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Frank S. Ravitch

Michigan State University College of Law.

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Complementary or Competing Freedoms: Government Officials, Religious Freedom, and LGBTQ Rights *

Frank S. Ravitch **

I. INTRODUCTION

The story of Clerk Kim Davis from Rowan County, Kentucky, made headlines across the country. Almost everyone is familiar with her refusal to provide marriage licenses after the United States Supreme Court held that same-sex marriage is a fundamental right that cannot be denied to same-sex couples.¹ Ironically, however, her case may have done more to obfuscate the issue of religious accommodations for government officials than to enlighten people about the issue.

This is in part because of the grandstanding that occurred in her case. Davis and her attorneys turned her into a *cause célèbre*, and in the process made claims that turned out to be false;² some of which did not relate directly to her legal arguments.³ Meanwhile, around the country, other government employees have sought accommodation without becoming *cause célèbres*. These cases raise many questions that will be addressed in this Essay.

Must religious freedom claims by government officials be accommodated when the requested accommodation is to not perform duties for which the official was elected or hired? If such accommodations are not mandatory, should they be given? And if so, under what circumstances? Does the availability of other officials who can perform the duties make a difference? What about the argument that dignitary harm results when a government official requests that someone else perform her duties? Does media attention figure into the question of dignitary harm?

* This essay is adapted from a Chapter in FRANK S. RAVITCH, *FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA* (forthcoming 2016).

** Professor of Law and Walter H. Stowers Chair in Law & Religion, Director, Kyoto Japan Program, Michigan State University College of Law. The author would like to thank the participants in the *FIU Law Review's* Religion and the Law Symposium for helpful comments and questions and the excellent staff of the *FIU Law Review* for the amazing organization and quality of the symposium.

¹ Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

² Dominic Holden, *Kim Davis's Lawyers Have Said Things that Are Literally Unbelievable*, BUZZFEED NEWS (Oct. 14, 2015, 3:57 PM), www.buzzfeed.com/dominicholden/kim-daviss-lawyers-have-said-things-that-are-literally-unbel#.vcmdAkxE4.

³ *Id.*

As will be seen, the biggest problem with Kim Davis' claim was not her personal refusal to issue marriage licenses, but rather her refusal initially to allow anyone in her office to do so. There is a fundamental difference between a government official seeking accommodation and an official seeking to keep others, even those whom she supervises, from following the law. Additionally, the media firestorm her situation generated—and which she helped to foster—raises additional questions that may not be present when a county clerk simply asks that others in her office issue same-sex marriage licenses.

This Essay is adapted from a key chapter in a forthcoming book, *Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America*.⁴ In the book, I argue that Lesbian, Gay, Bisexual, Transgender and Queer (LGBTQ) rights, reproductive rights, and religious freedom share common themes and common ground. Moreover, I argue that the supposed tension between these freedoms does not exist in most religious freedom claims, such as situations where Native Americans seek to maintain rituals and practices that conflict with federal or state law, but have no direct impact on anyone other than the persons or tribes seeking accommodation. Significantly, the book focuses heavily on those situations where conflict or tension does exist, suggesting that these situations should be resolved in a manner that minimizes harms and burdens on all sides.⁵ The county clerk/government official context provides an excellent example of how these harms and burdens can be minimized. This Essay does not address the broader issue of why we should maximize freedom and minimize burdens on all sides, but it does provide proof that maximizing freedom and minimizing burdens can be achieved even in a highly contested context.

II. ISSUES WITH ACCOMMODATING GOVERNMENT OFFICIALS

Should we accommodate government officials and employees who seek religious exemptions in cases involving sexual freedom? The answer is a qualified “yes.” Of course, the details matter. In some situations, a balance can be reached that will maximize protection for sexual freedom while allowing religious accommodation of government employees. In states that have Religious Freedom Restoration Acts (RFRA), or other laws that protect the religious freedom of government officials, the boundaries drawn would determine when accommodation is mandatory. In all other states, the boundaries drawn would determine when permissive accommodations are

⁴ FRANK S. RAVITCH, FREEDOM'S EDGE: RELIGIOUS FREEDOM, SEXUAL FREEDOM, AND THE FUTURE OF AMERICA (forthcoming 2016).

⁵ *Id.*

allowed if the relevant government entity seeks to accommodate.⁶

For the reasons explained in *Freedom's Edge*,⁷ I think accommodations should be given except when doing so will impose a direct and meaningful harm on others. Of course, the question of what accommodations will result in direct and meaningful harm raises a number of unique problems when those seeking accommodation are government officials. As a matter of law there is no duty to accommodate unless a RFRA or other law requires doing so.⁸ Thus, my argument is not that government entities must accommodate in the absence of a legal requirement to do so, but rather that they should accommodate regardless of whether there is a legal mandate to do so when doing so will not result in direct and meaningful harm to others.⁹ On the flip side, even in states with RFRA, or other relevant laws that apply to government officials or employees, accommodation may not be required unless certain parameters are met.¹⁰ These parameters are discussed in detail in the next section. First, some of the specific issues raised in the context of accommodating government officials and employees must be addressed.

A number of factors make situations involving government officials especially complex. Government officials are elected or hired to serve the public generally, so when they seek an exemption to refuse service to a specific group within the public—especially in relation to a right recognized by the United States Supreme Court—alarm bells should sound. For example, if a government official refused to grant marriage licenses to interracial couples based on a religious argument, no court would allow such an injustice to stand.¹¹ Why should the situation be any different when a government official asserts a religious objection to issuing same-sex marriage licenses?

First, there is an analogy to be made on the basic rights. The *Obergefell* Court did rely—and I would assert correctly so—in part on

⁶ See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 890 (1990) (exemptions to generally applicable laws are not required by the Free Exercise Clause, but government entities are free to give accommodations to generally applicable laws if they choose to do so).

⁷ See RAVITCH, *supra* note 4, at chs. 1–3.

⁸ *Smith*, 494 U.S. at 872 (no duty to provide exemptions to generally applicable laws under the Free Exercise Clause).

⁹ See RAVITCH, *supra* note 4, at chs. 1–2.

¹⁰ See *infra* Part III.

¹¹ In fact, in *Loving v. Virginia*, 388 U.S. 1 (1967), the state of Virginia relied in part on religious arguments and the Court resoundingly rejected those arguments as being based on a more general theme of racial inferiority (along with the state's other arguments). As will be discussed below, *Loving* and the unconstitutionality of anti-miscegenation laws generally, while helpful in demonstrating the constitutional right to same-sex marriage, are not as helpful in addressing claims for religious exemptions from supporting same-sex marriage because of significant historical and theological differences.

Loving v. Virginia to support its holding that denying the right to same-sex marriage violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹² Yet, this analogy does not address the question of religious accommodations. The nature and history of religious objections to interracial marriages and the nature and history of religious objection to same-sex marriage are quite different.¹³ Second, religious objections to interracial marriage were directly connected to a broader system of racism,¹⁴ while religious objections to same-sex marriage are often limited to the issue of marriage itself.¹⁵ In fact, this is reflected directly in the opinions finding a constitutional right to interracial marriage and to same-sex marriage. In *Loving v. Virginia*,¹⁶ the case in which the United States Supreme Court held that anti-miscegenation laws (laws that prohibited interracial marriage) are unconstitutional, the Court wrote: “The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain white supremacy.”¹⁷ Yet, in *Obergefell v. Hodges*,¹⁸ the case in which the Court held there is a constitutional right to same-sex marriage, the Court specifically noted:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their deep aspirations to continue the family structure they have long revered.¹⁹

There are certainly people who object to same-sex marriage based on bigotry and not religious principal. If any of these people were government

¹² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99, 2602–04 (2015).

¹³ SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS (Douglas Laycock et al. eds., 2008); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 114 (2013); Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DET. MERCY L. REV. 407 (2011). *But see* James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. CIV. RTS.-CIV. LIB. L. REV. 99 (2015) (arguing that the differences between religious objections to same-sex marriage and interracial marriage have been overblown).

¹⁴ *Loving*, 388 U.S. at 11.

¹⁵ Kent Greenawalt, *Religious Toleration and Claims of Conscience*, 28 J.L. & POL. 91, 111–14 (2013).

¹⁶ 388 U.S. at 1.

¹⁷ *Id.* at 11.

¹⁸ 135 S. Ct. 2584 (2015).

¹⁹ *Id.* at 2607.

officials and asserted a religious objection to issuing same-sex marriage licenses based on the argument that members of the LGBTQ community are inferior or should not interact with the heterosexual community on an equal basis, the exemption should be denied.²⁰ This is because the level of harm caused by granting an exemption in these circumstances would far outweigh the government official's religious freedom interest. It is not because the request for an exemption is religiously based.

The above are not the only concern with granting exemptions to government officials and employees. Two other factors are highly relevant—the proper role of government officials and the Establishment Clause. First, the person seeking the exemption is a government official. Government officials are elected or hired to serve the public generally. Allowing them to pick and choose who they will serve could set a dangerous precedent.²¹ Should a devout Christian government official who believes that she can only interact with Christians and that refuses to serve Jewish, Muslim, Buddhist, and Atheist citizens be accommodated? What about an extremely devout Wahhabi Muslim man who objects to interacting with female citizens?

The answer is “no,” because the accommodations would prevent the official from doing his job for a large percentage of the public; so while the government could give a permissive accommodation, there are good reasons why it shouldn't. How can we determine the line of demarcation between these situations and a clerk who seeks an accommodation to not issue same-sex marriage licenses? The key is in the parameters discussed in the next section. Unless the person's main duty is issuing marriage licenses, they can fulfill their other duties. And so long as someone else can issue the licenses without any inconvenience to any citizens, the situation is quite different. The former situations are more akin to someone who refuses to

²⁰ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) (holding DOMA unconstitutional in part because it disparaged same-sex couples who could legally marry in one state from affirming “their commitment to one another before their . . . community”); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating Colorado constitutional amendment that prevented any government entity within the state from protecting people from discrimination based on sexual orientation because the basis for the proposed amendment was discriminatory).

²¹ *Miller v. Davis*, Civ. Action No. 15-44-DLB, 2015 WL 4866729 (E.D. Ky. Aug. 12, 2015). While Mary Ann Case and I disagree on the possibility of finding workable accommodations that adequately protect rights on both sides of the debate, she pointed out this concern in her talk at the symposium and in her earlier article. See Mary Ann Case, *Why “Live-And-Let-Live” Is Not a Viable Solution to the Difficult Problems of Religious Accommodations in the Age of Sexual Civil Rights*, 88 S. CAL. L. REV. 463 (2015) (concerned about the slippery slope accommodation claims will take in derogation of the rights of others). In the context of accommodating government employees, I agree with her concern and that of Judge Bunning in the *Davis* case, about setting a dangerous precedent, but as explained *infra* at Part III, with proper parameters these claims can be workable. The parameters are based, in part, on Judge Bunnings careful analysis in *Miller v. Davis*.

serve any LGBTQ citizens. The government has the strongest interest in not accommodating such a person.²²

Next, accommodating government officials might raise Establishment Clause concerns that are not raised in other accommodation contexts.²³ For example, wouldn't accommodating a government official who refuses to issue marriage licenses to same-sex couples or who refuses to perform a same-sex civil ceremony be a violation of the Establishment Clause? The short answer is "no," but with one major exception discussed below. In *Employment Division v. Smith*,²⁴ the Supreme Court specifically held that permissive accommodations are allowed.²⁵ In *Cutter v. Wilkinson*,²⁶ the Supreme Court specifically addressed this issue and held that application of the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that applies the same—or perhaps an even more stringent level of protection—than RFRA,²⁷ does not violate the Establishment Clause.²⁸

The major exception occurs when a government endorses or advances religion through the accommodation. This can happen when states pass laws that are designed to promote religion rather than simply accommodate it.²⁹ For example, if a state designs a law to favor specific religious values or passes a law that favors those values in a manner that could harm the rights of others, there is a significant likelihood of an Establishment Clause violation.³⁰ This could happen if a law was passed that mandated accommodation for government employees, but did nothing to protect the rights of same-sex couples in areas where no government employee is available to give a marriage license or perform a civil ceremony.³¹ This could also happen if a state ended all civil ceremonies and made no allowance for other non-religious means of a marriage, therefore only allowing marriages to be validated through a religious entity.³²

²² See *supra* notes 12–20, and accompanying text.

²³ Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. CIV. RTS.-CIV. LIB. L. REV. 343 (2014).

²⁴ 494 U.S. 872 (1990).

²⁵ *Id.* at 890.

²⁶ 544 U.S. 709 (2005).

²⁷ *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2761–62 (2014) (RLUIPA altered RFRA to expand its focus beyond pre-*Smith* law). *But see* Frank S. Ravitch, *Be Careful What You Wish for: Why Hobby Lobby Weakens Religious Freedom*, 2016 B.Y.U. L. REV. (forthcoming 2016) (arguing that the *Hobby Lobby* Court was wrong about the impact of RLUIPA on RFRA).

²⁸ *Cutter*, 544 U.S. at 719–26.

²⁹ *Cf.* *Edwards v. Aguillard*, 482 U.S. 578 (1987).

³⁰ *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

³¹ *Miller v. Davis*, Civ. Action No. 15-44-DLB, 2015 WL 4866729 (E.D. Ky. Aug. 12, 2015).

³² This has not happened in any state, but legislation has been proposed in Alabama that would eliminate the requirement for marriage licenses, but this bill would change the process so that couples

Two states have already provided legal models for accommodating religious government employees without harming the rights of same-sex couples. Both North Carolina and Utah have passed laws that require someone be available to grant marriage licenses and perform same-sex civil ceremonies at the same times they are available to opposite-sex couples, while also allowing for religious accommodations for government employees.³³ These laws are not perfect, and some of the advocates of these bills seemed more concerned with protecting religious claims than with compromise, but the resulting laws protect the right of same-sex couples to get marriage licenses without delay or a lowering of available services. Neither law addresses parameter five below, but both do engage in balancing rights in a manner that should not violate the Establishment Clause.

III. THE PARAMETERS NECESSARY FOR ACCOMMODATING GOVERNMENT OFFICIALS WITHOUT MATERIALLY HARMING THE RIGHTS OF OTHERS

In this section I will set forth, and then explain, the basic parameters necessary to accommodate government officials and employees without imposing direct and meaningful harm on others. After that, I will look at two state laws, one in North Carolina and one in Utah that address these questions. Both of these laws address in a careful and balanced manner four of the five parameters I discuss. Neither law, however, addresses the fifth parameter. The parameters are designed to minimize harm to same-sex couples while protecting religious freedom. They are designed to work both in the RFRA and permissive accommodation contexts.

Here are the five parameters:

First, government officials and employees should be accommodated in cases where a government official seeks a religious accommodation and there are others who are able to fulfill the duties of that official without causing any delay or reduction in service to citizens, unless the fifth parameter below is violated.

Second, there should be no accommodation where the only government official able to carry out a function, or all officials able to

would submit a marriage contract which would then be recorded rather than the probate judge issuing a marriage license. Mike Cason, *Bill to Eliminate Marriage Licenses Moves Closer to Passing*, ALABAMA.COM (Sept. 14, 2015), www.al.com/news/index.ssf/2015/09/bill_to_eliminate_marriage_lic.html. While the law raises numerous practical and legal problems there is no reason to believe that this would lead to a requirement of a marriage ceremony that could only be performed by a religious entity.

³³ N.C. GEN. STAT. §§ 51-5.5, 7A-292(b) (2015); UTAH CODE ANN. §§ 17-20-4, 30-1-6, 63G-20-101, *et seq.* (West 2015).

carry out the function, seek accommodation to avoid doing so. Moreover, under these circumstances there should be no accommodation even under RFRA.

Third, accommodation should be given unless the fifth parameter is violated, where a government official seeks an accommodation beyond excusal from performing a specific duty, such as having his or her name removed from marriage license forms, so long as the accommodation would not invalidate or call into question the right or benefit conferred on citizens.

Fourth, there should be no accommodation where the accommodation sought is an exemption from performing on an equal basis the primary duty the official was elected or hired to perform.

Fifth, accommodation should be denied or revoked when a government official acting in his or her official capacity calls attention to the refusal to perform a duty, either through contacting the media or through direct confrontation with the citizens he or she refuses to serve.

The first parameter makes sense as a balance between religious freedom and same-sex marriage rights. So long as there is no denial, delay, or reduction in service, the fact that a specific official or employee does not issue a license or perform a civil marriage ceremony would not violate or infringe on the rights of any citizen. The key is that there be someone else who is ready, willing, and legally able to issue the license or solemnize the marriage. This is precisely what the North Carolina and Utah laws require.³⁴ These laws are reasonably clear that no denial or reduction in service is allowed,³⁵ but the Utah law could be improved by spelling out more clearly that no *delay* in services should be allowed.³⁶ The North Carolina law seems clear on this.³⁷

This factor is the one that most clearly works against Kim Davis. Having others perform the duty in question is an obvious accommodation, and yet one she did not seek. From the start she had at least one clerk willing to issue licenses,³⁸ and subsequently all but one clerk agreed to issue

³⁴ N.C. GEN. STAT. §§ 51-5.5(a)–(c), 7A-292(b) (2015); UTAH CODE ANN. § 17-20-4(1)–(2) (West 2015).

³⁵ N.C. GEN. STAT. §§ 51-5.5(a)–(c), 7A-292(b) (2015); UTAH CODE ANN. § 17-20-4(1)–(2) (West 2015).

³⁶ This does seem implicit in Utah Code § 17-20-4(1)–(2), but it is not spelled out. Interestingly, Utah Code § 63G-20-101, *et seq.*, prohibits discrimination as a result of either religion or sexuality in a variety of contexts.

³⁷ N.C. GEN. STAT. §§ 51-5.5, 7A-292(b) (2015).

³⁸ *Miller v. Davis*, Civ. Action No. 15-44-DLB, 2015 WL 4866729, at *3 (E.D. Ky. Aug. 12,

licenses,³⁹ yet she initially refused to allow them to do so.⁴⁰ Interestingly, her reason for refusing this obvious accommodation was concern about facilitating sin by having her name on the licenses. Facilitating something that violates one's deepest religious convictions is serious, but parameter three addresses this concern. As will be seen, she could have been accommodated by having her name removed from the forms, but that too was not adequate for her.⁴¹ If accommodation is available, but the person seeking accommodation refuses to accept available accommodations and insists on accommodations that would directly and materially have a negative impact on third parties, that individual cannot be accommodated.

The second parameter is a natural corollary to the first parameter. If there is no one else who can issue a marriage license or perform a civil ceremony without delay there should be no accommodation. This could occur because only one person is authorized to issue the license or perform the ceremony, as in the case of a small county office, or it could occur because everyone authorized to do so seeks an exemption. The North Carolina and Utah laws require that someone be available to issue the license or perform the ceremony so that this problem is avoided. The Utah law expands the range of officials who can perform these duties to help facilitate this,⁴² and the North Carolina law sets up a system that could provide immediate backup in situations where exemptions are given.⁴³

The one accommodation that is not available is to deny or limit access to marriage licenses (and by analogy civil ceremonies). This is a logical corollary to the Supreme Court's decision in *Obergefell*,⁴⁴ and a point specifically spelled out in Judge Bunning's opinion in the Kim Davis case.⁴⁵ Allowing such an accommodation would violate the fundamental rights of couples denied the licenses. The fact that the couples might go to other

2015).

³⁹ *Miller v. Davis*, Civ. Action No. 15-44-DLB, at 1 (E.D. Ky. Sept. 8, 2015), www.justsecurity.org/wp-content/uploads/2015/09/bunning.lift_.pdf (“[F]ive of her six clerks stated under oath that they would comply with the Court’s Order and issue marriage licenses to all legally eligible couples.”).

⁴⁰ *Davis*, 2015 WL 4866729, at *3 (she was not willing to allow it after one clerk agreed to issue licenses).

⁴¹ *Miller v. Davis*, Civ. Action No. 15-44-DLB, at 1 n.1 (E.D. Ky. Sept. 8, 2015), www.justsecurity.org/wp-content/uploads/2015/09/bunning.lift_.pdf (“Plaintiffs marriage licenses have been altered so that ‘Rowan County’ rather than ‘Kim Davis’ appears on the line reserved for the name of the county clerk, [and] Plaintiffs have not argued that the alterations affect the validity of the licenses.”).

⁴² UTAH CODE ANN. §§ 17-20-4(2), 30-1-6 (West 2015) (requiring that a county clerk or designee be available during business hours to solemnize a legal marriage and adding this to the list of those who may solemnize marriages).

⁴³ N.C. GEN. STAT. ANN. §§ 51-5.5(a)–(c), 7A-292(b) (West 2015).

⁴⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

⁴⁵ *See Davis*, 2015 WL 4866729, at *7–8.

counties does not solve this problem.⁴⁶ Since there is a fundamental right to marriage, and that right cannot be denied to same-sex couples, it follows that limiting the times and places that right can be effectuated in order to preclude same-sex couples from receiving marriage licenses in a given location violates the fundamental right and denies the couple equal protection of the law.

There is no constitutional basis for doing so under the Free Exercise Clause in this context because marriage laws are generally applicable.⁴⁷ Therefore, any countervailing free exercise right would arise under a statute such as a RFRA, under a state constitution, or as a matter of permissible accommodation. The Supremacy Clause of the United States Constitution answers any doubts as to which law prevails when a federal constitutional right is violated by federal statute, state constitution, or state law.⁴⁸ The right under the U.S. Constitution prevails.⁴⁹ Even if this were not the case, the government would have a compelling interest in upholding the U.S. Constitution under a state RFRA, and allowing accommodation so long as someone can perform the relevant duties. Moreover, denying accommodation where someone else could not perform the relevant duties under state law seems narrowly tailored to meet the interest in upholding the U.S. Constitution.

The third parameter is quite interesting. It raises the question of “facilitating evil,” which is a major focus of conscience claims generally, and an issue addressed in great detail in *Freedom’s Edge*.⁵⁰ What happens when a county clerk or other government official does not want his or her name on marriage licenses issued to same sex couples? The Kim Davis case raised this issue. In that case, however, two things kept this issue from being the primary focus.

First, the state Attorney General and the Governor⁵¹ have said that licenses altered by Davis to remove her name are valid under state law.⁵² This seems consistent with the state law governing marriage licenses,⁵³ but

⁴⁶ *Id.* at *6–7.

⁴⁷ *See Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

⁴⁸ U.S. CONST. art. VI, cl. 2.

⁴⁹ *Id.*

⁵⁰ RAVITCH, *supra* note 4, at ch. 3.

⁵¹ References to the Attorney General and Governor are to those from the Beshear administration, which ended on December 8, 2015. The new administration has implemented some changes, a discussion of which is beyond the scope of this Essay.

⁵² Eliana Dockterman, *Kim Davis’ Lawyers Argue Altered Marriage Licenses Are Valid*, TIME (Oct. 13, 2015), <http://time.com/4072544/kim-davis-marriage-licenses> (noting State Attorney General and Governor have approved the altered licenses as valid).

⁵³ KY. REV. STAT. ANN. § 402.100(1)(c) (West 2006) requires the use of a form prescribed by the state Department of Libraries and Archives, but only requires the signature of the “county clerk *or*

one could read the state law to require licenses to have the clerk's name on them.⁵⁴ The Kentucky Governor and Attorney General's reading seems to be both the better legal interpretation and the best practical approach.⁵⁵

Second, Davis initially refused to allow other clerks in her office to issue the licenses, which made whether her name appeared on the licenses secondary to the question of issuing the licenses. The questions were certainly intertwined. The fact that Davis' name would be on the licenses was one of the reasons she refused to allow others in her office to issue the licenses. She also initially believed that if her name were removed from the licenses they would be invalid, although she later changed this position.⁵⁶ Davis was initially wrong on the latter point, but the reason for parameter number three is to assure that where a clerk is willing to allow others in her office to follow the law, concerns about having her name on a document that violates her fundamental religious tenets can be accommodated.

The best way to approach this would be to allow just the name of the county, or a state office, to be on marriage licenses. This is, of course, a question of state law. It may be impossible to accommodate a clerk who wants her name removed if the state requires the name of the clerk to be on the license for it to be valid. If the state does not require the clerk's name to be on marriage licenses, even where the practice is to include the name, an objecting clerk should be accommodated in taking his or her name off of marriage licenses, so long as it is done on all licenses and not just those for same-sex couples.

The reason for allowing this accommodation, where doing so does not directly and materially harm others, is to protect the religious freedom of someone who cannot do something that violates a core tenet of their religion. It is important to accommodate these sorts of concerns so long as they can be accommodating without materially harming others; lest we impose our values on people with different values and traditions.⁵⁷ Of course, the removal of the name must be applied equally to all marriage

deputy county clerk issuing the license." Therefore, if the state Department of Libraries and Archives does not require the name of the clerk to be on the form, removal of the name should not be a problem.

⁵⁴ KY. REV. STAT. ANN. § 402.080 (West 2006), requires that the license be issued by "the clerk of the county." § 402.100(1)(c) suggests that this might include deputy clerks, but one might argue that it must be the County Clerk him or herself. Moreover, § 402.100(3)(a) requires that after the ceremony is performed a certificate must be delivered by the person performing the ceremony and that the certificate must include "the name of the county clerk under whose authority the license was issued." Again, this could be interpreted to include the deputy clerk's when the county clerk refuses to issue licenses or have her name on the licenses, a position with which the governor and state attorney general seem to agree, see *supra* note 52, and accompanying text, but one could argue against this interpretation under the statute.

⁵⁵ See Dockterman, *supra* note 52, and accompanying text.

⁵⁶ *Id.* (noting State Attorney General and Governor have approved the altered licenses as valid).

⁵⁷ RAVITCH, *supra* note 4.

licenses and could only be done if licenses issued without the name would remain valid.

The fourth parameter is a matter of common sense. If the main duty of an official is to issue marriage licenses or perform civil ceremonies, and the official cannot do so based on religious objections, there could be no accommodation. One option in this context, at least where the official is not elected, would be to relocate the employee. This would be at the discretion of the agency and would need to be done without negatively impacting others. For example, as where someone else in the office wants to perform the objecting employee's job and the objecting employee can be transferred without harming other employees. In the case of officials elected to do that specific duty, however, performing the duty equally for all citizens or stepping down are the only options allowed short of violating the Constitution.⁵⁸ As a practical matter this may rarely come up because county clerks and civil magistrates often perform many functions, only one of which is issuing marriage licenses or performing civil marriage ceremonies. In these cases, parameters one and two would govern.

The fifth parameter is both important and problematic. It is important due to the severity of the dignitary harm that can be fostered in situations where a government official seeks out media attention for the denial of service to citizens or where the official directly confronts the citizens in a disrespectful manner. As I have explained elsewhere, the mere existence of potential dignitary harm is not enough to deny exemptions.⁵⁹ Yet, in some situations the dignitary harm is severe and exacerbated by the behavior of the government official(s) who seek religious exemptions.⁶⁰ In these cases, as opposed to situations where a government official is accommodated and simply has someone else perform the duty or where the government official tells the citizens that he or she cannot perform the duty but will immediately get someone who can, the dignitary harm caused to the citizens would be direct and material.

This parameter is problematic because we are dealing with issues that could impact freedom of speech. Here, however, the fact that we are dealing with government officials and employees helps answer the question. The Supreme Court has long drawn a distinction between government officials and employees speaking as private citizens on matters of public importance

⁵⁸ Cf. *Miller v. Davis*, Civ. Action No. 15-44-DLB, 2015 WL 4866729, at *3 (E.D. Ky. Aug. 12, 2015) (noting that failure to issue the licenses or allow others to do so is unconstitutional).

⁵⁹ RAVITCH, *supra* note 4, at chs. 2–3.

⁶⁰ Cf. Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2574–79 (2015) (recognizing that direct confrontation can increase dignitary harm, but still suggesting that dignitary harm more generally must be addressed).

and speaking in their capacity as government officials or employees.⁶¹ When speaking in their capacity as government officials or employees speech can be limited. While government officials or employees speak as private citizens on matters of public concern, however, their freedom of speech is more carefully protected.⁶²

Here, the very issue arises from performance of government duties so any speech involved would be in the actors' capacity as government officials or employees. Therefore, if the government official or employee contacts the media to announce that he or she will not serve same-sex couples, or the official or employee confronts same-sex couples in a disrespectful way, the employee or official is speaking in his or her capacity as a government official or employee. Therefore, such speech can be limited. In this case the limitation would result in the denial of an accommodation because of the harm inflicted on citizens. Simply saying, "I cannot help you with that; I will get someone who can," is not the sort of thing that would raise these concerns.

What about the Kim Davis situation? Kim Davis did not make the initial contact with the media, so as an initial matter the problem was that she violated parameters one and two. As things progressed, however, she and her lawyers called additional attention to the situation. This creates a sort of chicken or the egg problem. Had the media not already been paying attention to her case perhaps this would violate parameter five, but since the media was already focused on the case it is a tougher call. Her direct contact with the couples she refused to serve, however, would violate parameter five. She did more than say something like, "Sorry, I can't serve you, I will get someone who can." She refused to allow anyone to serve these couples, and she made sure the couples knew why in no uncertain terms.⁶³

This is significant because when Davis refused to issue marriage licenses on the basis of her religious objection to same sex marriage she made clear that it is because she thinks same-sex marriage is a sin, and she said so in her capacity as a government official. The fact that she denied licenses to all couples, whether same sex or not, does not change the analysis, because her reasons for doing so were openly and directly based on her objection to same sex-marriage. Moreover, she confronted same-sex couples, and even though she did not act viciously or in an openly mean-

⁶¹ *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Connick v. Myers*, 461 U.S. 138 (1983).

⁶² *Id.*

⁶³ *Miller v. Davis*, Civ. Action No. 15-44-DLB, 2015 WL 4866729 (E.D. Ky. Aug. 12, 2015); WKYT, *Same Sex Couple Confronts Kentucky Clerk*, N.Y. TIMES VIDEO (Sept. 1, 2015), www.nytimes.com/video/us/100000003885415/same-sex-couple-confronts-kentucky-clerk.html (Davis says clearly that she is denying the license based on "God's authority.").

spirited manner towards same-sex couples, she denied them the license because she viewed their exercise of their constitutional rights as a sin and openly said so. Therefore, she violated parameter five. The sort of dignitary harm caused by such a direct refusal and denunciation by a government official is different from a situation where a government official simply asks someone else in the office to perform a duty.

It may be that in the latter situation the couple knows, or can easily figure out, the reason. As a result, they may feel some sense of dignitary harm, or they may simply respect the rights of the clerk and view the situation as part of living in a pluralistic society. As I have written elsewhere, such an indirect dignitary harm should not be a basis to deny a religious accommodation.⁶⁴ When the government official directly confronts citizens in the manner Kim Davis did, the situation reaches a different level and would violate parameter five. It may also violate the Establishment Clause.

CONCLUSION

Religious freedom and same-sex marriage need not conflict, even in contested contexts like requests for accommodation by government officials. Religious accommodations can and should be given where doing so would not delay service or lower the level of service provided same-sex couples. In some contexts, such as where there is only one official who can perform a specific function, this may mean that the official cannot be accommodated, because the accommodation would infringe on the fundamental rights of same-sex couples.

The Kim Davis case is a bad example because she made herself almost impossible to accommodate without violating the rights of citizens. Yet, for every Kim Davis there are numerous government officials who would welcome accommodations such as allowing others in the office to perform the duties to which they object or having their name removed from forms so long as the forms remain valid under state law. Both of these accommodations rejected at one point or another by Davis. Recent laws in North Carolina and Utah demonstrate it is possible to accommodate religious freedom claims without delaying or lowering the level of service provided to same-sex couples. These laws are not perfect, but they provide excellent and workable proof of concept.

⁶⁴ RAVITCH, *supra* note 4.