Liberty and SOGI Laws: An Impossible and Unsustainable "Compromise"

by Ryan T. Anderson and Robert P. George within Conscience Protection, Politics, Sexuality

Indiana's proposed sexual orientation and gender identity (SOGI) laws, SB 100 and SB 344, would make bad policy. The preamble of each states that it seeks a “balancing of differing religious values and matters of conscience so that individuals of good faith can live and work together without undue litigation or burden.” But in reality the bills favor one side of a cultural debate—the culturally and politically powerful LGBT lobby—at the expense of citizens of goodwill who believe that we are created male and female and that marriage unites a man and a woman. While these bills have some superficially appealing aspects, they would only increase cultural tensions, further empower an already powerful special-interest lobby, and impose unjustly on Hoosiers of many different faiths and all walks of life. All citizens should oppose unjust discrimination, but SOGI laws are not the way to do that.

Following the Obergefell decision redefining marriage throughout the nation, the people who need legal protections are those who believe that male and female are objective biological categories and that marriage unites a man and a woman. Yet these bills would establish a legal precedent that acting upon these beliefs is bigotry. They create legal privileges for new protected classes based not on objective, easily verifiable traits, but on subjective identities: SB 100 adds sexual orientation and gender identity, and SB 344 adds sexual orientation. Where these types of laws have been passed, the government has penalized bakers, florists, photographers, adoption agencies, and schools because of their beliefs, faith-based or otherwise, about human sexuality.

Thus, SB 100 and SB 344 threaten the civil rights of Hoosiers who believe basic truths about the human condition articulated by ancient Greek and Roman philosophers, members of the Abrahamic faiths, and secular people who believe in freedom of inquiry. Orthodox Jews, Catholics, Eastern Orthodox and Evangelical Christians, Latter-Day Saints, Muslims, and people of other faiths or none at all will be at risk.

Some advocates of these two bills argue that they protect “fairness for all,” others say that they are a “compromise” following the path that Utah took with its SOGI law, while still others say they lock in some freedom before the opportunity closes forever. We think all three are demonstrably mistaken.

1. They Do Not Protect Fairness for All. “Fairness for all” suggests that all the various aspects of SB 100 and SB 344 are desirable. They are not. SB 100 and SB 344 are first and foremost SOGI bills, meaning they create new protected classes based on sexual orientation and, in the case of SB 100, gender identity. They are not about protecting liberty. The fact that they attempt to exempt certain limited categories of people and institutions—clergy, houses of worship, religious non-profits, and small businesses with no more than three employees (SB 100) or five employees (SB 344)—from their new, harmful regulations is not fairness. It creates unjust policy and then tries to forestall some of its most egregiously bad consequences.

For a detailed discussion of SOGI laws in general, see Ryan Anderson’s report for the Heritage Foundation: “Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom.” In this essay, we focus on the specific features of the Indiana “compromise” bills.

2. They Do Not Establish a Compromise. The bills are not a compromise, at least not a good one. Compromise suggests that each side gets something that it wants, though less than everything, and that both sides stand roughly equal at the end of negotiations. SB 100 and SB 344 give one side special new legal privileges applicable almost everywhere, and “in exchange” the other side gets limited exemptions from this bad public policy. (And as we note below, these limited exemptions are not guaranteed to last.)
Both policies would label people acting according to their faith as “bigots” in myriad circumstances. For example, under SB 100 thousands of vulnerable small businesses could be sued (thus, at a minimum, causing them to incur large legal fees) if they fail to require their employees to address transgender co-workers with the pronoun of their choice, which, of course, raises freedom of speech as well as religious freedom concerns. Under both SB 100 and SB 344 they may also be sued for having policies that reflect the belief that marriage is the union of one man and one woman. SB 100 and 344’s exemptions for some religious institutions and microbusinesses do not limit the social dynamic unleashed when the state brands mainstream religious beliefs about what it means to be a man and a woman as bigoted and discriminatory. The Human Rights Campaign asserts that religious exemptions to SOGI laws constitute “a license to discriminate.” Far better not to go down this dead-end road for religious liberty to begin with.

3. They Are Not the Best for Indiana or America. Neither bill is the best that Hoosiers, or Americans in general, can hope for in the midst of a troubling political and cultural environment. SOGI laws are legal hammers that are purportedly justified by extensive, entrenched, and unjust discrimination that simply does not exist. In Indiana—like America in general—market forces are already curbing wrongful discrimination based on factors irrelevant to employment ability or performance without the costs of heavy-handed legal coercion. Market competition can provide nuanced solutions that are far superior to coercive, costly, one-size-fits-all government policy. SB 100 and SB 344 are solutions in search of a problem.

What should we work for instead?

After the Supreme Court’s decision in Roe v. Wade, Americans responded by protecting the rights of pro-life citizens—both religious and non-religious, both businesses and non-profits—to lead their lives in accordance with their beliefs. Americans enacted legislation at the local, state, and federal levels to protect the rights of pro-life Americans not to be punished by government for living out their beliefs. The Church and Weldon Amendments have protected the conscience rights of pro-life medical personnel to refuse to perform or assist with abortions, and the Hyde Amendment and Mexico City policy prevent taxpayer money from supporting abortion.

The same needs to happen in the aftermath of Obergefell for Americans who believe that male and female are objective biological categories and that marriage unites a man and a woman. Public policy must ensure that government never penalizes people for expressing or acting on their view that marriage is the union of husband and wife, that sexual relations are properly reserved for such a union, or that maleness and femaleness are indeed objective biological realities. An example of good policy that does just this is the First Amendment Defense Act. See Ryan Anderson’s report: “First Amendment Defense Act Protects Freedom and Pluralism after Marriage Redefinition.”

But SB 100, SB 344, and similar SOGI laws would almost certainly ensure that government discrimination does happen, for the following six reasons.

1. They Establish a Bad Principle. Irrespective of any exemptions, SB 100 and SB 344 establish the principle that sexual orientation (and gender identity) should be protected classes like race. SOGI policies attempt to impose, by force of law, a system of orthodoxy with respect to human sexuality: the belief that marriage is merely a union of consenting adults, regardless of biology, and that one can be male, female, none, or both, again, regardless of biology. SOGI laws impose this orthodoxy by punishing dissent, and by treating as irrational the beliefs that men and women are biologically rooted and made for each other in marriage. While such “bigotry” may be tolerated for now in certain religious and very small business settings, the overarching pedagogical effect of the SOGI law is to declare these truths to be false: indeed, irrational and unjust.

2. They Eliminate the Status-Conduct Distinction. SB 100 and SB 344 obliterate the status-conduct distinction. Where similar SOGI laws have been enacted, bakers, florists, photographers, adoption agencies, and schools have been penalized not because they “discriminated” against someone because of their status as LGBT, but because they judged in conscience that they couldn’t endorse certain conduct.
For example, a florist in Washington State employed a self-identified gay employee and sold flowers to a same-sex couple for a decade. It was only when the couple asked her to arrange flowers for their same-sex wedding celebration that she declined—because she was unable in conscience to facilitate or contribute her artistic talents to that sort of event. In reality, there is not a national problem of bakers vilifying people who identify as gay. They have no problems crafting birthday cakes for customers who identify as homosexual, but there are some who simply can't in good conscience use their talents to help celebrate a same-sex wedding by baking a cake with two grooms or two brides on top.

Similarly, religious adoption agencies don’t deny that a same-sex-attracted person can be a good parent, but are convinced, like millions of other Americans of goodwill, that having two dads can’t replace a missing mom. Thus, these agencies seek out homes with married moms and dads when placing adopted children, and should be free to do so. Schools have no problem employing teachers with same-sex attractions who support their religious mission and live out their religious teachings. But some religious schools have had to dismiss teachers who openly undermine those teachings by their conduct. SOGI laws have consistently ignored these distinctions. Indeed, obliterating them is a principal objective that LGBT activists are seeking to achieve by enacting these laws.

3. Their Exemptions Are Too Narrow. The religious liberty protections SB 100 and SB 344 do include are far too narrow. A husband and wife who run a bakery with one employee are exempted from the law, but if they expand and hire an additional employee (under SB 100) or three additional employees (under SB 344) they must forfeit their consciences and submit to government regulation and coercion. Foster care agencies are not explicitly protected. Neither are religious nonprofits, other than schools, that are not directly "controlled" by a larger church or denominational body. State government employees are not protected, which would include county clerks issuing marriage licenses or government employees who express their beliefs publicly, on private Facebook pages, or elsewhere on their own time. Private employers and employees who do not want to be coerced into referring to coworkers as “he” or “she” against reality are not protected either (SB 100). This is bad for freedom and bad for the economy.

4. Their Exemptions Are Susceptible to Erosion. Over time, it will be difficult to maintain the religious liberty protections in SB 100 and SB 344. Indeed, this is what has happened in Ireland and in Washington, DC, with similar SOGI laws. When Ireland first passed its SOGI law, it included exemptions for certain “religious, educational, or medical institutions.” In December 2015, the Parliament voted to repeal this section of the act. Likewise, Congress protected the religious freedom of religious schools in the District of Columbia with respect to sexual orientation, but in December 2014 the DC City Council voted to rescind those protections. SB 100 and SB 344 make it more likely that religious liberty and the freedom of conscience will be violated, for the SOGI rule will—over time—come to swallow the religious exception. After all, once you’ve established a principle that sexual orientation and gender identity are akin to race, why shouldn’t they receive the same legal protections as race? Why shouldn’t morally conservative people be branded as bigots—the equivalent of racists? Of course, that’s the point that LGBT activists have been making for years.

5. Their Transgender Policy Is Likely to Be Expanded. SB 100 includes protections based on gender identity, but it explicitly exempts bathrooms, locker rooms, showers and other sex-segregated facilities. Over time, however, once the principle that “gender identity” is and ought to be a protected class has been established, this transgender policy will be expanded and the exemption removed. After all, once you’ve conceded the principle that gender identity is based on self-definition, not biological reality, why shouldn’t people be free to use the restroom of their choice? In the meantime, there would probably be litigation over whether medical providers or insurers can decline to perform or cover “sex-reassignment” surgeries without violating SOGI policies.

Likewise, while SB 344 includes protections only based on sexual orientation—not gender identity—there will be strong pressure for expansion. Once the principle that one’s subjective “sexual orientation” is and ought to be a protected class has been established, it will be more difficult to argue that subjective “gender identity” is less deserving of the same protection. After all, once you’ve conceded the principle that sexual orientation merits protection despite being based on self-definition, it is tougher to say other types of self-defined sexual identities
should not also be covered. Indeed, SB 344 itself would set up a new committee to study gender identity discrimination and recommend new laws to the legislature to “aid in the removing of discrimination on the basis of sexual identity.”

6. They Will Encourage the Proliferation of SOGI Laws. Enacting SB 100 or SB 344 would create the appearance of a trend and lend support to activists at the state and federal level trying to pass SOGI laws. The number of SOGI laws is nearing the point where activist federal courts could declare an “emerging consensus” in order to read SOGI categories into existing federal laws banning “sex” discrimination, or into the U.S. Constitution itself. Such a court-created SOGI law would probably not include any explicit religious liberty protections. And yet, enacting the Indiana “compromise” would make such a nationwide judicial outcome all the more likely.

For these reasons, we believe the balance of the considerations weigh overwhelmingly against SB 100, SB 344, or any similar SOGI bills. There are decisive principled and practical reasons for not passing such laws. They invariably cause harms without sufficiently compensating benefits. No one should suggest that SOGI laws, of any form, constitute “fairness for all.”

In our current cultural and political situation, America needs public defenses of the truths of human nature, sexuality, and marriage. Americans should follow the example of the citizens of Houston, who recently rejected their SOGI law. The citizens of Houston—a majority of whom are progressive and who twice elected an open lesbian as mayor—rejected a SOGI by over 60 percent of the vote with substantial support from the African-American and Hispanic communities. This shows that rejection of SOGI proposals does not make one “anti-diversity” or anti anything. It just makes one a friend of liberty and a foe of government coercion on an issue fraught with such moral weight.

We suggested above that, in the aftermath of Obergefell, the First Amendment Defense Act is ideal policy at the federal level. Similar targeted policies should be enacted at the state level. Examples include Indiana’s SB 66, which would require state and local agencies, government, and courts to have a compelling governmental interest and use the least restrictive means before substantially burdening “fundamental rights” guaranteed by the state constitution, such as the free exercise of religion, freedom of speech, the right to bear arms, and freedom of assembly. This would truly be freedom for all Hoosiers.

We believe in freedom and that all citizens should oppose unjust discrimination. When Mozilla Firefox forced Brendan Eich to resign, we thought the company was doing the wrong thing. But we did not think the government should penalize the company for acting on its socially liberal convictions. Likewise, when A&E suspended Phil Robertson from Duck Dynasty and Cracker Barrel removed his products from its stores, we thought they were in the wrong. Nevertheless, we thought they should be free to act on their moral beliefs—as misguided as we believe those liberal beliefs are—in how they run their businesses. So, too, even those who disagree with the baker, florist, photographer, adoption agency or religious school should agree that the government shouldn’t penalize them for running their businesses according to their moral and religious convictions. Yet SOGI laws do exactly this.

What we are witnessing is a stunning example of Cultural Cronyism. Big Business and Big Law are using Big Government to impose their cultural values on small businesses and ordinary Americans. As Indiana experienced firsthand last spring, corporate elites are using their privilege and positions of power to have government coerce people whose convictions on matters of profound moral import differ from theirs.

SOGI laws are no more inevitable than the Equal Rights Amendment (ERA) was inevitable. Despite what appeared at the beginning to be a juggernaut, the ERA was never ratified. To this day there is no federal law against sex discrimination in public accommodations, yet sex discrimination has diminished in the decades since. Just so, Indiana does not need to create new laws on sexual orientation or gender identity for people who identify as sexual minorities to be treated justly. At the same time, the best way to protect the religious liberty and freedom of conscience of Hoosiers whose moral convictions differ is for Indiana not to adopt a SOGI policy at all.

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