



Why “Sexual Orientation” and “Gender Identity” Should Never Be Specially Protected Categories Under the Law

Peter Sprigg

With increasing fervor, LGBT (lesbian, gay, bisexual, and transgender) activists are urging local, state, and federal governments to expand the protected categories under existing laws to bar “discrimination” – in areas such as employment, housing, and public accommodations – on the basis of “sexual orientation” and “gender identity.” These terms are also being inserted into the law in some unexpected places. For convenience, we will refer to non-discrimination laws or other laws featuring special protections based specifically on sexual orientation (SO) and gender identity (GI) as “SOGI” laws.

The fundamental rights guaranteed by the U.S. Constitution should and already do apply to *all* Americans, including those who self-identify as lesbian, gay, bisexual, or transgender. However, the special protections found in SOGI laws:

- 1) are not justified in principle;
- 2) are invasive and cause tangible harms; and
- 3) are coercive and cannot be reconciled with religious liberty.

1. SOGI laws are not justified in principle.

Sexual orientation and gender identity are unlike other characteristics protected in non-discrimination laws. The federal Civil Rights Act of 1964, for example, bars discrimination based on “race, color, national origin, sex, and religion.”¹ The first four of these are clearly part of a person’s innate identity, with “race, color,” and “sex” being biological factors identifiable at birth. A large part of the reason why discrimination on these bases is considered unjust is because these characteristics are indisputably inborn, involuntary, and immutable. Religion is different in that it is voluntary and involves both beliefs and behaviors. However, freedom of religion is explicitly protected by the First Amendment to the U.S. Constitution – which is silent on issues of “sexual orientation” and “gender identity.”

“Sexual orientation” and “gender identity” are considerably more complex than these other characteristics and involve a combination of feelings, sense of identity, and outward behaviors.

The feelings and sense of identity (same-sex attraction or gender incongruity) may be involuntary, but they have not been proven to be inborn or immutable (there is certainly no way to identify them at birth).² The *behaviors*, however (homosexual conduct or presenting oneself as something other than one’s biological sex), are clearly a matter of choice, and those choices carry a substantial risk of harm to the LGBT individual and cost to society at large.³

SOGI laws increase government interference in the free market. They substitute the judgment of government officials in place of the judgment normally exercised by private businesses and organizations regarding what qualities or characteristics are most relevant to a particular job and how those private organizations wish to operate. The rights clearly protected by the Constitution do not place any limits on the free actions of private individuals and organizations; on the contrary, they protect such actions against interference by the government. And when a constitutional right is extended to a group previously deprived of it, no one else suffers any *reduction* in their rights as a result.

Non-discrimination provisions such as SOGI laws, however, do not merely limit the government; they coercively place a restriction upon the action of *private entities* (such as small businesses) in carrying out their private activity. While there is a place for non-discrimination laws, the burden of proof in every case must rest on those who seek to *increase* the number of categories or characteristics protected under such laws, since every such increase results in a corresponding *decrease* of freedom for someone else.

SOGI laws are unnecessary. One irony is that advocates of such laws place great emphasis on the large number and percentage of corporations that already have internal policies prohibiting discrimination based on sexual orientation and/or gender identity.⁴ That fact, however, undermines any suggestion that such discrimination is endemic, or that government action is required to arrest the perceived problem. A business that places unfounded prejudice ahead of legitimate qualifications will be punished by market forces. For example, an employer who rejects better-qualified applicants for arbitrary and irrelevant reasons will end up with an inferior workforce that is less competent, productive, or effective in meeting the needs of their customers – all of which will result in a decline in sales.

2. SOGI laws are invasive and cause tangible harms.

SOGI laws lead to costly and unnecessary lawsuits against businesses. They invite disgruntled employees to sue for discrimination over a characteristic (in the case of sexual orientation) which is not even visible and of which the employer may have been unaware. In the case of public employers, such laws at the local and state level have led to large settlements being paid at taxpayers' expense.⁵ Disgruntled customers have sued businesses in the wedding industry under such laws for declining to participate in same-sex "weddings" (even when the business made clear that they would serve customers who identify as homosexual in other ways that would not involve celebration of their homosexual partnership).⁶

Gender identity laws violate the privacy of others. Such laws allow biological males (who claim to be female) to access private spaces like showers, locker rooms, and bathrooms designated for women, allowing them to be nude or in various states of undress even if they have never altered their bodies through gender reassignment surgery. This could be, and has been, very disturbing to those (especially sexual assault victims,⁷ or residents of battered women's shelters) who are coerced into situations where they are exposed to, or find their own bodies exposed before, such individuals. In one school, a girl chose to wear her gym clothes under regular clothes all day rather than undress in front of a biological male;⁸ in another, there is current litigation concerning the sexual assault of a five-year-old girl by a biological male in the school's girls' bathroom.⁹ Such laws could be exploited by a "peeping tom," a rapist, or a pedophile as a way to gain access to women and girls in a vulnerable situation.¹⁰ Such privacy concerns can also arise for employees of a business governed by the law – such as a women's spa that was sued because workers did not feel comfortable waxing the male genitalia of a customer who identifies as female.¹¹

SOGI laws limit access to needed social services by effectively driving out faith-based providers.

These laws have been used in several states and localities to shut down faith-based adoption agencies. In Illinois alone, nearly 3,000 children were displaced when this happened.¹² Grants offered through the *Violence Against Women Act* have a SOGI provision that dictates the hiring practices of institutions that get grants to help battered women. Because this provision violates the conscience of religious institutions, they are unable to provide assistance desperately needed by battered women.¹³

SOGI laws could mandate the employment of persons who identify as homosexual or transgender in inappropriate occupations. Sexual conduct and gender can be relevant to employment. Under such legislation, for example, employers in education and childcare would be required to hire teachers who openly identify as LGBT, even if they consider them inappropriate role models for children and youth.

3. SOGI laws are coercive and cannot be reconciled with religious liberty.

SOGI laws force some businesses to violate their moral and religious convictions. These include businesses which provide products, services, or catering for weddings or groups and businesses which provide dating services. Under employment provisions of such laws, they could be forced to hire those who identify as homosexual, and under the public accommodations provisions they could be forced to participate in the celebration of same-sex “weddings,” even though homosexual behavior and treating same-sex unions as marriages are expressly contrary to their religious convictions.¹⁴ They could also force a medical professional to provide services in violation of his or her conscience, such as artificial reproductive technology for same-sex couples or cross-sex hormones for those who identify as transgender.¹⁵

SOGI laws prepare the way for discrimination against religious beliefs. The more entrenched that SOGI laws become in our culture, the more people who hold traditional values will be forced to conceal their views – or face punishment for expressing them. This can happen even if the employee’s views are expressed outside of work,¹⁶ and when no reference is made to sexual orientation or gender identity.¹⁷

Religious exemptions do not adequately protect people of faith. While such laws sometimes contain or are paired with “religious exemptions” (for example, to prevent churches from being forced to hire homosexual clergy), these may not protect the conscience rights of individual Christians, Jews, Muslims, and others. Profit-making corporations may not qualify for the exemption, so Christian bookstores, religious publishing houses, and religious television and radio stations could all be forced to compromise their faith-based principles. Approaches like the Religious Freedom Restoration Act (RFRA), on the other hand, leave ambiguity as to which religious practices are protected, and could be interpreted narrowly by courts.¹⁸

SOGI laws “legislate morality” – the “morality” of the sexual revolution. They send the message that it is morally wrong to *disapprove* of homosexual or transgender conduct. For such laws to be endorsed by citizens who believe that it is morally wrong to *engage in* homosexual or transgender conduct is a logical contradiction. The law is a teacher, and it is fundamentally unloving to “teach” our neighbors that they will find happiness by engaging in unnatural sexual conduct or by adopting a gender identity inconsistent with their biology and genetics.

Peter Sprigg is Senior Fellow for Policy Studies at Family Research Council in Washington, D.C.

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- ¹ *Civil Rights Act of 1964*, Public Law 88-352 (July 2, 1964), 78 Stat. 241, <https://www.govinfo.gov/content/pkg/STATUTE-78/pdf/STATUTE-78-Pg241.pdf>.
- ² For example, Lisa Diamond – a scholar who self-identifies as lesbian – has written that “arguments based on the immutability of sexual orientation are unscientific.” Lisa M. Diamond & Clifford J. Rosky, “Scrutinizing Immutability: Research on Sexual Orientation and U.S. Legal Advocacy for Sexual Minorities,” *The Journal of Sex Research*, 53:4-5 (March 17, 2016), 363, <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1023&context=scholarship>.
- ³ For example, see: “Gay and Bisexual Men’s Health: Sexually Transmitted Diseases,” Centers for Disease Control and Prevention, March 9, 2016, accessed December 17, 2018, <https://www.cdc.gov/msmhealth/STD.htm>; Tonia Poteat, “Top 10 Things Lesbians Should discuss with Their Healthcare Provider,” GLMA, May 2012, accessed December 18, 2018, <http://www.glma.org/index.cfm?fuseaction=Page.viewPage&pageID=691>; Karen Kaplan, “Being transgender in America may be hazardous to your health, study shows,” *Los Angeles Times*, May 30, 2017, accessed December 18, 2018, <http://www.latimes.com/science/sciencenow/la-sci-sn-transgender-health-disparities-20170530-htmstory.html>.
- ⁴ *Corporate Equality Index 2018*, Human Rights Campaign Foundation (2017); <https://www.hrc.org/campaigns/corporate-equality-index>.
- ⁵ “The ENDA Litigation Nightmare,” *Issue Brief*, Family Research Council, November 2013, <https://downloads.frc.org/EF/EF13K10.pdf>.
- ⁶ Alexandra McPhee, “Religious Liberty and the ‘Wedding Vendor’ Cases,” Family Research Council, November 2018, <https://downloads.frc.org/EF/EF16L23.pdf>.
- ⁷ Kaeley Triller Haver, “A Rape Survivor Speaks Out About Transgender Bathrooms,” *The Federalist*, November 23, 2015, accessed December 18, 2018, <http://thefederalist.com/2015/11/23/a-rape-survivor-speaks-out-about-transgender-bathrooms/>.
- ⁸ *Students and Parents for Privacy v. U.S. Department of Education, et al., Complaint* (N.D. Ill., May 4, 2016), 22, <http://www.adfmedia.org/files/SPPcomplaint.pdf>.
- ⁹ Alliance Defending Freedom, “US opens investigation into sexual assault of minor child in Georgia, violation of Title IX,” press release, October 03, 2018, <http://www.adfmedia.org/News/PRDetail/99205?search=1>.
- ¹⁰ “Bathroom Incidents,” *Issue Brief*, Family Research Council, April 2017, <https://downloads.frc.org/EF/EF16F27.pdf>.
- ¹¹ Matt McDonald, “Transgender Customer Demanded ‘Full Brazilian’ From Beauty Salon Under Massachusetts Gender Identity Law,” *NewBostonPost*, September 27, 2018, accessed December 18, 2018, <https://newbostonpost.com/2018/09/27/transgender-customer-demanded-full-brazilian-from-beauty-salon-under-massachusetts-gender-identity-law/>.
- ¹² Travis Weber, “The Child Welfare Provider Inclusion Act: Ensuring a Free Marketplace of Adoption Providers,” *Issue Brief*, Family Research Council, April 2018, <https://downloads.frc.org/EF/EF18D31.pdf>.
- ¹³ “Frequently Asked Questions: Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013,” U.S. Department of Justice, Office of Justice Programs, Office for Civil Rights, April 9, 2014, <https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-wawa.pdf>.
- ¹⁴ McPhee, op. cit.
- ¹⁵ E.g., Jennifer Riley, “Christian Fertility Doctors, Lesbian Settle Suit Over Treatment,” *The Christian Post*, October 2, 2009, accessed December 18, 2018, <https://www.christianpost.com/news/christian-fertility-doctors-lesbian-settle-treatment-lawsuit.html>.
- ¹⁶ Katie Leslie, “Former Atlanta fire chief files federal lawsuit against Reed, city,” *The Atlanta Journal-Constitution*, February 20, 2015, accessed December 18, 2018, <https://www.myajc.com/news/former-atlanta-fire-chief-files-federal-lawsuit-against-reed-city/fzALMp5sYZp4jwxxCMO7IP/>.
- ¹⁷ “Suit to decide workplace ‘hate speech,’” *The Washington Times*, June 10, 2007, accessed December 18, 2018, <https://www.washingtontimes.com/news/2007/jun/10/20070610-111445-6957r/>.
- ¹⁸ Peter Sprigg, “Can There Be ‘Compromise’ Between Sexual Orientation/Gender Identity Non-Discrimination Laws and Religious Liberty Protections?” *Issue Brief*, Family Research Council, February 2016, <https://downloads.frc.org/EF/EF16B15.pdf>.