ON MARRIAGE, RELIGIOUS FREEDOM, EQUALITY AND HOMOSEXUALITY: A REPLY TO PROFESSOR HUHN

– *George W. Dent, Jr.*[*]

They were careless people, Tom and Daisy – they smashed up things and creatures and then retreated back into their money or their vast carelessness, or whatever it was that kept them together, and let other people clean up the mess they had made. . . .[**]

I congratulate the editors of the *Akron Law Review* and the Constitutional Law Center of the University of Akron School of Law for launching *Akron Law Review: Strict Scrutiny*. By offering rapid analysis and commentary on current issues, it promises to enhance the quality of discourse on constitutional law. I thank them for allowing me to contribute to this inaugural edition.

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** F. SCOTT FITZGERALD, THE GREAT GATSBY 158 (Charles Scribner's Sons ed. 1953) (1925).

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

I am also grateful to Professor Wilson Huhn for permitting me to respond to his fine article. I hope that our exchange will help to illuminate thinking about the many difficult questions concerning marriage, religious freedom, and homosexuality. I believe that the matters on which we disagree fall generally into two categories – one relating to marriage, the other relating to religious freedom and laws barring discrimination against homosexuality. I address the former in Part I of my Reply, the latter in Part II.

I. MARRIAGE, HOMOSEXUALITY, EQUALITY AND DEMOCRACY

As Professor Huhn says, there is much on which we agree. I concur that the Free Exercise Clause gives citizens no power to override an Equal Protection decision by the Supreme Court (his answer to his Question 1),[1] or a decision of a state supreme court to compel legal recognition of same-sex "marriage" (SSM) (his answer to his Question 2).[2] We part company, though, over the meaning of equality and its application to marriage.

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1. Wilson R. Huhn, *Ten Questions on Gay Rights and Freedom of Religion*, 1 AKRON STRICT SCRUTINY 1 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/ten-questions-on-gay-rights-and-freedom-of-religion.pdf. However, I do object to his statement that the people of a state do *not* "have a constitutional right under the Free Exercise Clause to enact their religious beliefs into law." *Id.* Any group may seek to enact its beliefs, subject only to the limits of the Constitution, including the Establishment Clause. Religion has motivated the enactment of many of our laws, including several (like the Civil Rights Acts) that I presume Professor Huhn supports. *See* George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 BYU L. REV. 1, 30 (1999) (describing the key role of religion in much legislation). Indeed, the principle of equality that Professor Huhn champions so enthusiastically is based on religion. *See infra* notes 8 and accompanying text.

2. Huhn, *supra* note 1, at 2-3. I must point out, however, some misleading language in his Question 2. He refers to court decisions "that recognized a right to same sex marriage." *Id.* at 2. There was no question in those cases that same-sex groups have a right to marry. The question was whether the state had to legally recognize those "marriages" in the same way that it treated traditional marriages.

Similarly, it is inaccurate of Professor Huhn to say that I oppose same-sex "marriage" and believe that gay couples "must not be permitted to marry." *Id.* at 2-3 n.11. I do not. I oppose only

A. The Meaning of Equality

Professor Huhn challenges the claim (which I cannot claim to have originated but which I endorse) that the concept of equality is "empty" because it holds only that likes must be treated alike, but application of the norm depends entirely on what things we deem to be alike.[3] Although Professor Huhn says he disagrees,[4] his ensuing discussion seems (wisely) to accept it. Indeed, he quotes Abraham Lincoln as saying that the founders "did not intend to declare all men equal *in all respects*," but only in respect to "certain inalienable rights, among which are life, liberty, and the pursuit of happiness."[5] I agree.

I also agree with Lincoln (and Professor Huhn) that equality has no fixed meaning but constantly evolves and is open to reconsideration.[6] Equality is a term of art, not a mechanical concept. Certainly equality cannot mean that everyone is to be treated the same in all respects. That would mean, for example, that Bill Gates and a destitute homeless person would pay the same amount in taxes. It would mean the law could make no distinctions based on age in voting, driving a car, or collecting Social Security. I am sure that this is not what Professor Huhn intends.

In other words, as I said, application of the norm depends on what things we deem at any given time to be alike, and in what respects we deem them to be alike. Professor Huhn (and Lincoln) are wise to concede this, because it could hardly be otherwise. Every law makes certain choices. Or, to put it another way, every law discriminates. A law that punishes (or rewards) certain behavior punishes (or rewards) people who are apt to engage in that behavior. There are always some

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its state recognition and the legal compulsion of individuals (e.g., employers) to honor those "marriages" as equal to traditional marriages.

3. The idea is generally attributed to Peter Westen. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

4. Huhn, *supra* note 1, at 10.

5. *Id.* at 11 (emphasis in original) (quoting 2 ABRAHAM LINCOLN, COLLECTED WORKS OF ABRAHAM LINCOLN 406 (Roy Prentice Basler ed.) (1953), *available at* http://quod.lib.umich.edu/l/lincoln/).

6. *See* Huhn, *supra* note 1, at 12.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

who dislike the choice that any law makes; if everyone agreed with the law, there would be no need for it. The Equal Protection Clause only demands that there be a good enough reason (e.g., a rational basis or compelling justification, depending on the issue in question) for the distinction the law has made.

At several points, Professor Huhn stresses Supreme Court decisions that seem to preclude the democratic majority from enacting laws that stem from religiously-based principles.[7] The problem with this is that our nation's entire commitment to rights, including the principle of equality, stem from religious faith. The equality and the "inalienable rights" of "life, liberty, and the pursuit of happiness" that Professor Huhn properly invokes are proclaimed by the Declaration of Independence to be "endowed by [our] Creator."[8] Religion has been crucial throughout American history, including during the abolition and civil rights movements.[9] Professor Huhn lauds our religiously-based laws but simultaneously declares that religiously-based laws are forbidden.

Without a religious basis, rights are often considered, as Bentham put it, "simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts."[10] Efforts to establish a secular ground for rights have been ineffective.[11] Since Professor Huhn and others who purport to oppose religiously-based laws do not really want to jettison many of our rights based on religious belief, they are reduced to an unprincipled selectivity – they condemn laws they do not like while ignoring the religious basis of laws and principles (like equality) that they do like.

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7. *Id.* at 2 (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)); *id.* at 3 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984)).

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9. *See* George W. Dent, Jr., *Religion, Morality and Democracy: New Learning, New Challenges*, 2 GEO. J.L. & PUB. POL'Y 401, 427-28 (2004).

10. JEREMY BENTHAM, *Anarchical Fallacies, in* 2 WORKS 501 (John Bowring ed., 1843).

11. *See* MICHAEL J. PERRY, TOWARD A THEORY OF HUMAN RIGHTS: RELIGION, LAW, AND COURTS (2006).

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

B. Equality and Marriage

This brings us to the question of marriage. Professor Huhn declares:

> Gays and lesbians are entitled to equal rights, including equal marriage rights, because the love that they have for each other is indistinguishable from the love that heterosexual men and women have for their partners. Their relationships are just as valuable to themselves and to society – just as important and just as sacred as the love between heterosexual couples.[12]

I will not quarrel here with Professor Huhn's assertion that homosexual relationships are "just as sacred" as traditional marriages.[13] He is entitled to his own religious belief (though most human beings do not share it), but he has no legal right to impose it on everyone else. There are, however, many problems with his claim that homosexual relationships are "just as valuable . . . to society."[14] At least among men (who comprise about two-thirds of all homosexuals), homosexual practices are more likely to spread disease.[15] Heterosexual relationships integrate the two sexes and foster understanding and goodwill between them, which may be viewed as beneficial in the same way that integration is often considered beneficial, in that it fosters understanding and goodwill among different racial, ethnic, class and national groups.[16]

However, the most obvious and important difference is that heterosexuality creates human life, homosexuality does not. This, without more, could be a legitimate basis for distinguishing between the two. Most people see the bearing and raising of children as an intrinsic

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12. Huhn, *supra* note 1, at 12.
13. *Id.*
14. *Id.*
15. *See* George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 640 n.572 (2007) (citing several studies).
16. Even gay activists sometimes acknowledge this fact. *See* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 196 (1995) ("The timeless, necessary, procreative unity of a man and a woman is inherently denied homosexuals; and the way in which . . . parenthood transforms their relationship, is far less common among homosexuals than among heterosexuals.").

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

good – that is, something that is good in itself and not merely instrumental to the attainment of another good.[17]

Given the scientific and social benefits of the heterosexual relationship, it is not surprising that philosophers, artists, singers, and poets in all nations and in all ages have lauded it. Different cultures have treated heterosexual relationships in different ways, but all have sanctioned marriage. Marriage customs have varied, but have always been exclusively heterosexual and always centrally concerned with the bearing and raising of children. Attitudes toward homosexuality have also varied. In some cultures, certain homosexual practices have been tolerated or condoned (although almost never has it been respectable for an adult male to be the receptive partner in homosexual activity). However, with a very few, very recent exceptions, homosexual relationships have never been eligible for legal marriage.

Professor Huhn rejoins that homosexuals "can adopt or use reproductive technology to have children."[18] Societies throughout the world and throughout history have provided for adoption, which is a crucial institution that often produces loving relationships. Nonetheless, in general, adoption has been considered an unfortunate necessity for situations where the biological parents are unable or unwilling to care for a child, not an equal alternative to biological parenting to be employed for the gratification of adults. In all cultures, in all eras, the bond between biological parents and their children has been considered uniquely strong and valuable.

Contrary to the accusations of pro-gay activists, this preference for biological parentage is not just anti-gay bigotry. As reported in the *New York Times*, "[f]rom a child's point of view, according to a growing body of social research, the most supportive household is one with two

17. *See* Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 47 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella eds., 2001).

18. Huhn, *supra* note 1, at 3 n.11.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

biological parents in a low-conflict marriage."[19] Some claims have been made that children raised by gay couples fare equally well. These claims are seriously flawed. First, most of them do not compare adoptees of gay couples to traditional families. Some compare the adoptees to children of single parents, who in general fare much worse than children in traditional families.[20]

Further, these studies have small, self-selected samples, carelessly analyzed over short periods of time. It is hardly surprising that gay couples who respond to inquiries about their recent adoptions would report that all is well. When divorce laws were liberalized, hasty studies soon reported that children had benefitted from the ending of high-conflict marriages. Only many years later did the deep wounds to children from divorce become apparent.[21]

Adoption is necessary or desirable in some cases, but, other things being equal, traditional married couples are generally the best candidates for adoptive parenthood. For one thing, "men and women bring different strengths to the parenting enterprise."[22] Ideally, every child would have a mother and a father. Gays need not be strictly barred from adoption; in some cases adoption by one or more homosexuals may be

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19. Blaine Harden, *2-Parent Families Rise After Change in Welfare Laws*, N.Y. TIMES, Aug. 12, 2001. *See generally* George W. Dent, Jr., *How Does Same-Sex Marriage Threaten You?*, 59 RUTGERS L. REV. 233, 240-43 (2007).

20. *See* Lynn D. Wardle, *Considering the Impacts on Children and Society of "Lesbigay" Parenting*, 23 QUINNIPIAC L. REV. 541 (2004) (listing the methodological flaws of these studies, especially the use of small, self-selected samples).

21. *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 174-77 (2000); ELIZABETH MARQUARDT, BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE (2005); JUDITH WALLERSTEIN, JULIA LEWIS & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2000); BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE: RETHINKING OUR COMMITMENTS TO MARRIAGE AND FAMILY (1996). Liberalized divorce also inflicted harm to women. *See generally* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985).

22. WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES 18 (2006). *See also* WADE HORN & TOM SYLVESTER, FATHER FACTS 153 (2002); ELEANOR E. MACOBY, THE TWO SEXES: GROWING UP APART, COMING TOGETHER (1998); Thomas G. Powers et al., *Compliance and Self-Assertion: Young Children's Responses to Mothers Versus Fathers*, 30 DEVELOPMENTAL PSYCH. 980 (1994).

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

the best available option for a child. However, we should not simply assume that such adoption is equal to adoption by a traditional married couple. For this and other reasons, Professor Huhn is wrong to suggest that the recognition of marriage between an older man and woman is inconsistent with the non-recognition of same-sex "marriage."[23]

Even if adoption by homosexuals is sometimes the best option, it does not follow that this possibility requires licensing of same-sex "marriages." Unlike biological reproduction, adoption is a legal construct. The law can allow adoption by any individual or group it chooses. (In Donizetti's opera, *The Daughter of the Regiment*, a girl is adopted by an entire army unit.) There is no necessary connection to marriage, and there may be cases where it would be desirable to have co-guardians (e.g., a widower and his mother or sister) who are not eligible to marry. That option could include gay couples.

Professor Huhn's reference to homosexuals' use of "reproductive technology to have children"[24] is more disturbing. Many commentators (myself included) have expressed concerns about the effects of turning children into manufactured products who, like a computer, may be rendered obsolete by the new, improved model that is developed and marketed two or three years later.[25] These concerns are serious enough to give pause over the use of certain kinds of reproductive technology, even for infertile traditional married couples.

These concerns are even greater with respect to homosexuals. Again, ideally every child should have a mother and a father. Misfortune sometimes makes that impossible, and adoption may be the best option in some of these cases. To deliberately bring a child into the

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23. Huhn, *supra* note 1, at 3 n.11. In addition to the reasonableness of treating heterosexual and homosexual couples differently for purposes of adoption, refusal to recognize marriages of infertile heterosexual couples would violate our principles of personal privacy and our practice of drawing general rules in many cases rather than making complex, individual determinations. *See* Dent, *supra* note 19, at 242 n.55; George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 432 (2004).

24. *See* Huhn, *supra* note 1, at 3 n.11.

25. *See* Dent, *supra* note 9, at 440-46.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

world without a mother or without a father, however, strikes me as child abuse.[26]

Although homosexual relationships are not "just as good as" traditional marriages, perhaps the benefits of licensing gay "marriages" would outweigh the detriments. That seems highly unlikely. Much of the social benefit of legal recognition of marriage stems from the expressive function of law – i.e., the use of law "in expressing social values and in encouraging social norms to move in particular directions."[27]

Recognizing gay "marriages" would alter the expressive meaning of marriage. For the first time in our history, the law would license relationships that are inherently incapable of creating children. Marriage would be seen less as an institution for the nurturing of children and more as an arrangement for the gratification of adults. It would also diminish the prestige of marriage among heterosexuals, because most people consider gay "marriage" a "mocking burlesque"[28] or "mere parody"[29] of the real thing. Contrary to Professor Huhn's accusation, I do not claim that if the law licenses gay "marriages," "heterosexual couples will desert the institution – they will simply not marry."[30] However, the rate of marriage would decline, and marriage would become less normative. Indeed, this is an effect desired by many advocates of SSM.[31] Given the indifference or opposition of many gays

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26. Children conceived by artificial reproductive technology and raised apart from one or both biological parents "hunger for an abiding paternal presence." KYLE D. PRUETT, FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE FOR YOUR CHILD 207 (2000). Some family experts argue for a "birthright of children to be connected to their mothers and fathers" unless external events preclude it or separation is legally imposed to protect the child. DANIEL CERE, *War of the Ring, in* DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT 9, 11 (Daniel Cere & Douglas Farrow eds., 2004). *See also* MARGARET SOMERVILLE, *What About the Children?, in id*. at 67.

27. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 953 (1996).

28. Hadley Arkes, *The Closet Straight*, NAT'L REV., July 5, 1993, at 43, 45.

29. James Q. Wilson, *Against Homosexual Marriage*, COMMENTARY, Mar., 1996, at 34, 36 (quoting Kenneth Minogue).

30. Huhn, *supra* note 1, at 3 n.11.

31. *See* Dent, *supra* note 15, at 639 n.570.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

to SSM[32] and the general instability of homosexual relationships (at least among men),[33] it is likely that marriage rates would be relatively low among gays and divorce rates relatively high. As a result, heterosexuals who did marry would probably take marriage less seriously.[34]

In addition to the problems with the claim that gay relationships deserve equal recognition with traditional marriages, the argument of Professor Huhn (and many others) that the constitutional principle of equality demands licensing of gay marriage has two fundamental inconsistencies. First, if legal recognition of marriage now creates constitutionally offensive inequality, the solution would not be to extend recognition to gay couples (or even to any group of people), but to get the law out of the marriage business altogether, thereby ending the

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32. *See* KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW 78 (2006); CLAUDIA CARD, *Against Marriage, in* SAME-SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 317, 321 (John Corvino ed., 1997); PAULA L. ETTELBRICK, *Since When Is Marriage a Path to Liberation?, in* SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 164 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997); Anemona Hartcollis, *For Some Gays, a Right They Can Forsake*, N.Y. TIMES, July 30, 2006, at 12.

33. *See* DENNIS ALTMAN, THE HOMOSEXUALIZATION OF AMERICA, THE AMERICANIZATION OF THE HOMOSEXUAL 187 (1982) ("[A]mong gay men a long-lasting *monogamous* relationship is almost unknown."); Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to the Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029, 1031 (2003) (finding among a sample of Amsterdam men that gay male partnerships lasted on average 1.5 years and that men in these partnerships had an average of eight casual partners per year). Many gay activists laud promiscuity as a benefit of homosexuals because they are free of the obligations stemming from breeding. *See, e.g.*, DAVID A. J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 53 (1982).

34. Professor Huhn compares same-sex "marriage" to interracial marriage and notes that "[w]hen interracial marriages were recognized in *Loving v. Virginia*, [388 U.S. 1 (1967)] there was no overt movement among white racists to abandon the institution of marriage . . . ." Huhn, *supra* note 1, at 3 n.11. His statement is accurate and the comparison to *Loving* is apt, but he gets the lesson backwards. Anti-miscegenation laws were isolated departures from the traditions of Western civilization. *Loving* brought American law back into line with Jewish and Christian doctrine and Western tradition. By contrast, gay "marriage" has never been recognized in Western culture. Since *Loving* simply effected a return to tradition, it is not surprising that there was no major effort to overturn it. By contrast, since judicial decisions imposing same-sex marriage fundamentally insult traditional American attitudes, it is not surprising that that these decisions have provoked widespread opposition, and in several cases have been overturned by popular referendum.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

privileged status of the married relative to the unmarried. Marriage law now discriminates against not just gays but against others who are ineligible for licensing (like close relatives), and those who simply prefer to cohabitate without marrying.

The law could treat people based on the facts of their relationships (such as cohabitation and caring for children) rather than on a wedding. And, indeed this is the goal of some who push to have traditional marriage laws declared unconstitutional. They reason (perhaps correctly) that, as a policy matter, most people would prefer this option to being compelled to honor SSM.[35] Further, if marriage licensing is not intended primarily for the protection of children, it is hard to see any strong justification for licensing marriage at all, so that a legal preference for marriage under *any* definition would be unconstitutional.

There is a second inconsistency. I agree in part with Professor Huhn's claim that "most of the legal and social problems that arise under the Constitution stem from the belief, held by some people, that they are better than other people."[36] Clearly, such beliefs always have been and still are frequent sources of injustice and strife.

However, as noted before,[37] it is also inevitable that all law discriminates; all law makes some people more deserving than others of some benefit or detriment. Although this is not quite the same thing as declaring some people inherently better than others, the difference often seems negligible to the people affected. Again, it is possible to see licensing of marriage as regulation of "breeders," and many people (gay and straight) do not consider a marriage license desirable for a significant personal relationship. The primary expressive function of

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35. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228 (1995) ("[W]e should abolish marriage as a legal category . . . ."); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001) (arguing for treating personal relationships through contract rules modeled on corporate law); Tamar Lewin, *Untying the Knot, For Better or Worse: Marriage's Stormy Future*, N.Y. TIMES, Nov. 23, 2003, at WK1 ("The most radical structural change being discussed these days is taking the state out of the marriage business.").

36. Huhn, *supra* note 1, at 10.

37. *See supra* Part I(A).

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

current marriage law is to promote marriage for heterosexuals but, to some extent, it also expresses a preference for heterosexuality.

The question, then, is whether that preference is justified or violates the principle of equality. I have offered reasons for the preference that are persuasive to most Americans, but not all. What should a judge do if he or she is in the latter group? Professor Huhn says:

It is . . . our obligation under the Constitution to constantly look to this ideal of equality, to constantly labor for it, to constantly reexamine our own beliefs, our own preconceptions, our own attitudes, to consider and reconsider and reconsider *again* whether or not that person or group whom we thought to be inferior in fact might be our equal. [38]

I agree. Many people, myself included, have done so, and most Americans still support traditional marriage laws. Traditions can change, and sometimes they should. That is what happened with the Jim Crow racial segregation laws, anti-miscegenation laws, and criminal sodomy laws, and thus the Supreme Court was right to hold them unconstitutional. It is instructive that there was never any broad national movement to reverse those holdings. Our traditions about marriage have not changed. It is instructive that court decisions imposing SSM have invariably provoked widespread opposition and have been overturned by referendum every time citizens have been allowed to vote on this issue.

Thus, there is an inherent tension in judicial review in a democracy – a handful of unelected judges with life tenure ripping up laws enacted by legislators elected by democratic majorities in the name of equality. This function is consistent with democracy in cases like the homosexual sodomy and anti-miscegenation decisions, where laws seem out of step with long-standing beliefs prevalent in our society. But, if judges discard a law that does not meet that standard simply because it does not conform to their own tastes, in effect they proclaim that they are better than *hoi polloi*, the great unwashed. That is not legitimate. If equality means anything, the broad popular consensus supporting traditional marriage, now and at all times in our history – a consensus shared by

38. Huhn, *supra* note 1, at 12 (emphasis in original).

virtually all societies everywhere in history – should be binding on our courts.

II. THE GAY MOVEMENT AND RELIGIOUS FREEDOM

I agree with Professor Huhn that "decisions recognizing the equal rights of gays and lesbians" do not "in and of themselves, interfere with the Free Exercise rights of any *individual* or any *private business*" (his answer to his Question 4).[39] I also agree that *Employment Division, Department of Human Resources of Oregon v. Smith*[40] "establish[es] the standard for evaluating the constitutionality of laws under the Free Exercise Clause" (his answer to his Question 5),[41] and that laws forbidding discrimination on the basis of religion are valid (his answer to his Question 6).[42] However, I deplore the *Smith* decision. It eviscerates the right of free exercise by holding that it "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . . .'"[43] Under this standard, a state may forbid all consumption of alcohol, even in the Christian Holy Communion or a Jewish Seder. Individuals still have a right of religious expression and against arbitrary discrimination, but these rights are already protected by the guarantee of Free Speech and the Equal Protection Clause, so that the Free Exercise Clause is virtually meaningless.[44]

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39. Huhn, *supra* note 1, at 4.

40. 494 U.S. 872 (1990), *superseded in part by statute* Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb (West 2008).

41. Huhn, *supra* note 1, at 4.

42. Huhn, *supra* note 1, at 5.

43. 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring).

44. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U CHI. L. REV. 1109, 1144-45 (1990) (criticizing the *Smith* decision for "eliminating the doctrine of free exercise exemptions . . . .").

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

A. Religious Expression in the Workplace

I also agree with Professor Huhn that expressing disapproval of a co-worker's religion or trying to convert her can constitute illicit religious discrimination *if* it is done in a way that creates a "hostile environment."[45] The Supreme Court has held that, to create a hostile environment, behavior must be severe or pervasive.[46] However, in none of the cases I have criticized was there (or could there have been) a finding that the employee's behavior was so severe or pervasive as to create a hostile environment.

Professor Huhn says that the law "requires employers to make reasonable accommodation for their employees' religious observance or practice. People have the right to express themselves on matters of religion, but their co-workers also have the right to freedom from harassment."[47] I agree, and wish that were the end of it. Unfortunately, there are two problems.

First, Title VII of the Civil Rights Act of 1964 does not require an employer to accommodate an employee's religion if to do so would cause "undue hardship" for the employer.[48] That sounds fair, but courts have held that "anything more than a *de minimis* cost" can constitute an undue hardship, at least if it results in unequal treatment of employees.[49] In other words, the protection of religious exercise by the Civil Rights Act is *de minimis*.

The second problem concerns when religious expression constitutes "harassment" of co-workers. Professor Huhn defends the decision in *Peterson v. Hewlett-Packard Co*.[50] that Peterson's firing did not violate

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45. Huhn, *supra* note 1, at 6.

46. *See* Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).

47. Huhn, *supra* note 1, at 7 (footnote omitted).

48. 42 U.S.C.A. § 2000e (j) (West 2009).

49. Bruff v. North Miss. Health Servs., Inc., 244 F.3d 495 (5th Cir. 2001), *cert. denied*, 534 U.S. 952. *See generally* Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 392-406 (1997) (surveying cases finding that courts require little of employers to accommodate employees' religious needs).

50. 358 F.3d 599 (9th Cir. 2004). *See* Huhn, *supra* note 1, at 6-7 n.28.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

his statutory rights. Professor Huhn says that "Peterson chose to prominently display Bible verses,"[51] but they were posted inside his work cubicle.[52] Although they were visible to people walking in the adjacent corridor, they would not have been noticed by anyone who did not stop and look into Peterson's cubicle to read them.[53] Recall that to be illegal, harassment behavior must be "severe or pervasive."[54] The display was about as discrete as a posting in the workplace could have been.

Further, the verses displayed stated the Judeo-Christian attitude toward homosexuality. To condemn them as forbidden harassment, then, is to say that no expression of the Judeo-Christian view is permitted. One side may proclaim its approval of homosexuality as overtly as it wishes, and the other side must shut up. To call this freedom of expression is truly Orwellian.

Professor Huhn also defends the firing of the employee in *Bodett v. Coxcom, Inc.*[55] He agrees that Bodett's statement to Carson that Bodett "would be disappointed if Carson were dating another woman, but happy if she were dating a man" was harassment.[56] Again, this hardly seems severe or pervasive. Moreover, Professor Huhn takes this one statement out of the context of a long work relationship between the two women. Carson never complained about Bodett's expressions of her views until after Carson got a transfer with a promotion due in part to Bodett's support. It looks more like Carson milked Bodett for what benefits she could get from her, then viciously turned on Bodett and got her fired.

Professor Huhn denies that an individual could be refused employment or fired for disclosing her religion or posting the Ten Commandments.[57] However, if a jurisdiction bars discrimination against

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51. Huhn, *supra* note 1, at 6-7 n.28.
52. 358 F.3d at 601.
53. *See id.*
54. *See supra* note 46 and accompanying text.
55. 366 F.3d 736 (9th Cir. 2004). *See* Huhn, *supra* note 1, at 6-7 n.28.
56. Huhn, *supra* note 1, at 6-7 n.28 (quoting *Bodett*, 366 F.3d at 741).
57. Huhn, *supra* note 1, at 6-7 n.28.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

homosexuality, an employer would be prudent (and might be required) to inquire whether incumbent or prospective employees would be likely to violate that law, perhaps rendering the employer liable for permitting harassment. A worker might then be asked if she adhered to a faith that disapproved of homosexuality and, if so, whether she shared that disapproval. A positive answer might be grounds for rejection or dismissal.

Consider: Could an employer concerned about racial discrimination ask employees or job applicants if they belong to and support the principles of the Ku Klux Klan and fire or refuse to hire anyone who does? I believe the answer is yes. Many gay activists want traditional religious sects to be deemed as reprehensible as the Klan.[58] As for posting the Ten Commandments, if Richard Peterson could be fired for posting biblical passages about homosexuality, why couldn't an employee be fired for posting the commandment against adultery?

This scenario is not merely plausible but quite similar to some recent cases. Carrie Prejean, the former Miss California, apparently was denied selection as Miss USA 2009 because, in answer to a question posed by a gay activist judge, she said people can choose same-sex marriage but "I think that . . . marriage should be between a man and a woman."[59] Thus even if Professor Huhn were right that one could not be punished merely for disclosing one's religious affiliation, it seems that any statement of a tenet of one's faith could be grounds for punishment if it were displeasing to any other person.

Professor Huhn accuses me of favoring "individual immunity from nondiscrimination laws for religiously-based expressions of intolerance."[60] This is false. First, note the basis for nondiscrimination laws themselves. Most forms of discrimination are perfectly legal. An employer may openly discriminate on the basis of what college a person

58. *See infra* note 79 and accompanying text.

59. *Miss North Carolina Crowned Miss USA 2009*, Apr. 20, 2009, http://www.msnbc.com/id/30298051. It apparently did not help Ms. Prejean that her position on the matter is exactly the same as that expressed by President Obama.

60. Huhn, *supra* note 1, at 6-7 n.28.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

attended, what sports teams she cheers for, etcetera. Only a few grounds for discrimination are forbidden.

There are plausible arguments against adding sexual orientation to the list. Although discrimination against homosexuals is not uncommon, they are not in general a disadvantaged group.[61] Their median disposable income exceeds that of heterosexuals.[62] Unlike race or gender, homosexuality is a behavioral characteristic, and that behavior has been disapproved by many cultures around the world; the disapproval is not an unusual quirk of American or Western civilization.[63]

If discrimination against homosexuality is to be barred, however, should there be some allowance for expressions of religious attitudes that are uncongenial to homosexuals? Professor Huhn is (unfortunately) right that under *Smith* there is no constitutional free exercise exemption for individuals or businesses from laws barring discrimination against homosexuals. That does not mean that legislative exemptions should not

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61. Complaints about employment discrimination by homosexuals have not been very numerous. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 409 n.55 (1994) (citing studies showing fairly low rates of complaints); William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 120 (2007) (stating that the "total number of complaints claiming sexual-orientation discrimination has apparently always been small" under Wisconsin's anti-discrimination law).

62. Findings on the incomes of homosexuals vary. *Compare* Christopher Hewitt, *The Socioeconomic Position of Gay Men: A Review of the Evidence*, 54 AM. J. ECON. & SOC. 461 (1995) (finding that gay men have above-average incomes), *with* M. V. LEE BADGETT, MONEY, MYTHS, AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN (2001) (arguing against some of the "myths" of gay affluence). However, since gays have many fewer children than heterosexuals, their disposable income is higher.

63. *See* Clare Nullis, *South Africans OK Bill Recognizing Gay Unions*, PLAIN DEALER, Nov. 15, 2006, at A4 (stating that homosexuality is illegal in most of sub-Saharan Africa). Muslim nations have repeatedly blocked efforts to adopt, or even discuss, an international accord condemning discrimination against homosexuality. *See* Andrew Osborn, *Muslim Alliance Derails UN's Gay Rights Resolution of UN*, GUARDIAN, Apr. 25, 2003, at 17. In the West, disapproval of homosexuality has ancient roots. *See* Bowers v. Hardwick, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003) ("Homosexual sodomy was a capital crime under Roman law.").

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

be granted (if such laws are to be enacted at all). Unlike homosexuality, religious freedom has been a cornerstone of American values from the nation's founding – as much, if not more so, than equality.[64]

A balance needs to be struck between the civil rights of gays and the civil rights of religious people. Reasonable people can disagree about where that balance should be struck. This is not the place for a protracted discussion of the issue, so I will just offer a couple of general principles.[65] With respect to the provision of services, freedom of conscience should be honored unless it would result in denial to a homosexual of essential services. In other words, religious freedom should be granted if the person seeking services can obtain them elsewhere without serious hardship.

This principle would dictate different results in some court decisions. In *North Coast Women's Care Medical Group v. San Diego County Superior Court*,[66] for instance, the internist provided services that the complainant could easily have obtained from hundreds of other physicians in the same city (Los Angeles). The burden on the complainant of having to go elsewhere was less than the burden on the internist of having to violate her faith.[67]

In employment discrimination there should be an exemption for small businesses (perhaps those with 50 or fewer employees) that have a core religious commitment. Just as it is important to many people to pursue a social commitment in their work, so it is important to many people to maintain a religious commitment in their work. The law should respect those commitments if they do not impose serious hardships on others. Restricting the exemption to small businesses makes it unlikely that the exemption will preclude a disappointed worker from finding equivalent employment elsewhere.

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64. *See* JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 49-57 (1996) (describing the importance of religious freedom to the Founders).

65. I have discussed the issue at greater length in Dent, *supra* note 15, at 628-47.

66. 189 P.3d 959 (Cal. 2008).

67. This analysis would also have struck the balance in favor of religious freedom in the case of the adoption services of Catholic Charities of Massachusetts. *See* Dent, *supra* note 15, at 591-92.

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B. Religious Expression Elsewhere

Professor Huhn says little about the conflict between the gay movement and religious freedom outside the workplace. He acknowledges the constitutional right of expressive associations to exclude from membership persons whose inclusion would violate the association's principles,[68] but ignores many other issues. The war between the gay movement and religious freedom is broad, with battles on many fronts, and it threatens religious freedom.

How much of a threat? The expressive elements of religious services are probably safe by virtue of freedom of speech, but not much else. Even the freedom of expressive associations upheld in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[69] and *Boy Scouts of America v. Dale*[70] drew several dissents in the Supreme Court. With a couple of new justices, those decisions might be overturned.

Any activity not protected by freedom of speech would be subject to the *Smith* test that a "neutral law of general applicability" is constitutionally permissible.[71] Moreover, even that limited freedom could be reduced to insignificance by legal burdens other than outright prohibition. For example, a religious organization's tax exemption could be stripped away for discrimination,[72] thereby financially crippling the organization. Although the selection of clergy is probably protected under *Hurley* and *Dale*, unless those cases are overruled, those cases seem to extend only to employees in "leadership positions."[73]

Except in places of worship, religious expression is subject to time, place and manner limitations. This protects the right to speak in open, public venues, like a park, but little else. Expression annoying to homosexuals has been banned in public schools, even when it is a

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68. Huhn, *supra* note 1, at 8.
69. 515 U.S. 557 (1995).
70. 530 U.S. 640 (2000).
71. *See supra* note 43 and accompanying text.
72. *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (discriminating on the basis of race caused religious college to lose its tax exemption).
73. *See* Dent, *supra* note 15, at 614-15.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

response to an official campaign to condone homosexuality.[74] Some courts have ruled that a public school or college may refuse to recognize a student organization based on religion.[75] The government may exclude religious organizations that do not approve of homosexuality from public facilities.[76] Religiously-affiliated organizations may be denied government contracts or government funding if they discriminate against homosexuals.[77] In short, the Constitution (as now construed) offers religious freedom little defense against antidiscrimination laws.

C. How Will This War Be Resolved?

The goal of gay activists is complete social acceptance that homosexuality is, as Professor Huhn puts it, "indistinguishable from the love that heterosexual men and women have for their partners. Their relationships are just as valuable to themselves and to society – just as important and just as sacred as the love between heterosexual couples."[78] Traditional religions deny this belief. Gay activists realize, then, that their goal cannot be achieved so long as our society considers traditional religions respectable. They call for an attack on "the moral authority of homophobic churches by portraying them as antiquated backwaters, badly out of step with the times and with the latest findings of psychology."[79] Professor Huhn seems to endorse these attitudes by

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74. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006).

75. *See* Truth v. Kent Sch. Dist., 542 F.3d 634 (9th Cir. 2008).

76. *See* Barnes-Wallace v. Boy Scouts of Am., 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (holding that city could not favor Boy Scouts in leasing public park land because it is a religious organization); Evans v. City of Berkeley, 129 P.3d 394 (Cal. 2006) (holding that city could bar Sea Scouts from use of municipal marina).

77. *See* Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp.2d 77 (D. Me. 2004).

78. Huhn, *supra* note 1, at 12.

79. Marshall K. Kirk & Erastes Pill, *Waging Peace*, CHRISTOPHER ST., Dec. 1984, at 33, 38. *See also* MARSHALL KIRK & HUNTER MADSEN, AFTER THE BALL: HOW AMERICA WILL CONQUER ITS FEAR AND HATRED OF GAYS IN THE '90S, at 189 (1989) (advocating depicting traditionalists as "[h]ysterical backwoods preachers, drooling with hate to a degree that looks both comical and deranged," thereby rendering them "so discreditable that even Intransigents will eventually be silenced in public. . . .").

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

referring to the statements of traditional belief by Richard Peterson and Evelyn Bodett as "expressions of intolerance."[80]

The many cases I have cited show that the campaign to silence traditional religious views of homosexuality by punishing their expression in public has achieved considerable success. However, the number of such incidents remains fairly small, and the reaction to the mistreatment of Carrie Prejean indicates that, when the public is aware of such events, it does not fully embrace the gay agenda. The adoption of laws defending traditional marriage in every state where the matter has been submitted to a democratic vote confirms this. Religious freedom is deeply embedded in our society. So is religious belief. Despite the efforts of the gay movement, the Catholic Church, traditionalist Protestant sects, Orthodox Judaism, and Islam are not about to slink away.

A compromise is not hard to imagine. Professor Huhn refers to the events in *Peterson* and *Bodett* as "expressions of intolerance."[81] However, *any* statement of an attitude, opinion, or belief may be labeled "intolerance" by one who does not share it. Again, speech that offends others is curbed only in a few areas; in most matters people are free to express their beliefs even when they displease others. Democrats may criticize and even vilify Republicans, and vice versa. Disagreements about homosexuality could be treated in the same way. Every human being deserves to be treated with civility. Abuse and harassment violate this right. However, disagreement, even when heated, about matters on which people may legitimately disagree does not violate anyone's rights.

CONCLUSION

Professor Huhn waxes eloquent about equality and charges that "most of the legal and social problems that arise under the Constitution stem from the belief, held by some people, that they are better than other

80. Huhn, *supra* note 1, at 6-7 n.28.
81. Huhn, *supra* note 1, at 6-7 n.28.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .

people."[82] Unfortunately, he violates his own principle by treating traditional religious people as inferiors who should be silenced. Like Tom and Daisy Buchanan in *The Great Gatsby*,[83] Professor Huhn and other supporters of the gay movement consider their own views advanced, enlightened. They go around carelessly smashing up our social norms. Comfortable in their sense of superiority, they do not bother to think seriously about the effects of their acts. They "let other people clean up the mess"[84] they make.

There are strong public policy reasons – especially the care of children – for retaining traditional marriage. This policy does not violate either the constitutional or the philosophical principles of equality.

The war between the gay movement and religious freedom is already major and is growing rapidly. Unlike many other public controversies, such as abortion, this war will not be resolved in a final, conclusive battle. Rather it will rage in innumerable small skirmishes in a variety of contexts. Homosexuals, like all people, are entitled to be treated decently and, in some cases, to be protected from discrimination. These rights, however, must not come at the expense of religious freedom. In general, people should be free to express their religious beliefs even when those beliefs are unpleasant for homosexuals. A reasonable balance must be struck between the warring factions.

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82. Huhn, *supra* note 1, at 10.
83. *See supra* note **.
84. *Supra* note **.

George W. Dent, Jr., *On Marriage, Religious Freedom, Equality and Homosexuality: A Reply to Professor Huhn*, 1 AKRON STRICT SCRUTINY 18 (2009), http://strictscrutiny.akronlawreview.com/files/2009/07/on-marriage-religious-freedom-equality-and-homosexuality-a-reply-to-professor-huhn.pdf .