SYMPOSIUM - RELIGIOUS LIBERTY AND LGBTQI RIGHTS: FINDING THE RIGHT BALANCE

RUTH BADER GINSBURG LECTURE

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Thank you for inviting me to give the Annual Ruth Bader Ginsburg Lecture. Ruth Bader Ginsburg is an icon on so many dimensions – her advancement of civil rights, especially for women; her passion in holding true to her values; and her incredible legal mind – to name just a few. It is an incredible honor to be giving this RBG lecture.

And thank you for sponsoring a talk and comment session on seeking the right balance between religious liberty and LGBTQI rights. I started grappling with this issue many years ago.

In an article I published 13 years ago, in 2006, titled *Moral Conflict and Liberty: Gay Rights and Religion*, I stated:

> I want to make transparent the conflict that I believe exists between laws intended to protect the liberty of [LGBT] people so that they may live lives of dignity and integrity and the religious beliefs of some individuals whose conduct is regulated by such laws. I believe those who advocate for LGBT equality have downplayed the impact of such laws on some people's religious beliefs and, equally, I believe those who have sought religious exemptions from such civil rights laws have downplayed the impact that such exemptions would have on LGBT people.[1]

In the article, I set forth a legal and conceptual theory for analyzing these conflicts and I then offered some ideas on resolving certain of these conflicts, although certainly not all of them. I then stated:

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1. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 63 (2006).

> I have no illusions that either LGBT rights advocates or religious freedom advocates will decide I have offered the correct resolution. But my primary goal in this piece is simply to argue that this conflict needs to be *acknowledged* in a *respectful* manner by *both* sides, and then *addressed* through the legislative processes of our democratic system. Whether my particular resolution is ultimately accepted feels less important to me than helping to foster a fruitful conversation about possible resolutions.[2]

That's what I said 13 years ago. I would not say that this past year of controversy over my confirmation to a third term on the EEOC has been marked by the type of serious and respectful conversation that these issues deserve. To the contrary, most of the statements that have been misconstrued by my opponents to paint me as an enemy of religious liberty have been taken from this 2006 article. But to echo the last sentence of the paragraph above – I believe my not getting confirmed is way less important than continuing to talk about and resolving these conflicts. In that spirit, therefore, I welcome the opportunity to deliver a lecture that can go beyond the buzzwords and the headlines.

There are the three premises that I believe should structure this conversation. I believe these premises are implicit in the two paragraphs I have just provided, but let me make them explicit:

First, we as a society should protect religious liberty and pluralism. Our courts should do that through their interpretation of our federal and state Constitutions and the people should do that through their elected representatives enacting legislation.

Protecting religious liberty and pluralism means protecting the ability of individuals to hold their religious beliefs and engage in their religious practices without adverse consequences, and it also means protecting their ability to constitute religious associations through which they can practice their religious beliefs and can transmit their beliefs to the next generation. (And, of course, lack of religious belief is a form of religious liberty as well.)

The second premise is that we should ensure that all individuals are able to live lives of safety, integrity and honesty regardless of their race, ethnicity, sex (under which I include sexual orientation and gender identity), religion, disability, or age. A foundational component of such a life is being free of discrimination based on any of those

2. *Id.* at 64.

characteristics and the ability to constitute associations that reflect and transmit these values of non-discrimination, safety, integrity and honesty. Here, too, our courts should achieve this goal through their interpretation of our federal and state Constitutions, and the people should achieve this goal through their elected representatives enacting legislation.

My third premise is that a conflict can sometimes arise between these two commitments – the commitment to religious liberty and pluralism and the commitment to equality without regard to the characteristics I noted above. Pretending this conflict does not exist when, in fact, it does—is irresponsible and ultimately harmful to society. We should be open to learning about the conflict when it exists, to grappling with it once we recognize it, and to coming up with the best ways to resolve it. This can be complicated, messy and hard. But that's not a reason not to do it. Moreover, we need to engage in this hard work with a "generosity of spirit" – with a commitment to imagining what life is like for someone on the opposite side of the line – or on the opposite side of what can sometimes feel like a chasm.

I want to give you a bit of autobiographical information to explain how my interest in acknowledging these conflicts and my desire to deal with them in a respectful manner derives from my lived experiences. From my childhood until the age of 18, I was a deeply religious and practicing Orthodox Jew. Religion shaped my family, my community, my studies – indeed, it is not an overstatement to say that it defined my life. I loved that life. I loved the community I lived in, and I loved the values and practices of Orthodox Judaism.

At age 18, I lost my faith in God. It was a traumatic experience. It upended everything. It changed who my friends were; it changed whom I felt I could date; it ultimately changed what I studied and the profession I chose to enter. It did not (and I think this is important) change the close relationship I had with my father – an Orthodox Jewish Rabbi and Holocaust survivor—who never rejected me because of my decision to leave the practicing religious life.

A year later, when I was 19, I realized I was a lesbian. That was actually much less traumatic. It was more a moment of – "oh, that explains things." I have been an out, proud, and practicing (to the extent possible) lesbian since then. Again, this did not change the relationship I had with my father, who accepted my partners and my life over the years. I have been able to live a life of integrity and honesty, from the first day I realized I was a lesbian. With one exception, I have never been closeted – not to my immediate family,

not to my friends, not at my workplace. (The one exception was during the year I clerked for Justice Blackmun. I talk about that in the 2006 article I've referenced, so you will have to read that article to get the story.)

I give you this autobiographical information because when I come down on a particular side of the balancing question that is more protective of religious liberty than it is of anti-discrimination protection for LGBT people, or when I come down in a manner that is more protective of anti-discrimination protection for LGBT people than for religious liberty, it is not because that is necessarily the right policy position. It is because it's the position that feels right to *me* based on how I experienced life as a practicing Orthodox Jew until I reached the age of 18, and how I have experienced life as a practicing lesbian for the past 40 years. And perhaps because I have lived both lives, I feel committed to not characterizing those who disagree with me as either intolerant or bigots.

Now to the core of the issue – what type of conflicts can arise between a commitment to religious liberty and pluralism and a commitment to equality based on the characteristics noted above?

Before I begin, I want to acknowledge and give thanks to two people with whom I have discussed these issues many times over the years – including just in the past few days leading up to this lecture. They are Professor Nan Hunter, my spouse, and Jenny Pizer, a lawyer at Lambda Legal Defense Fund. Both Nan and Jenny have disagreed with some of my positions over time. But through serious and thoughtful conversation with them, I feel I have come to better understand their positions and to have incorporated some of their ideas into mine. (They, of course, should not at all be presumed to agree with everything I'm now about to say!)

To address these complex issues, I recommend that we identify – and distinguish between—four locations in which religious beliefs and practices can play out in this manner.

In the first location, we have ***individuals*** who practice a religious faith and are seeking accommodations from others in the private sector. These individuals are not seeking an accommodation from the government in terms of an exemption from an otherwise neutral law. Rather, they are seeking affirmative legal protection from the government that will get them accommodations from someone in the private sector who has power over them. The most salient example of this is an employee who is seeking an accommodation from an

employer because the person believes that carrying out some aspect of the job harms or burdens his or her religious belief or practice.

In the second location, we again have ***individuals*** who practice a religious faith, but in this location, they are seeking an exemption from the government from an otherwise neutral law. This can be an exemption from a non-discrimination law so they can fire or refuse to hire an LGBT person, an exemption from a public accommodations law so they don't have to bake a cake for a gay couple getting married, or an exemption from a law that prohibits leaving items in a wildlife refuge so they can leave food for migrants crossing to this country illegally. Whatever the particular situation, these individuals are claiming that their right to religious liberty should override the government's interest in enacting the law at issue.

In the third location, we have **religious institutions** (not individuals) that have employees that carry out a **ministerial function** for the religion. The archetype for this type of institutions would be a church, synagogue or mosque and the archetypal job would be a priest, pastor, Rabbi, Iman, or another religious position of that kind.

In the fourth location, we again have **religious institutions** (not individuals)**, as well as entities controlled by religious organizations**, such as religiously-affiliated schools or hospitals. Within these entities, a range of jobs may exist. Some of these jobs may seem clearly connected to the religious mission of the entity, others may seem marginally connected, and others might seem completely disconnected from the religious mission. The entities themselves can be quite different as well. They can range from a small Christian college to a large Jesuit law school, from a large Catholic hospital to a small group offering therapy sessions. Some of these entities might receive state or federal funding; others may eschew such funding.

These entities might argue that they should be permitted to discriminate in employment on any of the characteristics listed above, if doing so was necessary to preserve their religious character. Similarly, they might argue that they should be permitted to discriminate against customers, clients or visitors based on any of the characteristics enumerated above, again because doing so was necessary to preserve their religious character.

Where the balance should be struck between the principle of protecting religious liberty and pluralism, and the principle of non-discrimination, should be different based on the location in which the need for balancing arises. I map out these four locations, therefore, to

help sharpen and clarify our thinking as we consider what the correct balance should be.

Mapping out these locations serves another purpose as well. We must highlight the fact that these locations should not be conflated. It should be obvious that the balance one strikes in one location should not automatically be assumed to extend to the balance one would strike in a different location. So, for example, one can believe that an individual religious person who owns a funeral home should not be permitted to fire a transgender funeral director, but not believe that religious liberty should be eradicated across the country in all of these locations.

Those who want to undermine a thoughtful conversation about these issues, often choose—as a deliberate, calculated matter—to conflate these locations and extrapolate the choice of balancing made in one location to all the other locations. I call this extrapolating and catastrophizing. This type of conflation is disingenuous and irresponsible because it makes the serious and thoughtful conversation that we need to have way more difficult.

So, on to the serious – and I hope, thoughtful – conversation that reflects the realities of these four locations.

Let's start with the first location – where we have individuals who practice a religious faith and are seeking accommodations from others in the private sector. As I noted, the most salient example of this is the person who seeks an accommodation from an employer because the religious individual believes that carrying out some aspect of the job harms or burdens the individual's religious belief or practice.

We have a federal law – Title VII of the Federal Civil Rights Act of 1964[3]—that prohibits private employers from discriminating against applicants or employees based on their religious beliefs or practices. Through guidance first issued by the EEOC in the 1960s, and then codified by Congress, this non-discrimination rule includes an affirmative obligation on the part of employers and unions to accommodate a person's religious belief or practice (so as to remove the burden on the person's beliefs or practices) as long as the accommodation does not impose an undue hardship on the employer.

This strikes the appropriate balance between ensuring that religious people can be employed in a range of jobs while adhering to their beliefs and practices, and ensuring that employers can get the

[3] 42 U.S.C. § 2000e-2 (1991).

necessary work done. The EEOC has been a leader in protecting the religious liberty of employees in these types of situations. The agency has brought cases successfully challenging rules ranging from a ban on head coverings (which can burden Muslim women wearing a hijab or Orthodox Jewish men wearing a yarmulke), to a ban on facial hair (that can burden Sikh men), to a requirement that women must wear pants on the job (which can burden women whose religion requires that they wear only skirts), to a refusal to let employees rearrange schedules in a manner that would accommodate religious holidays and observances.

At the moment, the standard of what is an "undue hardship" for making an exception to any of these rules is quite low – anything more than "de minimus" difficulty would get the employer off the hook. (That standard is a result of a Supreme Court decision in *TWA v. Hardison*,[4] not based on language in the law itself.) But even with that standard, the EEOC has been very successful in its efforts to get accommodations for religious individuals. There is an effort, which I support, to raise the standard for "undue hardship" to the same one that exists in the ADA[5] for people with disabilities: that is, the accommodation must pose a "significant difficulty or expense" in order for the employer to avoid the obligation of making the accommodation.

Regardless of the standard that is used, I believe there are some accommodations that should not be made – even if the absence of the accommodation burdens an individual's religious belief or practice. And, in this day and age, these situations can derive from the (often sincerely held) belief of some religious people that a transgender person, or a practicing homosexual, is violating G-d's law.

For example, I do not believe one should accommodate a religious employee who believes his religion mandates him to berate the gay employee to change his or her sinful ways or to harass the trans employee who uses the appropriate bathroom for her gender identity. This is a judgment call. It is a subjective judgment call. But I believe that, in this type of case, the principle of equality should prevail over the principle of accommodating the religious belief. LGBT employees need to be able to work in a non-harassing environment. When religious people enter the realm of employment, they should be expected to adhere to certain codes of conduct.

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[4] TWA v. Hardison, 432 U.S. 63, 74-76 (1977).
[5] 42 U.S.C. § 12111(10)(A) (2008).

However, a religious person who believes a transgender person or a practicing homosexual is acting in a sinful manner should be permitted to hold and express those views outside of the workplace – without fearing adverse consequences within the workplace. A person should be able to write a letter to the editor opposing marriage for same-sex couples, or participate in a rally opposing LGBT rights, and not worry about losing his or her job.

Similarly, some religious people may feel that they are being complicit in sin if they bake a cake celebrating a marriage between a same-sex couple. Here is my judgment call on that. If the bakery has five employees baking cakes, and a gay couple may explicitly be told by one of the employees that she won't bake the cake for them, but someone else will – then to me, the harm to the dignity of the gay couple outweighs the need to accommodate the religious employee. That employee may, in fact, need to get another job.

But if there is a huge bakery in which people come in and put in their orders electronically or through a front desk and the orders then randomly get sent to employees who are baking – my judgment call is: let's see what we can do to accommodate the one religious employee who doesn't want to bake the cake that says "Congratulations Kevin and John on your marriage!" My initial idea was to simply allow that person to pass the order on to someone else. Another idea, suggested by Jenny Pizer, is to give the person the option of not baking any wedding cakes at all. That way, the person is able to keep her job (unless, of course, the business bakes only wedding cakes), but the employer is not allowing, on an ongoing basis, a communication from one employee to others that some people's marriages are wrong.

By definition, these will be case by case situations and they will require judgment calls. But law often requires individual assessments. If the guiding principle is that the ability of the LGBT person to be served with dignity must be maintained, there will be some situations where the religious person can be accommodated and others in which the accommodation would not be appropriate.

Now let's turn to the second location on the map. Here we again have ***individuals*** who practice a religious faith, but in this location, they are seeking an exemption from the government from an otherwise neutral law. If it's an exemption from an employment non-discrimination law, these individuals are the employers. If it's an exemption from a public accommodations non-discrimination law, these individuals control the business or non-profit entity that is operating in the stream of commerce offering a range of goods and

services. And if it's an exemption from a rule that prohibits leaving anything behind in a wildlife refuge, they are just ordinary people with no particular power.

Here is how I would approach the requests for exemptions in these situations:

First, unless there is reason to suspect fraud, I would defer to the person's experience of the burden on his or her religious belief. In the non-discrimination law context, this burden is usually experienced and articulated as "complicity with sin" – rather than the inability to engage in a particular religious practice or hold a particular religious belief. I disagree with those who say that being forced to act in a manner that makes one complicit in sin (for example, as a result of compliance with a neutral non-discrimination law) is not a burden on the religious person. I acknowledge that it is not, technically, a burden on religious practice or even belief. But I understand those who feel they are not being a "good religious person" if they act in a manner that makes them complicit in sin. And, as a matter of respect, I would accept that assertion.

I would adopt the same approach with regard to religious people who feel that their religious beliefs compel them to leave food in a wildlife refuge for individuals who are crossing through that refuge to enter the United States illegally. Unless there is reason to suspect fraud, I would defer to such individuals' experience of the burden on their religious beliefs imposed by a law that restricts leaving anything behind in the wildlife refuge.

The real question, for me, is whether burdening the individual's religious beliefs (as experienced by that person) is nonetheless justified. Although I am ready to be convinced otherwise, at the moment I believe that the government should be required to show that not granting an exemption is the most narrowly tailored way to meet a compelling government interest.

In the case of a law prohibiting employment discrimination, I see no way to grant an exemption to individuals who believe that hiring or retaining in employment an LGBT person burdens their religious beliefs by making them complicit in sin without undermining the entire purpose of the anti-discrimination law. And I believe that laws prohibiting discrimination on the basis of the characteristics noted above always serve a compelling government interest.

Similarly, in cases in which the law prohibits discrimination by public accommodations (either for-profit businesses or non-profit

organizations), providing exemptions from these laws because the businesses or organizations are owned or operated by religious people seems inappropriate. Safeguarding religious pluralism means safeguarding the ability of religious people to gather in protected associations and communities – which we will talk about in a moment. But when religious people enter the stream of public commerce, they have to expect to play by certain rules of the game. Conveying the societal message that LGBT people deserve to be served equally is a compelling governmental interest as much as prohibiting the discrimination itself. Allowing a religious person who owns a business or operates a non-profit organization to send an LGBT person down the street to be served by someone else completely undermines that societal message.

In contrast, I find it inexplicable that the government's interest in ensuring that food and other items not be left behind in a wildlife refuge generally cannot accommodate an exception for food that is left for the limited and specific purpose of ensuring that migrants coming into this country do not starve. And yet, in a recent case, a judge upheld the criminal prosecutions of several religious people who had left food in such a refuge for that purpose based on their religious beliefs. The judge in that case refused to acknowledge the burden on religious belief in that case and did not even try to grapple with whether applying that criminal law was narrowly tailored to a compelling government interest. That is simply wrong.

Now let's turn to the third and fourth locations. The defining aspect of these two locations is that they concern institutions and associations and organizations – not individuals. Therefore, many of them (albeit perhaps not all) constitute the core of religious pluralism – the ability of people of a faith to gather together and form entities through which they can practice their faith and propagate their faith by passing on their beliefs to the next generation. A commitment to religious pluralism must include a commitment to allowing such associations to survive and indeed, to *thrive* – even if the views they hold may be out of step with current societal values and mores.

The third location is small, discreet, and pretty easy to manage. It consists of religious institutions that have employees that carry out ministerial functions for the religion. The archetype for this type of institutions would be a church, synagogue or mosque and the archetypal job would be a priest, pastor, Rabbi, Iman, or another religious position of that kind.

In this location, the commitment to religious pluralism should prevail over the commitment to non-discrimination. At the core of religious pluralism is the ability to set up one's places of worship and to practice one's religion under the ministers of one's faith. If the faith mandates that certain individuals cannot be ministers – whether because of their gender, or race, or disability, or sexual orientation, or gender identity – the government should not interfere with that decision.

Of course, how a minister is defined, and therefore who loses anti-discrimination protection under this broad exemption, is of key importance. In the 2012 case of *Hosanna Tabor v. EEOC*, the Supreme Court weighed in on that question.[6] I know that some of my colleagues were dismayed by the result in that case.[7] I was less so. I think the decision is narrowly tailored to the facts of the case, and there were enough facts in that case (from my perspective) to conclude that the employee in question could be classified as falling under the ministerial exception.[8]

In the fourth, and final, location, we have what I experience as the most muddied and complicated situations. The underlying cause of my difficulty lies in the fact that there are so many different types of entities crammed into this location. There are lots of different neighborhoods in this location – and it's not often clear how to devise rules that will apply to some neighborhoods and not others.

To be more specific about the neighborhoods in this fourth location:

Again, we are focused on associations, organizations, and institutions – not individuals. Some of these institutions are purely religious—for example, a church, a synagogue or a mosque. But these institutions may employ many people besides ministers. And while those who attend the church, synagogue or mosque may be only members of that faith, the institutions might offer services or venues that are open to the general public.

We also have a wide range of organizations, associations and institutions that are officially *controlled* by a religious denomination – even if they are not religious institutions such as churches. These can

6. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188-89 (2012).

7 *See generally id.* at 190-95.

8. *Id*. at 190-92.

run the gamut of a Christian college attended exclusively by Christians of a particular denomination to a Jesuit law school attended by students of all faiths (and no faiths). These can include a large Catholic hospital, a gymnasium run by the Mormon Church, and a theatre company run by a religious association.

Some of these entities may feel pervasively religious by those who are part of them (for example, the very Orthodox Jewish elementary school and high school that I attended), others may feel largely religious, but with a number of secular components (like Yeshiva University college where one of my brothers went), and yet others may seem to have little to no valence of religious control, even if it technically exists. (For example, Cardozo Law School or Albert Einstein Medical School – both of which are part of Yeshiva University.)

Finally, members of a faith may gather into voluntary associations that are not technically controlled by any religious denomination but are, nonetheless, pervasively religious. The classic example for me are religious summer day camps and sleepaway camps. (Both of which I went to during my childhood.) These associations are geared solely to members of the faith and are designed specifically to remove children from secular influences and to reinforce the values of the religion to them and everyone else in the association.

I have come to know, over the past year, many serious religious people who represent a number of these entities who would like to support anti-discrimination legislation for LGBT people—but who also want to get rules in such legislation that would protect the religious character of the entities they represent. I don't necessarily agree with all the rules they suggest. But I appreciate the sincerity in which they are approaching this effort. I also understand the concerns of political LGBT advocates who would like to move forward on a clean piece of legislation that protects LGBT people in a range of arenas and not get caught up with these issues at the outset. As a political matter, they might not be wrong. But given the reality on the ground, I think we ultimately have to grapple with these questions.

In this fourth landscape, I do not have absolute answers. I have a lot of questions, and I have a few gut feelings.

I think an institution, organization or association, whether officially controlled by a religious denomination or constituted by members of a faith for which the religious character of that entity is important, should have significant discretion in hiring people who

reflect and maintain that religious character. I think such an entity should have discretion to designate job positions that are important for the entity's religious character and should be permitted to hire only people of its own faith for those positions and only people who meet the tenets of that faith – however the entity wants to define that. For example, for those religious entities, they may choose to hire for those positions only Jews, or Christians, or Hindus – and no LGBT Jews, or LGBT Christians, or LGBT Hindus. Under this approach, those entities would be permitted to engage in such discrimination and would suffer no adverse consequences for doing so.

There are many entities that are controlled by religious denominations but who hire people of all different faiths, as well as those with no religious faith. For those entities, it is more difficult to argue that they need an exemption from a non-discrimination rule in order to maintain their religious character. However, even in this arena, I would make a further exception.

If an institution is controlled by a religious denomination (or constituted by members of a religious faith), and serves only (or primarily) members of its own faith, and where a significant purpose of the institution or organization is to pass on the values of the faith, then that entity should be able to establish rules of conduct for all of the jobs in that entity – even if that entity fills some of the jobs with members not of its faith. For example, a Jewish Yeshiva high school may hire a non-Jewish person to teach English, or a Catholic college may hire a non-Catholic professor to teach history. Nevertheless, that entity should be permitted to set forth certain rules of conduct required for those positions – even if some of those rules (e.g., no same-sex sexual conduct) would discriminate against LGBT people. But there needs to be clear notice of those rules up front to anyone who seeks employment in such a setting.

These are some thoughts with regard to employing individuals within those entities. A similar approach could govern the public accommodations aspect – that is, when can the entity place restrictions on who will be accepted as customers or participants?

For many religious associations, those who participate in gatherings or groups are the ones that constitute the religious character of the enterprise. Therefore, if a religious entity caters solely to members of its own faith, it should be permitted to set the rules of conduct for participation that will ensure the religious character of the enterprise will be maintained, even if some of those rules (e.g., no transgender people and no practicing homosexuals) will also preclude

LGBT people from participating. However, if the entity, even if technically controlled by a religious denomination, provides services or membership to the general public, then the ordinary rules of non-discrimination should apply to those entities.

If a religious institution or organization decides to accept governmental funds, then the calculus should be different. Absent good reason otherwise, such entities must expect to play by the same rules of discrimination governing both employment and public accommodation.

Here too, though, I would suggest one modification—again, focused on the need to ensure that religious communities can pass on their beliefs to the next generation. Under existing civil rights law, if students in a school receive federal loans (or federally-backed loans), that school is considered to have received federal funding. I would maintain that as a general rule. However, I would not apply it to religious colleges and universities that wish to take advantage of the exemptions I described earlier. The fact that their students have received federal loans (or federally-backed loans) should not remove their right to access those exemptions.

As I said at the outset, I find this location to be the hardest one to navigate. Let me also repeat that these are simply my current thoughts in this area. I do not mean these ideas to be taken as the absolute answers. To the contrary. We need thoughtful and serious people to sit down together – and pull out what seems right about these proposed rules and what seems wrong. I offer these ideas as a starting point for a conversation, not an end point.

All of us should feel a stake in this conversation. All of us should engage in the hard work of supporting religious liberty and pluralism and supporting non-discrimination on the basis of sexual orientation and gender identity. I ask you to join the effort of grappling with these questions with a true generosity of spirit. We owe it to each other to reach across what may sometimes seem like a chasm, but really is not.

This is hard work. There is no doubt about that. But it is essential work. It is compelling work. It is, at bottom, work that we *must* do.