
ACCOMMODATING NONMARRIAGE

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I. INTRODUCTION

When Vanessa Willock emailed Elane Photography seeking information about photography services for her upcoming commitment ceremony, she was likely expecting a run-of-the-mill response—pricing information, samples of prior work, a discussion of the photographer’s availability for the date in question. She was not expecting Elaine Huguenin, a co-owner of Elane Photography, to refuse the commission outright on the ground that she “[did] not photograph same-sex weddings.”¹ Likewise, when Charlie Craig and David Mullins entered Masterpiece Cakeshop in Lakewood, Colorado to order a cake for a party celebrating their Massachusetts marriage, they probably were not expecting the owner, Jack Phillips, to refuse their business because his religious convictions prevented him from making cakes for same-sex weddings.²

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1. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 7, 309 P.3d 53, 60 (internal quotation marks omitted), *cert. denied*, 134 S. Ct. 1787 (2014).

2. *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008, at 1–2 (Colo. Civ. Rights Comm’n Dec. 6, 2013), [available at](http://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf) http://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf (initial decision granting complainants’ motion for summary judgment), *aff’d*, No. CR 2013-0008 (Colo. Civ. Rights Comm’n May 30, 2014), [available at](https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf) https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf (final

Perhaps the couples should have been prepared for these responses. As the facts of *Elane Photography v. Willock* and *Craig v. Masterpiece Cakeshop* suggest, the expansion of marriage equality across the country has also produced a clash of religious rights and civil rights.³ However, amidst these confrontations between claims for religious liberty and laws demanding LGBT equality, it is easy to overlook a crucial fact: neither *Elane Photography* nor *Masterpiece Cakeshop* actually involved marriages

agency order); Notice of Hearing and Formal Complaint at 2, *Masterpiece Cakeshop*, No. CR 2013-0008, available at [http://aclu-co.org/wp-content/uploads/files/2013-05-31%20Notice%20of%20Charges%20\(Craig\).pdf](http://aclu-co.org/wp-content/uploads/files/2013-05-31%20Notice%20of%20Charges%20(Craig).pdf).

3. The clash has generated refusals by state officials to license same-sex marriages due to religious objections. See, e.g., Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16, available at <http://www.nytimes.com/2004/05/17/us/massachusetts-arrives-at-moment-for-same-sex-marriage.html> (“Twelve . . . [Massachusetts] justices of the peace resigned rather than perform same-sex marriage”); Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 28, 2011, at A1, available at <http://www.nytimes.com/2011/09/28/nyregion/rights-clash-as-town-clerk-rejects-her-role-in-gay-marriages.html> (reporting that in New York, two clerks resigned and one appointed a deputy to issue licenses by appointment for same-sex couples). Additionally, wedding-related service providers have refused to provide services for use in same-sex weddings. See, e.g., Geoff Folsom, *Arlene’s Flowers Case Still Stalled*, TRI-CITY HERALD (Kennewick, Pasco, & Richland, Wash.) (July 10, 2014), <http://www.tri-cityherald.com/2014/07/10/3059058/arlenes-flowers-case-still-stalled.html> (reporting on the status of a case filed by the Washington Attorney General after a floral shop owner refused to provide floral arrangements for a same-sex wedding); Katie McDonough, *Yet Another Bakery Refuses to Make Cake for Gay Wedding*, SALON (May 15, 2013), http://www.salon.com/2013/05/15/yet_another_bakery_refuses_cake_for_gay_wedding/ (reporting on pending legal action for an Oregon baker’s refusal to bake a cake for a same-sex wedding); Katie McDonough, *Oregon Baker Denies Lesbian Couple a Wedding Cake*, SALON (Feb. 4, 2013), http://www.salon.com/2013/02/04/oregon_baker_denies_lesbian_couple_a_wedding_cake/ (discussing pending legal action for a second Oregon baker’s refusal to bake a cake for a same-sex wedding); 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#.UZqtN7Wkrlw> (reporting a New Jersey shop owner’s refusal to sell a wedding dress to a same-sex bride because, aside from the owner’s personal convictions, the state does not recognize same-sex marriage). More generally, religious objectors have refused to serve same-sex couples in other contexts. See, e.g., *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1280–81 (11th Cir. 2012) (involving a counselor who referred a client to another counselor because of the client’s same-sex relationship); *Ward v. Polite*, 667 F.3d 727, 729–30 (6th Cir. 2012) (concerning a graduate student who was expelled from a graduate-level counseling degree program due to her refusal to counsel a homosexual student during a counseling practicum); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 867–68 (11th Cir. 2011) (involving a graduate student who refused her university’s request that she participate in a remedial plan addressing her unwillingness to counsel LGBT clients); *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 497–99 (5th Cir. 2001) (involving a refusal by a family and marriage counselor to counsel a client on her same-sex relationship); *Cervelli v. Aloha Bread & Breakfast*, No. 11-1-3103-12 ECN, 2013 WL 1614105, at *2–3 (Haw. Cir. Ct. Apr. 11, 2013) (granting summary judgment in favor of same-sex couple who were refused service at a bed and breakfast). For further discussion of these clashes, see generally Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CALIF. L. REV. 1169 (2012) (discussing instances of religious objectors refusing to serve same-sex couples on the basis of sexual orientation).

that were civilly recognized by the states in which the litigants lived. Although the couples and the objecting service providers framed their legal arguments with reference to marriage, New Mexico and Colorado—the states in which the cases took place—did not actually recognize same-sex marriages at the time.⁴ Nevertheless, despite the absence of civil recognition of these relationships as marriages, all of the parties—and the reviewing courts adjudicating the parties’ claims—framed the relationships in marital terms.

Why did the parties and the courts characterize these nonmarital relationships as marriages? On one hand, the willingness to conflate committed relationships with marriages may suggest that the popular understanding of marriage is more expansive than state laws defining civil

4. In 2006, Colorado voters passed Initiative 43, which amended the Colorado Constitution to prohibit legal recognition of same-sex marriages. *See* COLO. CONST. art. II, § 31 (“Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”); *America Votes 2006: State Races—Colorado*, CNN.COM, <http://www.cnn.com/ELECTION/2006/pages/results/states/CO/index.html> (last visited Feb. 3, 2015) (showing Amendment 43 passed with 56 percent of the vote in the 2006 election). By contrast, New Mexico’s marriage statute was not specific as to the gender of the parties; nor did the state have a mini-DOMA that explicitly precluded legal recognition of same-sex marriage. *See* N.M. STAT. ANN. § 40-1-1 (West 2013) (“Marriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential.”). Nevertheless, in the absence of a clear state law or judicial ruling concerning same-sex marriage, the policy for issuing marriage licenses to same-sex couples was briefly determined at the county level at the discretion of local authorities before the state’s then-Attorney General prohibited that practice. *See New Mexico*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/entry/c/new-mexico> (last visited Feb. 6, 2015) (discussing the history of same-sex marriage in New Mexico). Recent developments, however, have prompted dramatic changes in these states. In 2013, Colorado legalized civil unions for same-sex couples. Jack Healy, *Colorado: Civil Unions Signed Into Law*, N.Y. TIMES, Mar. 22, 2013, at A19, available at http://www.nytimes.com/2013/03/22/us/colorado-approves-same-sex-unions.html?_r=0. On December 19, 2013, the New Mexico Supreme Court officially legalized same-sex marriages throughout the state. 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>. Additionally, on June 25, 2014, a three-judge panel of the Tenth Circuit, which covers the jurisdictions of Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, held that “the Fourteenth Amendment protects the fundamental right to marry, establish a family, raise children, and enjoy the full protection of a state’s marital laws. A state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union.” *Kitchen v. Herbert*, 755 F.3d 1193, 1199, 1230 (10th Cir. 2014) (staying its holding that “those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex” pending “the disposition of any subsequently filed petition[s] for writ of certiorari), *cert. denied*, 135 S. Ct. 265 (2014), *stay lifted* by 2014 U.S. App. LEXIS 19304 (10th Cir. Oct. 6, 2014). In the wake of the Tenth Circuit’s decision, a Colorado state judge struck down the constitutional amendment banning same-sex marriage, and clerks in Boulder began issuing marriage licenses. Jack Healy, *Colorado Clerk Won’t Halt Marriage Licenses for Gays*, N.Y. TIMES, July 3, 2014, at A12, available at http://www.nytimes.com/2014/07/03/us/colorado-clerk-wont-halt-marriage-licenses-for-gays.html?_r=0.

marriage—that, regardless of state licensure, we understand committed couples in marital terms. Or perhaps it reflects strategic choices that are made in the course of litigation. For example, a claim for a religious exemption from the operation of antidiscrimination law may seem more plausible if the believer’s objections concern an institution like marriage, which has religious underpinnings, rather than objections to homosexuality more generally.

Regardless of why it occurred, the conflation of nonmarital relationships with marriages in *Elane Photography* and *Masterpiece Cakeshop* is meaningful. As I explain in this Symposium Article, the conflation of these relationships with marriages reflects the broader elision—and *erasure*—of nonmarriage in our law and culture. To this end, the marital discourse that pervades these cases makes clear that the debate over religious exemptions and same-sex marriage is not exclusively about *religious* liberty—to what extent can we balance our commitments to free exercise of religion and equal protection of the laws for all citizens? Instead, this issue also raises broader questions about *sexual* liberty—to what extent are we willing to accommodate dissent from the prevailing orthodoxy of marriage?

Before outlining the contours of the argument that follows, let me briefly define terms. This Article draws a distinction between “marriage” and “nonmarriage.” These are obviously capacious terms. “Marriage” has traditionally referred to those relationships that are licensed and recognized by the state—civil marriages. However, those who are not civilly married, but nonetheless understand themselves to be married for purposes of public presentation, may use the term to refer to their relationships—we may call these “public marriages.” Likewise, those who are not in licensed, state-recognized marriages may be married for purposes of a particular faith tradition—we may call these “religious marriages.”

The category of “nonmarriage” may also be broadly construed. Nonmarriage may refer to any relationship that is not licensed and recognized by the state as a civil marriage. This could include coupled, intimate relationships that are not civilly recognized, but resemble marriage in particular ways. On this account, this category may overlap with public marriages and religious marriages. Alternatively, nonmarriage may include relationships that involve interdependence and caregiving, but are not necessarily conjugal. Or it could refer to relationships that may be considered deviant in some fashion—relationships that involve BDSM,⁵ for

5. The BDSM community, whose name is derived from the terms “bondage and discipline,” “dominance and submission,” and “sdomasochism,” encompasses a wide range of non-normative

example. More radically, nonmarriage may refer to a range of sexual behaviors that occur outside of committed sexual relationships.

Although I have begun to map the contours of this divide in other work,⁶ for the purposes of this Article, I have cabined these terms considerably. In this Article, by “marriage,” I mean specifically *civil* marriage. That is, relationships licensed and recognized as marriages by the state in which the parties are living. By “nonmarriage,” I refer to coupled intimate relationships that are *not* recognized by the state under the rubric of civil marriage. As the previous discussion suggests, this distinction is crude and obviously does not capture the full panoply of intimate relationships that might exist. Nor does it account for the fact that the term “marriage” may have meaning beyond state licensing and recognition. Although I recognize these nuances, I do not engage them in this Article. Instead, my focus is directed specifically toward relationships that the state recognizes as marriages and those it does not.

With these caveats duly issued, let me proceed to the argument. Using *Elane Photography* and *Masterpiece Cakeshop* as a point of entry,⁷ I explore the impulse to translate coupled intimate relationships into the vernacular of marriage. As I contend, viewing such relationships through the lens of marriage may entail short-term benefits—here, the same-sex couples prevailed over the objecting service providers.⁸ However, in the

erotic interpersonal relationships. Inclusion within the community is dependent on self-identification with shared experiences of the subculture. For further discussion of over-arching characteristics of such practices, see *BDSM, SUBMISSIVE GUIDE*, <http://www.submissiveguide.com/encyclopedia/bdsm/> (last visited Feb. 6, 2015).

6. See Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 54–58 (2012) [hereinafter Murray, *Marriage as Punishment*] (discussing the practical difference between “legally imposed monogamy” and “monogamous self-governance” in light of the shifting landscape of the “marriage-crime binary that traditionally [was] used to regulate sex and sexuality”); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1302–04 (2009) [hereinafter Murray, *Strange Bedfellows*] (addressing the existence of the legal “interstitial space occupied by intimate acts and choices that are neither criminal nor marital” and arguing that “the promise of an unregulated space between marriage and crime is ultimately unrealized” due to society’s habit of classifying such activities to map onto a familiar marriage-crime binary scheme).

7. A brief note about methodology and case selection. *Elane Photography* and *Masterpiece Cakeshop* are not the only cases that confront the intersections of religious accommodations, antidiscrimination law, and same-sex marriage. As noted earlier, *supra* note 3, such cases have proliferated in recent years. I focus on *Elane Photography* and *Masterpiece Cakeshop* because they are among the most recent challenges and feature many of the same arguments and discursive moves seen in other cases. As importantly, both cases were initiated at the level of a state administrative agency. Accordingly, they progressed through the state administrative adjudication system before ultimately proceeding to the state judicial system. As a result of this multilevel adjudicative process, both cases have a developed litigation record that permits a close-reading analysis of the cases as legal texts.

8. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 2–4, 309 P.3d 53, 59, *cert. denied*,

long-term, this impulse leads to the diminution of legal space for accommodating nonmarriage—a category that might encompass a wider range of intimate relationships. Moreover, the conflation of civil marriage and nonmarriage goes beyond simply blurring the lines between those coupled relationships that are legally recognized and those that are not. It further entrenches marriage’s primacy and actively erases nonmarriage as a meaningful category and alternative for intimate life.

This Article proceeds in three additional parts. Part II briefly relates the facts of *Elane Photography* and *Masterpiece Cakeshop*. Part III discusses the conflation of coupled same-sex relationships with civil marriages in these two cases. As this part explains, this discursive move gestures toward three distinct, but related, normative projects. First, it reflects the continuing contest to define marriage’s meaning and the sexual norms that embody that meaning. Second, it reflects a desire, whether conscious or not, to erase nonmarriage as a viable rubric for intimate life. Finally, it suggests an effort to reconfigure gay identity in a way that prioritizes marriage as an expression of gay and lesbian sexuality.

Part IV then shifts to consider what it would mean to take sexual liberty as seriously as we take religious liberty. Specifically, it considers whether we might accommodate nonmarriage, and other deviations from the orthodoxy of marriage, just as we accommodate religion. This part begins by first tracing the framework for accommodation in the context of religious liberty. It then considers what accommodation might mean in the context of sexual liberty, and relatedly whether accommodation is possible in a legal culture in which marriage and the marital family has been “established” as the preferred rubric for intimate life. As part of this inquiry, this part examines another case that, like *Elane Photography* and *Masterpiece Cakeshop*, implicates religious liberty, civil rights, and sexual liberty—*Brown v. Buhman*,⁹ the 2013 challenge to Utah’s criminal ban on bigamy and cohabitation.

In *Brown*, the plaintiffs challenged Utah’s law criminalizing certain forms of nonmarital cohabitation as bigamy and polygamy.¹⁰ According to the state’s logic, nonmarital cohabitation by someone who was already legally married to another person was akin to engaging in a subsequent

134 S. Ct. 1787 (2014); *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008, at 12–13 (Colo. Civ. Rights Comm’n Dec. 6, 2013) (initial decision granting complainants’ motion for summary judgment), available at http://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf, *aff’d*, No. CR 2013-0008 (Colo. Civ. Rights Comm’n May 30, 2014) (final agency order), available at https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

9. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

10. *Id.* at 1191–92.

(polygamous) marriage.¹¹ In challenging the law, the *Brown* plaintiffs actively resisted the state's efforts to cast their religious marriages as state-recognized marriages. Indeed, they characterized their relationships not as marriages, but as nonmarriages—relationships that were not recognized by the state as civil marriages.¹² Accordingly, their legal claims were framed in terms of sexual privacy—or more particularly, as a request for an accommodation of their nonmarital relationships.¹³ In this way, *Brown* offers a compelling counterpoint to *Elane Photography* and *Masterpiece Cakeshop*. Unlike those two cases, in which the opportunity to engage with and theorize nonmarriage is avoided and surrendered, *Brown* engages the distinction between civil marriage and nonmarriage—and the ways in which we might accommodate the desire to construct relationships outside of civil marriage and the confines of traditional coupled relationships. Part V briefly concludes.

II. THE CASES

A. *ELANE PHOTOGRAPHY V. WILLOCK*

In September 2006, Vanessa Willock contacted Elane Photography, a small business in Albuquerque, New Mexico, by e-mail.¹⁴ As she explained in her message, she and her partner, Misti Collinsworth, were planning a commitment ceremony celebrating their relationship, and they were “researching potential photographers.”¹⁵ Upon receiving Vanessa Willock’s email, Elaine Huguenin, who, along with her husband, owned and operated Elane Photography, responded that the company only “photograph[ed] traditional weddings.”¹⁶ Confused, Vanessa Willock wrote back to request clarification. Did Elaine Huguenin mean that Elane Photography “[did] not offer [its] photography services to same-sex couples?”¹⁷ Elaine Huguenin’s response made things clear: “Yes, you are correct in saying we do not photograph same-sex weddings, but again, thanks for checking out our site!”¹⁸

11. *Id.* at 1215.

12. *Id.* at 1178, 1223.

13. *Id.* at 1223.

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

15. Appeal from the Decision and Final Order of the New Mexico Human Rights Commission at 3, *Elane Photography*, 2009 WL 8747805 (No. CV-2008-06632), 2008 WL 9003694, ¶ 10 [hereinafter Appeal from New Mexico Human Rights Commission Decision] (internal quotation marks omitted).

16. *Id.* (internal quotation marks omitted).

17. *Id.* at 3–4 (internal quotation marks omitted).

18. *Id.* at 4 (internal quotation marks omitted).

As Elaine Huguenin later explained, she and her husband were devout Christians who held “strong moral and philosophical beliefs that marriage should be defined as one man and one woman.”¹⁹ Accordingly, the Huguenins refused to photograph “any situation that [would] communicate a view that contradicts or conflicts with [their] beliefs about the definition of marriage.”²⁰

Vanessa Willock filed a complaint against Elane Photography with the New Mexico Division of Human Rights (“Division”), alleging that in refusing to photograph her same-sex wedding, Elane Photography discriminated on the basis of sexual orientation, in violation of New Mexico’s Human Rights Act (“NMHRA”).²¹ The Division investigated the facts and filed a complaint of sexual orientation discrimination with the New Mexico Human Rights Commission.²² In an April 9, 2008 order, the Commission ruled in Vanessa Willock’s favor, holding that in declining to photograph the Willock-Collinsworth commitment ceremony, Elane Photography, a public accommodation, had engaged in unlawful sexual orientation discrimination.²³

Elane Photography appealed the Commission’s order through the New Mexico state court system.²⁴ The Huguenins argued that because it provided “nonessential, discretionary, and artistic services,” it could not be considered a public accommodation, and thus was beyond the ambit of the NMHRA.²⁵ The Huguenins further argued that, even if the NMHRA applied, its application violated their First Amendment rights to freedom of speech and religion, as well as their statutory rights under the New Mexico

19. *Id.* at 2–3.

20. *Id.* at 3.

21. *Id.* 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”).

22. Appeal from New Mexico Human Rights Commission Decision, *supra* note 15, at 4.

23. Willock v. Elane Photography, LLC, HRD No. 06-12-20-0685, at 19 (N.M. Human Rights Comm’n Apr. 9, 2008), available at <http://www.volokh.com/files/willockopinion.pdf> (decision and final order).

24. See generally *Elane Photography, LLC v. Willock*, 2013-NMSC-040, 309 P.3d 53 (affirming grant of summary judgment in Willock’s favor), *cert. denied*, 134 S. Ct. 1787 (2014); *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428 (same); *Elane Photography, LLC v. Willock*, No. CV-2008-06632, 2009 WL 8747805 (N.M. Dist. Ct. Dec. 11, 2009) (granting summary judgment in Willock’s favor).

25. Plaintiff’s Memorandum of Law in Support of Motion for Summary Judgment at 10–14, *Elane Photography*, 2009 WL 8747805 (No. CV-2008-06632), 2009 WL 8752005 [hereinafter *Elane Photography’s Memorandum*].

Religious Freedom Restoration Act,²⁶ by requiring them to endorse, through their photographs, a vision of marriage at odds with their traditional Christian beliefs.²⁷ Moreover, they maintained that they had not engaged in sexual orientation discrimination.²⁸ As they explained, they had no policy that prohibited them from photographing LGBT persons.²⁹ They simply objected to photographing same-sex weddings because such unions contradicted their Christian beliefs.³⁰

In the end, these arguments proved unavailing. In its May 31, 2012 decision, the New Mexico Supreme Court agreed that Elane Photography was a public accommodation subject to the NMHRA, and that it had engaged in unlawful sexual orientation discrimination.³¹ The majority rejected the couple's First Amendment arguments.³² The Huguenins appealed the state court decision to the United States Supreme Court, which declined to review the case.³³

B. CRAIG V. MASTERPIECE CAKESHOP

The facts of *Masterpiece Cakeshop* are similar to those of *Elane Photography*. In *Masterpiece Cakeshop*, Charlie Craig and David Mullins, visited the Masterpiece Cakeshop in Lakewood, Colorado, to order a cake for their wedding reception.³⁴ Because same-sex couples were ineligible for civil marriage in Colorado, the couple planned to travel to Massachusetts to marry.³⁵ The cake was intended for a reception that they would host for friends and family in Denver upon their return.³⁶ However, when Jack Phillips, the owner of Masterpiece Cakeshop, learned that the requested

26. See N.M. STAT. ANN. § 28-22-3 (West 2011) (“A government agency shall not restrict a person’s free exercise of religion unless (A) the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and (B) the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”).

27. Elane Photography’s Memorandum, *supra* note 25, at 20, 29, 35–37.

28. *Id.* at 14–20.

29. *Id.* at 16–18.

30. *Id.* at 18.

31. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 79, 309 P.3d 53, 77, *cert. denied*, 134 S. Ct. 1787 (2014).

32. *Id.*

33. *Elane Photography, LLC v. Willock*, 134 S. Ct. 1787, 1787 (2014) (denying petition for writ of certiorari).

34. Charge of Discrimination at 1, *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civ. Rights Comm’n Dec. 6, 2013), *available at* <http://www.adfmedia.org/files/masterpiececomplaints.pdf>.

35. Notice of Hearing and Formal Complaint, *supra* note 2, at 2, ¶ 10.

36. *Id.*

cake was intended for a party celebrating the couple's Massachusetts wedding, he refused the couple's business.³⁷ As Phillips explained to Craig and Mullins, it would defy his religious convictions, which specified that marriage was a union between a man and a woman, to provide cakes to celebrate a same-sex marriage.³⁸

On September 5, 2012, Craig and Mullins filed complaints against Masterpiece Cakeshop with the Colorado Civil Rights Division charging Phillips and Masterpiece Cakeshop with sexual orientation discrimination.³⁹ In support of their claim, they included affidavits from two other same-sex couples that had sought, and were refused, cakes for their upcoming commitment ceremonies.⁴⁰ According to one affiant, although Phillips drew the line at making cakes to celebrate same-sex weddings, he was willing to furnish a cake to celebrate "a dog wedding."⁴¹

Like the defendants in *Elane Photography*, Phillips countered by arguing that he had not engaged in sexual orientation discrimination, as he was happy to serve gays and lesbians by providing cakes for other (nonmarital) occasions, such as birthdays and baby showers.⁴² He also maintained that in compelling him to provide cakes for same-sex marriages, the Colorado antidiscrimination statute violated his First Amendment rights to free speech⁴³ and freedom of religion.⁴⁴

On December 6, 2013, an administrative law judge concluded that Masterpiece Cakeshop violated Colorado's antidiscrimination law, and ordered the cakeshop to "[c]ease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any other products [it] would provide to heterosexual couples."⁴⁵ Masterpiece

37. *Id.* ¶ 13.

38. Brief in Opposition to Complainants' Motion for Summary Judgment and in Support of Jack Phillips's Cross Motion for Summary Judgment at 2, *Masterpiece Cakeshop*, No. CR 2013-0008, available at <http://www.adfmedia.org/files/MasterpieceSJbrief.pdf> [hereinafter *Masterpiece Cakeshop's Brief*].

39. Charge of Discrimination, *supra* note 34, at 1–2.

40. Statement of Katie Allen at 1, ¶¶ 6–8, *Masterpiece Cakeshop*, No. CR 2013-0008, available at <http://static.aclu-co.org/wp-content/uploads/files/Affidavit%20of%20Katie%20Allen.pdf>; Statement of Alison Sandlin at 1, ¶¶ 6–8, *Masterpiece Cakeshop*, No. CR 2013-0008, available at <http://static.aclu-co.org/wp-content/uploads/files/Affidavit%20of%20Alison%20Sandlin.pdf>; Affidavit of Stephanie Schmalz at 1, ¶¶ 5–6, *Masterpiece Cakeshop*, No. CR 2013-0008, available at <http://static.aclu-co.org/wp-content/uploads/files/Affidavit%20of%20Stephanie%20Schmalz.pdf>.

41. Affidavit of Stephanie Schmalz, *supra* note 40, at 2, ¶¶ 12–13.

42. Masterpiece Cakeshop's Brief, *supra* note 38, at 5, 7–13.

43. *Id.* at 24–35.

44. *Id.* at 35–44.

45. *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008, at 13 (Colo. Civ. Rights Comm'n Dec. 6, 2013), available at

Cakeshop appealed the decision,⁴⁶ however, on May 30, 2014, the Colorado Civil Rights Commission affirmed the administrative law judge's ruling.⁴⁷ The case has been appealed to the Colorado Court of Appeals.⁴⁸

III. MARRIAGE MYOPIA IN *ELANE PHOTOGRAPHY* AND *MASTERPIECE CAKESHOP*

What is interesting about *Elane Photography* and *Masterpiece Cakeshop* is that, under the laws of New Mexico and Colorado, neither relationship was a legally recognized marriage. Although Vanessa Willock and Misti Collinsworth sought to celebrate their relationship with friends and family, they understood that their "marriage-like commitment ceremony"⁴⁹ would not result in legal recognition of their union. The same was true for Charlie Craig and David Mullins. The Denver party they were planning was intended to celebrate their (lawful) Massachusetts union, but they had no illusions that their Massachusetts marriage would result in legal recognition in Colorado, their home state.⁵⁰ In this way, we might instead think of these relationships as a species of nonmarriage. That is, as relationships that the state does not recognize as civil marriages.⁵¹ Yet, none of the parties in these cases characterized these relationships as nonmarriages. In fact, the participants in these two cases framed these

http://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf, *aff'd*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n May 30, 2014) (final agency order), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

46. Notice of Appeal and Petition for Review by Colorado Civil Rights Commission at 2–3, *Masterpiece Cakeshop*, No. CR 2013-0008, *available at* <http://www.adfmedia.org/files/MasterpieceAppeal.pdf>.

47. *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 (Colo. Civ. Rights Comm'n May 30, 2014) (final agency order), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

48. *Charlie Craig and David Mullins v. Masterpiece Cakeshop*, ACLU, <https://www.aclu.org/lgbt-rights/charlie-craig-and-david-mullins-v-masterpiece-cakeshop> (last visited Feb. 11, 2015); *Colorado Baker Jack Phillips Appeals Order to Provide Gay Wedding Cakes*, HUFFINGTON POST (July 17, 2014), http://www.huffingtonpost.com/2014/07/17/denver-gay-wedding-cake-baker-_n_5596493.html.

49. *Elane Photography's Memorandum*, *supra* note 25, at 8.

50. See Notice of Hearing and Formal Complaint, *supra* note 2, at 2, ¶ 10 (detailing the couple's plans for a Massachusetts wedding and Denver post-wedding celebration).

51. It is true that Craig and Mullins's marriage was lawful and valid in Massachusetts; however, this marriage was what Andrew Koppelman has termed a "migratory" marriage, as the couple immediately returned to Colorado where they lived. Although valid in Massachusetts, the marriage was not recognized by Colorado, leaving the couple unrecognized by their home state. For further discussion of "migratory marriages," see generally ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006) (detailing the nature of marriage recognition between states and setting forth a set of workable rules to help states determine when to recognize same-sex marriages, with a special focus on the miscegenation cases as examples of the federalist model).

nonmarital relationships in marital terms, eliding the distinction between state recognition and its absence.

In fairness, the couples themselves came closest to embracing the nonmarital label. In their lawsuits, they neither referred to themselves as spouses, nor claimed to be married by law. Despite these apparent concessions to nonmarriage, the couples nevertheless suggested in other ways that they wanted themselves and their relationships understood in marriage's familiar terms, if only by third parties. First, their coupled conduct was consistent with marital norms—they were conjugal cohabitants in exclusive relationships. But most revealing was their desire to commemorate their relationships in ways that connoted marriage. Charlie Craig and David Mullins actively sought legal recognition as spouses by marrying in a state where same-sex unions were lawful.⁵² And Vanessa Willock and Misti Collinsworth celebrated their relationship in an elaborate commitment ceremony in which Collinsworth wore “a traditional white gown,” and the pair recited vows and exchanged rings before a minister.⁵³

Although Colorado and New Mexico did not recognize the couples as married, others certainly did, including Elaine Huguenin and Jack Phillips. Critically, both Huguenin and Phillips were well aware that Colorado and New Mexico did not recognize marriage or any sort of legal union between same-sex couples.⁵⁴ Huguenin nonetheless insisted that she could not photograph Willock and Collinsworth's “marriage-like commitment ceremony”⁵⁵ because doing so would undermine her view of marriage as the union of one man and one woman.⁵⁶ And while Phillips was happy to provide cakes to celebrate a range of other (nonmarital) events, he insisted that he could not “design and create a *wedding* cake for [Craig and Mullins's] same-sex *wedding*.”⁵⁷ Despite the fact that they knew the parties were not legally married, Huguenin and Phillips nonetheless understood these nonmarital relationships as marriages that offended their personal religious beliefs.

What explains this impulse to conflate nonmarital relationships with

52. See *Goodridge v. Dep't of Public Health*, 798 N.E.2d 941, 968–70 (Mass. 2003) (legalizing same-sex marriage).

53. Elane Photography's Memorandum, *supra* note 25, at 8.

54. See *id.* at 9 (“The State of New Mexico does not recognize any sort of legal union, including marriages, between same-sex couples.”); Masterpiece Cakeshop's Brief, *supra* note 38, at 8 (noting that same-sex marriages are “not recognized in the state of Colorado”).

55. Elane Photography's Memorandum, *supra* note 25, at 8.

56. *Id.* at 6–7.

57. Masterpiece Cakeshop's Brief, *supra* note 38, at 8 (emphasis added).

marriages? In the sections that follow, I attribute this discursive move to three distinct, but related, projects: (1) the debate over marriage's social and legal meaning; (2) the erasure of nonmarriage as a legal category; and (3) the recasting of gay identity.

A. CONTESTING MARRIAGE'S MEANING

The effort to translate nonmarital relationships into marriages renders visible the way in which the debate over religious exemptions is part of the larger struggle to define marriage's meaning in modern society.⁵⁸ On one hand, these discursive moves may reflect the fact that our intuitions about marriage are far more expansive than the state's definition of the institution. On this account, regardless of whether the state limits civil marriage to opposite-sex couples, popular intuitions about what marriage is, and the social and sexual norms that constitute it, might cause us to regard *any* adult couple that comports themselves in a manner consistent with marital norms as "married."⁵⁹

With this in mind, the fact of the commitment ceremonies at the heart of the two cases is deeply meaningful. Historically, the public celebration of a wedding heralded the couple's entry into marriage.⁶⁰ In the 1970s and 1980s, gay men and lesbians hosted commitment ceremonies as a means of celebrating their relationships, while simultaneously calling attention to their exclusion from civil marriage. In some cases, these ceremonies were thinly veiled critiques of marriage's heteronormativity. In others, couples

58. See, e.g., DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 11–21 (2007); EVAN GERSTMANN, *SAME-SEX MARRIAGE AND THE CONSTITUTION* 22–26 (2d ed. 2008); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 11–33 (2008); JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 11–37 (2004); LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 1–46, 174–85 (2000); JAMES Q. WILSON, *THE MARRIAGE PROBLEM: HOW OUR CULTURE HAS WEAKENED FAMILIES* 65–106 (2002); EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 1–18, 103–22 (2004); Anita Bernstein, *Introduction: Questioning Marriage*, in *MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS* 1, 11–21 (Anita Bernstein ed., 2006); John Eekelaar, *Why People Marry: The Many Faces of an Institution*, 41 *FAM. L.Q.* 413, 422–27 (2007); Leah Ward Sears, *The "Marriage Gap": A Case for Strengthening Marriage in the 21st Century*, 82 *N.Y.U. L. REV.* 1243, 1252–53 (2007); Mary Lyndon Shanley, *Just Marriage: On the Public Importance of Private Unions*, in *JUST MARRIAGE* 3, 3–30 (Mary Lyndon Shanley, ed., 2004).

59. In this way, these two cases, perhaps paradoxically, might suggest that despite the efforts of mainstream LGBT rights groups to secure marriage equality, state recognition of marriage might be less weighty than—or perhaps *just as* weighty as—popular views of marriage in the debate over marriage's meaning.

60. See CELE C. OTNES & ELIZABETH H. PLECK, *CINDERELLA DREAMS: THE ALLURE OF THE LAVISH WEDDING* 25–54 (2003) (explaining that lavish public weddings have occurred for hundreds of years).

mirrored heterosexual wedding customs in an effort to signal their conformance with marriage's norms, or to contest their exclusion from the institution.⁶¹ In either case, such ceremonies could be powerful statements of the couple's desire to celebrate their relationship and have it recognized, if only by friends and family, as well as their desire to resist the traditional definition of marriage as a heterosexual institution.⁶²

This history helps to render intelligible the marital framing that pervades these cases. Although the couples knew that their relationships were not *civil marriages*, their desire to host events celebrating their relationships could be interpreted as an effort to celebrate their relationships with family and friends, while simultaneously contesting a definition of marriage from which they were excluded. By contrast, Elaine Huguenin's and Jack Phillips's responses are not about contesting the extant meaning of marriage, but preserving it. In this vein, Huguenin and Phillips frame the same-sex relationships in question as marriages not to highlight the similarities between these relationships and those that are recognized by the state, but to underscore their departure from marital norms—as the state historically has defined them. On this account, Huguenin and Phillips counter the couples' effort to contest the meaning of marriage by insisting that same-sex relationships are beyond the scope of marriage—that they are “illegal”⁶³ because they deviate from the state's definition of lawful marriage as a heterosexual enterprise.

Accordingly, *Elane Photography* and *Masterpiece Cakeshop* are not merely about a believer's objection to providing a cake or taking photographs. The marital framing that we see in these cases goes beyond the contours of the antidiscrimination claims presented to confront the equally fraught question of how marriage should be defined—by the state and by everyone else. In this way, these cases, and the marital framing that is threaded through them, are about a larger struggle to settle the definition of marriage—and in so doing, confirm the kinds of relationships that will be privy to the legitimacy, rights, and benefits with which marriage is associated.

61. See Barbara J. Cox, *A (Personal) Essay on Same-Sex Marriage*, 1 NAT'L J. SEXUAL ORIENTATION L. 87, 88–90 (1995) (discussing the contrasting views on marriage held by gay and lesbian couples), available at <http://www.ibiblio.org/gaylaw/issue1/cox.html>.

62. See, e.g., *id.* at 89–90 (discussing the effects of a commitment ceremony on a same-sex couple and the family and friends involved).

63. *Masterpiece Cakeshop's* Brief, *supra* note 38, at 19–22. See also *Elane Photography's* Memorandum, *supra* note 25, at 9, ¶ 31 (acknowledging that no legal union, including marriage, was recognized at that time by New Mexico).

B. ERASING NONMARRIAGE

The conflation of nonmarital relationships with marriage in *Elane Photography* and *Masterpiece Cakeshop* reflects an ongoing contest between marriage equality advocates and marriage traditionalists to settle the legal and social meaning of marriage. But this impulse toward casting coupled relationships in the framework of marriage reflects another socio-legal project—one that has received far less attention than the debate over the meaning of marriage: the erasure of nonmarriage as a viable rubric for intimate life.

As I have argued elsewhere, the Supreme Court's decision in *Lawrence v. Texas*⁶⁴ articulated the possibility of nonmarriage as a protected legal category.⁶⁵ Historically, law organized and regulated sex and sexuality under the rubrics of marriage and crime.⁶⁶ Sex was categorized as either marital and thus legitimate, or illegitimate and thus criminal.⁶⁷ Either way, sex was subject to the regulatory authority of the state.⁶⁸

In *Lawrence*, the Court famously struck down a Texas statute criminalizing same-sex sodomy.⁶⁹ In doing so, the Court made clear that same-sex sodomy was no longer criminal; however, same-sex sexual conduct was not eligible for marriage.⁷⁰ Instead, it was nonmarital, noncriminal conduct.⁷¹ With this, *Lawrence* dismantled the traditional marriage-crime binary in favor of organizing sex and sexuality in a more

64. *Lawrence v. Texas*, 539 U.S. 558 (2003).

65. See Murray, *Marriage as Punishment*, *supra* note 6, at 54 (“*Lawrence* interposed a space between marriage and crime that, in the relative absence of legal regulation, offered the possibility of sexual liberty untethered to the disciplinary domains of the state.”); Murray, *Strange Bedfellows*, *supra* note 6, at 1299 (noting that *Lawrence* created an “interstitial space between marriage and criminality”).

66. See Murray, *Marriage as Punishment*, *supra* note 6, at 53 (“[H]istorically, both criminal law and marriage law worked cooperatively to regulate sex and sexuality.”); Murray, *Strange Bedfellows*, *supra* note 6, at 1268 (“At every turn, criminal law’s prohibitions reinforce family law’s substantive restrictions.”); Melissa Murray, *The Private Life of Criminal Law*, in CRIMINAL LAW CONVERSATIONS 692, 694 (Paul H. Robinson et al. eds., 2009) (“Through its regulation of sexuality and its historic refusal to intervene inside the marital home, criminal law has played an important role in the regulation of marriage, family, and sexuality. It has been family law’s ‘muscle,’ reinforcing and refining intimate norms.”).

67. Murray, *Strange Bedfellows*, *supra* note 6, at 1256.

68. See Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2687 (2008) (discussing the totality of state regulation of sex and sexuality and noting that “there is no social or legal daylight between being subject to the regulation of criminal laws and being subject to the regulation of civil laws”).

69. *Lawrence*, 539 U.S. at 578–79 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

70. *Id.* at 585 (O’Connor, J., concurring).

71. *Id.* at 578 (majority opinion).

continuous fashion—fixing marriage and crime as two outer extremes, while interposing a space between these two domains in which sex was neither marital nor criminal.⁷² In this way, I have argued, *Lawrence* articulated a space for nonmarriage. And because this space is one that exists outside of the regulatory domains of marriage and crime, it has the potential to be a site of minimal state regulation.⁷³

This space between marriage and crime might accommodate a range of relationships, including the nonmarriages in *Elane Photography* and *Masterpiece Cakeshop*. However, in part because of their mutual commitment to contesting the definition of marriage, the parties do not explore nonmarriage or the possibilities of this unregulated space.⁷⁴

Nor do the courts explore such possibilities in reviewing the parties' claims. Like the parties themselves, the courts translate these nonmarital relationships into the vernacular of marriage in ways both explicit and subtle. In a particularly revealing moment, the New Mexico Supreme Court implicitly acknowledged the distinction between a commitment ceremony and a wedding, but nonetheless insisted on conflating the two: "Willock referred to the event as a 'commitment ceremony' in her e-mail to Elane Photography. However, the parties agree that the ceremony was essentially

72. Murray, *Strange Bedfellows*, *supra* note 6, at 1299 ("Instead of organizing intimate life along the marriage-crime binary, *Lawrence* poses a continuum where marriage and criminality remain fixed as opposite extremes. However, between these two poles exists an interstitial space where sex is neither valorized or vilified, but is simply permitted.")

73. Melissa Murray, *Paradigms Lost: How Domestic Partnership Went From Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 301 (2013) ("This interstitial space is less thickly regulated than the legal categories of marriage and crime that frame it. For this reason, this space offers the possibility of a paradigm shift in state regulation of sex, sexuality, and relationships. That is, it offers the possibility of a legal regime in which state regulation of sex, sexuality, and relationships is less robust than it historically has been." (footnote omitted)); Murray, *Marriage as Punishment*, *supra* note 6, at 54 ("*Lawrence* interposed a space between marriage and crime that, in the relative absence of legal regulation, offered the possibility of sexual liberty untethered to the disciplinary domains of the state."); Murray, *Strange Bedfellows*, *supra* note 6, at 1302 ("The continuum that . . . *Lawrence* puts forth is one that dismantles the marriage-crime binary by creating a space where some acts are not subject to either criminal law's or family law's governance.")

74. More practically, invoking nonmarriage and this space of minimal state regulation arguably could have jeopardized the chance for success on the legal claims advanced by each side. For the couples, emphasizing their commonalities with marriages could well have enhanced their respectability before the courts and the public, while also highlighting the multiple injustices they endure because of their sexual orientation—not only were they excluded from civil marriage, they were subject to discrimination in their attempt to celebrate their relationships privately with family and friends. For the objecting service providers, characterizing the relationships as nonmarriages might have amplified the sense that impermissible discrimination was afoot. Further, Huguenin's and Phillips's claims for religious exemptions from the antidiscrimination laws were rooted in their deeply-held beliefs in heterosexual marriage. If the couples to whom they refused services were understood to be in nonmarriages, the objectors' claims of religious offense may have seemed less plausible to the courts.

a wedding . . . [In this opinion,] [w]e use the terms ‘wedding’ and ‘commitment ceremony’ interchangeably.”⁷⁵

To be clear, I do not mean to suggest that this is simply a matter of semantics—you say marriage, I say nonmarriage. The impulse to translate nonmarriages into the familiar vernacular of marriage reflects a reluctance to recognize, and indeed inhabit, the space between marriage and crime that *Lawrence* presents. This impulse is troubling because it suggests an effort to not only elide the differences between marriage and nonmarriage—including the difference between state regulation and the absence of that regulation—but to actually *erase* nonmarriage as a viable possibility for intimate life. Let me say more about each of these concerns.

The reluctance to inhabit the unregulated space between marriage and crime that *Lawrence* presents is in many respects predictable. *Lawrence* itself appeared deeply conflicted about the possibility of sex that was neither marital nor criminal.⁷⁶ In the majority opinion, as in *Elane Photography* and *Masterpiece Cakeshop*, Justice Anthony Kennedy translated the petitioners’ sexual conduct into marriage-like terms.⁷⁷ In describing the petitioners, two gay men who were discovered engaged in “deviate sexual intercourse”⁷⁸ in a Houston apartment, Justice Kennedy presented the pair as though they were a long-term, monogamous couple.⁷⁹ This cozy depiction of marriage-like bliss, however, belied the truth of the matter.⁸⁰ Tyron Garner and John Geddes Lawrence were not a long-term, monogamous couple.⁸¹ In fact, they were not even a couple at all.⁸² Instead,

75. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 7 n.1, 309 P.3d 53, 59 n.1, *cert. denied*, 134 S. Ct. 1787 (2014).

76. See Murray, *Strange Bedfellows*, *supra* note 6, at 1305 (“Despite his efforts to promote a more fluid understanding of sex and intimate life, even Justice Kennedy has trouble dealing with a sexual continuum on its own terms. . . . Having clearly decriminalized the conduct at issue in *Lawrence*, [Justice] Kennedy attempts to render intelligible the dissonance that decriminalization without marriage produces by likening [the same-sex unmarried couple] to a married couple.”).

77. *Id.*

78. *Lawrence v. Texas*, 539 U.S. 558, 562–63 (quoting TEX. PENAL CODE ANN. § 21.06(a) (West 2003)).

79. See Murray, *Strange Bedfellows*, *supra* note 6, at 1305 (“Kennedy’s opinion speaks of [John Geddes] Lawrence and [Tyron] Garner as though they are long-term partners sharing a life in common.”); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1407 (2004) (“Justice Kennedy takes it as given that the sex between John Geddes Lawrence and Tyron Garner took place within the context of a relationship.”).

80. See Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 MICH. L. REV. 1464, 1478 (2004) (“[John Geddes] Lawrence and [Tyron] Garner may have been occasional sexual partners, but were not in a long-term, committed relationship when they were arrested.”); Franke, *supra* note 79, at 1408 (neither the facts of the case nor the briefs offered anything that would suggest that Lawrence and Garner were in a long-term relationship).

81. See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* 134 (2012)

their conduct could more appropriately be categorized as a species of nonmarriage—sexual conduct that was not conducted within the confines of marriage and, after the Court’s decision, was no longer subject to criminal regulation.

However, Kennedy’s insistence on rewriting *Lawrence* and *Garner*’s situation in a manner that evoked marriage is only part of the story. Since *Lawrence* was decided in 2003, there has been little interest in exploring the zone of minimal state regulation that the decision offers.⁸³ Rather, there has been a rush to impose some form of state regulation on that space. The effort to expand marriage equality is instructive in this regard. As soon as the *Lawrence* decision was announced, mainstream LGBT rights groups interpreted it as an opening salvo in the effort to secure marriage rights for same-sex couples.⁸⁴ Rather than exploring the possibilities of unregulated nonmarriage, the impulse has been to bring same-sex conduct within the ambit of another state regulatory project—marriage.⁸⁵ In this way, the interstitial space between marriage and crime that once seemed so promising for the prospect of liberating sex from the regulatory presence of the state has been diminished.

But it is not just that the reluctance to recognize these relationships as nonmarriages results in the diminution of the space between marriage and crime. The effort to translate nonmarriages into marriages—or otherwise conflate the two—erases nonmarriage as a possibility for intimate life. Kenji Yoshino’s work on bisexuality provides a productive lens through which to consider this development.

In an article written in 2000, Yoshino noted that bisexuals were largely invisible in life and law.⁸⁶ This invisibility, he argued, “arises from erasure.”⁸⁷ As he explained, monosexuals—that is, heterosexuals and

(referring to the two men as “casual acquaintances three weeks before” their arrest).

82. *Id.* at 90–91.

83. See Murray, *Strange Bedfellows*, *supra* note 6, at 1305–06 (discussing efforts to reconstitute the space for nonmarriage in ways that are consistent with a traditional understanding of sexual regulation).

84. See, e.g., Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 6, 2003, at A8, available at <http://www.nytimes.com/2003/07/06/us/adversaries-on-gay-rights-vow-state-by-state-fight.html> (discussing how LGBT groups viewed *Lawrence* a “tremendous tool” in their fight for civil rights).

85. See Murray, *Marriage as Punishment*, *supra* note 6, at 61 (“[*Lawrence*] is understood by many to be a ‘stepping stone’ towards constitutional protection for same-sex marriage.”); Franke, *supra* note 68, at 2687–88 (noting that although *Lawrence* generates a number of “political possibilities” for the LGBT community, it has been referenced largely in the pursuit of same-sex marriage rights).

86. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 363–69 (2000).

87. *Id.* at 388–91.

homosexuals—were mutually invested in the erasure of bisexuality.⁸⁸ According to Yoshino, their “shared political interests” in the “stability of sexual orientation categories” and the “preservation of monogamy” prompted monosexuals to maintain an epistemic contract by which bisexuality was rendered invisible.⁸⁹ Put differently, the two groups’ investments in monosexuality gave rise to a mutual investment in erasing its antithesis: bisexuality.

A similar dynamic exists with regard to nonmarriage and marriage. Religious objectors and same-sex couples (as well as the judges reviewing their cases) are mutually invested in preserving marriage as the primary rubric for organizing and recognizing intimate relationships. As in the context of bisexuality, the reasons underlying these mutual investments may differ as to each group. For example, religious objectors, like Elaine Huguenin and Jack Phillips, may be invested in maintaining marriage’s primacy because of their faith traditions and the religious view that marriage reflects the union of God and the faithful. Along these lines, they may object to the disruption of traditional gender roles that inevitably results when marriage is expanded to include same-sex couples.⁹⁰ By contrast, same-sex couples may be invested in maintaining marriage’s primacy because the institution is a conduit to important public and private benefits and a means of signaling the legitimacy of the couple and their relationship. On this account, same-sex couples may resist casting their relationships in nonmarital terms because they desire the respectability and dignity, as well as the public and private benefits that traditionally have accompanied marriages. Regardless of the underlying rationales, both groups maintain a common interest in preserving marriage’s primacy. Their conflict is simply about whether to include same-sex couples within this privileged status.

Taken together, these mutual investments in marriage’s primacy lead religious objectors and same-sex couples to engage in an epistemic contract to subordinate and erase the antithesis of marriage—nonmarriage. To be clear, this “contract” is not necessarily the result of explicit negotiations and brokering between these groups. As Yoshino observes, the “epistemic contract . . . is not a conscious arrangement between individuals, but

88. *Id.* at 399–402.

89. *Id.* at 399.

90. See Richard Thompson Ford, *Hate and Marriage*, SLATE (July 12, 2006), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/hate_and_marriage.html (suggesting that resistance to same-sex marriage is animated in part by resistance to the disruption of traditional gender roles).

rather a social norm that arises unconsciously.”⁹¹ In this case, the social norm is one that is informed by marriage’s place as the dominant rubric for organizing and recognizing intimate life, and a common interest in keeping it that way.

Yoshino’s epistemic contract framework deepens the discourse of *Elane Photography* and *Masterpiece Cakeshop*. The parties’ characterization of the same-sex relationships as marriages is not simply about semantics or rhetorical slippages. Instead, we might understand the desire to translate nonmarriages into marriages as resulting in the erasure of nonmarriage as a viable rubric for organizing intimate life.

C. RECASTING GAY IDENTITY

Yoshino’s epistemic contract framework also illuminates the way in which the conflation of nonmarriage with marriage in *Elane Photography* and *Masterpiece Cakeshop* results in the recasting of gay identity. When he was writing in 2000, the focus of his inquiry was primarily on sexual conduct. That is, the epistemic contract between heterosexuals and homosexuals was, in part, about stabilizing categories of conduct: of organizing sexual conduct in a binary fashion—homosexual and heterosexual—and erasing the possibility of bisexuality, which would unsettle these categories by suggesting a spectrum of sexual desire and behavior.⁹²

The erasure of nonmarriage seen in *Elane Photography* and *Masterpiece Cakeshop* does not lend well to binary conduct categories. Indeed, it blurs the distinction between status and conduct, revealing the way in which the two can be mutually constitutive. In both *Elane Photography* and *Masterpiece Cakeshop*, the same-sex couples argued that the religious objectors had engaged in impermissible conduct—sexual orientation discrimination. Critically, the objectors disclaimed any discriminatory animus against gay men and women. They were happy to serve gay customers by providing cakes and cookies for a bar mitzvah or shower, or by photographing gay men and women in portrait settings. They did not object to gay people as a class, but rather to the prospect of participating—however indirectly—in the celebration of a gay wedding or marriage.⁹³ By their logic, their concerns were about the distortion of a status.

91. Yoshino, *supra* note 86, at 391–92.

92. *Id.* at 399–410.

93. *Elane Photography’s Memorandum*, *supra* note 25, at 18; *Masterpiece Cakeshop’s Brief*, *supra* note 38, at 5, 7–13.

In considering these two competing claims—one about conduct, and the other about status—the reviewing courts offered another perspective on these questions—and another view of the status/conduct distinction. In both cases, the courts ruled in favor of the same-sex couples, concluding that Elaine Huguenin and Jack Phillips had engaged in impermissible sexual orientation discrimination. However, in doing so, the courts’ rationales were noteworthy. The New Mexico Supreme Court “declined to distinguish between status and conduct,”⁹⁴ holding instead that “when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct *that is inextricably tied to sexual orientation*.”⁹⁵ Accordingly, the court saw “no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone’s conduct of publicly committing to a person of the same sex.”⁹⁶ Indeed, “[t]o allow discrimination based on conduct *so closely correlated* with sexual orientation would severely undermine the purpose of [New Mexico’s antidiscrimination law].”⁹⁷

In considering the claims of sexual orientation discrimination in *Masterpiece Cakeshop*, a Colorado administrative law judge made similar observations, clearly viewing same-sex marriage as inextricably intertwined with LGBT identity and conduct.⁹⁸ Relying on *Bray v. Alexandria Women’s Health Clinic*,⁹⁹ in which the United States Supreme Court concluded that where “[s]ome activities may . . . happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed,”¹⁰⁰ the judge determined that “discrimination against same-sex weddings is *the equivalent of discrimination due to sexual orientation*.”¹⁰¹

In deciding these cases, the courts’ logic is intriguing—and subject to multiple interpretations. On one hand, the courts’ view that the service providers’ objections to celebrating same-sex marriages was consistent

94. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 17, 309 P.3d 53, 62 (quoting *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 689 (2010)), *cert. denied*, 134 S. Ct. 1787 (2014).

95. *Id.* (emphasis added).

96. *Id.* ¶ 18, 309 P.3d at 62.

97. *Id.* ¶ 16, 309 P.3d at 61 (emphasis added).

98. *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 at 5 (Colo. Civ. Rights Comm’n Dec. 6, 2013), *available at* http://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf, *aff’d*, No. CR 2013-0008 (Colo. Civ. Rights Comm’n May 30, 2014) (final agency order), *available at* https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

99. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993).

100. *Id.* at 270.

101. *Masterpiece Cakeshop*, No. CR 2013-0008, at 5 (emphasis added).

with sexual orientation discrimination may reflect an intuition that objections to same-sex marriage are rooted in more basic objections to homosexuality.¹⁰² Alternatively, the courts' logic might simply underscore that as a descriptive matter, participation in *same-sex* weddings is something that only gay men and women do.¹⁰³

But the courts' reasoning and language also suggests another interpretation. In these cases, the courts go beyond simply associating objections to same-sex marriage with anti-gay animus. They consciously link marriage—and the performance of behavior associated with marriage—with gay identity. It is not simply that the objectors' antipathy to same-sex marriage was a proxy for anti-gay animus or that only same-sex couples participate in same-sex marriages. It is that marriage—and conformance with social and sexual norms associated with marriage—has become a core component of gay identity. It is something that gay men and women *do*.¹⁰⁴

102. See NeJaime, *supra* note 3, at 1177 (“Episodes of discrimination that would otherwise be handled in antidiscrimination law, whether or not an exemption existed, would instead hide behind the veil of marriage. In the end, careful analysis of the proposed ‘marriage conscience protection’ reveals that the current debate implicates much more than marriage. At stake is a broader vision of sexual orientation nondiscrimination.” (footnote omitted)).

103. This interpretation recalls the debate over including pregnancy discrimination within the definition of sex discrimination on the ground that pregnancy was something that only women experienced. See, e.g., Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138–39 (1976) (“[G]ender-based discrimination does not result simply because an employer’s disability-benefits plan is less than all-inclusive. . . . [P]regnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits. . . .”), *superseded by statute as stated in* AT&T Corp. v. Hulteen, 556 U.S. 701, 705 (2009) (referencing Congress’s passage of the Pregnancy Discrimination Act, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (1978), in response to *Gilbert* so as to make it “clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions”); Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that a state’s denial of disability insurance benefits for work loss due to pregnancy does not violate the Equal Protection Clause) *superseded by statute as stated in* California Fed. Savs. & Loan Ass’n v. Guerra, 758 F.2d 390, 395 (9th Cir. 1985) (again referencing the passage of the Pregnancy Discrimination Act and its effect in “chang[ing] the result of *Gilbert* and its ‘logic’ that purposeful exclusion of pregnancy disability benefits did not amount to sex discrimination”).

104. See M.V. LEE BADGETT & JODY L. HERMAN, WILLIAMS INST., UCLA, PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES 5 fig.1 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf> (showing the steadily increasing number of same-sex marriages in the United States from 2004 to 2010); M.V. LEE BADGETT & CHRISTY MALLORY, WILLIAMS INST., UCLA, THE WINDSOR EFFECT ON MARRIAGES BY SAME-SEX COUPLES 2 (2014), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Mallory-Windsor-Dec-2014.pdf> (finding that “the number of same-sex couples who married nearly doubled from 2012 to 2013” in three New England states post-*Windsor*); PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 69–71 (2013), available at http://www.pewsocialtrends.org/files/2013/06/SDT_LGBT-Americans_06-2013.pdf (stating that 16 percent of LGBT respondents were married and 60 percent of LGBT respondents were either married or

Of course, the irony is that, in blurring the distinctions between status and conduct, the courts' logic reinforces the erasure of nonmarriage as a *status*, even as it focuses on marriage as *conduct* associated with gay identity. Recall the Supreme Court's discussion of status and conduct in *Lawrence v. Texas*. In *Lawrence*, the majority blurred the distinction between homosexual conduct and gay identity in order to amplify the dignitary and collateral injuries posed by the criminalization of sodomy. According to the *Lawrence* Court, "[w]hen homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination" ¹⁰⁵ Justice Sandra Day O'Connor seconded the point more explicitly in her concurrence: "[T]he conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class." ¹⁰⁶

In *Lawrence*, anti-sodomy laws were understood as an imposition on gay men and women as a class because the conduct in question—sodomy—was so closely associated with gay identity. Put differently, sodomy was something that gay people *did*. In *Elane Photography* and *Masterpiece Cakeshop*, the courts' efforts to link same-sex marriage and gay identity sound in a similar register. Far from being divorced from gay identity, as they once were, marriage and marriage-like committed relationships are now regarded as something that LGBT people *do*. ¹⁰⁷ The status itself has become conduct that is constitutive of gay identity.

But if marriage is now constitutive of gay identity, what kind of conduct is negatively correlated with gay identity? Although neither court makes the point explicitly, by insisting that marriage is something that LGBT people now *do*, the courts (perhaps inadvertently) advance the notion that nonmarriage is no longer consistent with gay identity (or, more particularly, that it should not be). This is not to say that the courts in *Elane Photography* and *Masterpiece Cakeshop* are ignorant of the fact that, at the

would like to get married); Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Same-Sex Married Couples (Sept. 27, 2011), available at https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html ("According to revised estimates from the 2010 Census, there were 131,729 same-sex married couple households and 514,735 same-sex unmarried partner households in the United States."); *Second Annual Same-Sex Wedding Survey Highlights Trend in LGBT Nuptials*, XO GROUP (June 27, 2014), <http://www.xogroupinc.com/press-releases-home/2014-press-releases/2014-06-27-same-sex-wedding-survey.aspx> (documenting trends in the same-sex wedding industry).

105. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (emphasis added).

106. *Id.* at 583 (O'Connor, J., concurring).

107. See *supra* note 104.

time of the decisions, same-sex marriages were not legally recognized in New Mexico and Colorado. Instead, my point is merely that the correlation of same-sex marriage with gay identity supports the view that, in these two cases, *all* committed, sexual relationships are reconstituted as marriages.¹⁰⁸ As importantly, the correlation of marriage and gay identity limits the possibility that nonmarriage can be viewed as consistent with normative sex and sexuality.

The conflation of coupled same-sex relationships with marriages has important consequences for ensuring that nonmarriage is a viable possibility for organizing intimate life. The effort to interpret the same-sex relationships in *Elane Photography* and *Masterpiece Cakeshop* through marriage's lens is at once a product of the contest to define modern marriage, as well as an ongoing effort to entrench marriage—however it is defined—as the normative ideal for adult intimate life. The effort to bolster marriage's primacy requires the subordination—indeed, the erasure—of alternatives to marriage. In this regard, the conflation of same-sex relationships with marriages does more than simply erase nonmarriage and recast gay identity in ways that are consistent with marital norms. It actively sublimates any effort to foster an ethos of intimate pluralism that would allow marriage to exist alongside a wider range of options for structuring intimate life.

An interest in fostering pluralism is one of the values that undergirds the American commitment to religious liberty, and more particularly, religious accommodation. Yet, in our society, there is no corollary interest in fostering intimate pluralism as part of a broader commitment to ensuring sexual liberty; nor has there been a robust effort to accommodate those who dissent from marriage's orthodoxy.

With that in mind, Part IV embarks on a thought experiment. Using religious accommodation as a frame of reference, it considers whether and how we might accommodate nonmarriage as a legitimate dissent from the orthodoxy of marriage.

108. See *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 7 n.1, 309 P.3d 53, 59 n.1 (“Willock referred to the event as a ‘commitment ceremony’ in her e-mail to Elane Photography. However, the parties agree that the ceremony was essentially a wedding . . . We use the terms ‘wedding’ and ‘commitment ceremony’ interchangeably.”), *cert. denied*, 134 S. Ct. 1787 (2014); *Craig v. Masterpiece Cakeshop, Inc.*, No. CR 2013-0008 at 5 (Colo. Civ. Rights Comm’n Dec. 6, 2013), available at http://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf (“Conceptually, [Masterpiece Cakeshop’s] refusal to serve a same-sex couple due to religious objection to same-sex weddings is no different from refusing to serve a biracial couple because of religious objection to biracial marriage.”), *aff’d*, No. CR 2013-0008 (Colo. Civ. Rights Comm’n May 30, 2014) (final agency order), available at https://www.aclu.org/sites/default/files/assets/masterpiece_-_commissions_final_order.pdf.

IV. ACCOMMODATING NONMARRIAGE

It is perhaps ironic that cases like *Elane Photography* and *Masterpiece Cakeshop*, which consider the degree to which common commitments to equality must yield to individual claims of liberty, represent an emerging force for the erasure of nonmarriage and the diminution of spaces where individuals might resist marriage's hegemony. It is ironic because these cases, like other religious exemption cases before them,¹⁰⁹ are, at bottom, about accommodating individual choices, beliefs, and liberties, in the face of strong state pressure to conform to a set of prescribed values.

With that in mind, what would it mean to be as attentive to the project of creating and maintaining space for nonmarriage and sexual liberty as we are to preserving a space for religious believers to object to the status quo? What would it mean to frame the decision to live outside of marriage's borders as a legitimate choice or a worthwhile expression of individual liberty, like the exercise of one's religious beliefs? Instead of thinking of nonmarriage as the deviant, illegitimate antithesis of marriage, what would it mean to think of it as a righteous objection to the prevailing orthodoxy of marriage?

To frame this thought experiment, some discussion of what accommodation means in the religious context may be useful. In the section that follows, I briefly sketch the contours of the jurisprudence surrounding religious accommodation.

A. ACCOMMODATION—RELIGIOUS LIBERTY

Although religious accommodation has long been a part of the Anglo-American legal landscape,¹¹⁰ federal constitutional grounds for accommodating religion are of a more recent vintage. In 1963's *Sherbert v. Verner*,¹¹¹ the Supreme Court held that the Free Exercise Clause of the First Amendment required the government to accommodate religion.¹¹²

109. See *infra* Part IV.A.

110. See MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 86–102 (2d ed., 2006) (discussing the history of religious accommodation in America). See also, e.g., *People v. Phillips*, (N.Y. Ct. Gen. Sess. 1813), reprinted in 1 W.L.J. 97, 109 (1843) (holding that a priest need not disclose confidential information obtained during confession, as this would violate his priesthood oath).

111. *Sherbert v. Verner*, 374 U.S. 398 (1963).

112. *Id.* at 402, 410 (“The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such. Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.” (internal citations omitted)).

There, Adell Sherbert, a Seventh-day Adventist, was fired from her mill job when, because of the tenets of her faith, she refused to work on Saturdays, as her employer requested.¹¹³ She filed a claim for unemployment benefits, which was denied on the ground that she had “failed, without good cause . . . to accept available suitable work when offered . . . by . . . [her] employer”¹¹⁴ In a 7–2 decision, the Supreme Court reversed the denial of benefits, holding that “to condition the availability of benefits upon [Sherbert’s] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.”¹¹⁵

Under *Sherbert*, in order to impose a substantial burden upon an individual’s sincerely held religious beliefs, the government must demonstrate both: (1) a compelling state interest exists and (2) it has vindicated that interest in the manner least restrictive, or least burdensome, to religion.¹¹⁶ In a concurring opinion, Justice Stewart underscored *Sherbert*’s ethos of accommodation: “[T]he guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief.”¹¹⁷ Justice Potter Stewart went on to note that “our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us.”¹¹⁸

Sherbert’s logic, which prioritized religious pluralism and protected minority religions, shaped the Court’s disposition of 1972’s *Wisconsin v. Yoder*.¹¹⁹ There, a group of Amish fathers challenged a Wisconsin law mandating compulsory high school attendance.¹²⁰ According to Old Order Amish church tenets, higher education was not only unnecessary for life in the Amish community, it also jeopardized the salvation of Amish believers.¹²¹ Accordingly, the fathers sought, and were denied, an

113. *Id.* at 399.

114. *Id.* at 401 (internal quotation marks omitted).

115. *Id.* at 406.

116. *See id.* at 403 (“Plainly enough, appellant’s conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision . . . is to withstand appellant’s constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant’s religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate’” (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

117. *Id.* at 415–16 (Stewart, J., concurring).

118. *Id.* at 416.

119. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

120. *Id.* at 207–09.

121. *Id.* at 209–12.

exemption from the compulsory education law on the basis of their religious convictions.¹²² Applying the *Sherbert* test,¹²³ the Court unanimously held that the compulsory schooling law violated the Amish fathers' First Amendment rights.¹²⁴

Critically, *Sherbert* and *Yoder* reflect two distinct impulses that undergird religious accommodation. On one level, the two cases characterize accommodation as a negative right—accommodation as an opportunity to withdraw from the public sphere and the force of public values. *Yoder* perhaps exemplifies this idea more clearly than does *Sherbert*. In *Yoder*, the Amish sought nothing more from the state than an exemption from the ambit of the compulsory schooling law. *Sherbert*, on the other hand, suggests that accommodation may require more affirmative steps on the part of the state. While Adell Sherbert wanted an exemption from her employer's Saturday work schedule, her request for religious accommodation required something more of the state than simply permission to withdraw from the public sphere. She sought not only an exemption from the Saturday work schedule, but also unemployment benefits when she prioritized her faith over her employer's wishes.¹²⁵ She sought the state's affirmative protection of her free exercise rights.

Sherbert and *Yoder* represent a high-water mark in the recognition of a federal constitutional principle requiring religious accommodation. In 1990's *Employment Division v. Smith*,¹²⁶ the Court appeared to retreat from religious accommodation, holding that although the government may accommodate religion in particular circumstances, it is not constitutionally *required* to do so in all cases.¹²⁷ Nevertheless, even if the Constitution does not demand religious accommodation, recent developments¹²⁸ suggest that

122. *Id.* at 208.

123. *Id.* at 214, 219–221.

124. *Id.* at 234. The Court also noted that the law infringed upon the fundamental right of parents to direct their children's upbringing. *Id.* at 233–34.

125. *Sherbert v. Verner*, 374 U.S. 398, 399, 409–410 (1963).

126. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

127. *Id.* at 884–85 (“To make an individual's obligation to obey [the] law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is ‘compelling’—permitting him, by virtue of his beliefs, ‘to become a law unto himself,’—contradicts both constitutional tradition and common sense.” (internal citation omitted) (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879))).

128. See *Holt v. Hobbs*, 135 S. Ct. 853, 859–61 (2015) (finding a state correctional department grooming policy violated the Religious Land Use and Institutionalized Persons Act of 2000 as (1) it substantially burdened a Muslim inmate's religious exercise by preventing him from a growing a half-inch beard and (2) the correctional department was unable to demonstrate that the policy was the least restrictive means to further its compelling interest of preventing the concealment of contraband within the prison system); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759–60 (2014) (interpreting

statutes and state constitutional principles may provide an alternative basis for doing so.

B. ACCOMMODATION—SEXUAL LIBERTY

As the previous section suggests, those seeking accommodations for religious liberty have an established foundation upon which to rest their claims. This is not the case for those seeking accommodations for sexual liberty. Although American constitutional law supports pluralism in religious practice, it lacks a corollary interest in supporting pluralism in intimate life.¹²⁹ Instead, American constitutional law has “established” marriage and the marital family as the normative ideal for intimate life.¹³⁰

To be clear, to argue that marriage and the marital family have been “established” in American law is not to say that deviations from these norms are absolutely prohibited. Indeed, one might argue that even in the face of marital establishment, some principle of free exercise in intimate life exists. After all, American constitutional doctrine has recognized rights to marry and to divorce,¹³¹ to procreate¹³² or avoid procreation,¹³³ to direct the education of one’s children,¹³⁴ and to cohabit with relatives.¹³⁵

the Religious Freedom Restoration Act to allow a closely-held for-profit corporation to be exempt from a law to which its owners religiously objected on the ground that there was a less restrictive means of furthering the law’s interests). For a succinct recounting of Congressional enactments aimed at reinstating the traditional balancing test as applied in *Sherbert* and *Yoder* for religious accommodation claims post-*Smith*, see *Holt*, 135 S. Ct. at 859–60.

129. See Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1240–41 (2010) (arguing that marriage and the marital family have been “established” as the favored rubric for organizing intimate life).

130. See *id.* at 1252 (“Constitutional doctrine’s clear preference for the marital nuclear family above other alternatives is evident in a number of contexts.”).

131. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down Virginia’s antimiscegenation laws because the right to marry is a “fundamental freedom” that may not be “restricted by invidious . . . discriminations”); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“reaffirming the fundamental character of the right to marry”); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (“[A] State may not . . . pre-empt the right to dissolve [a marriage] without affording all citizens access to the means it has prescribed for doing so.”).

132. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing procreation as a “basic liberty”).

133. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the constitutional right of privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”), *overruled in part by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *as acknowledged by* *Gonzales v. Carhart*, 550 U.S. 124 (2007); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (invalidating a statutory prohibition on contraception because it violated the right of marital privacy).

134. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (invalidating a state statute requiring attendance at public schools because it “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (invalidating state statute prohibiting foreign-language education because it was an arbitrary and unreasonable “infringement of rights long freely enjoyed”).

However, while these examples of a principle of free exercise may foster some degree of pluralism in intimate life, it is a tolerable, nonthreatening pluralism. It is not necessarily a principle that would accommodate more profound departures and dissent from the marital form.

To be sure, there have been some efforts to expand the state's understanding of intimate life beyond the marital model. For example, in *Marvin v. Marvin*,¹³⁶ the California Supreme Court permitted the enforcement of a contract between unmarried cohabitants.¹³⁷ The defendant had argued that, because of the couple's nonmarital sexual relationship, the contract was premised on meretricious consideration, and thus, unenforceable.¹³⁸ The court disagreed, reasoning that "the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case."¹³⁹ Likewise, in *Braschi v. Stahl Associates*,¹⁴⁰ the New York Court of Appeals, in a nod to evolving social norms and mores, determined that two unmarried gay men were "family members" for purposes of a New York City rent and eviction regulation.¹⁴¹

One might read decisions like *Braschi* and *Marvin* as an effort to disestablish marriage as the normative ideal, or at the very least, to permit accommodation of nonmarriage as an alternative to marriage. But if these developments reflect disestablishment or accommodation, they do so only contingently. In *Marvin*, the court's acknowledgement of nonmarital cohabitation as a viable model for intimate life was premised on its understanding of cohabitation as a "trial period" during which "young couples [could] live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage."¹⁴² On this account, cohabitation was legible only as a "preliminary to marriage,"¹⁴³ not as an alternative to marriage in its own right.

135. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 498–99 (1977) (invalidating a housing ordinance that limited the definition of "family" to the nuclear family on the ground that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment" (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (internal quotation marks omitted)).

136. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

137. *Id.* at 122–23.

138. *Id.* at 112.

139. *Id.* at 122.

140. *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49 (N.Y. 1989).

141. *Id.* at 54–55.

142. *Marvin*, 557 P.2d at 122.

143. *Id.*

In the same vein, the *Braschi* court's embrace of Leslie Blanchard and Miguel Braschi as family members was premised on the fact that the pair, although unmarried, comported with the traditional indicia of marriage.¹⁴⁴ They were in a long-term relationship that was marked by financial interdependence and cohabitation.¹⁴⁵ Third parties, including their families and their doorman, understood them to be spouses in all but name.¹⁴⁶ Although the *Braschi* court gestured toward a less rigid understanding of relationship forms,¹⁴⁷ it did not appear willing to break completely with marriage and "our society's traditional concept of 'family.'"¹⁴⁸

Both *Marvin* and *Braschi* suggest a principle of free exercise in intimate life. In both cases, nonmarital relationships are recognized and credited with benefits heretofore reserved for those in state-recognized marriages. But critically, in both cases, the effort to accommodate these nonmarriages is not grounded in a robust defense of pluralism in intimate life. Instead, these cases accommodate departures from marriage by mapping minority preferences onto majoritarian norms. Michelle Marvin and Miguel Braschi prevail only because their departures from the marital model are understood to be consistent with, rather than threatening to, marriage as a social and legal institution. Put another way, nonmarriage is accommodated only insofar as it can be translated into marital terms. Indeed, this weak form of accommodation is consistent with the impulse toward the erasure of nonmarriage discussed in Part III.B of this Article.

Would we tolerate the erasure of religious difference in this manner?¹⁴⁹ Would we protect minority religious beliefs only where they

144. *Braschi*, 543 N.E.2d at 54.

145. *Id.*

146. *Id.* at 55.

147. *Id.* at 53 ("[W]e conclude that the term family, as used in [the ordinance], should not be rigidly restricted to those people who have formalized their relationship by obtaining, for instance, a marriage certificate or an adoption order. The intended protection against sudden eviction should not rest on fictitious legal distinctions or genetic history, but instead should find its foundation in the reality of family life.").

148. *Id.* at 54.

149. Of course, some argue that we *do* permit the erasure of religious difference in particular ways. For example, some critics have argued that the First Amendment's protections are more robust for majoritarian religious sects. Minority religions, these critics assert, are subject to uneven First Amendment protections. See, e.g., Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 222, 224 (2003) (discussing the effects of diminished First Amendment protections from the 1950s to the present, "especially for religious minorities"); Gary S. Gildin, *The Sanctity of Religious Liberty of Minority Faiths Under State Constitutions: Three Hypotheses*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 21, 29 (2006) (noting that "[a] sea change in federal constitutional protection of minority sects occurred in 1990" when the Supreme Court in *Smith* held that strict scrutiny would no longer be used to analyze facially-neutral laws that nonetheless had a burdensome effect on religious exercise.); Samuel J. Levine, *A Look*

comported with majoritarian religions? The earlier discussion of *Sherbert* suggests that we would not.¹⁵⁰ Recall that Adell Sherbert argued that she was penalized for her (minority) religious practice. If she had been a Sunday worshipper (the majority), rather than a Seventh-day Adventist and thus a Saturday worshipper (a minority), she would have fared better under the law and with the South Carolina Employment Security Commission. As an initial matter, she would not have been disqualified from receiving unemployment benefits because South Carolina law likely would not have regarded her objections to working on Sunday as unreasonable. Moreover, her employer would not have required Sunday work, as South Carolina law made it “unlawful for any person owning, controlling or operating any textile manufacturing . . . plant to request, require or permit any regular employee to . . . perform any of the usual . . . work . . . on Sunday.”¹⁵¹

Taken together, the claims in *Sherbert* and *Braschi* are united in an important way. Both Adell Sherbert and Miguel Braschi failed to conform to majoritarian norms—Sherbert regarded Saturday as the Sabbath and Braschi was in a nonmarital relationship with another man. Although they did not comport with majoritarian norms, both sought the same treatment and benefits afforded to those who did. The critical difference for Sherbert was that she was able to frame her claim for accommodation in terms that acknowledged—and credited—her departure from the majority. Essentially, Sherbert argued that, under the First Amendment, she was free to believe what she wanted and to conduct her religious life in the manner of her choosing, and that the state was not only required to provide her with the space to do so, it was required to provide her with unemployment benefits when her employer fired her.

By contrast, Miguel Braschi’s claim was framed in fundamentally different terms. Instead of adverting to his departure from majoritarian norms, his accommodation request was framed in terms of his comportment with majoritarian sexual norms. Essentially, Braschi was able to secure an exemption from the ordinary operation of the rent control law because the court understood that he was conducting his life in the manner of the majority. As the comparison of *Sherbert* and *Braschi* makes clear,

at the Establishment Clause Through the Prism of Religious Perspectives: Religious Majorities, Religious Minorities, and Nonbelievers, 87 CHI.-KENT L. REV. 775, 808 (2012) (“[L]atent majoritarian religious perspectives . . . continue to characterize the Supreme Court’s Establishment Clause jurisprudence.”). I take no position in this debate. Instead, I note only that the fact that the debate exists at all suggests that we take accommodation and other protections for minority views seriously in the context of religious liberty. There is no analogous debate about accommodation or protections for minority views in the context of sexual liberty.

150. See *supra* Part IV.A.

151. See S.C. CODE ANN. § 64-4 (1952 & Supp. 1960).

religious accommodation embraces pluralism and difference in a way that is wholly absent in the context of sexual liberty.

A 2013 case, *Brown v. Buhman*,¹⁵² offers a glimpse of what it might mean to infuse claims of sexual liberty with the pluralistic impulse that undergirds claims of religious liberty. In *Brown*, Kody Brown, a polygamist, challenged Utah's criminal bigamy law,¹⁵³ which made it a crime for a person "knowing he has a husband or wife or knowing the other person has a husband or wife . . . [to] purport[] to marry another person or cohabit[] with another person."¹⁵⁴ Brown and his four "wives" had been threatened with criminal prosecution on the ground that their cohabitation reflected the intent to engage in plural marriage.¹⁵⁵ Interestingly, in threatening prosecution, state officials characterized Brown's relationships with his second, third, and fourth wives as state-recognized marriages. Critically, this characterization was not for the purpose of civil recognition, but rather for criminal prosecution.¹⁵⁶

The Browns resisted the characterization of their relationships as marriages. As they explained, these were sexual relationships that involved cohabitation; and while they were marriages for *religious* purposes, they were not marriages for any legitimate *state* purpose, including criminalization.¹⁵⁷ Accordingly, the Browns argued that the Utah law violated various constitutional rights, including "fundamental liberties that are protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution."¹⁵⁸

For some, *Brown* is a case about legalizing plural marriage.¹⁵⁹ But this

152. *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013).

153. *Id.* at 1176.

154. *Id.* at 1191–92 (quoting UTAH CODE ANN. § 76-7-101(1) (West 2013) (internal quotation marks omitted)).

155. *Id.* at 1178–79.

156. *See id.* at 1180, 1192–93 (discussing the meaning of "marriage" with respect to the bigamy statute).

157. *Id.* at 1178, 1218–19.

158. Complaint at 31, *Brown v. Buhman*, 947 F. Supp. 2d 1170 (D. Utah 2013) (No. 2:11-CV-0652-CW), 2011 WL 2739555 [hereinafter Browns' Complaint].

159. *See, e.g.*, Mark Goldfeder, *It's Time to Reconsider Polygamy*, CNN (Dec. 16, 2013), <http://www.cnn.com/2013/12/16/opinion/goldfeder-polygamy-laws/> (including *Brown v. Buhman* as part of larger narrative arguing that polygamy should be decriminalized); Cheryl Wetzstein, *We Told You So: Conservatives Foresaw Polygamy Ruling*, WASH. TIMES (Dec. 17, 2013), <http://www.washingtontimes.com/news/2013/dec/17/conservatives-foresaw-polygamy-ruling/?page=all> (noting conservative predictions that same-sex marriage would lead to the legalization of polygamy in a case like *Brown v. Buhman*); Daniel B. Wood, 'Sister Wives' Family Sues to Prevent Prosecution for Polygamy, CHRISTIAN SCI. MONITOR (July 13, 2011), <http://www.csmonitor.com/USA/Justice/2011/0713/Sister-Wives-family-sues-to-prevent-prosecution->

characterization is incomplete and obscures the heart of the Browns' challenge. On its face, *Brown* is nominally about polygamy, a species of marriage that does not enjoy state recognition in any American jurisdiction. And it may be the case that *Brown* lays a foundation for the eventual legalization of polygamy—in much the same way that *Lawrence* laid the foundation for the legalization of same-sex marriage. But, it is worth noting that the claims surfaced in *Brown* were not arguments for the legal recognition of polygamous marriages.¹⁶⁰ Instead, the crux of the Browns' legal challenge was an explicit claim for nonmarriage and accommodation of sexual liberty.¹⁶¹ Although Kody Brown argued that he and his "wives" referred to each other as "spouses," they were "married" only in a religious sense.¹⁶² The Brown family "d[id] not hold multiple marriage licenses" and its plural relationships were not "legitimated and sanctioned by the state."¹⁶³ Indeed, the only state-recognized marriage within the family was Kody Brown's marriage to his first wife, Meri.¹⁶⁴ The Browns did not want the state to recognize their relationships as marriages; they wanted the state to credit their sexual liberty by exempting their nonmarital relationships from the criminal law's reach. In short, they sought an accommodation of nonmarriage.

In reviewing the parties' cross-motions for summary judgment, the U.S. District Court for the District of Utah credited this aspect of the Browns' claim.¹⁶⁵ In doing so, the court rejected the state's efforts to conflate nonmarital "religious cohabitation" with marriage.¹⁶⁶ Instead, the court credited the Browns' invocation of *Lawrence v. Texas* as providing constitutional protection for private, intimate, and nonmarital/noncriminal

for-polygamy (discussing the range of potential legal ramifications of *Brown v. Buhman*).

160. See *Brown*, 947 F. Supp. 2d at 1181 ("[C]ounsel for Plaintiffs have vigorously advanced arguments in favor of the right of religious polygamists to practice polygamy (through private 'spiritual' marriages not licensed or otherwise sanctioned by the state, a relationship to which the court will refer as 'religious cohabitation') . . ."); Browns' Complaint, *supra* note 158, at 5 ("The Brown family does not seek declaration that [the statutes in question] are unconstitutional to the extent that they merely prohibit the official recognition of polygamous marriage or the acquisition of multiple state marriage licenses.").

161. *Brown*, 947 F. Supp. 2d at 1197–98 (discussing the Browns' creation of a plural family in terms of "religious cohabitation").

162. *Id.*

163. Browns' Complaint, *supra* note 158, at 3.

164. *Id.*

165. *Brown*, 947 F. Supp. 2d at 1234.

166. *Id.* at 1223 ("[I]n the case of people who have not even claimed to be legally married—are not making any claim to legal recognition of their unions or the network of laws surrounding the institution of marriage—[i]t is the state that is treating the relationship as a form of marriage and prosecuting on that basis.") (alteration in original) (internal quotation marks omitted)).

conduct between consenting adults.¹⁶⁷ *Lawrence*, the court noted, protected the exercise of intimate liberty—a liberty that included “an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹⁶⁸

In this way, *Brown v. Buhman* offers a compelling counterpoint to *Masterpiece Cakeshop* and *Elane Photography*. *Brown* is an effort to both recuperate *Lawrence*’s promise of an accommodating space for nonmarriage and to resist the erasure of nonmarriage as a viable rubric for intimate life. Unlike the parties in *Elane Photography* and *Masterpiece Cakeshop*, Kody Brown and his wives willingly inhabited the space of nonmarriage that *Lawrence* presented. They were conscious of that space and conscious of the opportunity that it presented to be married only in a private, religious sense, rather than a public, civilly-recognized sense. For them, that space was one of profound liberty and accommodation—a place where they might exercise their religious beliefs and organize their intimate lives in the manner of their choosing.

Brown is remarkable in its effort to validate and protect nonmarriage.¹⁶⁹ In other cases, nonmarriage has not fared as well. Consider *Seegmiller v. LaVerkin City*.¹⁷⁰ There, police officer Sharon Johnson attended an out-of-town police training conference.¹⁷¹ At the time, Johnson was estranged from her husband, whom she would later divorce.¹⁷² During her off-duty time at the conference, she engaged in a brief affair with an officer from another jurisdiction.¹⁷³ When her supervisors learned of the affair, she was reprimanded and suspended from her job.¹⁷⁴ She challenged her employer’s actions, arguing that *Lawrence* protected her private, sexual conduct.¹⁷⁵ On appeal, the U.S. Court of Appeals for the Tenth Circuit

167. *Id.* (“Consensual sexual privacy is the touchstone of the rational basis review analysis in this case, as in *Lawrence*.”).

168. *Id.* at 1199 (quoting *Lawrence v. Texas*, 539 U.S. 558, 562 (2003)).

169. To be clear, *Brown* reflects one possibility for accommodation in which the state permits nonconformers space to withdraw from the force of public values. In keeping with the discussion in Part IV.A, this kind of accommodation is more consistent with the kind of negative right accommodation seen in *Yoder*. In another work, I consider what it would mean to frame accommodation of nonmarriage in terms of a positive right, as in *Sherbert*. See generally Melissa Murray, Rights, Recognition, and Regulation (2015) (unpublished manuscript) (on file with author) (discussing the “expansion of constitutional protections for private, consensual nonmarital sex” and the limits such protections impose upon the state’s ability to regulate sex).

170. *Seegmiller v. LaVerkin City*, 528 F.3d 762 (10th Cir. 2008).

171. *Id.* at 765.

172. *Id.*

173. *Id.*

174. *Id.* at 765–66.

175. *Id.* at 769–70.

conceded “[b]roadly speaking, . . . a right to be free from government interference in matters of consensual sexual privacy.”¹⁷⁶ Nevertheless, it refused to interpret *Lawrence* as conferring a fundamental right to engage in private sexual conduct.¹⁷⁷ Moreover, the *Seegmiller* court concluded that the employer’s actions were justified, as it was “reasonable for the police department to privately admonish Ms. Johnson’s personal conduct consistent with its code of conduct when the department believe[d] [that] it [would] further internal discipline or the public’s respect for its police officers and the department they represent.”¹⁷⁸ Critically, *Seegmiller* is not exceptional. In a number of challenges, lower courts have refused to interpret *Lawrence* as articulating robust protections for sexual liberty.¹⁷⁹

Given contemporary trends, which make clear that nonmarital sex and relationships are increasingly common,¹⁸⁰ why is *Brown* the exception and *Seegmiller* the rule? Why do we not take accommodation of sexual liberty as seriously as we take religious accommodation? Critically, *Brown* suggests one reason for this development. Although the *Brown* court

176. *Id.* at 769.

177. *Id.* at 771–72.

178. *Id.* at 772.

179. *See, e.g.,* *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (holding that *Lawrence* did not announce “a fundamental right . . . for adults to engage in all manner of sexual conduct” in regards to incest); *Williams v. Pryor*, 240 F.3d 944, 954 (11th Cir. 2001) (declining to find that “there is a fundamental constitutional interest—broad or narrow—that encompasses a right to use sexual devices”), *aff’d after remand and appeal sub nom.* *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1234–38 (11th Cir. 2004) (declining to “extrapolate from *Lawrence*” a fundamental right and upholding Alabama’s criminal ban on commercial sex toys under rational basis review); *State v. Romano*, 155 P.3d 1102, 1110 (Haw. 2007) (holding that prostitution “is expressly rejected as a protected liberty interest under *Lawrence*”); *In re R.L.C.*, 635 S.E.2d 1, 3–4, 8 (N.C. Ct. App. 2006) (refusing to apply *Lawrence* in circumstances involving consensual oral sex between a sixteen-year-old boy and thirteen-year-old girl as the two were minors, but still holding that the act did not fall under the felony “crime against nature” charge), *aff’d* 643 S.E.2d 920 (N.C. 2007); *State v. Lowe*, 2007-Ohio-606, 861 N.E.2d 512, at ¶ 23 (holding that *Lawrence* was “limited to consensual sexual conduct between two unrelated adults”); *Singson v. Commonwealth*, 621 S.E.2d 682, 685–66 (Va. Ct. App. 2005) (refusing to extend *Lawrence*’s reasoning to the solicitation of oral sex in a public bathroom because *Lawrence* “[left] undisturbed the states’ authority to prohibit sexual conduct that occurs in . . . public”). *See also* Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 829–35 (2010) (discussing various cases that interpreted *Lawrence* narrowly); Murray, *supra* note 169, at 9–23 (discussing various cases in which state regulation of nonmarital sexual conduct was upheld).

180. *See* CASEY E. COPEN, KIMBERLY DANIELS & WILLIAM D. MOSHER, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL HEALTH STATISTICS REPORT NO. 64, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 1–3 (2013), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf> (“In more recent years, women were increasingly likely to cohabit with a partner as a first union rather than to marry directly”); PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES i (Paul Taylor ed., 2010) (“[T]ransformative trends of the past 50 years . . . have led to a sharp decline in marriage and a rise of new family forms”), available at <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.

credited *Lawrence* as offering some protection for private, consensual sex between adults, it balked at characterizing the protection as fundamental.¹⁸¹ *Lawrence*, the court observed, was an “enigmatic decision” that “eschew[ed] a formal, technical analysis of the level of detail modeled in the . . . framework” for analyzing fundamental rights claims.¹⁸² Nor did the *Lawrence* majority “explicitly identif[y] the standard of review applied,” instead toggling between strains of heightened scrutiny and rational basis review.¹⁸³ Other courts have echoed this resistance. Many have interpreted *Lawrence* as offering some limited protection for sex outside of marriage, but not in the manner of a fundamental right. Others have gone so far as to translate *Lawrence*’s protections into marriage-like terms, reasoning that the decision protects only long-term, monogamous relationships.¹⁸⁴

The absence of a robust principle of constitutional protection for sexual liberty helps explain why we take the accommodation of nonmarriage less seriously than the accommodation of religion. In stark contrast to *Lawrence*, the First Amendment provides a more robust framework for permitting religious pluralism and accommodating religious liberty. Without a more robust constitutional principle of sexual liberty, protections for nonmarital sex and sexuality have been uneven and unpredictable, as *Brown* and *Seegmiller* suggest.¹⁸⁵

But is a limited view of *Lawrence* the only factor in our neglect of sexual liberty? In the section that follows, I again draw on analogies to religious liberty. Specifically, I return to the concept of establishment and

181. See *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1202 (D. Utah 2013) (“The court views the Tenth Circuit’s analysis and interpretation of *Lawrence* as binding for this case and, accordingly, finds that it precludes the application of heightened scrutiny to [the Browns’] substantive due process claim . . .”).

182. *Id.* at 1198.

183. *Id.* (*Lawrence* “could fairly easily support an interpretation that heightened scrutiny was indeed applied, [as] the Court used some terminology arguably characteristic of rational basis review in ruling Texas’ anti-sodomy statute unconstitutional.”)

184. See, e.g., *United States v. Thompson*, 458 F. Supp. 2d 730, 732 (N.D. Ind. 2006) (stating that *Lawrence* “was concerned about protecting personal relations in the home”); *832 Corp. v. Gloucester Twp.*, 404 F. Supp. 2d 614, 623 (D.N.J. 2005) (emphasizing that *Lawrence* “reflected [a] focus on protecting relationships from governmental intrusion”); *United States v. Marcum*, 60 M.J. 198, 212–13 (C.A.A.F. 2004) (Crawford, J., concurring) (erroneously characterizing the circumstances in *Lawrence* as a “romantic relationship,” and distinguishing it from a “casual” sexual encounter); *Romano*, 155 P.3d at 1110–11 (holding that *Lawrence* protected the “intimate choices” of those in homosexual or heterosexual “relationships” but did not extend to the “exchange of money for sexual relations”); *Vanderveer v. Vanderveer*, No. 0122-04-2, 2004 Va. App. LEXIS 459, at *1–5, 12 (Va. Ct. App. Sept. 28, 2004) (holding that *Lawrence* applies only to criminal cases and is irrelevant in child custody determinations, where it is permissible for courts to adversely rule against a parent based “on [parent’s] unmarried cohabitation”).

185. See *Murray*, *supra* note 169, at 24–27.

consider how the establishment of marriage as the preferred rubric for sex and sexuality impedes a more robust understanding of sexual liberty.

C. ESTABLISHMENT, FREE EXERCISE, AND SEXUAL LIBERTY

The absence of a well-articulated and robust constitutional underpinning for sex and sexuality outside of marriage offers only a partial explanation for our thin account of sexual liberty. The entrenchment—indeed, *establishment*—of marriage as the normative model for sex and sexuality also helps explain the neglect of sexual liberty. Although marriage’s grip on intimate life has loosened somewhat over the last half-century, marriage persists as the established norm for adult intimate life.¹⁸⁶ And many view the establishment of marriage as the preferred rubric for intimate life as an affirmative good. By contrast, many of us would view the establishment of a state religion negatively, or at the very least, skeptically.

Our acceptance of marital establishment may stem from the fact that, as acknowledged earlier, marriage can mean different things to different people.¹⁸⁷ Consistent with this view is Mary Anne Case’s observation that the state’s vision of marriage is one that can accommodate a wide range of conduct and practices—that is, once you are recognized by the state as married, you have broad license to comport with, or depart from, accepted marital norms.¹⁸⁸ This broad understanding of what might be encompassed in marriage is largely absent in the context of religion. At least in terms of defining their normative commitments, religions are relatively fundamentalist. You are either Protestant or you are not. And critically, Protestantism does not make room for Catholicism or Judaism in its account of its normative commitments.¹⁸⁹

Because religion is, in this way, fundamentalist, religious establishment may raise greater concerns about state coercion of dissenters. If the state establishes Judaism as its religion, then one must either convert or be excluded. Marital establishment may not spark the same concerns

186. For a more robust discussion of marital establishment, see Ristroph & Murray, *supra* note 129, at 1252–59.

187. See *supra* text accompanying notes 4–5.

188. Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1765 (2005) (“[M]arriage now licenses in a new way—a married couple is by and large free to have or not have sex, vaginal or not, procreative, contracepted, or otherwise; to be faithful or not, to divorce and remarry, to commingle their finances or keep them separate, to live together or separately, to differentiate roles or share all tasks, to publicize their relationship or be discreet about it, while still having their commitment to one another recognized by third parties including the state.”).

189. I do not mean to suggest that Protestantism is hostile to Catholicism or Judaism. Rather, I mean only that each faith tradition is self-contained in terms of its normative commitments.

because marriage, by contrast is not as starkly fundamentalist in this regard. Within marriage—and within the privacy protections that marriage affords—individuals have some license to conduct their sexual lives more or less in the manner of their choosing.¹⁹⁰ The fact that marriage is not fundamentalist in the manner of religion may help explain why the impulse is toward expanding its scope to include more constituents, rather than disestablishing it as the preferred rubric for intimate life and pluralizing the available choices for intimate life.

This insight regarding marital establishment helps illuminate another aspect of *Brown*, *Elane Photography*, and *Masterpiece Cakeshop*. In *Brown*, the Browns willingly inhabited the space for nonmarriage that *Lawrence* provided.¹⁹¹ Their willingness to do so was likely rooted in legal concerns: by claiming nonmarriage, they were distancing themselves from the reach of the polygamy statute, which criminalized plural “marriages.” But their interest in nonmarriage may also have been inspired by other considerations. Recall the earlier discussion of the contest over marriage’s meaning seen in *Elane Photography* and *Masterpiece Cakeshop*.¹⁹² The parties in those two cases framed the relationships as marriages in part because they were engaged in a conflict about how the state would define marriage and which sexual norms—heterosexuality or homosexuality—would be credited as legitimate and marital.

With this in mind, the Browns’ appeal to nonmarriage in their challenge of the Utah polygamy law is perhaps more easily comprehensible. At present, the contest over the meaning of marriage and the sexual norms that will be incorporated into that meaning, has focused exclusively on monogamous pairings. The contested variables involve the gender of the participants; but currently there is no conflict about the number of participants. As has been the case for more than a century in the United States, plural marriage is seen as inconsistent with the social and legal meaning of marriage.¹⁹³ In this way, polygamy is not a robust part of

190. This is not to say that marriage does not involve some degree of state coercion. It surely does. See Murray, *Marriage as Punishment*, *supra* note 6, at 23–51 (discussing how marriage has been used to regulate intimate relationships and sexual conduct); Ruthann Robson, *Compulsory Matrimony*, in FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS 313, 314 (Martha Albertson Fineman et al. eds., 2009) (describing “forces that impose, manage, organize, propagandize and forcefully maintain the political institution of marriage”). Nor do I mean to suggest that once in marriage, anything goes. See, e.g., *Lovisi v. Slayton*, 539 F.2d 349, 350 (4th Cir. 1976) (affirming denial of habeas corpus relief for a married couple convicted of violating a state sodomy statute by engaging in sex with a third person).

191. See *supra* notes 166–169 and accompanying text.

192. See *supra* Part III.

193. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 46, 67 (1890) (Fuller, C.J., dissenting) (objecting to the Court’s decision to uphold a

the debate over what marriage means and how the state should define it. Put differently, a viable claim for plural marriage was not available to the Browns because monogamy is part of the established definition of marriage. Accordingly, the Browns framed their claims within the context of nonmarriage, and focused on decriminalization as their desired outcome.¹⁹⁴

But what if legal recognition of plural marriage was not, practically speaking, an impossibility? What if there was a viable claim to be made for state recognition of plural marriage? Would the Browns *still* willingly claim that their relationships were nonmarriages? Would they happily occupy the accommodative space between marriage and crime that *Lawrence* presents? Would they continue to seek a space for their intimate lives outside of the state's regulatory reach? I doubt it.

Together, these insights help explain our neglect of nonmarriage as a legal category. *Elane Photography* and *Masterpiece Cakeshop* make clear that cases like *Brown* are possible only when marriage is not a possibility, or at least not the only possibility. That is, more robust consideration of nonmarriage—and what it would mean to accommodate nonmarriage—is possible only when marriage is not the established rubric for encompassing and envisioning intimate life. And this (depressing) realization is one that renders intelligible the cautions of queer theorists, who have bemoaned the rush toward same-sex marriage as foreclosing the possibility of other kinds of intimate relationships.¹⁹⁵ Moreover, it underscores the importance of

congressional act dissolving the Mormon Church, and suggesting that the act was motivated by a distaste for polygamy); *Reynolds v. United States*, 98 U.S. 145, 161–67 (1878) (upholding, in the face of a free exercise challenge, criminal law prohibiting polygamy and bigamy); *Bronson v. Swensen*, 500 F.3d 1099, 1105–06 (10th Cir. 2007) (rejecting a claim for state recognition of plural marriage due to a lack of standing and forfeiture); *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (“Monogamy is inextricably woven into the fabric of our society. . . . In light of these fundamental values, the State is justified . . . in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship.”); *State v. Holm*, 137 P.3d 726, 732–45 (Utah 2006) (rejecting a challenge to Utah's anti-polygamy laws). See generally SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* (2002).

194. In this way, *Brown v. Buhman* has much in common with *Lawrence v. Texas*, in which the litigants made no claim to civil marriage, but instead focused on the unconstitutionality of a criminal prohibition on same-sex sodomy. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003). However, given that *Lawrence* is credited with laying a foundation for same-sex marriage, it remains to be seen whether *Brown* may play a similar role in the context of polygamy.

195. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 25–52 (1999); Judith Butler, *Is Kinship Always Already Heterosexual?*, in *LEFT LEGALISM/LEFT CRITIQUE* 229, 232–38 (Wendy Brown & Janet Halley eds., 2002); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 *COLUM. J. GENDER & L.* 236, 246 (2006); Franke, *supra* note 79, at 1414–15; Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE*, *supra*, at 80, 98–103; Michael Warner, *Beyond Gay Marriage*, reprinted in *LEFT*

situations like those in *Lawrence* and *Brown*—situations where marriage is off the table and space for nonmarriage is affirmatively marked and claimed. But it also suggests the importance of situations unlike *Elane Photography* and *Masterpiece Cakeshop* where space for nonmarriage is preserved against efforts to further entrench marriage’s primacy.

V. CONCLUSION

At the time of this writing, the marriage equality question seems to be marching to its inevitable conclusion.¹⁹⁶ In this regard, *Elane Photography*

LEGALISM/LEFT CRITIQUE, *supra*, at 259, 259–88.

196. Since *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (finding the limiting definition of “marriage” in the Defense of Marriage Act, as it referred only to a legal union between a man and a woman, to be unconstitutional under the Fifth Amendment), federal courts have either struck down or entered injunctions against the enforcement of same-sex marriage bans in twenty states. See *Majors v. Horne*, 14 F. Supp. 3d 1313, 1315 (D. Ariz. 2014) (holding Arizona’s same-sex marriage ban unconstitutional); *Hamby v. Parnell*, No. 3:14-cv-00089-TMB, 2014 U.S. Dist. LEXIS 145876, at *3 (D. Alaska Oct. 12, 2014) (holding that Alaska’s ban on same-sex marriage and its refusal to recognize same-sex marriages from other states unconstitutional); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281–82 (N.D. Fla. 2014) (invalidating Florida’s same-sex marriage ban); *Gen. Synod of the United Church of Christ v. Cooper*, 12 F. Supp. 3d 790, 791 (W.D.N.C. 2014) (holding unconstitutional North Carolina’s same-sex marriage ban); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 U.S. Dist. LEXIS 100894, *2–3 (D. Colo. July 23, 2014) (enjoining enforcement of Colorado’s same-sex marriage ban in light of the Tenth Circuit’s decision in *Kitchen v. Herbert*); *Love v. Beshear*, 989 F. Supp. 2d 536, 539 (W.D. Ky. 2014) (striking down Kentucky’s same-sex marriage ban on equal protection grounds), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom.* 135 S. Ct. 1041 (Jan. 16, 2015) (No. 14-571); *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1149 (S.D. Ind. 2014) (holding Indiana’s same-sex marriage ban unconstitutional); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (invalidating Pennsylvania’s same-sex marriage ban); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1133 (D. Or. 2014) (striking down Oregon’s same-sex marriage ban); *Latta v. Otter*, 19 F. Supp. 3d 1054, 1060 (D. Idaho 2014) (finding Idaho’s marriage laws to be unconstitutional), *aff’d*, 771 F.3d 456, 464–65 (9th Cir. 2014) (holding Idaho and Nevada same-sex marriage bans to be unconstitutional); *Henry v. Himes*, 14 F. Supp. 3d 1036, 1039 (S.D. Ohio 2014) (striking down Ohio’s same-sex marriage ban), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted*, 135 S. Ct. 1041 (Jan. 16, 2015) (No. 14-571); *Bourke v. Beshear*, 996 F. Supp. 2d 542, 544 (W.D. Ky. 2014) (finding Kentucky’s policy of not recognizing same-sex marriage to be unconstitutional), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom. Bourke v. Beshear*, 135 S. Ct. 1041 (Jan. 16, 2015) (No. 14-571); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 759 (E.D. Mich. 2014) (holding that Michigan’s marriage amendment was not rationally related to a government interest in child rearing), *rev’d*, 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom. Bourke v. Beshear*, 135 S. Ct. 1041 (Jan. 16, 2015) (No. 14-571); *Tanco v. Haslam*, 7 F. Supp. 3d 759, 763 (M.D. Tenn. 2014) (requiring Tennessee to recognize out-of-state same-sex marriages by issuing a preliminary injunction regarding the six plaintiffs) *rev’d sub nom. DeBoer v. Snyder* 772 F.3d 388 (6th Cir. 2014), *cert. granted sub nom. Bourke v. Beshear*, 135 S. Ct. 1041 (Jan. 16, 2015) (No. 14-571); *De Leon v. Perry*, 975 F. Supp. 2d 632, 639–40 (W.D. Tex. 2014) (holding Texas’s same-sex marriage ban unconstitutional); *Lee v. Orr*, No. 13-CV-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014) (ordering immediate issuance of marriage licenses to same-sex couples seeking to marry in Cook County, Illinois); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1258 (N.D. Okla. 2014) (striking down Oklahoma’s same-sex marriage ban), *aff’d sub nom. Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014). *But see* *Conde-Vidal v. Garcia-Padilla*, No. 14-1253(PG),

and *Masterpiece Cakeshop* represent the last throes of a contest for marriage's meaning that has long been joined and will soon be settled.¹⁹⁷ But there will surely be other battles—for marriage and nonmarriage alike. In the face of these contests, it is unclear how marriage and the sexual norms it reflects will shift and evolve. Nor is it clear how claims of religious liberty and requests for accommodation will respond to these changes.

What *is* clear, however, is that we could do more to be precise about the distinctions between private beliefs and public recognition, whether through marriage or through state accommodations for religious beliefs. We could do more to resist the urge to diminish the theoretical and practical space for nonmarriage by rendering all intimate relationships marriages. We would do well to understand nonmarriages not as expressions of deviancy and illegitimacy, but as expressions of liberty for which individuals may require accommodation and exemption from the prevailing orthodoxy of marriage.

2014 WL 5361987, at *10 (D.P.R. Oct. 21, 2014) (holding that Puerto Rico is free to shape its own marriage policy); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014) (upholding Louisiana's same-sex marriage ban and refusal to recognize out-of-state same-sex marriages); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1021 (D. Nev. 2012) (upholding Nevada's same-sex marriage ban), *rev'd and remanded sub nom.* *Latta v. Otter*, 771 F.3d 456, 464–65 (9th Cir. 2014) (holding that the Nevada and Idaho statutes violated the Equal Protection Clause). The Supreme Court denied review of seven petitions on the matter, effectively settling the question for the Fourth, Seventh, and Tenth Circuits. *See Baskin v. Bogan*, 766 F.3d 648, 654, 672 (7th Cir. 2014) (striking down Indiana's statutory and Wisconsin's constitutional prohibitions on same-sex marriage), *cert. denied*, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 367 (4th Cir. 2014) (striking down Virginia's constitutional and statutory same-sex marriage bans and refusal to recognize out-of-state same-sex marriages), *cert. denied*, 135 S. Ct. 308 (Oct. 6, 2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1199 (10th Cir. 2014) (striking down Utah's same-sex marriage ban), *cert. denied*, 135 S. Ct. 265 (2014). However, the Sixth Circuit has overturned lower-court rulings in Ohio, Tennessee, Kentucky, and Michigan striking down same-sex marriage bans in those states. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (applying only rational-basis review).

197. In response to the Sixth Circuit's holding in *DeBoer v. Snyder*, the Supreme Court has consolidated several district court cases, granted petitions for writs of certiorari, and set the final round of briefings to be filed before 2 p.m. on April 17, 2015 regarding 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?" *Bourke v. Beshear*, 135 S. Ct. 1041 (Jan. 16, 2015) (No. 14-571).

