GAY RIGHTS, RELIGIOUS ACCOMMODATIONS, AND THE PURPOSES OF ANTIDISCRIMINATION LAW

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I. INTRODUCTION

In 2006, an Albuquerque photographer declined to photograph a same-sex wedding, citing religious objections. The couple sued her for discrimination and won.[1] Cases like this one present a conflict between gay rights and religious liberty.[2] Religious conservatives feel that it would be sinful for them to personally facilitate same-sex marriages, and they have sought to amend the laws to accommodate their objections. These efforts have met fierce resistance. In Arizona, the only state where a legislature

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1. Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶¶ 2–4, 309 P.3d 53, 59, *cert. denied*, 134 S. Ct. 1787 (2014). For a detailed discussion of the case, see *infra* text accompanying notes 6–14.

2. For other widely publicized examples, see *infra* note 6.

has passed a religious accommodation law,[3] the governor vetoed it in response to enormous national public pressure.[4]

The resistance is largely unnecessary. Gay rights advocates have misconceived the tort of discrimination as a particularized injury to the person, rather than the artifact of social engineering that it really is. Religious conservatives likewise have failed to grasp the purposes of antidiscrimination law, and so have demanded accommodations that would be massively overbroad.

If those purposes are carefully disaggregated, the result is different from what advocates on either side have demanded. Businesses that serve the public, such as wedding photographers, should be exempted, but only if they are willing to bear the cost of publicly identifying themselves as discriminatory. That cost will make discrimination rare almost everywhere. Employers—some of whom also object to recognizing same-sex marriages—should not however be allowed to discriminate in providing benefits for their employees, such as denying health insurance to same-sex spouses. You can find another wedding photographer, but you only have one insurance plan.

This issue exposes a huge flaw in progressive thought, one that entrenches the very inequalities the left seeks to combat. The individualized injury-based conception of antidiscrimination law has not only produced excessively harsh treatment of religious conservatives. It has also entrenched racial and gender subordination, by imagining discrimination to be the conduct of a few bad actors rather than a structural wrong that demands structural remedies. If discrimination is fundamentally a wrong to individuals, then group inequalities do not matter unless they are intended. This vision misconceives the purpose of antidiscrimination law. Those inequalities, not individual acts of discrimination, are the real evil that the law aims to remedy.

I have been a gay rights advocate for more than twenty-five years.[5]

3. S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), *available at* http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf.

4. Ariz. Governor Jan Brewer, S.B. 1062—Press Conference (Feb. 26, 2014), *available at* http://archive.azcentral.com/ic/pdf/brewer-1062-prepared-remarks.pdf. This vetoed Arizona bill is discussed *infra* Part II.B.

5. *See* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 146–76 (1996); Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights: A Reply to Edward Stein*, 49 UCLA L. REV. 519 (2001), *reprinted in* 1 DUKEMINIER AWARDS 49 (2001); Andrew Koppelman, *DOMA,* Romer*, and Rationality*, 58 DRAKE L. REV. 923 (2010); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Andrew Koppelman, *Is Marriage Inherently Heterosexual?*, 42 AM. J. JURIS. 51 (1997);

Here in this Article, for the first time, I make common cause with my longtime adversaries. I have worked very hard to create a regime in which it's safe to be gay. I would also like that regime to be one that's safe for religious dissenters.

Here is what happened in Albuquerque.[6] In September 2006, Vanessa Willock sent an email to a business called Elane Photography, asking it to photograph her commitment ceremony. She indicated that she and her partner were a same-sex couple.[7] Although same-sex marriages were not then legally recognized in New Mexico, that did not stop same-sex couples from celebrating their unions.[8] She received an emailed refusal, which explained that company policy forbids photographing same-sex weddings. The company's owner, Elaine Huguenin, later testified that facilitating such a ceremony is contrary to her religious beliefs.[9]

Willock then brought a complaint with the state Human Rights

Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431 [hereinafter Koppelman, *Judging the Case Against Same-Sex Marriage*]; Andrew Koppelman, *Sexual Disorientation*, 100 GEO. L.J. 1083 (2012); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131 (2013) [hereinafter Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*]; Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988). I also coauthored amicus briefs in *Lawrence v. Texas*, the Supreme Court case that invalidated laws against homosexual sex, and *Hollingsworth v. Perry* and *Obergefell v. Hodges*, both of which considered a right to same-sex marriage. Brief of Amici Curiae Constitutional Law Professors Bruce A. Ackerman et al. in Support of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 136139; Brief of Amici Curiae William N. Eskridge, Jr. et al. in Support of Respondents, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 840011; Brief of Amicus Curiae Stephen Clark et al., Obergefell v. Hodges, (No. 14-556), 2015 WL 1048436.

6. Other prominent cases highlighting the conflict between gay rights and religious accommodation include: a florist who declined to provide flowers for a same-sex wedding, two bakeries that refused to make wedding cakes, and a clothing store that refused to sell a bridal dress. Associated Press, *Colorado Baker Must Make Cakes for Gay Weddings, Panel Rules*, N.Y. DAILY NEWS (May 30, 2014), http://www.nydailynews.com/life-style/colorado-baker-cakes-gay-weddings-panel-rules-article-1.1811676; Dominic Holden, *Bigotry in Bloom: A Flower Shop Is Refusing to Do Business with a Gay Couple Getting Married—Is That Blatantly Illegal?*, STRANGER (Mar. 13, 2013), http://www.thestranger.com/seattle/bigotry-in-bloom/Content?oid=16232163; Todd Starnes, *Oregon Ruling Really Takes the Cake—Christian Bakery Guilty of Violating Civil Rights of Lesbian Couple*, FOX NEWS (Jan. 21, 2014), http://www.foxnews.com/opinion/2014/01/21/christian-bakery-guilty-violating-civil-rights-lesbian-couple/; Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says: "That's Illegal"*, ABC NEWS (Aug. 19, 2011), http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333.

7. Elane Photography, LLC v. Willock, No. CV-2008-06632, slip op. at 1, 2009 WL 8747805, ¶ 3 (N.M. Dist. Ct. Dec. 11, 2009).

8. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 4, *Elane Photography*, 2009 WL 8747805 (No. CV-2008-06632), 2008 WL 9003694, ¶¶ 14–18.

9. *Id.* at 1–3.

Commission.[10] New Mexico law prohibits discrimination, on the basis of sexual orientation, by businesses that offer their services to the general public.[11] The Commission concluded that the discriminatory policy violated New Mexico's Human Rights Act, and required Elane Photography to pay more than six thousand dollars in attorney's fees and costs.[12] The district court granted summary judgment for Willock, the state supreme court affirmed, and the U.S. Supreme Court declined to hear the case.[13] If Huguenin does not change her policy, she will either have to stop advertising to the public or shut down Elane Photography altogether.[14]

This tension between religious liberty and antidiscrimination protection for gay people has become the topic of a large body of academic and popular literature.[15] The issue is not the consequences of legal

10. *Id.* at 3.

11. *See* N.M. STAT. ANN. § 28-1-7(F) (West 2011) (making it an unlawful discriminatory practice for "any person in any public accommodation to make a distinction, directly or indirectly in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap").

12. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission, *supra* note 8, at 5.

13. Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 10, 309 P.3d 53, 60 (affirming grant of summary judgment in Vanessa Willock's favor), *cert. denied*, 134 S. Ct. 1787 (2014). The U.S. Supreme Court was right to turn away this case, which at that stage in the litigation presented only weak free speech claims that had little to do with the underlying religious liberty question. *See* Andrew Koppelman, *A Zombie in the Supreme Court:* The Elane Photography Cert Denial, ALA. C.R. & C.L. L. REV., *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2455848 (forthcoming 2015).

14. A bakery in Oregon that was sanctioned for refusing to bake a wedding cake did in fact shut down. *Sweet Cakes By Melissa, Oregon Bakery That Denied Gay Couple a Wedding Cake, Closes Shop*, HUFFPOST GAY VOICES (Sept. 2, 2013), http://www.huffingtonpost.com/2013/09/02/sweet-cakes-by-melissa-closed-_n_3856184.html.

15. *See generally* JANET L. FOLGER, THE CRIMINALIZATION OF CHRISTIANITY (2005); ALAN SEARS & CRAIG OSTEN, THE HOMOSEXUAL AGENDA: EXPOSING THE PRINCIPAL THREAT TO RELIGIOUS FREEDOM TODAY (2003); Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206 (2010); Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389 (2010); Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173 (2012); Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236 (2010); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260 (2010); Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J. C.R. & C.L. 123 (2012); Douglas Laycock & Thomas C. Berg, *Protecting Same-Sex Marriage and Religious Liberty*, 99 VA. L. REV. ONLINE 1 (2013); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274 (2010); Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248 (2013); Megan Pearson, *Religious Claims vs. Non-discrimination Rights: Another Plea for Difficulty*, 15 RUTGERS J.L. & REL. 47 (2013); Elizabeth

recognition of same-sex marriage, though it has often been presented that way. As already noted, New Mexico did not recognize such marriages.[16] Religious conservatives are alarmed. "The message a same-sex commitment ceremony communicates is not one I believe," Elaine Huguenin said.[17] "If it becomes something where Christians are made to do these things by law in one state, or two, it's going to sweep across the whole United States . . . and religious freedom could become extinct."[18] Maggie Gallagher worries that those who oppose same-sex marriage will be regarded "as hateful bigots whose beliefs must be suppressed by operation of law."[19]

Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L.J. 703 (2014); Roger Severino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J.L. & PUB. POL'Y 939 (2007); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307 (2010); Marc D. Stern, *Same-Sex Marriage and the Churches*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS, 1 (Douglas Laycock et al. eds., 2008) [hereinafter SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY]; Robin Fretwell Wilson, *The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State*, 53 B.C. L. REV. 1417 (2012); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010); Shannon Gilreath, *Not a Moral Issue: Same Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205 (2010); Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict Between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179 (2009); Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD (May 15, 2006), http://www.weeklystandard.com/Content/Public/Articles/000/000/012/191kgwgh.asp.

16. Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169, 1201 (2012). New Mexico has since recognized same-sex marriage by judicial decision. Fernanda Santos, *New Mexico Is 17th State to Allow Gay Marriage*, N.Y. TIMES, Dec. 20, 2013, at A22, *available at* http://www.nytimes.com/2013/12/20/us/new-mexico-becomes-17th-state-to-legalize-gay-marriage.html.

17. *The Cost of Being a Christian*, ALLIANCE DEFENDING FREEDOM, https://www.alliancedefendingfreedom.org/Home/Detail/4333 (last visited Mar. 20, 2015).

18. *Id*. A recent, widely publicized focus group study likewise finds that American evangelicals regard homosexuality as the harbinger of a culture that marginalizes and despises them. *See* STAN GREENBERG, JAMES CARVILLE & ERICA SEIFERT, DEMOCRACY CORPS, INSIDE THE GOP: REPORT ON FOCUS GROUPS WITH EVANGELICAL, TEA PARTY, AND MODERATE REPUBLICANS 14–15 (Oct. 3, 2013), *available at* http://www.democracycorps.com/attachments/article/954/dcor%20rpp%20fg%20memo%20100313%20final.pdf ("[Evangelical Christians] believe the dominant national culture promotes homosexuality and . . . . has marginalized them ideologically, linguistically, and culturally.").

19. Gallagher, *supra* note 15, at 269. It has also been alleged that the churches that decline to recognize same-sex relationships could lose their tax exemptions under the authority of *Bob Jones University v. United States*, 461 U.S. 574 (1983). *See, e.g.*, Douglas W. Kmiec, *Same-Sex Marriage and the Coming Antidiscrimination Campaigns Against Religion*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 103, 103–04 (the result of *Bob Jones* "frame[s] a possible coming difficulty for churches that remain steadfast in their defense of traditional marriage"); Jonathan Turley, *An Unholy Union: Same-Sex Marriage and the Use of Governmental Programs to Penalize Religious Groups with Unpopular Practices*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 59, 67–68

The battle over same-sex marriage is effectively over.[20] Only a few years ago, Congress seriously considered a constitutional amendment to ban same-sex marriage throughout the country.[21] Now, nationwide recognition of such marriages appears inevitable. According to Gallup, 55 percent of Americans now support same-sex marriage; 42 percent oppose it. The percentage in support has doubled in only fifteen years. There is a sharp generational divide: among those eighteen to twenty-nine years old, 78 percent support same-sex marriages. That number drops steadily with age, to 42 percent of those sixty-five and older.[22] Nate Silver estimates that in 2020, there will be majority support for same-sex marriage in forty-four states.[23]

("Gay rights and same-sex marriage are issues that promise to reignite th[e] [*Bob Jones*] controversy over tax-exempt status."). Douglas Laycock observes, however, that "at least so long as large and historically important churches refuse to recognize gay marriages, it seems . . . unlikely that the executive branch in any jurisdiction would try to revoke tax exemptions over the issue." Douglas Laycock, *Afterword*, *in* SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY, *supra* note 15, at 189, 193. Additionally, a vehement and thorough critic of the *Bob Jones* doctrine found hardly any examples of it actually being used by the IRS to deny an exemption. Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U. KAN. L. REV. 397, 404–07 (2005). As Kmiec acknowledges, the IRS has never extended *Bob Jones* to any discrimination other than race. Kmiec *supra*, at 110.

20. Following the Sixth Circuit's overturning of lower-court rulings in Ohio, Tennessee, Kentucky, and Michigan striking down same-sex marriage bans, the Supreme Court appears likely to resolve the same-sex marriage issue during its 2014 term by deciding the following issues: "(1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same-sex?; (2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" DeBoer v. Snyder, 135 S. Ct. 1040 (2015). Oral argument for the case took place on April 28, 2015. *Supreme Court of the United States October Term 2014: For the Session Beginning April 20, 2015*, Supreme Court (Mar. 5, 2015), *available at* http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApr2015.pdf. For discussion of the oral argument, see Andrew Koppelman, *Traditional Marriage Gets a SCOTUS Amackdown*, SALON (April 29, 2015), http://www.salon.com/2015/04/29/traditional_marriage_gets_a_scotus_smackdown_the_incomprehensible_right_wing_logic_thats_poised_to_go_down_in_flames/.

21. In 2004, both houses of Congress considered a constitutional amendment to ban same-sex marriage in all states. H.R.J. Res. 56, 108th Cong. (2003). In the Senate, the motion to proceed on the amendment failed by a 50-48 vote. Carl Hulse, *Senators Block Initiative to Ban Same-Sex Unions*, N.Y. TIMES, July 15, 2004, at A1, *available at* http://www.nytimes.com/2004/07/15/us/senators-block-initiative-to-ban-same-sex-unions.html. In the House, the amendment failed by "227-186 in favor of the amendment, far short of the 290 votes, or two-thirds of the House, required to adopt it." Sheryl Gay Stolberg, *Same-Sex Marriage Amendment Fails in House*, N.Y. TIMES, Oct. 1, 2004, at A14, *available at* http://www.nytimes.com/2004/10/01/politics/01gay.html?_r=0. Another bill, to deny federal courts the right to hear same-sex marriage cases, passed the House but got no further. Carl Hulse, *House Backs Bill to Limit Power of Judges*, N.Y. TIMES, July 23, 2004, at A19, *available at* http://www.nytimes.com/2004/07/23/us/house-backs-bill-to-limit-power-of-judges.html.

22. Justin McCarthy**,** *Same-Sex Marriage Support Reaches New High at 55%*, GALLUP **(**May 21, 2014), http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx.

23. Nate Silver, *How Opinion on Same-Sex Marriage Is Changing, and What It Means*, N.Y. TIMES: FIVETHIRTYEIGHT (Mar. 26, 2013, 10:10 AM),

Conservative columnist Rod Dreher describes an emerging consensus for the right, "that the most important goal at this stage is not to stop gay marriage entirely but to secure as much liberty as possible for dissenting religious and social conservatives while there is still time."[24] That goal is ambitious, perhaps unrealistically so. Not a single state has a religious accommodation law that would help Elaine Huguenin.[25]

About one in four Americans think, most for religious reasons,[26] that homosexual sex is never morally acceptable.[27] These people are not homophobic bigots who want to hurt gay people. On the contrary, gay people are marginal to their view of the world. Justice Samuel Alito nicely summarizes the position, as it applies to same-sex marriage: "[M]arriage is essentially the solemnizing of a comprehensive, exclusive, permanent union that is intrinsically ordered to producing new life, even if it does not always do so."[28] Whatever the merits of this notion,[29] it is not about gay people. It is focused on the value of a certain kind of heterosexual union.[30]

http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/?_r=0.

24. Rod Dreher, *Does Faith = Hate?: Gay Marriage and Religious Liberty Are Uneasy Bedfellows*, AM. CONSERVATIVE (Oct. 9, 2013), http://www.theamericanconservative.com/articles/does-faith-hate/.

25. The federal circuits are split on whether the federal Religious Freedom Restoration Act ("RFRA") provides a defense against private suits. Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 VA. L. REV. 343, 343–44 (2013). The Texas RFRA expressly grants such a defense, but there appear to be no cases in which it was used against a discrimination suit. Connecticut allowed its RFRA to be used as a defense against a claim of clergy malpractice. Courts in Illinois and New Mexico have disallowed their own RFRAs as defenses in cases involving private parties. W. COLE DURHAM & ROBERT SMITH, 2 RELIGIOUS ORGANIZATIONS AND THE LAW § 10:53 (2013).

26. Frank Newport, *Religion Big Factor for Americans Against Same-Sex Marriage*, GALLUP (Dec. 5, 2012), http://www.gallup.com/poll/159089/religion-major-factor-americans-opposed-sex-marriage.aspx ("Americans who oppose the legalization of same-sex marriage . . . are most likely to explain their position on the basis of religious beliefs and/or interpretation of biblical passages dealing with same-sex relations.").

27. In 2013, 41 percent of Americans thought that homosexual sex was not morally acceptable, compared with 60 percent in 2001. Frank Newport & Igor Himelfarb, *In U.S., Record-High Say Gay, Lesbian Relations Morally OK*, GALLUP (May 20, 2013), http://www.gallup.com/poll/162689/record-high-say-gay-lesbian-relations-morally.aspx.

28. United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

29. For critiques of the claim as it has been presented in secular terms, see Koppelman, *Judging the Case Against Same-Sex Marriage*, supra note 5, at 444–64; Andrew Koppelman, *More Intuition Than Argument*, COMMONWEAL (Mar. 25, 2013), https://www.commonwealmagazine.org/more-intuition-argument (reviewing SHERIF GIRGIS ET AL., WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012)).

30. *See, e.g.*, Rod Dreher, *Sex After Christianity: Gay Marriage Is Not Just a Social Revolution but a Cosmological One*, AM. CONSERVATIVE (Apr. 11, 2013), http://www.theamericanconservative.com/articles/sex-after-christianity/ ("In classical Christian teaching, the divinely sanctioned union of male and female is an icon of the relationship of Christ to His

The existence of gay people is a side issue.[31] The function of marriage law, in this view, is to protect a human good that gay people happen to be unable to realize: marriage laws do not discriminate against them any more than art museums discriminate against blind people.

I think that these people's religious ideas are obviously wrong. But that is what I think about an enormous range of beliefs, religious and other. Most Americans surely agree that some religious beliefs are worthless, harmful, weird delusions. They do not agree about which ones. This is nothing new. It is the chronic condition of the United States, probably the most religiously diverse nation in the history of the world. The way the American regime has coped with this diversity is to treat religion—understood at such an abstract level as to ignore all doctrinal differences—as a good, and to accommodate it where possible.[32]

Some religious beliefs are not only false, but also destructive. Pertinently here, some give transcendent sanction to discrimination and inequality. When this is the case, these types of beliefs must be deprived of their cultural power. With respect to the religious condemnation of homosexuality, this marginalization is already taking place; but, that does not mean that conservatives need to be punished or driven out of the marketplace. There remains room for the kind of cold respect that toleration among exclusivist religions entails.[33]

Both gay people and religious conservatives seek space in society wherein they can live out their beliefs, values, and identities.[34] As with the old religious differences that begot the Establishment Clause of the First Amendment, each side's most basic beliefs entail that the other group is in error about moral fundamentals and that the other's entire way of life, predicated on that error, ought not to exist. Coexistence has nonetheless been achieved in the religious sphere. The United States is a longstanding counterexample to Jean-Jacques Rousseau's dictum that "[i]t is impossible to live in peace with people whom one believes are damned."[35] Religious

church and ultimately of God to His creation."). Thanks to Maggie Gallagher for calling this article to my attention.

31. *See* GIRGIS ET AL., *supra* note 29, at 10–12, 86–93.

32. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY 1–119 (2013).

33. Such toleration is familiar in the United States. In 2003, for example, about 34 percent of Americans believed Christianity to be the one true religion; 17 percent rejected the view that all major religions contain some truth about God. ROBERT WUTHNOW, AMERICA AND THE CHALLENGES OF RELIGIOUS DIVERSITY 190–91, tbl.1 (2005).

34. The parallel has also been explored in Berg, *supra* note 15, and Brownstein, *supra* note 15.

35. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 131 (Roger D. Masters ed., Judith R. Masters trans., 1978).

accommodation is a part of the reason for the American regime's success.

Religious liberty in the United States encompasses action as well as thought. The First Amendment protects "the free exercise of religion." Quakers' and Mennonites' objections to participation in war have been accommodated since colonial times.[36] Sacramental wine was permitted during Prohibition.[37] Today the Catholic Church is exempted from antidiscrimination laws when it denies ordination to women.[38] The question of religious accommodation arises in cases in which a law can allow some exceptions. Many laws, such as military conscription, taxes, environmental regulations, and drug laws, will accomplish their ends even if there is some deviation from the norm they set forth, so long as that deviation does not become too great. In the context of such laws, special treatment is sometimes appropriate.[39]

Our question, then, is whether accommodation is appropriate for businesses that hold themselves open to the public, or whether the costs are too high. In order to determine that, we must examine the purposes of antidiscrimination laws, such as the one Elaine Huguenin violated, and decide whether these would be frustrated by religious exemptions.

Antidiscrimination law has multiple purposes. Canonically, they are the amelioration of economic inequality, the prevention of dignitary harm, and the stigmatization of discrimination.[40] Consider them in turn.

Because antidiscrimination laws' economic purposes are a response to pervasive discrimination, they are not frustrated by discrimination that is unusual. If the law requires religious objectors to identify themselves to the public in order to be accommodated, few are likely to take advantage of that. If gay people are generally protected against discrimination, then a few outliers won't make any difference. Albuquerque has plenty of other wedding photographers from which Vanessa Willock and her partner could

36. Michael W. McConnell, *The Original and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468–69 (1990).

37. *See* National Prohibition Act of 1919, ch. 85, tit. 2, § 3, 41 Stat. 305, 308–09 (repealed 1935) ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, [and] sold . . . but only as herein provided . . . .").

38. Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 1968, 1978–79 (2007).

39. *See* Andrew Koppelman, *Nonexistent and Irreplaceable: Keep the Religion in Religious Freedom*, COMMONWEAL (Apr. 10, 2015), https://www.commonwealmagazine.org/nonexistent-irreplaceable; Andrew Koppelman, *Religion's Specialized Specialness*, 79 U. CHI. L. REV. DIALOGUE 71, 72–79 (2013), *available at* https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Koppelman%20Online.pdf.

40. *See* KOPPELMAN, *supra* note 5, at 1–114; *infra* Part III.

have chosen.

Discrimination is also insulting. However, the dignitary harm of knowing that some of your fellow citizens condemn your way of life is not one from which the law can or should protect you in a regime of free speech. Face-to-face refusals of service, a more targeted and damaging kind of insult, can be prevented if businesses must announce their religious concerns in advance in order to qualify for exemptions. This requirement would confine accommodation to those with the strongest scruples, those who are willing to pay the cost in lost economic opportunities.

The reshaping of culture to marginalize anti-gay discrimination is inevitable. To say it again: The gay rights movement has won. It will not be stopped by a few exemptions. It should be magnanimous in victory.

I have been focusing on public accommodations, but some of the proposed remedies also would allow employers (including for-profit businesses owned by people with religious objections) to deny benefits such as health insurance to same-sex spouses, because here, too, they would be recognizing and facilitating same-sex marriages. Permitting employers to discriminate in the terms of employment, where the employer either provides health insurance for your spouse or does not, presents a very different case. Many commentators[41] have treated the issue in *Elane Photography* as if it were the same as that presented in *Burwell v. Hobby Lobby Stores, Inc.*,[42] in which a group of employers demanded the right to refuse health insurance coverage of contraception. In *Hobby Lobby*, the employers sought to impose their religious views on women who do not share their employers' religious beliefs.[43] Similarly, some employers wish not to provide insurance coverage to their employees' same-sex spouses. In

41. *See* Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154, 175–76 (2014) (listing writers who conflated the two cases).

42. Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751 (2014).

43. *See id.* at 2764–66 (summarizing the employers' religious beliefs forming the basis of their objections to providing their employees with access to contraception); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 52 (2014), *available at* http://www.vanderbiltlawreview.org/content/articles/2014/03/Gedicks-and-Koppelman_Invisible-Women.pdf. The Court (here parting company with the lower court) devised an accommodation that, if implemented, would guarantee that women still got coverage, but this was not what the employer had asked for. Andrew Koppelman, *The Hobby Lobby Decision Was a Victory for Women's Rights*, NEW REPUBLIC (June 30, 2014), http://www.newrepublic.com/article/118488/hobby-lobby-decision-was-victory-womens-rights. Whether it will successfully be implemented remains to be seen. *See* Andrew Koppelman & Frederick Mark Gedicks, *Is* Hobby Lobby *Worse for Religious Liberty Than* Smith*?*, ST. THOMAS J.L. & PUB.POL'Y (forthcoming 2015). No one has suggested any comparable accommodation of employees in the gay rights context.

both cases, that would produce a concrete and focused inequality: those employees must pay extra for what others automatically get. In effect, gay employees would be paid less for the same work. Here, religious accommodations would frustrate the purpose of antidiscrimination law and should be refused.

The stakes of this dispute go beyond the gay rights issue. Resistance to religious accommodation has its source in the political left, much of which, largely as a consequence of disputes over sexual ethics, regards religion as a malign force in the world. Yet the American left has never accomplished anything without religious allies.[44] For those who are most concerned to ameliorate the growing inequality in America, hostility toward religion is a potentially catastrophic error. Accommodation in this context would be a step in the right direction.

Part II of this Article examines the most prominent proposals to accommodate religious dissenters such as Elaine Huguenin. Part III considers whether religious exemptions would frustrate the core purposes of antidiscrimination law. Part IV takes up employment law and explains why it presents different considerations. Part V concludes, explaining why, in contemporary American politics, this narrow issue has become the object of such intense contestation.

II. PROPOSALS FOR ACCOMMODATION

The prima facie case for a religious exemption is simple: the burden on individuals like Elaine Huguenin outweighs the burden on individuals like Vanessa Willock. Willock had no difficulty finding another photographer in Albuquerque—for this reason, most Americans' sentiments are on Huguenin's side.[45] On the other hand, assuming that Huguenin's religious beliefs really forbid her to photograph same-sex weddings, the court's decision might mean that she must abandon her business. Maggie Gallagher states the point succinctly: "Small numbers of unusually devoted Christians are just trying to feed their kids. I do not see who is benefited really by putting them out of business. . . . It is abstract

44. *See* KOPPELMAN, *supra* note 32, at 175–77 (discussing the historical alignment of the political left and religious groups and their role in abolishing slavery, creating the Social Gospel movement, implementing the New Deal, leading the civil rights movement, and protesting the Vietnam War).

45. *See 85% Think Christian Photographer Has Right to Turn Down Same-Sex Wedding Job*, RASMUSSEN REP. (July 12, 2013), http://www.rasmussenreports.com/public_content/business/general_business/july_2013/85_think_christian_photographer_has_right_to_turn_down_same_sex_wedding_job.

justice versus real concrete and unreasonable harm."[46]

There are ways to accommodate Elaine Huguenin without changing present law. One would be for her to merge her company with some larger enterprise, some of whose employees had no objection to participating in same-sex weddings. Then the company could accommodate religious objectors by only giving tasks involving same-sex marriages to the employees who have no religious objections. Customers like Vanessa Willock would never even have to know about the arrangement. This is the only way that California allows businesses that serve the public to accommodate employees who are religious objectors.[47]

A second possibility is for Huguenin to stop holding her company out to the public, and to rely entirely on private social networks for her business. No website, no phone book listing. In this case, Vanessa Willock would probably never even have known that the business existed. Word of mouth, perhaps within megachurches, for example, might be able to generate a large enough customer base for her business to remain in operation. She could provide photography services without her service being a public accommodation.[48] Given the high failure rate of small businesses,[49] however, it would be foolish not to want as large a customer base as possible. So someone like Huguenin would like to be able to advertise to the general public.

In order for Elaine Huguenin to have that ability in a regime that still provides antidiscrimination protection for gay people, she would need a statutory exemption for religious accommodation. Several statutes with such exemptions have been proposed. Here I will describe the most prominent ones.[50] I defer to Part IV proposals to modify employment law.

46. Lila Shapiro, *Leading Gay Marriage Opponent on Losing the Battle: 'I Have a Lot More Freedom Now"*, HUFFPOST GAY VOICES (Mar. 21, 2014), http://www.huffingtonpost.com/2014/03/20/maggie-gallagher_n_5001848.html.

47. *See* N. Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court, 189 P.3d 959, 968–69 (Cal. 2008) ("to avoid any conflict between their religious beliefs and" California antidiscrimination law, defendant physicians, who refused to perform a medical procedure on the basis of their religious beliefs, could have found a physician in the same medical group lacking such objections to perform the procedure instead).

48. This may already have happened. I can find no website for Elane Photography or Elaine Huguenin, but if she has been forced out of business entirely her attorneys surely would have publicized the fact.

49. *Cf.* Amy E. Knaup & Merissa C. Piazza, *Business Employment Dynamics Data: Survival and Longevity, II*, MONTHLY LAB. REV., Sept. 2007, at 3, 4–5, 8 (Sept. 2007) (detailing the survival and growth rate of new businesses).

50. For a summary of other recent state legislative efforts, see Jaime Fuller, *The Arizona 'Religious Rights' Bill—and Where the Fight Might Move Next*, WASH. POST FIX (Feb. 24, 2014, 11:30

A. KANSAS

Kansas H.B. 2453, enacted by the state house in February 2014, declared:

> [N]o individual or religious entity shall be required by any governmental entity to do any of the following, if it would be contrary to the sincerely held religious beliefs of the individual or religious entity regarding sex or gender: (a) Provide any services, accommodations, advantages, facilities, goods, or privileges; provide counseling, adoption, foster care and other social services; or provide employment or employment benefits, related to, or related to the celebration of, any marriage, domestic partnership, civil union or similar arrangement; (b) solemnize any marriage, domestic partnership, civil union or similar arrangement . . . .[51]

This is a blanket license to discriminate against same-sex couples. There is no weighing of the burden placed upon those exhibiting their religious beliefs against the burden placed upon the couples; the couples lose every time. Moreover, if a religious defense is successfully made against a suit, the defendant would automatically collect attorney's fees from the plaintiff, even though the plaintiff might have had no notice at the time of the suit that religion was even an issue. The law is so broadly worded that it may protect government employees who refuse to do their jobs if doing so involves providing services to a same-sex wedding.

The bill was widely condemned, and the state senate declined to take it up.[52]

B. ARIZONA

Also in February 2014, the Arizona legislature passed S.B. 1062, an amendment to the state's Religious Freedom Restoration Act ("RFRA"), which mandates judicial accommodation of religious objectors.[53] It provided that religion should be eligible for such accommodation not only

AM), http://www.washingtonpost.com/blogs/the-fix/wp/2014/02/24/the-states-fighting-the-fight-between-religious-rights-vs-gay-rights/.

51. H.B. 2453, 85th Leg., Reg. Sess. (Kan. 2014) (as amended by the House Committee), *available at* kslegislature.org/li/b2013_14/measures/documents/hb2453_01_0000.pdf. *See also* Michael McGough, *Kansas Goes Off the Deep End with an Anti-Gay Bill*, L.A. TIMES (Feb. 15, 2014), http://articles.latimes.com/2014/feb/15/news/la-ol-kansas-legislation-gay-marriage-religion-20140214.

52. Katy Steinmetz, *Kansas Bill Allowing Businesses to Snub Gay Couples Is 'Dead'*, TIME (Feb. 18, 2014), http://nation.time.com/2014/02/18/gay-marriage-kansas-wedding-cake-dead/; *HB 2453*, KAN. 2013–2014 LEGIS. SESSIONS, http://www.kslegislature.org/li_2014/b2013_14/measures/hb2453/ (last visited Mar. 21, 2015).

53. Bill Summary SB 1062/HB 2153, Arizona House of Representatives (Feb. 24, 2014), *available at* http://www.azleg.gov/legtext/51leg/2r/summary/h.sb1062_02-21-14_astransmittedtogovernor.pdf (as transmitted to the governor).

in disputes with the state, but also in private lawsuits, "[r]egardless of whether the government is a party to the proceeding."[54] It was enacted in response to local ordinances in Phoenix, Flagstaff, and Tucson banning discrimination on the basis of sexual orientation and gender identity in employment and public accommodations.[55]

State RFRAs are a response to two Supreme Court cases that reduced judicial protection for religious freedom. In 1990, the Court declared in *Employment Division v. Smith*[56] that there was no right to religious exemptions from generally applicable laws. Native Americans thus could be penalized for using peyote as part of their religious ceremonies. This reversed earlier decisions that had held that government could not substantially burden religious practice without compelling justification. Congress responded in 1993 with the federal RFRA, which restored the compelling interest requirement. It was enacted almost unanimously, and President Clinton signed it enthusiastically.

In 1997, the Court held in *City of Boerne v. Flores*[57] that Congress had exceeded its constitutional powers by making the federal RFRA applicable to the states. It remained valid as applied to federal law.[58] Many state legislatures responded by enacting their own state-level RFRAs, which, like the federal law, make religious accommodations available unless the state can show a compelling justification for denying them. Barack Obama, as a state senator, voted for one of the earliest ones, enacted in Illinois in 1998.[59] There are now twenty-one state RFRAs.[60] Most of these were enacted after *Boerne*, but interest in them had waned—only three were enacted between 2003 and 2013—until the *Elane Photography* case created new interest among religious conservatives.[61] That led to the Arizona bill and later RFRA activity in the states.

54. S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), *available at* http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf.

55. Dinita L. James, *Amid SB 1062 Frenzy, Tempe Becomes 4th AZ City to Protect LGBT Status*, ARIZ. EMP. L. LETTER, Apr. 2014, at 1, *available at* http://www.gshllp.com/download/AZ%20Emp%20Law%20Letter%20DLJ%20April%202014.pdf.

56. Employment Div. v. Smith, 494 U.S. 872 (1990).

57. City of Boerne v. Flores, 521 U.S. 507 (1997).

58. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) (applying RFRA to limit federal drug statute).

59. Katie Sanders, *Did Barack Obama V*ote for Religious Freedom Rest*oration Act with 'Very Same' Wording as Indiana'*s?, POLITIFACT (Mar. 29, 2015), http://www.politifact.com/truth-o-meter/statements/2015/mar/29/mike-pence/did-barack-obama-vote-religious-freedom-restoratio/.

60. State Religious Freedom Restoration Acts, NAT'L CONF. STATE LEGISLATURES (Apr. 6, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

61. Dave Johnson and Katy Steinmetz, *'Religious Freedom'* Laws Around the United States, TIME (Apr. 2, 2015), http://time.com/3766173/religious-freedom-laws-map-timeline/.

The statute did not guarantee that there would ever be a religious accommodation. Accommodation would be denied if this were necessary to a compelling state interest. Courts would have to decide that on a case-by-case basis. It is not clear that Elane Photography would have prevailed had this bill been the law. It merely would have prevented the company from losing on summary judgment without even having its religious liberty claim considered by a court.[62] In states with religious accommodation laws, courts have not been generous in granting such accommodations, and some have construed the statutes so narrowly that they have little effect.[63]

The bill quickly was denounced by former Republican presidential candidate Mitt Romney, Arizona's U.S. Senators John McCain and Jeff Flake, and the Arizona Chamber of Commerce.[64] The National Football League threatened to relocate the Super Bowl from Arizona if the bill became law,[65] and other large businesses, including Apple, American Airlines, and Intel, declared that they might withdraw from the state.[66] One Phoenix businessman protested the law by printing and giving away "Open for business to everyone" signs for businesses to post in their windows.[67] Arizona Governor Janice Brewer vetoed it.[68]

62. The Arizona bill was fundamentally different from the Kansas bill, as Douglas Laycock explained:

> The Kansas bill does not enact a broadly applicable standard, give each side a chance to prove its case, and leave decisions to the courts. It enacts a specific rule about religious objections to same-sex marriages and civil unions, and it says the religious objector *always wins*, no matter what.
>
> The Kansas bill appears to limit discovery for both sides. It authorizes awards of attorneys' fees against private citizens; the Arizona bill does not. Any religious objection triggers the Kansas law; it doesn't matter that a business may be so large and impersonal that there is no substantial burden on anyone's religion. Substantial burden on religion isn't required. There is no compelling interest exception, and no hardship exception; it doesn't matter if the religious objector is the only provider of some essential goods or services in a rural Kansas county.

Letter from Douglas Laycock, Professor, Univ. of Va. Sch. of Law, et al., to Janice K. Brewer, Governor, Ariz. (Feb. 25, 2014), *available at* www.azpolicy.org/media-uploads/pdfs/Letter_to_Gov_Brewer_re_Arizona_RFRA.pdf.

63. *See* Christopher C. Lund, *Religious Liberty After* Gonzales: *A Look at State RFRAs*, 55 SAN DIEGO L. REV. 466, 479–91 (2010).

64. Jennifer Rubin, *Brewer Vetoes Anti-Gay Bill*, WASH. POST (Feb. 27, 2014), http://www.washingtonpost.com/blogs/right-turn/wp/2014/02/27/brewer-vetoes-anti-gay-bill/; *Arizona Governor Jan Brewer vetoes 'Anti-Gay' Bill*, BBC.COM (Feb. 27, 2014), http://www.bbc.com/news/world-us-canada-26363704.

65. Erik Brady et al., *If Arizona Bill Becomes Law, Will NFL Move Super Bowl?*, USATODAY.COM (Feb. 25, 2014), http://www.usatoday.com/story/sports/nfl/2014/02/25/arizona-anti-gay-legislation-super-bowl-national-football-league/5821799/.

66. Blake Ellis, *Veto Follows Business Backlash Over Arizona Anti-Gay Bill*, CNNMONEY (Feb. 26, 2014), http://money.cnn.com/2014/02/25/news/economy/arizona-anti-gay-bill/.

67. Eric English, *Arizona Business Owner Makes 'Open for Business to Everyone' Signs in Protest of SB1062*, ABC15 ARIZ. (Feb. 24, 2014), http://www.abc15.com/news/region-phoenix-

C. MISSISSIPPI

Mississippi enacted a mini-RFRA in April 2014. It made no mention of suits between private parties.[69] As originally introduced, it included language providing such a defense, but this was deleted from the final version signed by the governor.[70] The change, which removed any mention of discrimination, did not keep the law from being denounced as an "anti-gay segregation bill."[71]

D. OREGON

The Oregon Family Council sought to place on the November 2014 ballot an initiative that provided, in pertinent part:

> [n]otwithstanding any other provision of law, if doing so would violate a person's deeply held religious beliefs, a person acting in a nongovernmental capacity may not be:
>
> (a) Penalized by the state or a political subdivision of this state for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements; or
>
> (b) Subject to a civil action for declining to solemnize, celebrate, participate in, facilitate, or support any same-sex marriage ceremony or its arrangements, same-sex civil union ceremony or its arrangements, or same-sex domestic partnership ceremony or its arrangements.[72]

This is the most narrowly targeted provision to date, applying only to the facilitation of ceremonies. It clearly has no application to ongoing

metro/central-phoenix/arizona-business-owner-makes-open-for-business-to-everyone-in-protest-of-sb1062.

68. Fernanda Santos, *Arizona Governor Vetoes Bill on Refusal of Service to Gays*, N.Y. TIMES (Feb. 26, 2014), http://www.nytimes.com/2014/02/27/us/Brewer-arizona-gay-service-bill.html [hereinafter Santos, *Governor Vetoes Bill*]; Fernanda Santos, *Governor of Arizona Is Pressed to Veto Bill*, N.Y. TIMES (Feb. 24, 2014), http://www.nytimes.com/2014/02/25/us/governor-of-arizona-is-pressed-to-veto-bill.html.

69. S.B. 2681, 2014 Leg., Reg. Sess. (Miss. 2014) (enacted), *available at* http://billstatus.ls.state.ms.us/documents/2014/pdf/SB/2600-2699/SB2681SG.pdf.

70. S.B. 2681, 2014 Leg., Reg. Sess. § 1(3)(b) (Miss. 2014), *available at* http://billstatus.ls.state.ms.us/documents/2014/pdf/SB/2600-2699/SB2681IN.pdf. For a full history of S.B. 2861's enactment, see *Senate Bill 2681*, MISS. LEGISLATURE: 2014 REGULAR SESSION, http://billstatus.ls.state.ms.us/2014/pdf/history/SB/SB2681.xml (last updated June 10, 2014).

71. Stern, *supra* note 54. *See also* Associated Press, *Mississippi Governor Phil Bryant Signs Anti-gay Bill*, POLITICO (Apr. 4, 2014), http://www.politico.com/story/2014/04/mississippi-governor-phil-bryant-signs-anti-gay-bill-105378.html.

72. Press Release, Or. Family Council, Protect Religious Freedom Initiative (Nov. 21, 2013), *available at* https://www.oregonfamilycouncil.org/2013/11/21/protect-religous-freedom-initiative/.

same-sex marriages. On the other hand, it would not have prevented the nasty surprise that Vanessa Willock got when she contacted Elane Photography.

The sponsors unsuccessfully attempted to title the ballot initiative without making reference to licensing discrimination.[73] Once they lost that fight in the Oregon Supreme Court, they stopped gathering signatures for the initiative.[74]

E. GEORGIA

In Georgia, a RFRA[75] closely modeled on the federal law passed the Senate but stalled in the House Judiciary Committee in March 2015 after an amendment was added providing that the law would not be a defense against antidiscrimination laws.[76] Proponents had insisted that the bill had nothing to do with discrimination, but the bill's author protested that this amendment "would completely undercut the purpose of the bill."[77] The Bill's opponents included former State Attorney General Michael Bowers, who in 1986 successfully defended the state's prohibition of sodomy before the Supreme Court and once fired an assistant attorney general for participating in a same-sex wedding.[78] Evidently times have changed.

F. INDIANA

Indiana passed a RFRA in March 2015 that was substantially similar to the one vetoed in Arizona, including the provision making it applicable

73. Zack Ford, *Oregon Conservatives Suddenly Drop Arizona-Style 'License to Discriminate' Initiative*, THINKPROGRESS (May 12, 2014, 2:08 PM), http://thinkprogress.org/lgbt/2014/05/12/3436933/oregon-religious-liberty-suspension/. The Oregon Family Council's proposed title was "Protects persons choosing non-participation in same-sex ceremonies based on conscience or religious belief from penalization." *Id.* The title approved by the Oregon Supreme Court was "'Religious belief" exceptions to anti-discrimination laws for refusing services, other, for same-sex ceremonies, 'arrangements.'" *Id.*

74. Anna Staver, *Family Council Drops Initiative Targeting Gay Weddings*, STATESMAN JOURNAL (May 12, 2014, 6:48 AM), http://www.statesmanjournal.com/story/news/politics/elections/2014/05/09/oregon-family-council-drops-gay-marriage-ballot-initiative/8927097/.

75. S.B. 129, 153d Gen. Assemb., Reg. Sess. (Ga. 2015), *available at* http://www.legis.ga.gov/legislation/en-US/Display/20152016/SB/129.

76. Matt Hennie, *Anti-gay Bill Suffers Near Fatal Blow in State House*, PROJECT Q (Mar. 26, 2015), http://www.projectq.us/atlanta/Anti-gay_bill_suffers_near_fatal_blow_Georgia_House.

77. Jim Galloway, *Agreement on Both Sides: 'Religious Liberty' Bill Would Gut Local Anti-Discrimination Ordinances*, AJC.COM (Mar. 26, 2015), http://politics.blog.ajc.com/2015/03/26/agreement-on-both-sides-religious-liberty-bill-would-gut-local-anti-discrimination-ordinances/#__federated=1.

78. Matt Hennie, *State's Ex Top Lawyer Rips 'Religious Freedom' Bills*, PROJECT Q (Feb. 24, 2015), http://www.projectq.us/atlanta/georgias_ex_top_lawyer_rips_religious_freedom_bills.

to suits between private parties.[79] It also expressly allowed for-profit businesses to invoke it as a defense in such suits.[80] Amendments considered and rejected by the legislature would have made the law inapplicable to antidiscrimination and civil rights laws,[81] declared that the prevention of discrimination was a compelling state interest,[82] and required businesses to post signs telling the public about their religious objections before they could invoke the statute as a defense.[83]

As in Arizona, the reaction against Indiana's law was intense. In protest, thousands of businesses displayed window stickers announcing "This business serves everyone."[84] At least ten national conventions, including Gen Con, the world's biggest gaming convention, threatened to pull out of the state; the NCAA president expressed doubts about keeping the organization's headquarters in Indianapolis; Angie's List canceled plans to add up to one thousand jobs in the city; and, the CEOs of Apple and Nike condemned the law.[85] Governor Mike Pence had been

79. S. Enrolled Act 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015), *available at* https://iga.in.gov/static-documents/9/2/b/a/92bab197/SB0101.05.ENRS.pdf. The Indiana Constitution already contained religious liberty protections, but their scope was ambiguous. *See* Letter of Douglas Laycock, Professor, Univ. of Va. Sch. of Law, et al., to Brent Steele, Chair, Ind. Senate Judiciary Comm. 2 (Feb. 3, 2015), *available at* http://www.indianahouserepublicans.com/clientuploads/PDF/RFRA.pdf.

80. S. Enrolled Act 101 §§ 7–9. It was sometimes claimed that this was a difference from the federal RFRA, but this was not accurate, since under a different provision of federal law corporations are "persons." *See* Kristine Guerra & Tim Evans, *How Indiana's RFRA Differs from Federal Version*, INDY STAR (Apr. 2, 2015), http://www.indystar.com/story/news/politics/2015/03/31/indianas-rfra-similar-federal-rfra/70729888/; *Why Law Professor Douglas Laycock Supports Same-Sex Marriage and Indiana's Religious Freedom Law*, RELIGION & POL. (Apr. 1, 2015), http://religionandpolitics.org/2015/04/01/why-law-professor-douglas-laycock-supports-same-sex-marriage-and-indianas-religious-freedom-law/.

81. H. Amend. 3 to S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015), *available at* https://iga.in.gov/static-documents/b/5/8/a/b58a93e0/SB0101.04.COMH.AMH003.pdf.

82. H. Amend. 5 to S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015), *available at* https://iga.in.gov/static-documents/6/a/a/1/6aa19d1f/SB0101.04.COMH.AMH005.pdf.

83. H. Amend. 6 to S.B. 101, 119th Gen. Assemb., Reg. Sess. (Ind. 2015), *available at* https://iga.in.gov/static-documents/2/4/6/d/246dc292/SB0101.04.COMH.AMH006.pdf. This Amendment provided that such a sign "must be posted and maintained in a conspicuous place that is visible to customers of the person's business before customers enter the premises of the business," must "state that the person believes a governmental entity substantially burdens the person's exercise of religion by requiring the person's business to serve individuals who are members of certain groups," and must "specifically identify the certain groups or classes of individuals" thus excluded. Similar information must be posted on any web site maintained by the business. *Id.*

84. Robbie Couch, *Indiana's Anti-Gay Law Prompts Thousands of Businesses to Stand Up for Diversity*, HUFFINGTON POST (Mar. 30, 2015), http://www.huffingtonpost.com/2015/03/30/indiana-religious-freedom-bill_n_6969686.html.

85. Adam Wren, *The Week Mike Pence's 2016 Dreams Crumbled*, POLITICO (Apr. 1, 2015), http://www.politico.com/magazine/story/2015/04/mike-pence-indiana-2016-116569.html.

considering a bid for the Republican presidential nomination in 2016; however, the controversy has probably ended that ambition.[86]

Governor Pence quickly responded that the law would be amended to clarify that it did not protect discrimination.[87] The amendment was hastily enacted and signed into law.[88] There is still no statewide antidiscrimination protection for gay people in Indiana, however. Such protection only exists in eleven municipalities within the state.[89]

G. OKLAHOMA

The requirement to post a sign was also proposed in March 2015 in Oklahoma, where the RFRA bill was withdrawn without a vote.[90]

86. *Id.*

87. Monica Davey & Mitch Smith, *Indiana Governor, Feeling Backlash from Law's Opponents, Promises a 'Fix'*, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/04/01/us/politics/indiana-governor-mike-pence-feeling-backlash-from-religious-laws-opponents-promises-a-fix.html.

88. See Monica Davey et al., *Indiana and Arkansas Revise Rights Bills, Seeking to Remove Divisive Parts*, N.Y. TIMES (Apr. 2, 2015), http://www.nytimes.com/2015/04/03/us/indiana-arkansas-religious-freedom-bill.html. The amendment provides that the law does not

> (1) authorize a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service;
>
> (2) establish a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services, facilities, use of public accommodations, goods, employment, or housing to any member or members of the general public on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity, or United States military service; or
>
> (3) negate any rights available under the Constitution of the State of Indiana.

Conf. Comm. Rep. on Engrossed S.B. 50, 119-CC005005/DI 51, Reg. Sess. (Ind. 2015), *available at* http://www.indianahouserepublicans.com/clientuploads/PDF/RFRA/CC005005_MS.pdf.

89. Kristine Guerra & Tim Evans, *RFRA Revision Does Not Widely Extend Discrimination Protections for LGBT, Experts Say*, INDY STAR (Apr. 6, 2015), http://www.indystar.com/story/news/politics/2015/04/02/yes-rfra-fix-require-christian-businesses-serve-gay-weddings/70848994/.

90. *See* Jean Ann Esselink, *Amendment Would Make Anyone Claiming a 'Religious Freedom' Exemption in Oklahoma Post a Sign for All to See*, NEW CIV. RTS. MOVEMENT (Mar. 14, 2015), http://www.thenewcivilrightsmovement.com/uncucumbered/amendment_to_oklahoma_s_religious_freedom_bill_would_make_anyone_using_it_post_a_sign. The amendment provided:

> Any person not wanting to participate in any of the activities set forth in subsection A of this section based on sexual orientation, gender identity or race of either party to the marriage shall post notice of such refusal in a manner clearly visible to the public in all places of business, including websites.The notice may refer to the person's religious beliefs, but shall state specifically which couples the business does not serve by referring to a refusal based upon sexual orientation, gender identity or race.

Floor Amend. to H.B. 1371, 55th Leg., 1st Sess. (Okla. 2015), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20FLOOR%20AMENDMENTS/House/HB1371%20FA1%20VIRGINEM-AM.PDF.

H. ARKANSAS

March 2015 was a busy month for RFRA laws. The Arkansas legislature passed H.B. 1228, which was, in various details, even more favorable to religious claimants than previous state laws had been, because the State's burden of justification was described in even more demanding terms than in earlier state RFRAs.[91] It was immediately condemned by prominent businesses, most notably Wal-Mart, the largest employer in the state.[92] The negative reaction, coming on the heels of a similar uproar in Indiana, led the governor to demand that the bill be amended to delete the provisions that did not mirror earlier RFRAs.[93] The legislature passed the revised bill,[94] which the governor quickly signed.[95] Ironically, the modification appears to have distracted attention from a much more important antigay law enacted earlier, which bars municipalities from giving gay people any antidiscrimination protection at all.[96] So long as that law is on the books, gay people can get no antidiscrimination protection anywhere in Arkansas, with or without the RFRA. The criticism directed at the State aimed at the wrong target.

I. THE SCHOLARS' MODEL STATUTE

Professors Robin Fretwell Wilson, Thomas C. Berg, Carl H. Esbeck, Richard W. Garnett and Edward McGlynn Gaffney, Jr. have proposed a model statute that aims at an accommodation far narrower than the Kansas bill and more specific than the Arizona bill.[97] They have refined it over a period of years in response to objections.

91. Nelson Tebbe et al., *Why Arkansas is Worse Than Indiana*, BALKINIZATION (Apr. 1, 2015, 6:39 PM), http://balkin.blogspot.com/2015/04/why-arkansas-is-worse-than-indiana.html.

92. H.B. 1228, 90th Gen. Assemb., Reg. Sess. (Ark. 2015), *available at* http://www.arkleg.state.ar.us/assembly/2015/2015R/Bills/HB1228.pdf; Jena McGregor, *Wal-Mart CEO Speaks Out Against 'Religious Freedom' Bill in Arkansas*, WASH. POST (Apr. 1, 2015), http://www.washingtonpost.com/blogs/on-leadership/wp/2015/04/01/wal-mart-ceo-speaks-out-against-religious-freedom-bill-in-arkansas/; Hiroko Tabuchi & Michael Barbaro, *Walmart Emerges as Unlikely Social Force*, N.Y. TIMES (Apr. 1, 2015), http://www.nytimes.com/2015/04/02/business/walmart-emerges-as-unlikely-social-force.html.

93. Campbell Robertson & Timothy Williams, *Arkansas Governor Asks Lawmakers to Recall Religious Exception Bill*, N.Y. TIMES (Apr. 1, 2015), http://www.nytimes.com/2015/04/02/us/arkansas-indiana-religious-freedom-hutchinson-pence.html.

94. Howard Friedman, *Arkansas Quickly Enacts Narrower Version of RFRA Than Originally Passed*, RELIGION CLAUSE BLOG (Apr. 2, 2015, 8:26 PM), http://religionclause.blogspot.com/2015/04/arkansas-quickly-enacts-narrower.html.

95. *Id. See also* Davey et al., *supra* note 88.

96. Tebbe et al., *supra* note 91.

97. *See* Letter from Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, et al., to Rosalyn H. Baker, State Senator, Haw. 4–5 (Oct. 17, 2013) [hereinafter Letter from Edward McGlynn Gaffney, Jr.], *available at* http://mirrorofjustice.blogs.com/files/hawaii-special-

The model statute declares that "no individual, sole proprietor, or small business shall be required to . . . provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage" if doing so would cause those providers "to violate their sincerely held religious beliefs."[98] The statute further provides that it would not apply if "a party to the marriage is unable to obtain any similar goods or services . . . without substantial hardship."[99]

The "substantial hardship" proviso is vague, and it is uncertain whether it can be refined into a workable rule that would guide people prospectively.[100] As drafted, it would be a reliable safe harbor for religious dissenters in urban areas where search costs are low. (Albuquerque is obviously an example.) How serious a problem the uncertainty would be would depend on how many claims for exemption arise.

III. PURPOSES OF ANTIDISCRIMINATION LAW

All of these laws, if enacted, would reverse the result in *Elane Photography v. Willock*. Would that frustrate the purposes of antidiscrimination law? The answer is complex, because the enterprise of antidiscrimination law is complex. At issue is not merely the dispute between Elaine Huguenin and Vanessa Willock. Antidiscrimination law is an intervention that aims at systemic effects in society, dismantling longstanding structures of dominance and subordination. That overall aim involves the pursuit of a number of subsidiary goals.

A. ECONOMIC HARM

The most basic purpose of antidiscrimination law is the amelioration of economic inequality.[101] A central purpose of the Civil Rights Act of 1964[102] was to reduce black poverty by making well-paying positions

session-letter-10-17-13-1.pdf (laying out the proposed model statute).

98. *Id.* (A "small business" is defined as an entity "(A) that provides services which are primarily performed by an owner of the business; or (B) that has five or fewer employees; or (C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing"). The model statute also provides that landlords who own "five or fewer units of housing" need not "provide housing to any married couple." *Id.* I quote from the latest version.

99. *Id.*

100. The difficulties of refining the proviso into a workable rule are explored in Brownstein, *supra* note 15, at 414–22.

101. The following discussion elaborates upon and revises an analysis first offered in Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions*, 72 BROOKLYN L. REV. 125, 131–37 (2006).

102. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered

available to black workers. It succeeded:

> In 1964, the median income of nonwhite males was 57% of median white male income. By 1985, that proportion had risen to 66%. . . . The proportion of black men working as professionals or managers relative to white[s] . . . doubled from 32% in 1964 to 64% in 1986.[103]

The most dramatic progress came in the first ten years after the Act.[104] Discrimination against gay people causes similar economic harm,[105] and antidiscrimination law, where it protects gay people as is the case in some jurisdictions, seeks to remedy this.

The general rule that governs business transactions, both public accommodation and employment, is contract at will. In most states, most businesses have the privilege of refusing service to anyone for any reason or no reason.[106] They need not justify these actions to any official. Antidiscrimination laws, such as the Civil Rights Act, are exceptions. So long as economic actors do not engage in the enumerated types of discrimination, they have the privilege of being as arbitrary as they like. I can, for example, absolutely refuse to hire or do business with anyone whose eyebrows are not at least three inches long.

It is important to understand the reasons for the rule of contract at will so that we can understand what we are doing when we depart from that rule. One traditional justification is rights-based: people have a right, it is sometimes said, to do what they like with their private property.[107] The bankruptcy of this justification became clear during the debate over the Civil Rights Act of 1964, which then-presidential candidate Barry

sections of 28 and 42 U.S.C. (2012)).

103. James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 281–82 (1990) (footnotes omitted).

104. *Id.* at 282–83.

105. The economic consequences of anti-gay discrimination are documented, including citations to scholarship on the topic, in the report accompanying the Employment Non-Discrimination Act of 2013, S. Rep. No. 113-105, at 14–19 (2013).

106. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1617–18 (2001). This may be a departure from preexisting common law rules, *see* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1439–43 (1996) (detailing the common law right of public access), but is now the law in most places, *see, e.g.*, Feldt v. Marriott Corp., 322 A.2d 913, 915 (D.C. 1974) ("[A] restaurant owner had the right to arbitrarily refuse service to any guest."). At common law, the duty to serve the public pertained only to inns and common carriers. Singer, *supra*, at 1439.

107. *See, e.g.*, AYN RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM 126–34 (1964) (invoking such principles to argue that Congress "has no right to violate the right of private property by forbidding discrimination in privately owned establishments"); Michael Levin, *Negative Liberty*, 2 SOC. PHIL. & POL'Y 84, 98–100 (1984).

Goldwater opposed on libertarian grounds.[108] The Civil Rights Act is not an invasion of our precious liberties. On the contrary, it diminishes the amount of oppression in the world. The idea of private property is not as sacrosanct as it once was, because it is understood that the uses of that property can have public effects that are legitimate objects of legislative concern.[109] Even Goldwater eventually abandoned the libertarian argument and supported antidiscrimination protection for gay people.[110]

The more persuasive justification for the rule of employment at will is efficiency-based. It would be a crushing burden on the economy for government officials to have to approve every refusal of a contract that takes place in the private sector. Moreover, there is little reason to think that most types of arbitrary refusal can have much effect on anyone's opportunities. Although I may refuse to hire anyone whose eyebrows are less than three inches long, other employers will compete for the services of the short-eyebrowed and will bid their wages up to pretty much the same level that they would have been had I been willing to hire them. And the market will also punish me for my foolishly discriminatory hiring practices, since competent short-eyebrowed workers will go to work for my competitors. My taste for discrimination means that I am turning away better workers and hiring worse ones. I will be punished in the same way if I arbitrarily turn away customers. The overall tendency is for people like me to be driven out of the market.

Considerations of this sort led Richard Epstein to argue that the Civil Rights Act ought to be repealed, because it interfered with freedom of contract for no good reason.[111] In a free market, he argued, we can expect that black workers' wages, for instance, will be about as high as they would

108. *See* RICK PERLSTEIN, BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS 362–64 (2001) (describing how Goldwater viewed the Civil Rights Act of 1964 as an unconstitutional infringement on individual liberties); *id*. at 462 (quoting Goldwater's speech "Civil Rights and the Common Good," co-authored by William Rehnquist, declaring that "the freedom to associate means the same thing as the freedom not to associate").

109. More generally, property rights are created by the law for reasons and should not be defined in a way inconsistent with those reasons. *See* THOMAS NAGEL & LIAM MURPHY, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 92 (2002) ("[O]ne can maintain that it is best for people to decide individually what to do with 'their' money, but at the same time affirm that government has a legitimate role, through design of the tax and property system, in determining what is 'theirs'—what different individuals will end up with as disposable income and wealth, after taxes and transfers."). For a superb treatment of the philosophical basis of property rights, see generally JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1989).

110. *See* Barry M. Goldwater, *The Gay Ban: Just Plain Un-American*, WASH. POST, June 10, 1993, at A23, *available at* http://www.qrd.org/qrd/usa/military/1993/Goldwater_on_ban.

111. *See generally* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

be if there were no discrimination.[112] Epstein did not persuade many people. The point most commonly made by his critics was that he had left culture out of his model. Some groups are subject to *pervasive* discrimination. At least when the Civil Rights Act was enacted, his critics argued, racism was sufficiently ubiquitous to withstand the egalitarian tendencies of a well-functioning free market.[113]

The response to Epstein turns on the ubiquity of the discrimination that is at issue. Economic equality can be achieved even if there is discrimination, indeed even if there is a lot of discrimination, so long as the discriminators are a minor part of the market as a whole. (Sometimes they dominate the market.[114] That's the part Epstein misses.) On the other hand, if the accommodation has the effect of being a free pass for any discriminator, then the antidiscrimination law is effectively repealed. When the federal Civil Rights Act was passed in 1964, many racists had religious bases for their views.[115] Had they been entitled to religious exemptions, the statute would have had little or no effect.[116] Does antidiscrimination protection for gay people operate in a similar environment?[117]

112. *Id.* at 58.

113. *See* John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1415–19 (1986); Samuel Issacharoff, *Contractual Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219, 1221–26, 1242–43 (1992) (reviewing EPSTEIN, *supra* note 111); Symposium, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, 31 SAN DIEGO L. REV. 1 (1994) (critiques by Ian Ayres, Drew Days, Evan Tsen Lee, Jerry L. Mashaw, and Richard H. McAdams).

114. *See* Issacharoff, *supra* note 113, at 1224–25 ("Epstein needs to argue that although a discriminatory effect may survive at the margin, in gross there will be ample opportunity for all . . . .One need only look to the pre-1964 South to see that bigotry can indeed dominate an entire local economy and foreclose opportunity not just at the margin but in the aggregate.").

115. On the religious basis of racism in the mid-twentieth century deep South, see Jane Dailey, *Sex, Segregation, and the Sacred After* Brown, 91 J. AM. HIST. 119, 119–26 (2004); Jane Dailey, *The Theology of Massive Resistance: Sex, Segregation, and the Sacred After* Brown, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 151, 151–57 (Clive Webb ed., 2005).

116. I am only aware of one case raising such a defense, but had it succeeded there surely would have been others. *See* Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966) ("Defendant [L. Maurice] Bessinger . . . contends that the Act violates his freedom of religion under the First Amendment 'since his religious beliefs compel him to oppose any integration of the races whatever.'"), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd per curiam*, 390 U.S. 400 (1968).

117. The basic point is acknowledged by Thomas C. Berg, an author of the model statute discussed *supra* Part II.I. and one of the most prominent proponents of religious accommodation for those who object to facilitating same-sex marriages:

> Exemptions prompt the worry that granting one will invite a series of future claims whose cumulative effect on social interests will be damaging. But the smaller and more unconventional the group, the fewer the likely prospective claims. . . . Where the practice is sufficiently attractive that too many exemption claims will follow, this can be taken into account in judging whether the state's interest is compelling.

Thomas C. Berg, *Minority Religions and the Religion Clauses*, 82 WASH. U. L.Q. 919, 968 (2004) (footnotes omitted).

Discrimination is, of course, part of the daily experience of every openly gay person in the United States. Taylor Flynn worries about the breadth of the model statute's language:

> Although framed in terms of marriage and sexual orientation, the exemptions' reach extends far beyond both: they excuse compliance from fair housing laws, healthcare, education, adoption, employment, government contracts, licensing, grants, tax-exempt status, and anywhere else that public accommodations laws apply. In addition, they permit sincerely-held religious objections based on any protected classification, including race, sex, sexual orientation, and religion.[118]

Flynn fears that the statute will be frequently invoked.[119] *Slate* columnist Mark Joseph Stern fears that if there is any religious accommodation, "inevitably, it will soon stretch to restaurants, hotels, movie theaters—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation."[120]

Yet hardly any of these cases have occurred: a handful in a country of 300 million people.[121] In all of them, the people who objected to the law at issue were asked directly to facilitate same-sex relationships by providing wedding, adoption or artificial insemination services, counseling, or rental of bedrooms. There have been no claims of a right to simply refuse to deal with gay people. Douglas Laycock explains why:

> The religion that generates most of these claims in the U.S. proclaims its obligation to hate the sin but love the sinner. . . . They have no desire to deprive same-sex couples of food, or plumbers, or most other goods and services in the economy. But some of them are scrupulous about their own conduct in facilitating what they believe to be the sexual immorality in that relationship.[122]

118. Flynn, *supra* note 15, at 238–39.

119. *See id.* at 241, 244–46 (while "[e]xemption proponents assert that religious objections under their proposal will be relatively rare . . . objectors overstate support for same-sex marriage" (footnote omitted)). She also inconsistently argues that accommodation is unnecessary because so few claims involving marriage have arisen. *Id.* at 247–48.

120. Mark Joseph Stern, *Anti-Gay Segregation May Soon Be Coming to Oregon*, SLATE: OUTWARD (Feb. 4, 2014, 10:48 AM), http://www.slate.com/blogs/outward/2014/02/04/oregon_anti_gay_referendum_the_initiative_is_homophobic_segregation.html.

121. See, for example, the catalogues of such cases in TODD STARNES, GOD LESS AMERICA: REAL STORIES FROM THE FRONT LINES OF THE ATTACK ON TRADITIONAL VALUES 63–90 (2014); George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 565–75 (2007); and Stern, *Same-Sex Marriage and the Churches*, *supra* note 15, at 2–19.

122. Douglas Laycock, *Civil Unions: Making Religious Exemptions Work*, UNIV. OF CHI. LAW SCH. FACULTY BLOG (May 10, 2009, 2:41 PM), http://uchicagolaw.typepad.com/faculty/2009/05/civil-unions-making-religious-exemptions-work.html.

If such exemptions will rarely be invoked, then they cannot do much harm to anyone.

One may respond that there are places in the country where a lot of businesses would invoke an exemption. Probably none of those places now have antidiscrimination protection for gay people, but a federal antidiscrimination law may eventually be enacted.[123] A religious exemption could encourage the formation of new centers of resistance to the gay rights movement. It is even possible to envision a nightmare cascade scenario in which, once the accommodation is made available, its invocation becomes a sign of social solidarity, like the anticommunist blacklist in the 1950s or the Confederate flag in the deep South today. Such a cascade would resuscitate attitudes that otherwise would have continued to steadily disappear.[124]

There is no way to prove that this will not happen. Any religious accommodation rests in part on a bet that it will not be invoked so often as to defeat the purpose of the law. In this context, however, social attitudes toward gay people have changed so decisively that the trend appears irreversible. The kind of cascade just described would immediately be checked by the very negative reactions of openly gay people, their family members, and growing numbers of sympathizers. Businesses would have a powerful economic incentive to avoid the controversy rather than conspicuously take a side. I acknowledge the danger but do not regard it as likely.

B. DIGNITARY HARM

Antidiscrimination law is also concerned with insult, dignitary harm, and social equality. It is what is most immediately at stake in the *Elane Photography* case.

Taylor Flynn argues that each individual act of discrimination constitutes "status-based harm to personhood."[125] Even if discrimination is rare, it still hurts. "When a same-sex couple is denied service," Ira Lupu and Robert Tuttle write, "the couple must absorb the full burden of such a denial—measured in the time and other expense incurred in locating a willing provider, along with the dignitary harm of being refused access to

123. The proposal that is now most prominent bans employment discrimination, *see infra* text accompanying notes 166–167 (discussing the Federal Employment Non-Discrimination Act), but eventually there might be a ban on discrimination in public accommodations as well.

124. Thanks to Frederick Mark Gedicks for raising this concern.

125. Flynn, *supra* note 15, at 240–41.

services that are otherwise available to the public."[126] A considerable literature documents the effects of "minority stress" on the well-being of people who experience discrimination, which has found that it can have a severe impact on gay people's mental and even physical health.[127] Doubtless a major component of that stress is the anticipation that one is in danger of losing real and important economic opportunities, and, as I have already argued, the degree of that danger is in dispute here. But the insult is itself a source of stress.

Here I just return to where I began: the burden on Vanessa Willock of being refused service, even if one counts the stress, is less than the burden on Elaine Huguenin of going out of business. It is also relevant that the harm of knowing that there are Americans who emphatically reject same-sex marriage is not one from which the law can or should protect anyone.[128] The right of free speech is, among other things, the right to say hurtful things.[129]

The sense of insult and dehumanization that Willock felt depends in part on systemic effects that go beyond the particular transaction. An insult that is unusual loses much of its sting. When my father grew up, he often encountered anti-Semitic slurs, but I have not been subjected to one in decades, so such slurs would bother me less than they did him. It is different if it is part of a daily stream of abuse and rejection.

Another aspect of the injury is that Willock sought services and was directly and personally told that she was not eligible for them. She was induced—by a business that held itself out to the public and so invited her to contact it—to participate in the activity of her own rejection. (The objection is somewhat analogous to religious conservatives' objections to participating in the celebration of same-sex unions.) That direct, personal

126. Lupu & Tuttle, *supra* note 15, at 290.

127. *See, e.g.*, Vickie M. Mays, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869, 1874 (2001) (finding "a relatively robust association between experiences of discrimination and indicators of psychiatric morbidity" in lesbian, bisexual, and gay respondents); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 674–92 (2003) (using "minority stress" to explain the evidence that "LGB people have a higher prevalence of mental disorders than heterosexual people").

128. *See* Jeremy Waldron, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, 115, 119–131 (1993) (arguing that, in the philosophy of John Stuart Mill, distress at having one's views challenged is positively valuable).

129. For a recent extreme example, see *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1220 (2011) (holding a picket outside the funeral of a recently killed Marine, in which the Westboro Baptist Church displayed signs such as "Thank God for IEDs," "Thank God for Dead Soldiers," and "God Hates Fags," was protected by the First Amendment).

insult wounds more than the mere knowledge that there are people out there who do not want to deal with you.

That brings us to the important but neglected issue of whether, if there are religious accommodations to antidiscrimination laws, the licensed discrimination must be overt. None of the proposed statutes address it. Douglas Laycock, who supports both same-sex marriage and religious exemptions, observes that there is a dilemma here:

> I would have no objection to a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises. Whether the gay-rights side would want such a requirement is a harder question. An advertising requirement would avoid unfair surprise, and it would probably deter many merchants from refusing service at all, for fear that their public avowal of discrimination against same-sex couples might cost them business from sympathetic opposite-sex couples. On the other hand, gays and lesbians might fear that many such notices would reinforce resistance and embolden other merchants to post similar notices. I think the benefits would outweigh the costs, but this is not a confident prediction.[130]

As we have seen,[131] a notice requirement was considered, but not adopted, by the legislatures of Indiana and Oklahoma. Something close to the prior-announcement regime is now the law in New Mexico. The state supreme court declared that "businesses retain their First Amendment rights to express their religious or political beliefs. They may, for example, post a disclaimer on their website or in their studio advertising that they oppose same-sex marriage but that they comply with applicable antidiscrimination laws."[132] Such a disclaimer is probably enough to persuade gay customers to look elsewhere, with no formal change in the antidiscrimination law required.[133] The New Mexico Supreme Court does

130. Laycock, *supra* note 19, at 198–99.

131. *See supra* notes 83, 90 and accompanying text.

132. Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 3, 309 P.3d 53, 59, *cert. denied*, 134 S. Ct. 1787 (2014).

133. Licensing of social workers presents a different issue. Several social work schools have claimed that a person who cannot provide relationship counseling to any couple does not meet professional standards. *See* Mark Oppenheimer, *A Counselor's Convictions Put Her Profession on Trial*, N.Y. TIMES (Feb. 3, 2012), http://www.nytimes.com/2012/02/04/us/when-counseling-and-conviction-collide-beliefs.html?pagewanted=all&_r=0 (discussing a social work school that expelled a student after she "expressed her reluctance to work with any [clients] who were in same-sex relationships"). Maggie Gallagher is right that the issue here is whether "whole professions should be closed to people who cannot affirm gay unions as marriages." Shapiro, *supra* note 46. It is not necessary for every social worker to be willing to counsel gay couples, just as it is not necessary for every doctor to be willing to perform abortions. Here only a specific, codified accommodation will do.

not notice that this accommodation might require legislative amendment of the law of harassment. The antidiscrimination laws of some states would treat this kind of disclaimer as creating an actionable hostile environment.[134] It evidently supposes, and in effect announces, that such disclaimers are now permissible in New Mexico.

The cost of having no notice requirement is not merely unfair surprise. An exemption that can be invoked on an ad hoc basis would eviscerate the law because it would be available as a defense in any case at all.[135] Any responsible lawyer would at least ask the client about religious scruples, and some will try to elicit positive answers.

Those who feel they must do what their religion demands, even at great personal cost, have the strongest religious liberty claims. A prior-notice requirement is a good way to pick those people out.[136] Open avowal would have protected Vanessa Willock from the unpleasant shock she got in response to her email: she would never have contacted Elane Photography in the first place. The specific, personal insult to which she was subjected would not have happened.

On the other hand, even a few such notices impose dignitary harm—here not concentrated on any particular individual but diffused across the community. Just as a "Whites Only" sign does not make the discrimination nicer, so, Taylor Flynn objects, this would be "iconic of second-class citizenship."[137] She fears "a cascading effect that encourages additional claims for exemption as well as other acts of discrimination. Seeing the equivalent of 'no gays served here' affixed throughout town, all with the permission of the state, may spur further acts of discrimination or

134. *See* Eugene Volokh, *Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 299, 318-26 (2000) (discussing the "doctrine of 'hostile public accommodations environment harassment'"); Daniel Koontz, Note, *Hostile Public Accommodations Laws and the First Amendment*, 3 N.Y.U. J.L. & LIBERTY 197, 199–209 (2008) (same); There are also laws that bar notices that the patronage of a protected group is undesired. *E.g.,* DEL. CODE ANN. tit. 6, § 4504 (2013). Thanks to Eugene Volokh for the reference.

135. ANDREW KOPPELMAN & TOBIAS BARRINGTON WOLFF, A RIGHT TO DISCRIMINATE? HOW THE CASE OF *BOY SCOUTS OF AMERICA V. JAMES DALE* WARPED THE LAW OF FREE ASSOCIATION 26–31 (2009) (making a similar point about the freedom of association exemption from antidiscrimination law announced in *Boy Scouts of America v. Dale*).

136. David Bernstein has objected, in conversation, that this requirement, like other formal requirements, is likely to protect the religious liberty only of well-educated businesspeople familiar with the law. I think, on the contrary, that less educated people are often able to, and usually do, find out what the law requires of them. Conservative American Christians in particular have well-developed networks of information. This is really an objection to any regulation whatsoever.

137. Flynn, *supra* note 15, at 254.

violence."[138]

This objection runs into familiar free speech concerns. But it also fails to account for ongoing cultural change.

The likelihood of Flynn's scenario is quickly evaporating. At the time she wrote, just a few years ago, she could accurately report that "majority opposition to equal marriage is the nationwide norm."[139] Since that time, that opposition has collapsed, and a growing majority supports same-sex marriage.[140] Reflect on the fact that the conservative claim has now shifted from "stop same-sex marriage" to "let us retreat into our enclaves and be left alone." That does not mean that discrimination will not happen. But it will look increasingly like racial discrimination does today: it is practiced, alarmingly often, but almost nobody admits, even to themselves, that they are doing it.[141]

Flynn points out that the model statute's proposed accommodation isn't specific to same-sex marriage, but would apply to religious objections to the facilitation of other marriages, such as interracial marriages. She is correct,[142] but this aspect of the statute shouldn't be changed. The whole point of the exercise is to avoid confrontation on divisive moral issues. The question whether sexual orientation discrimination is morally comparable to racial discrimination is hotly contested. An accommodation regime ought to take no position on it.[143] The possibility of exemptions for race discrimination (which, for reasons already noted, will hardly ever be exercised) may be a formidable political obstacle, but it need not be if the line is drawn in a nonpolitical, low-visibility context, such as the judicial interpretation of a religious accommodation statute. How likely is it that such a case will ever arise?

I suspect that many gay people misperceive the situation for the following reason. Discrimination and violence—open, unapologetic, hateful—have been part of their daily experience since adolescence. If you are subjected to enough of that stuff, you are going to see the danger of it everywhere. It is hard to get your mind around the fact that the vicious

138. *Id.* at 257.

139. *Id.* at 242.

140. *See supra* text accompanying notes 21–23.

141. For a compilation of evidence of the persistence of unconscious racism, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–528 (2005).

142. Flynn, *supra* note 15, at 237.

143. I mistakenly attempted to distinguish the cases in Koppelman, *supra* note 101, at 145. The argument there is subjected to withering criticism in Flynn, *supra* note 15, at 248–54, and in private correspondence with Tobias Barrington Wolff. I am persuaded and recant.

monster who abused you is now in hospice care.

C. STIGMATIZING PREJUDICE

Finally, antidiscrimination law aims to reshape culture in order to eliminate patterns of stigma and prejudice that constitute some classes of persons as inferior members of society. This aspect of law is often unremarked, but it is indispensable if basic rights are to be guaranteed. Prejudice, if it is sufficiently deeply ingrained in a society, will prevent the state from even providing police protection on an equitable basis, a phenomenon that remains all too familiar to gay people in the United States.[144]

One goal of antidiscrimination protection of gay people is cultural transformation: to stigmatize stigma, and make the prejudice that had been pervasive in society into something that citizens instinctively reject.[145] The central triumph of the gay rights movement has been the spreading of that ethic across society, so that prejudice against gays is despised in the same way as racism. That is the most fundamental source of the conflict between gay rights and religious liberty, and it is a powerful political obstacle to efforts at religious accommodation.

Consider again the reaction to S.B. 1062, the Arizona bill authorizing businesses to raise a religious liberty defense when they are burdened by a statute.[146] The businesses would not necessarily have won—they almost certainly would have lost[147]—and the bill made no mention of discrimination against gay people, though everyone knew it was written with situations like the *Elane Photography* case in mind.

A wave of revulsion quickly induced the governor to veto the bill.[148] The *New York Times* declared that the bill "sends the abhorrent message that respecting the civil rights of all people interferes with religious freedom."[149] "This bill instinctively struck people as a violation of individual liberty," said Ari Fleischer, who had been White House Press

144. *See* KOPPELMAN, *supra* note 5, at 181–82.

145. *See id.* at 4–12.

146. *See* text accompanying notes 64–68.

147. *See supra* note 63 and accompanying text.

148. Santos, *Governor Vetoes Bill*, *supra* note 68. The governor was also under pressure from the national Republican Party, which was hoping to emphasize economic issues in the midterm elections and thought that the gay rights issue would not help them. Adam Nagourney, *Arizona Bill Allowing Refusal of Service to Gays Stirred Alarm in the G.O.P.*, N.Y. TIMES (Feb. 27, 2014), http://www.nytimes.com/2014/02/28/us/arizona-bill-allowing-refusal-of-service-to-gays-stirred-alarm-in-the-gop.html. The isolation of religious conservatives became clearer as their party abandoned them.

149. Editorial, *A License to Discriminate*, N.Y. TIMES, Feb. 25, 2014, at A24.

Secretary under President George W. Bush. "The notion that because of your orientation or your religion that you can be denied food service because of someone else's sincere religious belief went too far."[150] As we have seen, there was a similar national reaction against the Indiana RFRA.[151]

Other proposals for accommodation have elicited similar reactions. Ira Lupu and Robert Tuttle later argued, against the Mississippi bill,[152] that such laws would "inflict discrete and material harms on customers," who would be "denied goods and services."[153] Even if there are other businesses that would provide the same services, "the existence of market options should never be enough to make up for the indignity and lost opportunity inflicted by discrimination."[154] A concurring judge in the New Mexico case declared that "refusal to do business with the same-sex couple in this case, no matter how religiously inspired, was an affront to the legal rights of that couple."[155]

Discrimination is thus regarded as a prototypical tort, an injury to one person by another. The underlying idea is that the law should protect people from such injuries. Ernest Weinrib has argued that tort law is fundamentally concerned with corrective justice between the parties, and that it should not be contaminated with extraneous concerns of social or economic policy.[156] His argument takes its strength from the fact that, in a usual tort case, A has done something that would have injured B if they were the only two people in the world. The condemnation of the Arizona bill treated discrimination like a Weinribian tort: the law was bad because it allowed people to be harmed with impunity, thus violating norms of corrective justice. Breaking your leg is such an injury,[157] but refusing to deal with you is not. In refusing to deal, I make you no worse off than you

150. Nagourney, *supra* note 148 (quoting Ari Fleischer).

151. *See supra* text accompanying notes 84–86.

152. *See supra* text accompanying notes 69–71.

153. Letter from Ira C. Lupu, F. Elwood & Eleanor Davis Professor of Law Emeritus, George Wash. Univ., et al., to Philip Gunn, Speaker, Miss. House of Representatives, et al. 5 (Mar. 10, 2014) [hereinafter Letter from Lupu et al.], *available at* http://content.thirdway.org/publications/795/Letter_by_Religious_Liberty_Scholars_Opposing_Mississippi_Bill_2681.pdf.

154. *Id.*at 6.

155. Elane Photography, LLC v. Willock, 2013-NMSC-040, ¶ 86, 309 P.3d 53, 78 (J. Bosson, concurring), *cert. denied*, 134 S. Ct. 1787 (2014).

156. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–57 (1995).

157. So is restricting your access to goods and services. An individual discriminator does not have the power to do that, but pervasive discrimination does. So does an employer who provides the one and only health insurance policy that an employee receives. *See supra* text accompanying notes 138–139 (discussing this aspect of scholars' proposal).

would be if I had never been born. The normal rule of law in business and employment, once more, is contract at will: businesses have the right to refuse service to unwelcome customers, and employers may refuse to hire for any reason or no reason. Antidiscrimination law is an exception to that rule, created in response to circumstances that demand this peculiar kind of legal intervention. Whether or not Weinrib is correct that traditional tort law is not social engineering, his logic cannot possibly apply to the private causes of action created by antidiscrimination laws.

The tort of discrimination makes no sense outside of a social context in which some particular group has been systemically wronged.[158] It is social engineering all the way down.[159] Because this has not been understood, antidiscrimination law has sometimes been distorted at the core. Its ends are thereby frustrated more radically than they ever could be by occasional exemption. The wrong of racial discrimination, for example, comes to be seen as a kind of damage to the souls of white people when they act with impure hearts. Black unemployment, low incomes, de facto segregated schools, substandard housing, and disproportionate incarceration all disappear from view, because they are not the consequence of intentional discrimination. Racial injustice becomes invisible.[160]

The better understanding of antidiscrimination law is that it is part of a project of social reconstruction. Its aim is to reshape the beliefs and values that are shared by the members of the society; the practices that are constructed by (and, reciprocally, construct) those beliefs; and the distribution of wealth and power that emerges out of those practices. Thus, for example, the project of racial equality seeks to culturally marginalize the notion that African-Americans are intrinsically inferior and unworthy. The consequences of that idea are also part of the evil to be eliminated, not only because of their intrinsic perniciousness, but also because they

158. *See* Andrew Koppelman, *Justice for Large Earlobes! A Comment on Richard Arneson's "*What Is Wrongful Discrimination?*"*, 43 SAN DIEGO L. REV. 809, 811–14 (2006).

159. *See* Patrick S. Shin, *Is There a Unitary Concept of Discrimination?*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 163, 169–79 (Deborah Hellman & Sophia Moreau eds., 2013).

160. *See* KOPPELMAN, *supra* note 5, at 76–92. Iris Marion Young pointed this out long ago:

> If one focuses on discrimination as the primary wrong groups suffer, then the more profound wrongs of exploitation, marginalization, powerlessness, cultural imperialism, and violence that we still suffer go undiscussed and unaddressed. One misses how the weight of society's institutions and people's assumptions, habits, and behavior toward others are directed at reproducing the material and ideological conditions that make life easier for, provide greater real opportunities to, and establish the priority of the point of view of white heterosexual men.

IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 196–97 (1990). The classic statement of this critique is Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1066 (1978).

reproduce the idea itself. The desperate condition of huge numbers of black citizens would be a great evil for anyone, but the racial patterns, which reproduce themselves for generations, make the situation both more politically intractable and worse in itself. The injury of poverty is compounded by the insult of racism. Thus, the law of racial equality seeks to eliminate racial meanings, such as the belief that blacks are intrinsically inferior to whites; racially significant practices, such as school segregation and job discrimination; and racially tainted distribution, such as the existence of a large black underclass. Antidiscrimination law has an important role to play in this enterprise, but it takes its sense and purpose from the larger context in which it operates.[161]

When discrimination is characterized as if it were a punch in the nose, we are outside the realm of ordinary policy analysis. Antidiscrimination law's social engineering, once more, is not just about economic inequality; it takes us into the realm of pollution and taboo. Liberal theorists are uncomfortable with the invocation of such primitive impulses, but they appear to be an ineradicable part of humanity's moral vocabulary.[162] As with racism, the stigmatization of gays is so deeply rooted in American culture that it is probably necessary to rely on this kind of countertaboo in order to respond to it. In each case, the aim is to induce citizens to regard the relevant prejudice as itself ritually unclean. But this weapon is, if you'll pardon the expression, undiscriminating. It can't capture the moral dimensions of fine-grained cases like *Elane Photography*. It will also continue to do its work whatever happens in these cases.

Perhaps the strongest case for resisting religious accommodation is this: if you are going to fight a taboo with a countertaboo, the consequential social rule will inevitably be crude in its application. The Arizona and Indiana controversies helped cement the countertaboo into the American ethos. Religious dissenters are necessary casualties in this political war. It makes no rational sense to refuse to accommodate them, but if irrational forces are to be invoked, then the consequences of doing so must be accepted.

This Article cannot assess whether this justification is sound. It can point out that the human costs of refusing accommodation are serious, that the costs of accommodation in any particular case are trivial, and that the

161. I have drawn this paragraph from KOPPELMAN, *supra* note 5, at 92–93. *See also id*. at 93–99 (further discussing the social construction of stigmatized classes).

162. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 170–77 (2012) (looking at the "brutal" and "hierarchical" societal structures of early humans and how they inform moral perceptions today).

refusal to accommodate is therefore irrational. The question of whether rational lawmaking is possible can only be answered with regard to local political conditions.

It's also relevant that, if this is to be the justification for refusing religious accommodation, the stakes go beyond denying accommodation to a few photographers and bakers. It raises the question whether the millions of Americans with conservative religious views about sexuality have any legitimate place in American society. During the controversy over the Indiana RFRA, the *New York Times*, one of the world's most trusted newspapers, ran an editorial with the title: "In Indiana, Using Religion as a Cover for Bigotry."[163] The implicit assumption is that the objection to facilitating same-sex marriage isn't really religion at all, that it is a "cover" for something else. The label of "bigotry" is powerful medicine. It can fairly be applied to some sources of opposition to gay rights. Thugs who randomly attack gay people on city streets are not motivated by moral objections to their conduct. But there are also longstanding religious traditions that condemn same-sex relationships, and adherence to those traditions can't fairly be equated with irrational hatred.[164] The notion that religious conservatives are all consumed with a hateful compulsion to hurt gay people has been an effective rhetorical trope, but it unfairly stereotypes those it purports to describe—much like the vicious old notion of gay men as misogynistic, amoral sociopaths.

IV. EMPLOYMENT LAW

Thus far, I have only discussed public accommodation laws, such as the one at issue in *Elane Photography*. Employment law raises different issues. Economic analysis shows that, when benefits are provided, they are a substitute for wages.[165] If employers are permitted to selectively deny family benefits to gay employees because they do not want to facilitate same-sex marriages, the gay employee will get less compensation, on an ongoing basis, than the heterosexual employee.

The most prominent religious accommodation of employers that has been under discussion was in the federal Employment Non-Discrimination Act passed by the Senate in November 2013, which if it had been enacted

163. Editorial, In Indiana, Using Religion as a Cover for Bigotry, N.Y. TIMES (Mar. 31, 2015), http://www.nytimes.com/2015/03/31/opinion/in-indiana-using-religion-as-a-cover-for-bigotry.html.

164. ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW 17–25 (2002).

165. RONALD G. EHRENBERG & ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 273–78 (6th ed. 1997).

would have prohibited employment discrimination based on sexual orientation.[166] It absolutely exempted from the law's coverage any religious "corporation, association, educational institution or institution of learning, or society."[167] A religiously affiliated hospital thus could have fired a nurse when it discovered that he was gay; a religiously affiliated university could have denied health insurance to the spouse of a groundskeeper. The Act would have licensed an enormous amount of raw discrimination, unrelated to the requirements of any religion. Although an amended version of the Act which dropped this provision was considered in the House,[168] it was not enacted during the 113th congressional term and has yet to be introduced in the 114th Congress.[169]

The scholars' model state statute is similarly overbroad.[170] It excuses any "organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization" from treating any marriage as valid if this would violate religious beliefs, and says that small businesses need not "provide benefits to any spouse of an employee."[171] These provisions permit employers to selectively deny family benefits to gay employees. "Religious dissenters can live their own values," Douglas Laycock writes, "but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values. If the dissenters want complete moral autonomy on this issue, they must refrain from occupying such a choke point."[172] Employer-provided health insurance is precisely such a choke point.[173] "The First Amendment," the

166. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6.

167. *Id.*

168. *See* Chris Johnson, *House Panel Rejects Last-Ditch Effort To Pass ENDA*, WASH. BLADE (Dec. 3, 2014), http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda/.

169. *Employment Non-Discrimination Act*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/employment-non-discrimination-act (last updated Mar. 9, 2015).

170. For this reason, when the model statute was proposed in Illinois shortly before the legislature enacted same-sex marriage, I opposed it. Open Letter from Dale Carpenter, Earl R. Larson Professor of Civil Rights & Civil Liberties Law, Univ. of Minn. Law Sch., et al. (Oct. 23, 2013), *available at* http://blogs.chicagotribune.com/files/five-law-professors-against-changing-sb-10.pdf. Earlier, I endorsed similar proposals because, like many others, I was focused on the public accommodations issues and overlooked the model statute's implications for terms of employment. *E.g.,* Letter from Douglas Laycock, Yale Kamisar Collegiate Professor of Law, Univ. of Mich., et al., to David. A. Paterson, Governor of N.Y. (May 8, 2009), *available at* http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html (New York 2009 round Letter 2).

171. Letter from Edward McGlynn Gaffney, Jr., *supra* note 97, at 5.

172. Laycock, *supra* note 19, at 200.

173. *See* Lupu & Tuttle, *supra* note 15, at 303–05 (discussing employer-provided spousal benefits when a member of the same-sex couple is employed by a religious organization).

Supreme Court has said, "gives no one the right to insist that in pursuit of their own [religious] interests others must conform their conduct to his own religious necessities."[174]

The statute's accommodation of employers is limited to those with "five or fewer employees."[175] Such employers are generally not required to provide benefits of any kind. It may thus be argued that the accommodation subtracts nothing from the rights of their employees.[176]

For such employers, however, the real burden of an antidiscrimination law—and many such laws do apply to small employers[177]—is that it puts them to the choice of either providing insurance to their employees on a nondiscriminatory basis or not providing insurance at all (and so sending them to the Obamacare exchanges, where they will get insurance of the same quality the employer would have provided). The model statute creates a third option: providing insurance on a discriminatory basis. The married gay employee will have higher out-of-pocket costs than the married heterosexual employee (because the former must purchase separate insurance for their spouse). Why is that option better than the alternatives? How is religion burdened if the employer is put in a position where he must pay his employees cash instead of discriminatory in-kind benefits?

V. CONCLUSION: WHY IT IS HARD

The precise shape of a legislative accommodation is a matter of negotiation. Political horse-trading is often disdained, but it can realize the noble aspiration of reaching a solution that everyone can live with. What I have offered is a way of thinking about the problem. I'll conclude by considering why such negotiation is so politically difficult. The fight over gay rights and religious liberty has led many to doubt the value of specifically accommodating religion as such, and so has raised the stakes of what was once a very local dispute.

I have presumed that we will continue the longstanding American tradition of accommodating religious objectors. That has, however, now become controversial, for reasons that are tightly tied to the emergence of

174. Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985) (quoting Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)).

175. Letter from Edward McGlynn Gaffney, Jr., *supra* note 97, at 5.

176. This point was raised in conversation by Douglas Laycock.

177. *See, e.g.*, MINN. STAT. § 363A.08 (2012) (barring sexual orientation discrimination, applicable to all employers); N.Y. EXEC. LAW §§ 292, 296 (2009) (barring sexual orientation discrimination, applicable to all employers with more than three employees); VT. STAT. ANN. tit. 21, § 495 (Supp. 2014) (barring sexual orientation discrimination, applicable to "any employer").

the gay rights movement. Disaffiliation with religion has become a cultural marker for solidarity with gay people.

In modern America, politics has become unusually polarized along religious lines. In the 2012 presidential election, for example, 59 percent of those attending church weekly or more voted for then-presidential candidate Mitt Romney, compared with 34 percent of those who never attended services. This pattern was consistent with elections in years prior.[178]

The proportion of Americans who report having no religious preference—statisticians call them the "nones"—nearly doubled in the 1990s, from 8.2 percent in 1990 (which had been its level for almost twenty years) to 14.1 percent in 2001, to 15 percent in 2008.[179] Perhaps even more revealingly, 27 percent of Americans do not expect a religious funeral.[180] However, 68 percent of the "nones" believe in God or a universal spirit; 21 percent pray daily, and 20 percent pray weekly or monthly; 18 percent describe themselves as "religious," and 37 percent as "spiritual but not religious."[181] More than half believe in life after death, about a third believe in heaven and hell, and 93 percent sometimes pray.[182] One study concludes that the newer "nones" are mostly "unchurched believers" who declare no religious preference in an effort to express their distance from the Religious Right.[183] They are disproportionately represented among the young, including about 25 percent of those who came of age in the 1990s and 2000s.[184] Overwhelmingly, they vote for Democrats. The result is growing polarization: the sum of evangelicals plus the unaffiliated was 30 percent of the American population in 1973, but had risen to 41 percent by 2008.[185]

178. *How the Faithful Voted: 2012 Preliminary Analysis*, PEW RES. CTR. (Nov. 7, 2012), http://www.pewforum.org/2012/11/07/how-the-faithful-voted-2012-preliminary-exit-poll-analysis/.

179. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2008 SUMMARY REPORT 2–3 (2009), *available at* http://commons.trincoll.edu/aris/files/2011/08/ARIS_Report_2008.pdf.

180. *Id.* at 10.

181. PEW FORUM ON RELIGION & PUB. LIFE, "NONES" ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 22 (2012), *available at* http://www.pewforum.org/files/2012/10/NonesOnTheRise-full.pdf.

182. Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 AM. SOC. REV. 165, 165.

183. *Id.* at 175 tbl.2. *See also* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 120–32 (2010).

184. PUTNAM & CAMPBELL, *supra* note 183, at 123 ("[T]he incidence of nones was about 5–7 percent in the pre-boomer generations who reached adulthood before 1960, doubled to about 10–15 percent among the boomers (who came of age in the 1960s, 1970s, and 1980s), and after 2000 doubled again to about 20–30 percent among the post-boomers (who came of age in the 1990s and 2000s.")).

185. *Id.* at 105–06 fig.4.4.

Robert Putnam and David Campbell explain how this happened. The liberalization of sexual mores in the 1960s mobilized religious conservatives against the change, and they soon aligned with the Republican Party. From the 1980s on, "conservative politics became the most visible aspect of religion in America."[186] This produced a counterbacklash, especially among those who came of age in the 1990s. Among those born in the 1980s, those with gay-friendly views "are more than twice as likely to be religious nones as their statistically similar peers who are conservative on homosexuality."[187]

Alexis de Tocqueville observed in 1835 that anticlericalism had arisen in Europe because religion had become identified with conservative politics. In America at that time, on the other hand, religion was powerful precisely because it was not associated with any party. Modern secular Americans, like nineteenth century secular Frenchmen, "attack Christians more as political than as religious enemies."[188] The culture wars damaged the Christian brand. In 1990, 86 percent of American adults identified as Christian; in 2008, only 76 percent did.[189] Douglas Laycock observes that what happened to religion in France could happen in America: by placing itself on the wrong side of the revolution, organized religion comes to be understood as the enemy of liberty.[190] The stigma of moral pollution, which I discussed earlier, has come in the minds of some to be associated with religion itself. Conservative Christians have good reason to fear becoming a despised outlier caste, like Jews in medieval Europe.

As the gay rights movement consolidates its victories, the heat of this conflict could abate.[191] Meanwhile, and partially as a consequence of these developments, the idea of religion-specific accommodation has itself been thrown into doubt.[192] For those who resist such accommodation—and they

186. *Id.* at 81.

187. *Id.* at 129. In keeping with this pattern, almost half (48 percent) of LGBT Americans say they have no religious affiliation. PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 90–104 (2013), *available at* http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf.

188. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 300 (J.P. Mayer ed., George Lawrence trans., 1969).

189. KOSMIN & KEYSAR, *supra* note 179, at 3 tbl.1.

190. Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 865.

191. PUTNAM & CAMPBELL, *supra* note 183, at 414–18.

192. Ira Lupu and Robert Tuttle, for example, opposed the Mississippi mini-RFRA because "the Bill's combination of context, timing, and specific provisions will send a powerful message that religiously justified refusals to serve particular classes of customers are legally superior to any state or local prohibitions on invidious discrimination." Letter from Lupu et al., *supra* note 153, at 1. The salience of the gay rights issue evidently was a reason to oppose a broad protection of religious liberty. A similarly worded Michigan bill, which made no mention of gay rights, was widely mischaracterized

are now the mainstream of political and legal theory[193]—the gay rights issue is an inviting battleground. As Maggie Gallagher observes, "we do not draft legislative accommodations for irrational hatred."[194] The gay rights issue can become an occasion for calcifying the left's suspicion of religion.

That suspicion is misplaced. The association of religion with political conservatism is a recent development. The Social Gospel movement of the late nineteenth century fought alcoholism, sweatshops, decaying tenements, business monopolies, and foreign wars. Organized Catholics helped push the New Deal to the left.[195] In the 1960s, religious groups swung left on the most pressing issues, the civil rights movement and the Vietnam War. The most important effect of politically-mobilized religion in American public life is the abolition of slavery. If history shows anything, it is that in this country the secular left can accomplish little without religious allies.[196] Militant atheism in contemporary America, to the (large) extent that it is politically motivated, mistakes a historical blip for a permanent feature of the political world.

This militancy isn't even good for the gay rights cause. Legislative majorities are slowly shifting toward recognition of gay rights all over the United States. Same-sex marriage seems to be inevitable everywhere. But it will take a while for these majorities to form, and in some states, enactment of reforms such as same-sex marriage will be delayed if its proponents regard compromise as unthinkable.[197]

As I have said, I am a gay rights advocate. We won. Good. But now I want to talk less about that and more about America's neglected, violent ghettoes, its interminable drug war, its bulging prisons, its radical constriction of government services, its chronically high unemployment, and its increasing concentration of wealth at the top. The growing neo-Ayn

in the press as an authorization of discrimination. *See* Ryan T. Anderson, *Here's How the Media Got the Latest Religious Liberty Bill Wrong*, DAILY SIGNAL (Dec. 13, 2014), http://dailysignal.com/2014/12/13/heres-media-got-latest-religious-liberty-bill-wrong/.

193. KOPPELMAN, *supra* note 32, at 120–65 (engaging with prominent theorists who object to American law's special treatment for religion).

194. Gallagher, *supra* note 15, at 263.

195. A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 210–12, 219–25 (1985).

196. KOPPELMAN, *supra* note 32, at 175–77. The continuing existence of a large religious left is often overlooked. *See* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010); STEVEN H. SHIFFRIN, THE RELIGIOUS LEFT AND CHURCH-STATE RELATIONS 2 (2009).

197. *See* Robin Fretwell Wilson, *A Marriage of Necessity: Same-Sex Marriage and Religious Liberty Protections*, 64 CASE W. RES. L. REV. 1161, 1228–41 (2014).

Rand antiwelfarism is irreconcilable with Christianity.[198] Only Christians can effectively point that out.

The culture wars have led regular churchgoers increasingly to ally with oligarchs. That alliance is rife with contradiction and instability, but the culture wars help to maintain it. Some accommodation of, and respect for, the religion of the right can, paradoxically, encourage the religion of the left.

198. For other nasty implications of this antiwelfarism trend, see generally ANDREW KOPPELMAN THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (2013) (discussing the influence of libertarian political philosophy on the constitutional challenge to the Affordable Care Act in *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012)).