisions, taken collectively (albeit, often unconsciously) by society over time. These actions and decisions may seem natural, and even unassailable, but they have still been created collectively by society.

C. Should There Be Limits to Rectifying the Tilt?

Under the ADA, the obligation to provide a reasonable accommodation—what I call, under this model, the obligation to rectify the tilt—has a statutory limitation built into it. For example, an employer is not required to make a reasonable accommodation if doing so would impose an "undue hardship" on the business. While "undue hardship" is defined in the statute as an action requiring "significant difficulty or expense," there are no clear, bright-line rules in the law as to what rises to the level of a "significant difficulty or expense." Indeed, the law is explicitly set up as a flexible, "deep-pocket" bill. Whether an action rises to the level of a significant expense depends on a list of factors, including the size of the business, the number of employees, and the cost of the accommodation. Thus, the larger the business, the more the employer is expected to pay for a reasonable accommodation.

Several commentators who favor disability rights have challenged the ADA's *bona fides* as a civil rights law in light of the statutory limits built into the law. And from an opposite perspective, several economists and other commentators have criticized the ADA as faulty public policy because it places an inappropriate burden on individual employers and businesses. If rectifying the tilt is an appropriate societal obligation to ensure that all members of society are treated as equals, should there be *any* financial or programmatic limits to such an obligation? And regardless of whether one believes there should be such limits, is the approach taken by the ADA the best one for rectifying the tilt?

I have an open mind on the first question and a strong instinct on the latter one. Viewed within the "rectifying the tilt" model, the ADA's approach is clearly not the optimal one. The assumption of the model is that all of us, as members of society, have contributed to the establishment of norms that have created the tilts for our fellow society members. Hence, it should be incumbent on *all* of us to pay for the rectification of the various tilts. Why should one particular employer be forced to pay for a ramp because that employer was "unlucky" enough to have one of its employees involved in an accident that required the employee to use a wheelchair? Why should one company that offers training sessions be required to pay for a sign-language interpreter because that company is "unlucky" enough to have one deaf person sign up for its training? Why should one company have to reorder its personnel line-up because it is "unlucky" enough to have hired six Orthodox Jews?[83] Why should one company have to pay extra premiums to a health insurance carrier because it has a significant number of gay employees with domestic partners or pay to install a one-person unisex bathroom to accommodate a

83. This example presumes the "undue hardship" standard for religion has been modified along the lines proposed by the Workplace Religious Freedom Act.

transgender employee?[84]

In light of the fact that it was society, collectively, that engaged in the affirmative actions that created the norms and the tilts, I believe we should establish a fund that we all contribute to equally. This fund, which I call the RTF (Rectifying the Tilt Fund), should be available for covering the costs of rectifying the tilt for any characteristic for which the law has created a reasonable accommodation mandate.

The political hurdle in establishing such a fund clearly lies in the source of funding." In recent decades, the idea that "our money belongs to us and not the government," has held powerful sway over the electorate. The converse idea—that we the people *are* the government—and that, we the people, have collective responsibilities to each other, seems to have had much weaker political pull. Nevertheless, as a *theoretical* matter, I do not believe the reasonable accommodation mandate should fall haphazardly on those businesses that happen to be the ones faced with an employee or customer with a disability (or other characteristic requiring an accommodation).

It is possible, however, to imagine all employers contributing equally to such a fund in the same manner that all employers pay into an unemployment compensation fund. Until such a RTF is created, however, the "undue hardship" limitation, together with its "deep pocket" approach, seems a pragmatically necessary limit for the moment. It is appropriate to require an entity operating within society to take some responsibility for rectifying the tilt created by society at large. However, there must be a limitation to that responsibility. Such an entity cannot be expected to rectify the tilt at the significant expense of its other employees or shareholders.[85]

D. Morality and the Tilt

The "rectifying the tilt" model can also offer us some insights as to why certain forms of civil rights are accepted as legitimate forms of producing "equality," while others are not. Obviously, as a society, we are not committed to treating *everyone* as an equal—with a concomitant equal right to have his or her tilt rectified. If the person's norm that creates the tilt is morally problematic and/or is threatening to society, a society may legitimately choose not to rectify the tilt under that person.[86] For example, a person who can achieve sexual pleasure only by

84. This first example presumes ENDA has passed, with a reasonable accommodation component requiring equal provision of benefits. The second example presumes ENDA has been amended prior to passage to prohibit discrimination based on transgender status. The question of what accommodation is appropriate for transgender employees with regard to bathrooms is currently being actively discussed among a small group of legal and political advocates. My belief is that the accommodation should be that the transgender person is provided the right to use (on a consistent basis) the bathroom of the gender with which the person self-identifies. However, an alternative accommodation may be the establishment of a single, unisex bathroom.

85. If a RTF is created through equal contributions from all employers, much like workers' compensation an unemployment compensation, then the conceptual justification for a limit on expenditures becomes weaker. Nevertheless, even with a RTF, some limit may be required if necessary to ensure that funds are available to all who would need them.

86. I use the and/or form quite deliberately. *See generally* Feldblum, *supra* note 16.

having sex with young children, or a person who can feel empowered only by inflicting violence on a spouse, are clearly on a tilt to the rest of society. And yet, there is no reason to treat these people "as equals" with regard to those characteristics—precisely because we do not believe those characteristics should be lauded and approved by society.

Society's collective sensibility of whether a status or characteristic is morally problematic can provide an explanation for the public's differing views on "equality" for gay people. One of the most significant shifts in this country over the past several decades has been the move from a long-standing assumption that homosexuality is naturally co-extensive with immorality to a lack of a presumption that such co-extensiveness exists.[87] Of course, it is still considered well within the pale of acceptable social norms to hold the view that homosexuality is immoral.[88] It is simply that homosexuality is no longer inherently, automatically, or necessarily *presumed* to be considered immoral by everyone.

Because a significant number of people in this country no longer presume that being gay is necessarily morally problematic, it is not surprising that polls have shown over the last decade a high degree of support for not discriminating against gay people in employment.[89] But I believe it is telling that most supporters of a law to prohibit such discrimination (for example, ENDA) do not perceive their support as necessarily "condoning" or "endorsing" homosexuality. Rather, they perceive their support as a simple expression of "fairness" or "equality."

The distinction between tolerating homosexuality and endorsing homosexuality turns out to be key for various public policy decisions. The reality is that most people in this country do *not* believe that homosexuality is morally *equivalent* to heterosexuality. Indeed, a clear majority of the public believes it is "better"

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87. This reality was brought home quite dramatically in *Boy Scouts of America v. Dale*, a case in which an openly gay scoutmaster lost his bid to remain in the Boy Scouts. 530 U.S. 640 (2000). During the oral argument in the case, Justice Antonin Scalia asked the following question of the Boy Scouts' lawyer: "Is there any doubt that one of the purposes of the Boy Scouts, if not its primary purpose, is moral formation, the Scout's Oath and all that good stuff?" "Yes," answered the attorney. "Well," responded Justice Scalia—and one could just hear the exasperation in his voice that he even had to follow up this question with another statement—"And they, the Boy Scouts, say, and I don't know why we have any power to question it, that one of the elements of that moral formation is that they think homosexuality is immoral. Now how does that not make it an essential part of Scouting's purpose?"

88. Again, the transcript, and ultimately the opinion in *Dale*, highlights this point. The reason I believe Justice Scalia was so exasperated during the oral argument in *Dale* is that his colleagues, Justices Kennedy and O'Connor, were treating the question of whether being a gay scoutmaster was inherently in conflict with the moral code of Scouting as a serious, open question. Indeed, in the majority opinion in *Dale*, Justice Rehnquist apparently felt obligated to observe that the Scout Oath never expressly mentions either sexuality or sexual orientation and indeed, that the terms "morally straight" and "clean" are not self-defining. Boy Scouts of America v. Dale, 530 U.S. at 650. As Justice Rehnquist concedes: "Some people may believe that engaging in homosexual conduct is not at odds with being 'morally straight' and 'clean.' And others may believe that engaging in homosexual conduct is contrary to being 'morally straight' and 'clean.' The Boy Scouts says it falls within the latter category." *Id.* It is hard to imagine seeing this type of acknowledgment in a Supreme Court opinion written fifty, or even twenty-five, years ago.

89. Gallup; *Inside-Out: A Report on the Experiences of Lesbian, Gays and Bisexuals in America and the Public's View on Issues and Politics Related to Sexual Orientation*. The Kaiser Family Foundation. Pub. #3193, *available at* www.kff.org.

to be heterosexual than homosexual, "better" for individuals to be in long-term heterosexual relationships, rather than long-term homosexual relationships; and "better" for children to be brought up in families headed by a heterosexual couple, rather than a homosexual relationship. Thus, most individuals are not comfortable with any public policy that appears to directly condone gay relationships or to endorse such relationships as equivalent to heterosexual relationships.[90]

This reality translates into a willingness on the part of the public to provide gay people with a certain amount of formal equality—but a distinct lack of willingness to rectify the tilt in a manner that would achieve full equality. Thus, a majority of the public is comfortable with stating (as a matter of law) that a person should not be fired "just because" he or she is gay. But that same majority is not willing to rectify the employment injustice that arises from the dual reality that gay people cannot marry and that employment health insurance benefits are tied to marriage. Rectifying this tilt would presuppose a concomitant belief that it is legitimate for society to support, and treat "as equal," gay couples and gay families. I do not believe the American public is yet at that place.

A similar lack of moral development underlies the public's view of transgender individuals—albeit at a more basic level of discomfort with accepting the simple reality of such individuals. Even more than gay people, transgender people stand on a tilt in employment settings. Every transgender person who changes gender on the job is faced with "bathroom issues." This is not usually an issue fraught with any uncertainty or drama for the transgender person; she or he simply uses the bathroom assigned to the gender with which he or she identifies. But it is often

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90. Indeed, I believe this is the reason Justices Kennedy and O'Connor joined the majority opinion in *Dale*. The majority explained that "*Dale*'s presence in the Boy Scouts would, at the very least, send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." Requiring the Boy Scouts to send this message of moral equivalence was beyond the pale for Justices O'Connor and Kennedy. (Or, at least, those Justices could not imagine forcing that result on the Boy Scouts simply because the organization had not amended its Scout Oath and Law to explicitly mention homosexuality.) The dissent protested mightily against presuming such a message. Justice Steven's dissent observed that the Boy Scouts retain scoutmasters with a range of religious and political convictions, although religious and political proselytizing is not allowed within the troop. Stevens noted:

> Nothing . . . even remotely suggests that Dale would advocate any views on homosexuality to his troop. The Scoutmaster Handbook instructs Dale, like all Scoutmasters, that sexual issues are not their "proper area," and there is no evidence that Dale had any intention of violating this rule. Indeed, from all accounts Dale was a model Boy Scout and Assistant Scoutmaster up until the day his membership was revoked, and there is no reason to believe that he would suddenly disobey the directives of BSA because of anything he said in the newspaper article.

Boy Scouts of America v. Dale, 530 U.S. at 689. This is identical to the response Congressman Tom Campbell gave to reassure a fellow Member of Congress that voting for ENDA would not create a problem of gay teachers acting as "role models." Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. LAW REV. 992, 1001-02 (1997). The flaw in Congressman Campbell's response, *id.* at 1003-05, is identical to the flaw in the dissent's analysis: there is a message sent by retaining a scoutmaster who is an open evangelical Christian, or an open ardent Republican, and an open gay person—even if no one is permitted to talk about religion, politics, or sex. The message is that it is not morally problematic to be an evangelical Christian, a Republican, or gay. A scoutmaster who is an open robber or an open spouse abuser would probably not be retained, even if the person never robbed anything from the troop or never brought his spouse near the troop. For the same reason that the tilt need not be corrected for such individuals, they are legitimately precluded from being role models as well.

fraught with confusion and drama for the person's co-workers. In order for a majority of the public to believe society has an obligation to rectify the tilt for transgender people in this arena, we need a societal consensus that it is not morally problematic for a person to adopt a gender presentation different from the gender assigned the person at birth. We have a fair amount of public education yet ahead of us before we reach this societal consensus.

E. What Do We Do When Changing the Tilt for One Person Creates a Tilt for Another?

A difficult question arises when changing the tilt under one person will create a tilt for another. Because societal norms are not static, particularly norms created by moral beliefs, such conflicts will inherently occur any time a society is in transition regarding its moral norms. One can assume that, prior to a transitional period, one group (the group comfortable with a particular moral norm) is standing comfortably upright. A second group (the group disadvantaged by the moral norm) is standing on a very steep tilt, but no one in the dominant society even entertains the idea that such individuals need to be treated equally or "as equals" in society.

As a society's moral norms shift, however—for example, by a significant segment of society developing a belief that members of the second group are not inherently immoral and unworthy of equality—rules will begin to develop that incorporate some forms of equality for the second group. But *any* rule establishing *any* form of equality for members of this group (even the simple, formal equality of requiring the characteristic to be ignored in employment, housing, and receipt of services) represents an affront to the moral beliefs of the first group. That is, if the first group still adheres to the belief that the characteristic at issue renders members of the second group immoral and sinful (assuming the moral beliefs stem from religious beliefs), it is very difficult for members of the first group to accept a rule that requires them to *ignore* this distasteful and destructive trait.

Let us assume these moral beliefs are based on religion, and that—as a society—we have decided that religious people should be treated "as equals" in our society. Should we accommodate a religious person who does not wish to comply with a civil rights law that requires the individual to ignore the homosexual orientation of a prospective employee, tenant, customer, or client when that person's religion teaches that homosexuality is sinful? Should we accommodate a religious person who does not wish to comply with a civil rights law that requires the individual to *accommodate* the homosexual orientation of a prospective employee (for example, a law that rectifies the tilt by requiring employers that offer health benefits tied to marriage to also offer health benefits tied to domestic partner status)?

The answer to this is not easy. Here are my thoughts thus far. First, I think society needs to decide whether the moral beliefs held by the religious group will be accepted as "within the pale" of acceptable societal beliefs. I say this for one reason. As I have puzzled through this dilemma, I find I am willing to consider accommodations for religious beliefs that hold homosexuality to be immoral, disabled people to be blemished, members of other religions to be sinful, or members of various ethnic groups to be shunned. But I find I am not as readily open to accommodating a religious belief that African Americans are inferior beings or that white people and black people should not marry. Why is that? The only

rationale I can discern is that I experience race as *sui generis* because of the particular history of African Americans in this country.[91] I do not know if this particular history should justify the unique position in which I place religious beliefs about race. But, for the moment, I experience those beliefs as ones that we, as a society, should place beyond the pale of acceptable beliefs.

Second, I believe it is essential to accept, acknowledge, and treat with *respect*, the different norms that govern the lives of the two groups of people described above. Thus, I think it is inappropriate and counter-productive to assert that one group is "right" and another group is "prejudiced." To me, a better way to describe a situation of moral conflict, is to observe that *some* decision has to be made about whether to rectify a tilt and that any decision will necessarily mean one group's norms will be accepted and accommodated while another group's will not. Being *honest* about the fact that rectifying the tilt for one group will cause another group to be on a tilt seems to be a minimum acknowledgment we should expect society to make.

Third, by using the visual of the tilt, we can try to envision how *steep* the tilt becomes for members of each group—and how many members are affected by the tilt. For example, the student government council at Tufts voted to deny school funding and recognition to an evangelical Christian group on campus because the group refused to consider for a leadership position a group member who was bisexual.[92] This seems to be an example where the tilt for one person (the bisexual woman who wants a particular position) is being rectified at the expense of a large number of people who will have to live with a significant tilt throughout the woman's leadership role in the group.[93] While I do not agree with the substantive position taken by the evangelical group, the relative differences in the resulting inclines of the tilt appear to justify a greater accommodation of the religious group. By contrast, the tilt gay employees may feel being told at the outset of a counseling session that their relationships are sinful may be significantly more steep than the tilt experienced by a religious counselor who needs to find a different setting to practice her career.

Finally, there might be some relevance to how a member of the first group came to be standing on a particular tilt. For example, a person makes a choice to enter the stream of commerce by being an employer or landlord. That may mean

91. *See, e.g.*, Emma Coleman Jordan, *Crossing the River of Blood Between Us: Lynching, Violence, Beauty and the Paradox of Feminist History*, 3 J. GENDER, RACE & JUST. 545, 558 (2000) (discussing how the effects of lynching have affected identity of and the meaning of the law to Black people); Emma Coleman Jordan, LYNCHING THE DARK METAPHOR OF AMERICAN LAW (Basic Books, 1999).

92. John Leo, Commentary, Selective Campus Coercion, WASH. TIMES, May 10, 2000, at A16. The woman, Julie Catalano, considered herself an evangelical Christian who had worked out her bisexuality with God—that is, as far as she was concerned, God was fine with her being bisexual. The problem was that the official teachings of the evangelical group on homosexuality conflicted with her personal beliefs.

93. The way this group picked its leadership was not by having candidates voted on by the whole group. That would have resolved this issue more easily; presumably, the bisexual woman would not have garnered a majority of the votes. But the system in this group was for the outgoing leadership of the group to choose the incoming leadership. And, the outgoing group refused to even consider the bisexual woman for a position, expressly because of her sexual orientation.

that a person should be expected to play by the rules of civil rights laws mandated by the majority for employment or housing. Or if a person chooses to become a counselor, as opposed to, for example, a secretary or a nurse or a construction worker, that person may need to take some responsibility for that decision. It may be that, given shifting societal moral norms, the decision to become a counselor and work for a general company (as compared to, for example, in a religious setting) carries with it a different set of responsibilities to one's prospective clients.

F. How Does Being on a Tilt Color One's Perspective of the World?

This is a true story, with names changed to protect the innocent:

> *It is fall 2001. I am sitting in an outdoor café, talking animatedly with my friend Jerri about my "rectifying the tilt" model. My friend Jerri is a very masculine looking woman, a butch lesbian. She's the type of woman to whom waiters sometimes say "and what can I get you sir? Oh, I mean ma'am."*
>
> *There are a number of empty tables around us, some in the sun and some in the shade. A middle-aged woman wanders through the tables and sits down at our table. I give her a quizzical look. "Why is she sitting at this table?," I wonder. We're sitting at this table already and there are other empty tables. I continue talking to Jerri, and the other woman continues to sit at the table. After my third quizzical look at her, the woman says: "What, do you have a problem?" And I say, "Well, I'm just curious why you're sitting at this table. There are plenty of other empty tables, including tables in the shade." "Humph," the woman says, and flounces off to another table.*
>
> *I don't think much more of the incident, other than to wonder in passing if the woman has some mental disorder. But a few minutes later, Jerri says to me: "You know, what really annoys me about what just happened? She never would have sat down at this table if we had been a man and a woman having an animated conversation." "Really?" I say—the thought never having crossed my mind. "Oh yes," says Jerri, "she would never have done that had we been a male/female couple."*

One of the ramifications of being on a tilt in a society is that any event is necessarily viewed from the angle and perspective of that tilt. What that means is that an event that obviously seems to signal ABC to a person standing upright may just as obviously signal XYZ to a person standing on the tilt.

The reason for this difference in perspective is two-fold. First, as a simple matter of geometry, if two people are viewing the same event from different angles, it is quite probable they will perceive the event differently. For example, if organizers of a conference are told a hotel in which they plan to hold a conference is physically accessible, and it turns out there are several steps up to the podium for the speakers (but everything else is physically accessible), and—"Thank goodness! We have no speakers who use wheelchairs"—the organizers might feel that the steps to the podium are a minor glitch in an otherwise admirable effort on their part to be welcoming of people who use wheelchairs. By contrast, a person in the audience who uses a wheelchair might be conscious throughout the presentation of the steps leading up to the podium and experience that fact as yet *further evidence* that people who use wheelchairs are *never* thought about as the type of people who could be considered competent as speakers.

The event is the same: there are steps leading up to the speakers' podium. But the experience of the event is quite different depending on whether one is standing on level ground or on a tilt. And the second aspect of the experience is as follows: the person on the tilt is not experiencing that event in a *vacuum*. Rather that person has a *lifetime* of experiences on the tilt, which will necessarily inform the person's perspective on any one event in time. Moreover, if the person is a member of a racial or ethnic group that has a history of being on a tilt, that person may also come with a historical, *collective* memory that will inform the person's perspective.[94]

What this means is that any particular event in a society can be honestly, sincerely, and legitimately viewed by one group as connoting ABC and the same event can honestly, sincerely, and legitimately be viewed by another group as connoting XYZ. The two groups may never openly acknowledge their respective perspectives on the event. Sometimes this occurs because members of each group so completely assume their own meaning of the event is correct that it does not even occur to them to consider some possible alternative meaning. Other times it may be clear to the group on the tilt that the group standing upright has attached a particular meaning to an event, which is contrary to the meaning understood by the group on the tilt. But members of the tilt group may not feel sufficiently empowered to express their perception. Indeed, part of the lifetime experiences for the person on the tilt may be ones in which she or he has expressed a particular perception of an event, only to be told that she or he is "wrong." Moreover, to the extent such exchanges have occurred, the result may be that members of the upright group experience members on the tilt as "too sensitive" or "too quick to discern prejudice where none exists," while members of the tilt group may experience the upright group as insensitive and lacking any self-awareness.

Is it possible to bridge these perceptual differences? I do not believe it is possible to bridge the differences completely, because I do not believe it is possible to replicate through simple empathy the actual lifetime experience and collective group memory of living on the tilt. I do believe, however, that we can do a *better* job than we are doing so far. The following are some thoughts on this issue:

First, I think it is useful simply to *acknowledge* the reality that there may be different perceptions of an event because of the angle on which a person stands and that such angle includes lifetime and community experiences. Acknowledging this reality does not mean one abdicates one's own perception of any particular event. Rather, it simply means one can acknowledge there may be another, equally perceived truth, experienced by someone else.

Second, I believe one must explore ways to feel a *connection* to the person on the tilt. An individual who is mobile on two legs, but who has a son who uses a

94. Professor Nan Hunter, in a forthcoming piece, *Gay Rights, Identity and Ideology*, nicely captures the manner in which an individual's identity can shape a person's perception of events and issues: "Identity claims in law arise not merely from a social context in which a particular group shares a certain history, culture, or status. Underlying that kind of identity is a shared viewpoint, not a set of opinions or a viewpoint specific to any particular topic or issue, but 'view-point' in a more literal, basic sense: a shared point of view(ing), a shared position from which one's views emerge." Nan D. Hunter, *Gay Rights, Identity and Ideology*, (manuscript at 3, on file with author). *See also* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 5 (2000).

wheelchair, is more likely to understand and give credence to the perception of someone living on that particular tilt. In the story I told above, I did not believe (even after Jerri told me her perception) that the woman would have acted any differently had we been a male/female couple. But I did not think Jerri was "oversensitive," "over-reacting," or bizarre in her perception because I experience a *connection* with Jerri. That connection allows me to accept that we can have different perceptions of an event and that either perception can be true.

Having a connection with a person on the tilt can help a person who stands upright engage in a "constructive visualization" of being on the tilt. As I note above, I do not believe it is possible to replicate the experience in its entirety. But feeling some commitment to the lives of the people on the tilt is the necessary precursor to even attempting such constructive visualization. The difficulty, of course, occurs when the group standing upright and the group on the tilt have little social interaction with each other. Without such interactions, it is difficult to nurture connections.[95]

Third, I think members of any group that stands upright—as a result of any particular norm—must become *aware* that the land is level beneath them because of decisions taken by society. This is more difficult the more "natural" the norms feel, and hence the more natural the level of the land. But it is only by acknowledging that society's choices have privileged the group standing upright that members of that group can feel any responsibility not only to rectify the tilt, but to give credence to the perceptions of those who live on the tilt.

To end on an optimistic note, the more a tilt is rectified, the less likely variant perceptions will continue to exist between groups.[96] It *is* possible to change the lifetime experiences of someone on the tilt. The premise of this piece is that civil rights laws should be designed to rectify the tilt as well as to establish formal equality. Hence, if such laws are passed and implemented effectively, presumably the tilts should lessen. It might be that the tilt will be rectified under that person *only*, through the provision of a reasonable accommodation, as opposed to a societal norm being changed more globally. But even so, if the tilt is rectified at each opportunity, that will go a long way to ensuring the person is treated "as an equal" in society.

V. GETTING FROM HERE TO THERE

The challenge of achieving true equality for all people on this earth—not just the people on our piece of land called the United States of America—should be one of the great challenges of our time. We have some wonderful history behind

95. The situation is even more complicated when the events concern two groups—both of whom live on a tilt and neither of which have much social interaction with each other. For example, I hear little empathy from Jews living in Israel regarding their oppression of Palestinians and their displacement of Palestinians from land in which they lived for 2000 years. And I hear little empathy from Palestinians regarding the fears and needs of Jews, who experience a Zionist, Jewish state as an essential component of their existence. Better and more consistent social interactions, while seemingly impossible in today's violent atmosphere of Palestinian suicide bombings and Israeli retaliations, seems an essential element of achieving a true peace and state of equality. For a formidable effort at "constructive visualization" by an Israeli author, see DAVID GROSSMAN, THE YELLOW WIND (Haim Watzman, trans. Picador 3d ed. 2002) (1988).

96. I owe this insight to Mary Reed.

us and some not so-wonderful history. I hope that as we move forward we commit ourselves to treating all people "as equals" and that we make that commitment not only in the context of our own parochial world, but worldwide as well.

In an op-ed last fall, Robert Edwards, the President Emeritus of Bowdoin College, noted that in the wake of the attacks of September 11th, our public leaders must reassert the "traditional durable American commitment to economic uplift, hope, and social justice."[97] I would call this a commitment to treating all people as equals, even if their norms are different from ours. Edwards urges us to "clearly signal our renewed generosity and compassion in the world" with actions that are "large, dramatic, and easy to understand as tied to the needs of the common man [and woman], a Marshall Plan to establish the moral tables firmly and broadly."[98]

Exactly. And I think our best way to do that is to reaffirm our commitment to treating people "as equals." If we could all do as much good in our lives, both publicly and privately, as Judge Frank Morey Coffin has done in his, we will all have traveled far down the road that Robert Edwards calls us to.

97. Robert E. Edwards, Editorial, *Building for the Future: Nation Needs Grand Vision, Determination*, PORTLAND PRESS HERALD, Oct. 13, 2001, at 9A.

98. *Id.*