

## RELIGIOUS CLAIMS VS. NON-DISCRIMINATION RIGHTS: ANOTHER PLEA FOR DIFFICULTY

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In *A Plea for Difficulty*,<sup>2</sup> Martha Nussbaum urged caution and nuance in the analysis of the relationship between religion and feminism. Her essay was written in response to Susan Okin's problematizing of the relationship between multiculturalism and the protection of women's rights and to Okin's question of "what should be done when the claims of minority cultures or religions clash with the norm of gender equality that is at least formally endorsed by liberal states?"<sup>3</sup> Okin argued that religion was hostile to women, and therefore there was a "considerable likelihood of tension between . . . feminism and a multiculturalist commitment to group rights for minority cultures."<sup>4</sup> This article does not consider the question of multiculturalism per se, but the similar, and perhaps even more contested, relationship between freedom of religion and the right not to be discriminated against on the grounds of sexual orientation. Like Nussbaum, I call for difficulty in considering this relationship.

There is a narrative which sees the question of gay rights as a political and practical one of progress: of hurdles to be overcome sequentially, beginning with campaigns to overturn legal bans on "sodomy," then focusing perhaps on discrimination in employment and then to same-sex marriage, accompanied by the inevitable evolution of public opinion in favor of such rights, with opposition to be fought against and overcome rather than capitulated to, and in any case irrelevant to the issue of others' rights.<sup>5</sup> This narrative is

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1. PhD Candidate, London School of Economics and Political Science. My thanks are due to my supervisors, Conor Gearty and Kai Möller.

2. Martha C. Nussbaum, *A Plea for Difficulty*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 105 (Joshua Cohen, Matthew Howard, & Martha C. Nussbaum eds., 1999).

3. Susan M. Okin, *Is Multiculturalism Bad for Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN*, *supra* note 2, at 9.

4. *Id.* at 10.

5. See, e.g., Douglas Nejaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 *HARV. J.L. & GENDER* 303 (2009) (describing the strategies and rhetoric of both gay rights and conservative Christian cause lawyering); Robert Wintemute, *Religion vs. Sexual Orientation: A Clash of Human Rights?*, 1 *J. L. & EQUALITY* 126, 133

not without merit. Certainly the advances made in some, but certainly not all, contexts have been extraordinary, and there is momentum behind the movement. Public opinion is also changing.<sup>6</sup> However, there is one aspect of this narrative that is unsatisfactory: the aspect of how those, who for conscientious, religious reasons, are unable to accept the proposition that gay relationships and sexuality are as worthy of protection as heterosexual ones, should be treated, and how their objections should be characterized.

Nussbaum stated, “I am troubled by Okin’s argument, because she makes it all sound so easy.”<sup>7</sup> In the context discussed in this article, there are at least two ways this conflict can be made “too easy.” The first is a problem with the narrative above, which writes off those who conscientiously believe that they cannot support such an advance as mere bigots and who, consequently, do not present an issue of legal or constitutional value. However, sometimes those who argue for greater exemptions for religious individuals and groups make a second and equally serious error. This is a failure to take the value of non-discrimination seriously, by reducing it to mere inconvenience or some other practical problem.

This article considers these problems in the context of public accommodations and the provision of services, where a person, who does not share the religious beliefs of the service provider, demands non-discriminatory treatment. I will limit this discussion to their treatment by legal actors, rather than in the political or social spheres. It should be made clear though that these cases are the exceptions rather than the rule. In most cases, no conflict arises between the rights of non-discrimination and freedom of religion because either a person or an organization does not perceive any conflict between their beliefs and non-discrimination or,

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(2002) (opposition rests on an “inaccessible, extra-democratic source of authority which cannot be challenged and overturned by reasoned arguments”); *Lambda Legal History*, LAMBDA LEGAL, <http://www.lambdalegal.org/about-us/history> (last visited Dec. 26, 2013) (“Until we achieve full equality under the law in every state in this country, we will keep fighting and moving history forward”). Carl F. Stychin has also interrogated this narrative from a British perspective. See Carl F. Stychin, *Faith in the Future: Sexuality, Religion and the Public Sphere*, 29 OXFORD J. LEGAL STUD. 729 (2009).

6. See, e.g., Dawn Michelle Baunach, *Changing Same-Sex Marriage Attitudes in America from 1988 through 2010*, 76 PUB. OPINION Q. 364 (2012) (stating support for same sex marriage in 1988 was restricted to specific subgroups, but by 2010 there was much more broad-based support).

7. Nussbaum, *supra* note 2, at 105.

while they do have discriminatory<sup>8</sup> beliefs, they do not consider that they are required to discriminate in the situation in question.<sup>9</sup> Nevertheless, conflicts do arise.

### THE TWO RIGHTS

At this point it is necessary to say more about why the two rights of non-discrimination and freedom of religion should be valued. Part of Nussbaum's criticism of Okin was that she undervalued the benefits religion can bring to people. Nussbaum argued that it had an important role "in people's search for the ultimate meaning of life; in consoling people for the deaths of loved ones and in helping them face their own mortality; in transmitting moral values; in giving people a sense of community and civic dignity [and] in giving them imaginative and emotional fulfillment."<sup>10</sup> Perhaps because of these benefits, religion can have an "identity-generative"<sup>11</sup> nature. It can be experienced not simply as an activity, but going to the very core of a person's identity. Furthermore, freedom of religion is part of a broader value intrinsic to a liberal democracy that one should be free to seek one's own ultimate convictions without state interference and should be able to live in accordance with these convictions, where possible, and compatible with others' rights.<sup>12</sup>

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8. I use "discriminatory" here simply to mean those who treat, or believe they should treat, gay people and relationships differently from heterosexual ones. It does not necessarily follow that "it is to be condemned as disreputable or bigoted." *McFarlane v. Relate Avon Ltd.*, [2010] EWCA (Civ) 880 [19] (Eng.).

9. According to one study, 55% of white mainline Protestants, 48% of Catholics, and 24% of white evangelical Protestants supported same-sex marriage. David B. Oppenheimer et al., *Religiosity and Same-Sex Marriage in the United States and Europe*, 31 *BERKELEY J. INT'L L.* (forthcoming Fall 2013). The relationship between religion and discriminatory beliefs is certainly not monolithic.

10. Nussbaum, *supra* note 2, at 106.

11. David B. Salmons, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 *U. CHI. L. REV.* 1243, 1259 (1995).

12. See JOCELYN MACLURE & CHARLES TAYLOR, *SECULARISM AND FREEDOM OF CONSCIENCE* 11-12 (2011) ("It is in choosing values, hierarchizing or reconciling them, and in clarifying the projects based on them that human beings manage to structure their existence, to exercise their judgment, and to conduct their life . . . . In the realm of core beliefs and commitments, the state, to be truly everyone's state, must remain neutral.") (internal quotation marks omitted). See also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) ("At the heart of liberty is the

Freedom of religion, including the protection of individual religious conduct, is therefore a right worthy of significant protection. Since religions typically lay down not only patterns of belief, but requirements to act in accordance with these beliefs, there should be some protection of religious conduct. Michael Perry argues that banning religious practices “causes serious human suffering: the emotional (psychological) suffering . . . that attends one’s being legally forbidden to live a life of integrity . . . to live one’s life in harmony with the yield of one’s religious conscience.”<sup>13</sup> The basis of this article is that, given the importance of being able to live in accordance with one’s religious beliefs, while it would of course be impossible and highly undesirable to protect every religious practice, there should be consideration of whether it is possible to protect people’s conscientious actions and, further, denial of these religious practices is unwarranted “unless [the state] has good reason to do so.”<sup>14</sup> This idea was well expressed by Judge Sachs in the South African Constitutional Court who stated:

The underlying problem in any open and democratic society based on human dignity, equality and freedom in which conscientious and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not . . . . [B]elievers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law.<sup>15</sup>

It should be clear that these arguments do not depend on the value of any particular religious belief or on any sympathy for them, but on a deeper value of being able to live in accordance with one’s deeply felt convictions.

An objection could be made that while a person may believe what he or she wants and may express these views and seek to

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right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).

13. MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* 70-71 (2010).

14. *Id.* at 71.

15. *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) at 39 para. 35 (S. Afr.).

persuade others of their truth, this does not mean that a person necessarily has any rights to act on such beliefs, and it could further be argued, there should certainly be no right to seek exemptions from neutral and generally applicable laws. This was the position taken by the Supreme Court in *Employment Division v. Smith*.<sup>16</sup> The literature (mostly) criticizing this decision is vast, and I cannot deal with every point here.<sup>17</sup>

Some of the objections include that such an approach poses greater problems for unpopular minorities than for majorities because majorities have greater access to political means of change and therefore are likely to experience fewer conflicts between their beliefs and the law. Furthermore, the decision was based upon a tendentious reading of previous case law, which was distinguished on a flimsy basis and thus gave rise to an exception to the general rule of unclear meaning and extent.<sup>18</sup> Finally, it does not easily fit within the text of the First Amendment. Rather, it permits interference with religious practices, “no matter how serious the interference, no matter how trivial the state’s nonreligious objectives, and no matter how many alternative approaches were available to the state to pursue its objectives with less impact on religion.”<sup>19</sup> It provides no justification to those affected by the interference with religious practices other than that the religion was not deliberately targeted, which may be of little comfort and is certainly of little

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16. 494 U.S. 872 (1990).

17. It includes: Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329 (1991); Karin M. Rebesch, *The Illusory Enforcement of First Amendment Freedom: Employment Division, Department of Human Resources v. Smith and the Abandonment of the Compelling Governmental Interest Test*, 69 N.C. L. REV. 1332 (1991); Tom C. Rawlings, *Employment Division, Department of Human Resources v. Smith: The Supreme Court Deserts the Free Exercise Clause*, 25 GA. L. REV. 567 (1991); and, John Witte & M. Christian Green, *The American Constitutional Experiment in Religious Human Rights: The Perennial Search for Principles*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 497 (John D. van der Vyver & John Witte eds., 1996). For favorable comment see MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* (2005) and William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

18. Steven H. Aden & Lee J. Strang, *When A “Rule” Doesn’t Rule: The Failure of the Oregon Employment Division v. Smith “Hybrid Rights Exception,”* 108 PENN ST. L. REV. 573 (2003).

19. Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1346 (1995).

practical use. It thus fails to take the importance of conscience and freedom of religion seriously.

Free exercise is therefore of fundamental importance. However, so too is the right to non-discrimination. Discrimination not only deprives a person of tangible goods, such as a particular service, thus leading to economic disadvantage, but more intangibly, through its stigmatic effect,<sup>20</sup> it leads to a sense of exclusion, thereby undermining dignity and self-respect. This is particularly true because the problem is a cumulative one as many discriminatory views are common throughout society, and therefore a person is likely to repeatedly experience such discrimination. As with freedom of religion, this principle can be misunderstood. Douglas Laycock reduces this serious problem to “the insult of being refused service”<sup>21</sup> and therefore seems to view it as an easy decision to protect discriminatory refusals of service relating to same-sex marriage. The concept of insult though does not fully comprehend why non-discrimination is a fundamental social value, since it suggests hurt pride and perhaps pettiness, rather than any essential moral value. A better explanation is that discrimination affects “equal citizenship”<sup>22</sup> or, to put it another way, the fundamental obligation owed by the state is to treat everyone with “equal concern and respect.”<sup>23</sup> These principles “presumptively insist[] that the organized society treat each individual as a person, one who is worthy of respect, one who ‘belongs.’”<sup>24</sup>

The state’s obligation is not only to refrain from acting in discriminatory ways itself but its obligation is also, in some contexts, to prevent private actors from acting in discriminatory ways.<sup>25</sup> As Ronald Dworkin puts it, “[A] political and economic system that allows prejudice to destroy some people’s lives does not treat all members of the community with equal concern.”<sup>26</sup> Rather, it dem-

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20. Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 9 (1976).

21. Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 189-207 (Douglas Laycock et al., eds., 2008).

22. Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5 (1977).

23. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

24. Karst, *supra* note 22, at 6.

25. *Id.* at 35. Karst argues that “respected participation in the community’s life implies access to all those activities and places, whether managed directly by government or not, that are normally open to the public at large.”

26. Ronald Dworkin, *What Is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 36 (1987).

onstrates an impermissible lack of interest in the welfare of its citizens or, more likely, that the discriminatory views are tacitly, or perhaps even explicitly, agreed with. Prohibitions on discrimination in, for example, employment and public accommodations are therefore required.

The next question therefore is deciding whether the negative treatment is serious enough to require state protection against discrimination. There is extensive scholarship pointing to the historical disadvantage suffered by gay people and to the social discrimination gay people face, for example, in employment, housing, and in seeking legal recognition of their relationships.<sup>27</sup> Additionally, the existence of violent hate crime serves as a particularly abhorrent reminder of the levels of prejudice in existence.<sup>28</sup> Of course there is also an inevitable moral aspect to referring to something as discrimination. We need to know what counts as discrimination, or, to put it another way, what counts as an “alike” situation.<sup>29</sup> As far as the *state* is concerned, heterosexual and gay people are relevantly alike because there is no neutral, non-religious principle that adequately justifies the discriminatory treatment.<sup>30</sup>

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27. See, e.g., David M. Huebner et al., *Experiences of Harassment, Discrimination, and Physical Violence among Young Gay and Bisexual Men*, 94 AM. J. PUB. HEALTH 1200 (2004) (finding that 37% of men in the study reported experiencing anti-gay verbal harassment in the previous six months; 11.2% reported discrimination, and 4.8% reported physical violence). Only fifteen states and the District of Columbia permit same-sex marriage. The consequences of the lack of protection is emotionally described in JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* (2012).

28. E.g., Gregory M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States: Prevalence Estimates from a National Probability Sample*, 24 J. INTERPERS. VIOLENCE 54 (2009).

29. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 540-41 (1982) (arguing that the concept of equality does not provide guidance, but that external moral principles are needed).

30. Individuals may, of course, oppose it on the basis of their moral or religious beliefs. The state, however, is prevented from acting for religious reasons under the Establishment Clause. See also *Romer v. Evans*, 517 U.S. 620 (1996) (holding bare animus is not an acceptable motive for prohibiting anti-discrimination laws); *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding morality is not a permissible basis for legislation where it affects liberty rights); NICHOLAS BAMFORTH & DAVID A.J. RICHARDS, *PATRIARCHAL RELIGION, SEXUALITY, AND GENDER: A CRITIQUE OF NEW NATURAL LAW* (2007); and JOHN CORVINO, *WHAT'S WRONG WITH HOMOSEXUALITY?* (2013).

However, just as there are limits to the value of freedom of religion, there are limits to the value of non-discrimination. As Andrew Koppelman puts it:

The antidiscrimination project represents a claim of enormous moral power: the demand that society recognize the human worth of all its members, that no person arbitrarily be despised or devalued. Yet as soon as we begin to try to carry it out, we find ourselves in collision with other moral considerations, equally powerful, that demand that the project be a limited one.<sup>31</sup>

Conflicts between religious rights and the prohibition of sexual orientation discrimination are therefore not only likely but also potentially serious. A choice must be made about which interest to protect at the cost of violating another important interest, thus presenting a difficult dilemma. What then is the correct attitude to take towards this choice?

#### THE IDEA OF TRAGIC CHOICE

Nussbaum has written about the idea of the “tragic choice”:<sup>32</sup> a dilemma where there is a significant moral cost whichever decision is to be taken. She sees this in Sophocles’ *Antigone*.<sup>33</sup> In the play, *Antigone* is prevented from burying her brother, Polynices, a traitor, by Creon’s edict, because anyone who buries a traitor will be put to death. She decided to honor her religious commitment, thus disobeying Creon. There were serious moral considerations on both sides: *Antigone*’s religious obligation to bury her brother and Creon’s obligation to consider the welfare of the city. However, whichever decision *Antigone* would have made, one of these moral considerations would be violated. Nussbaum further argues that both *Antigone* and Creon failed in their moral duties by focusing on their own interest rather than noticing the tragic choice that must be made.

The conflict between the religious individuals’ conscientious obligations and the obligation not to discriminate can also potentially give rise to a tragic choice, though it is not clear that Nussbaum

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31. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 10 (1996).

32. Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1011 (2000).

33. This is discussed in EMILY M. CALHOUN, *LOSING TWICE: HARMS OF INDIFFERENCE IN THE SUPREME COURT* (2011).



would necessarily perceive this in the same way.<sup>34</sup> She argues that there would be no tragic choice if a religious group refused to provide primary-level education to their children because it conflicted with a religious obligation, since a rejection of this claim would not deny them “a fundamental entitlement involved in the very notion of the freedom of conscience”<sup>35</sup> and because granting an exception would “erode the foundations of civic order.”<sup>36</sup> However, while preventing discrimination in the types of circumstances referred to in this article would not deny those with religious objections “a fundamental entitlement involved in the very notion of the freedom of conscience,” the burden of being prevented from discriminating on the one side and the importance of the opposing interest in discrimination, can give rise to a tragic choice.

Nussbaum argues that if a choice is “tragic,” it gives rise to moral obligations, beyond the need to act morally in making the decision, including the obligation to regret having to make the choice and perhaps to express this or make amends in another way. A further responsibility, of crucial importance here, is to fully account for the interests in question; to, as stated above, not make this discussion “too easy.”

Marie Failinger, in referring to disputes where religious landlords refuse to let their apartments to gay or unmarried couples, has referred to a similar obligation.<sup>37</sup> As she points out, cases in this context have often been resolved by reducing either the landlord’s or prospective tenants’ interests to money or inconvenience. Thus, the landlord is told that there is no conflict with her free exercise rights because she can avoid the conflict “. . . by selling her units and redeploying the capital in other investments.”<sup>38</sup> Alternatively the tenants are told that the only harm they have suffered is a marginal reduction in the number of places to rent.<sup>39</sup> The

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34. Although in *MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY* (2008), she suggests conscience should be protected in a much greater number of circumstances than she seems to suggest in *The Costs of Tragedy*, *supra* note 32.

35. Nussbaum, *supra* note 32 at 1025.

36. *Id.* at 1026.

37. Marie A. Failinger, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 *CAL. U. L. REV.* 383 (2001).

38. *Smith v. Fair Emp’t & Hous. Comm’n.*, 913 P.2d 909, 925 (Cal. 1996).

39. *Donahue v. Fair Emp’t & Hous. Comm’n.*, 2 Cal. Rptr. 2d 32 (Ct. App. 1991), *review granted*, 825 P.2d 766 (Cal. 1992) (en banc), *and review dismissed and cause remanded*, 859 P.2d 671 (Cal. 1993) (en banc).

question then appears easy to the court. After all, a minor inconvenience is nothing compared to the importance of protecting freedom of religion, and if there is not really a conflict between religious beliefs and the law, then this is nothing compared to the fundamental right not to be discriminated against. However, this is not an adequate explanation of the issues. Rather, it is important to account fully for the losses caused. This means, when referring to religious claims, accounting for the loss and hurt caused by not being able to live out deep moral convictions, rather than dismissing claims outright. When referring to discrimination claims, this means not reducing the interest to one of mere inconvenience or limited economic harm, but to the fundamental importance of inclusion and non-discrimination as a moral value.

This is part of a broader point. Emily Calhoun argues that we should think about the “constitutional losers” in litigation.<sup>40</sup> It is of course in the nature of a legal system that there will be winners and losers, and this is not in itself problematic, but she argues that judges have obligations to the parties beyond deciding fairly who should win and lose. She links this to the idea of “constitutional stature” which all those who bring a rights case possess. Since they possess this constitutional stature, judges should not “characterize constitutional losers as valueless, as persons whose consent does not matter to judicial legitimacy, as wrongdoers rather than worthy and respected proponents of non-frivolous constitutional arguments.”<sup>41</sup> This “violates justices” obligations to citizens and has the potential to cause outrage “outrage” among those who do not agree with the judgment, because they can correctly perceive that their claim is thought of as worthless.<sup>42</sup>

This article will now discuss three case studies that demonstrate these points. They all raise situations where a religious individual or organization has denied a service to a gay person or couple because of their sexual orientation, as they argue to do so would be contrary to their religious beliefs. My purpose here is not to analyze particular legal doctrines or to argue that these demonstrate that there should or should not be an exemption, but a more normative one of asking what a good result and judgment, which fulfills the ethical demands argued for so far, should look like.

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40. CALHOUN, *supra* note 33.

41. *Id.* at 4-5.

42. *Id.*

## CASE STUDIES

*Elane Photography v. Willock*

In *Elane Photography v. Willock*<sup>43</sup> a photography company refused to photograph a lesbian couple's commitment ceremony. The couple that owned the company, the Huguenins, said they would only photograph "traditional" weddings because they had a policy of only photographing events which complied with their religious beliefs, and they believed that same-sex marriage was immoral. The New Mexico Supreme Court granted summary judgment against Elane Photography, holding that they had not demonstrated any defense to the discrimination.

Although summary judgment was not necessarily inappropriate, there are failures in the main decision in the obligation to realize that this was a potentially tragic choice and to acknowledge the owners' religious objections. Despite the fact that religion was at the center of their argument, their religious claims were not only unsuccessful, which is justifiable, but there was also no legal avenue under which they could be addressed. It was held they had no claim under the Free Exercise clause because the prohibition of discrimination did not selectively burden any religion or religious belief and was therefore a neutral and generally applicable law under *Smith*.<sup>44</sup> While the New Mexico Religious Freedom Restoration Act<sup>45</sup> would have given them an opportunity to raise their religious beliefs as a defense against a government agency, it did not apply here because the other party was a private individual.

The essence of the Huguenins' claim, that they are subject to a conscientious dilemma which asks them to choose between obeying the law and fulfilling their religious duty, therefore is not addressed because there is no cognizable religious claim. They therefore have "lost twice" under Calhoun's formulation<sup>46</sup> because they are not accepted as having a legitimate religious grievance. My argument is not at this point whether or not the Huguenins should have been successful, but only that they should have had available to them some cause of action which recognized the basis of their claim.

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43. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

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

45. N.M. STAT. ANN. § 28-22-1 (West).

46. CALHOUN, *supra* note 33.

It is because of this failure to recognize a religious basis of the claim that a weaker basis became important, that of free speech. As the court held though, this argument is artificial.<sup>47</sup> The Huguenins argued that they would be forced to express a message that they approved of same-sex marriage through their photography if they were required not to discriminate and that this forced expression violated their free speech rights. However, as the court said:

Reasonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events. It is well known to the public that wedding photographers are hired by paying customers and that a photographer may not share the happy couple's views on issues ranging from the minor (the color scheme, the hors d'oeuvres) to the decidedly major (the religious service, the choice of bride or groom).<sup>48</sup>

The couple's claim was a claim of conscience not expression. Their real fear was not that people would mistake what their beliefs are, but that they did not wish to be involved in an activity they believed morally wrong. Although the failure of the speech argument is recognized, it is the failure of the law to appreciate the value of conscience which leads to the casting around for alternative arguments.

However, there is a concurring judgment by New Mexico Supreme Court Justice Bosson that clearly perceives there is a tragic choice to be made between two important rights. He goes to some lengths to assure the Huguenins that their beliefs deserve our respect, but then goes on to point out that their right to act on their beliefs cannot be absolute where it would affect others' rights. He argues that it is essential in a multicultural and pluralistic society for everyone to compromise with those of different beliefs in some situations and concludes that the Huguenins cannot be permitted an exemption. Nevertheless, he states that this result, which requires the Huguenins to either give up their business or act contrary to their beliefs, is "sobering." This judgment gives a clear account of the different interests in the case and perceives that

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47. For an opposing argument see James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961 (2011)

48. *Elane Photography, LLC*, 309 P.3d at 69-70.

there is a difficult conflict of rights, thus respecting the obligations owed to constitutional losers.

Even when all the relevant concerns are taken into account, the Huguenins should not be successful. They were providing a commercial service, and the link between their views and the disapproved of act is remote. This is not an argument that claims like the Huguenins are unintelligible because they maintain that the actions of another hurt their consciences. Their argument was not that they wished to interfere in another's conscientious choice. Rather they argued that in assisting Willock they would thereby share in the fault. Assisting morally wrong acts is widely understood by law and morality, both religiously based and not, to inculpate the assistor in some circumstances.

However, not all assistance is equally morally culpable or indeed culpable at all. Daniel Sulmasy outlines how the Natural Law tradition provides a sophisticated understanding of whether cooperation affects conscience and whether assisting wrongdoing is permissible.<sup>49</sup> The Natural Law tradition divides cooperation into formal and material cooperation. Formal cooperation is where the assistor shares the intent of the person doing wrong. This is always unacceptable. Material cooperation is where, as here, the intent is not shared. Whether this is acceptable depends on a number of factors. Most relevant for present purposes is the proximity to the morally culpable act. Other relevant factors are whether there is a causal link, as in the act would not take place without the assistor's involvement, and finally whether assistance is likely to lead to "scandal." This has the technical meaning of whether involvement is likely to lead others to believe that the person finds the act assisted morally acceptable and thus encourage others into committing the act under this mistaken belief.

As there is no reason to impute any approval of the marriage to the Huguenins, the question of scandal does not arise. The Huguenins' act is also not very proximate to the marriage. They were only asked to take part in an act which was incidental to the commitment ceremony and had no causal link to it, since the ceremony easily could have gone ahead without a photographer. This is not to deny the conflict that the Huguenins felt, but merely to conclude that, for the purposes of balancing their rights against other rights and interests, the interference with their rights was relatively mi-

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49. Daniel P. Sulmasy, *What is Conscience and Why is Respect For it so Important?*, 29 THEOR. MED. BIOETH. 135 (2008).

nor. Indeed it would have been possible for them to employ another photographer to cover same-sex weddings.<sup>50</sup> Although they may still argue that this is contrary to their beliefs, and of course it may be, the link is then extremely limited.

In contrast, Willock's rights were more fundamentally affected. It is important to go back to the point above that the stigma caused by this refusal and patterns of discrimination make this a serious issue. This is not a mere matter of "inconvenience" in finding another provider as Laycock seems to suggest,<sup>51</sup> as it would have been had the Huguenins simply been unavailable. Willock and her partner were able to find another photographer, but that does not remove the harm caused by the Huguenins, at least potentially, to their sense of dignity and inclusion and to their right to feel like equal citizens. Additionally, from a slightly different perspective, there would also be a great difficulty in giving an exemption because of its precedential value. There is nothing distinctive about this case to distinguish it from any other where a person claims a religious exemption from providing a commercial service. Granting an exemption would therefore lead to an evisceration of the anti-discrimination principle and leave gay people in a state of considerable uncertainty as to whether or not they were entitled to receive a service.<sup>52</sup>

This means the Huguenins are left with a conflict between their legal obligations and their beliefs. They must then decide whether to give up their business or to comply with the antidiscrimination law. This is a matter of regret, which must be acknowledged, but it is an unavoidable problem, given that not to do so would cause greater moral harm to Willock.

*Ward v. Polite*<sup>53</sup>

The second case I will discuss is more complex than *Elane Photography*, since it requires consideration of four organizations' or

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50. As suggested by now EEOC Commissioner, Chai Feldblum as noted in ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN THE PERSON AND STATE 303 (2009).

51. Laycock, *supra* note 21.

52. This is recognized but seemingly accepted by Laycock. *Id.* at 199 ("In more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago.")

53. 667 F.3d 727 (6th Cir. 2012).

individuals' interests, in addition to the general public interest in eliminating discrimination. It does not involve the straightforward denial of services that arose in *Elane Photography* but a claim to be accommodated in professional training because of discriminatory religious reasons. In *Ward v. Polite*, Ward, a counseling degree student sought to avoid counseling a gay client if he sought help relating to his relationship because of her religious objections to affirming same-sex relationships. She therefore sought permission from the university, before she had begun counseling him, to transfer him to different student counselor. This was refused, and she was instead expelled from the course. The university held that she had failed to comply with the American Counseling Association's (ACA) Code of Ethics. This required a non-directional style of counseling where counselors were to "affirm" their clients' values rather than to persuade them to accept their own values. It also prohibited discrimination on certain grounds including sexual orientation. It permitted, and in some cases required, referrals where a counselor did not have relevant expertise or considered that they could not help the client.

The case was remanded to the district court for further consideration of the factual issues, although the judgment is favorable to Ward. The case later settled.<sup>54</sup> As with *Elane Photography*, the case was considered on two bases: free speech and free exercise. The question in relation to the free speech claim was whether the policy was reasonable and viewpoint neutral. The viewpoint neutral policy the university sought to put forward was that it refused to permit students to refer clients. This argument was difficult to make, because the ACA did permit referrals where this was in the client's best interests and because there was evidence that the university had permitted referrals in the past. This also made it difficult to demonstrate that the policy was neutral and generally applicable for the purposes of the free exercise claim. There was therefore a factual disagreement, which is why the case was remanded to the district court.

Although certainly the court is right in that "at some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action

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54. Leigh Jones, *Christian Counselor Bias Case Settled Out of Court*, WORLD ON CAMPUS (Dec. 13, 2012), [http://www.worldoncampus.com/2012/12/christian\\_counselor\\_discrimination\\_case\\_settled\\_out\\_of\\_court](http://www.worldoncampus.com/2012/12/christian_counselor_discrimination_case_settled_out_of_court).

that must run the gauntlet of strict scrutiny,"<sup>55</sup> seeking only to demonstrate there was a neutral policy can only give a partial analysis of the interests at stake. It focuses attention on the somewhat tangential issue of whether anyone had been permitted to transfer clients and left the university in difficulty in explaining its point of view. The problem is that there is nothing necessarily suspect in having a non-absolute policy in terms of the purpose of the training. There is a difference, for example, between a student referring a client who is seeking bereavement counseling when she has recently suffered a bereavement,<sup>56</sup> and referrals for discriminatory reasons. The university's training was designed to create counselors who complied with the professional ethics of a particular body. These ethics were not incidental, but rather directed how the whole relationship between counselor and client was meant to operate. A transfer for bereavement counseling would not affect this policy because it does not involve any moral disapproval of the person who has been bereaved. A transfer for discriminatory reasons though does.

As stated above, there are four groups or individuals whose interests should be recognized as relevant to this dispute. These are: Ward, the client Ward was meant to counsel, her prospective future clients, and the university. All must be accounted for since they are not necessarily coterminous. The Court argued, "[A]llowing a referral would be in the best interest of Ward (who could counsel someone she is better able to assist) and the client (who would receive treatment from a counselor better suited to discuss his relationship issues)."<sup>57</sup> This may be persuasive if only this client's interests are considered, but it does not address the full range of interests. Indeed, it may even understate the client's interests. It is probably assumed that he would have been unaware of such a transfer, and therefore he suffered no injury. However, if such a policy did become public it may have caused him stigmatic injury because a person in a heterosexual relationship would not have been transferred. He would not have received the same treatment due to his sexual orientation.

More important is the wider interest the university has in promoting certain ways their trained counselors should act. As far as the university is concerned, its role is to train counselors in a

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55. *Ward*, 667 F.3d at 740.

56. An example given in the case.

57. *Ward*, 667 F.3d at 740.



certain method of counseling, which must be accepted for the purposes of training, even if it can be discarded or challenged at a later date. Furthermore, the interests of future clients are not considered in the judgment. This is the crucial issue. They would have a legitimate expectation that accredited counselors would abide by their professional body's code of conduct, including its non-discrimination requirements and would be trained to do so. Their interests are stronger here than in receiving normal commercial services without discrimination, because of their presumably vulnerable state when seeking counseling services.

Of course, Ward's interests must also be addressed. She had a genuine conscientious objection, which she sought to deal with in a way that would cause the least disruption to both the client and the course by seeking a referral at an early stage. It is also regrettable that this issue arose in her final semester, when she had apparently been a conscientious and competent student, thus preventing her from graduating. Nevertheless, she still opposed a core value of her chosen profession, giving rise to a dilemma, which she felt she could not conscientiously ignore. Given the importance of non-discrimination to this career, therefore, despite the sincerity of her views and the fact that she only attempted to avoid a conflict rather than change others' views,<sup>58</sup> the university was justified in not giving her a transfer.

However, this does not mean that Ward's treatment was entirely fair. The formal review to decide whether she should be dismissed from the course, at least in the way it is represented by the court, was questionable in that it did not treat her with full concern and respect. It appeared to focus more on her religious beliefs than on her behavior and professional obligations, with one professor stating in his evidence that he took her "on a little bit of a theological bout"<sup>59</sup> and another telling Ward during the review that she was "selectively using her religious beliefs in order to rationalize her discrimination against one group of people."<sup>60</sup> Of course, discussion of different moral and religious beliefs is good and, indeed, probably essential if a pluralistic society is to function, but it was not appropriate for this context. This is firstly because her professors were in a position of power. Secondly, it gives the appearance

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58. Unlike the plaintiff in the factually similar case of *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011).

59. *Ward*, 667 F.3d at 738.

60. *Id.* at 737.

of bias, leading to some basis for an allegation of religious discrimination, even if there were sound reasons for the university's decision. Thirdly, by challenging her deepest moral beliefs it failed to respect her as a person capable of moral reasoning and of adopting her own ultimate convictions. It should be emphasized that this conclusion only relates to the particular circumstances of this case: in many cases, of course, challenging deep moral beliefs is an important aspect of university education. Finally, by focusing on high level rather than low level reasoning,<sup>61</sup> that is on the "Truth" about the morality of same-sex relationships according to Christianity, a subject of deep complexity even for the most eminent theologians, rather than what is required to comply with this code of ethics, the dispute becomes less capable of peaceful resolution and more likely to engender distrust and opposition.

In conclusion then, the judge's statement that denying Ward a referral because "her conflict arose from religious convictions is not a good answer; that her conflict arose from religious convictions for which the department at times showed little tolerance is a worse answer" is correct.<sup>62</sup> She may have an understandable sense of anger and discrimination. Nevertheless, she should not have an exemption because of the interests of the university and her future clients.

Without gainsaying anything said up to this point, some of the issues Ward raises are legitimate. The university and the ACA argue that they require students to engage in non-directional counseling, but it is difficult to think of what truly non-directional counseling would involve. If a client engaged in conduct widely perceived as abhorrent but which he considered to be morally acceptable, it seems unlikely that the reaction by the counselor to this would, or should be, one of neutrality or acceptance of his moral stance.<sup>63</sup> The university and ACA are using a mask of neutrality to defend their Code of Conduct, when it is actually underpinned by a strong moral code, which takes as its starting point non-discrimination and a particular type of toleration.<sup>64</sup> The point

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61. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 51 (2001).

62. *Ward*, 667 F.3d at 737.

63. This point is made in the judgment. *Id.*

64. FRANK FUREDI, *ON TOLERANCE: A DEFENCE OF MORAL INDEPENDENCE* (2011). Furedi discusses different types of tolerance, and this kind of tolerance is what Furedi refers to as the newer type of tolerance.

is not that this is in any way problematic, but that the university is inevitably requiring students to follow its moral code.

More generally, the case shows starkly the problem of how those with strong beliefs are likely to struggle in an environment which opposes these views. Ward could not follow both her religious convictions and the professional obligations intrinsic to her chosen career. It is possible that as the anti-discrimination norm becomes more entrenched and those who have opposing moral views less dominant,<sup>65</sup> managing this conflict will become more difficult for some people, especially if they consider that the only way to manage this conflict is to either refuse to perform part of their duties or to resign. It is understandable that some arguing for religious rights has therefore adopted the language of ‘closeting’ from gay rights discourse, arguing that they are being forced to keep their religious identity silent,<sup>66</sup> although the adoption of this language may be partly due to a somewhat cynical attempt to portray strongly religious people as victimized minorities. Certainly the two situations are not identical. For gay people, throughout much of recent history, the stigma was such that it prevented any mention of relationships or sexuality and thus required them to keep an essential part of their identity secret for fear of losing their job or worse.<sup>67</sup> There is no suggestion that people with strong religious views will be required to keep this secret in a similar way, although there may be restrictions on offensive speech in the workplace.<sup>68</sup> Furthermore, in general, it is inevitable that the more different a person’s beliefs are from the mainstream, the more likely conflicts are to arise. While I have argued that such conflicts must be recognized and alleviated where possible, in

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65. For a thorough explanation on the effect that age has on views towards homosexuality—though this is not an inevitable or simple process *see* Oppenheimer et al., *supra* note 9.

66. *See, e.g.*, Thomas C. Berg, *What Same-Sex Marriage and Religious Liberty Claims Have in Common*, 5 NW. J. L. & SOC. POL. 206 (2010). *See also* Carl F. Stychin, *Closet Cases: □ Conscientious Objection’ to Lesbian and Gay Legal Equality*, 18 GRIFFITH L. REV. 17 (2009) (providing comment on this from a progressive approach).

67. *See* William N. Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship 1961-81*, 25 HOFSTRA L. REV. 817, 820 (1997) (explaining that gay and lesbian professionals faced the prospect of losing their professional licenses and that “consensual homosexual intercourse was a serious crime in all the states, and a felony in all but one.”).

68. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 605 (9th Cir. 2004).

many cases, because of the importance of the right of non-discrimination, this must be given greater protection. The difficulty this may pose for some, however, should not be underestimated.

*Bernstein v. Ocean Grove Camp Meeting Association*<sup>69</sup>

So far this article has only discussed the value of individual conscience and religious belief. The third case involves slightly different interests from the other two cases discussed so far, because it involves a religious organization claiming control over the use of its property, rather than an individual refusing to provide a service, thus raising the issue of collective religious freedom in the relationship between religious organizations and non co-religionists. Ira Lupu argues that conscientious objection is only relevant to individuals and not institutions on the basis that only people can feel the psychological effects of being forced to act in ways in which they disagree.<sup>70</sup> It is of course true that the situation is different for organizations compared to individuals, particularly because the emotional and psychological harm of being required to make an agonizing choice is not the same. Nonetheless, this does not mean that issues of religious conscience are not relevant.

Firstly, those within the religion may experience such a dilemma. A leader of a religious organization may argue that it goes against his<sup>71</sup> conscience, and against his understanding of the organization's religious precepts, to permit an activity which is contrary to the religious teachings on its premises. Permitting it may also cause hurt to religious members who may feel that a sacred, or at least religiously important, space is being despoiled in some way. In a more fundamental sense, conscience and religious beliefs are not merely valued because to do otherwise would cause psychological harm, but because freedom of belief is an essential part of human flourishing. Religious organizations promote conscience by allowing the continuation and dissemination of a religious mes-

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69. *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Office of Admin. Law), available at <http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf>.

70. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B. U. L. REV. 391, 419-22 (1987).

71. I use "his" deliberately here: discrimination against gay people is often accompanied by discrimination against women.

sage over time to both members and non-members and providing a source of teaching and support.<sup>72</sup> The organization may have an interest in promoting a consistent religious message and thus controlling the use of its property to ensure this message is not distorted. As with religious individuals, it is not a full answer to say that they could avoid the conflict by not entering into commercial activities. Offering out space for hire may be an important source of income that is relied upon to fulfill the religious mission or used to spread general awareness of the religion.

Ocean Grove is a resort, owned by a Methodist organization, which has its roots in the nineteenth century camp meeting revival movement.<sup>73</sup> On the resort was the Boardwalk Pavilion, which was used for religious services and concerts but could also be hired out for weddings. When not in use it was freely open to the public. A lesbian couple, Bernstein and Paster, who were residents of Ocean Grove, tried to book the Pavilion for their wedding but were refused on the basis that the Methodist Church did not approve of same-sex marriage. The couple was successful in their argument that the Pavilion was a place of public accommodation at the time, that Ocean Grove Camp Meeting Association (OGCMA) had discriminated against the couple, and there was no free exercise defense under the approach in *Employment Division v. Smith*<sup>74</sup> since there was no targeting of religious practice.

Although a religious organization has an interest in controlling the use of its property, there are of course different kinds of property. A church has a greater claim over the use of sacred places such as a chapel, than it does to premises used mainly as a source of income, not used for religious purposes, and rented out to all-comers. The first question is therefore to assess to what extent the Pavilion should be characterized as a public or private space. I do not wish to use this distinction to set up a false dichotomy between public and private or to suggest that whether discrimination is permissible or impermissible should be coterminous with this distinction. However, ascertaining the character of the Pavilion is

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72. The idea that religious organizations have their own rights is not new. The rise of the idea of *corporate* conscience is an interesting but problematic one. See VISCHER, *supra* note 50 (arguing that corporations should be able to claim conscience rights).

73. TROY MESSENGER, HOLY LEISURE: RECREATION AND RELIGION IN GOD'S SQUARE MILE 4-5 (2000).

74. 494 U.S. 872 (1990).

relevant in ascertaining the extent to which the rights of its owners have been affected.

On the one hand, Fredric Bold characterizes the Pavilion as private, arguing that “if the public sees religious institutions such as the Methodist pavilion owners allowing same-sex civil commitment ceremonies on their premises, casual observers may erroneously think the Methodist church has changed its historic stance against same-sex marriage.”<sup>75</sup> He also suggests that a ceremony would have received a great deal of media interest. This analysis makes the mere ownership of a place crucial. It follows that a religious organization should be able to prevent a use which it does not agree with on any premises it owns, no matter how attenuated its link to its religious mission. This would significantly reduce the protection given by the anti-discrimination norm. As it relates to this case it also fails to appreciate that the Pavilion was at least a partly public place. Although used for religious worship, it was not a church and was open to everyone. Non-Methodist and non-religious weddings and other non-religious events had taken place there, with no indication that the church thereby endorsed them. Importantly also, OCGMA received a tax exemption for the Pavilion on the basis that it was open to the public.

In contrast to Bold, Ira Lupu and Robert Tuttle depict the Pavilion as public.<sup>76</sup> They argue that, “Bernstein and Paster asked to use a facility that was not specifically identified with Methodist worship, that ordinary observers would see as public space, and that had been available for rental by anyone willing to pay the fee.”<sup>77</sup> This is a more apposite characterization than Bold’s. Although OGCMA is a religiously based organization, this does not thereby make the property it owns necessarily religious in nature. Given the particular circumstances and use to which the Pavilion was put, the religious interest is fairly small. The risk of confusion between the Methodist Church’s precepts and the actions it permits on some of its property therefore appears remote. If OGCMA was particularly concerned about the risk that people would erroneously think that the Methodist Church endorsed same-sex weddings, it could perhaps lessen this by having a sign saying that any

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75. Fredric J. Bold, *Vows to Collide: The Burgeoning Conflict between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U. PA. L. REV. 179, 202, 224 (2009).

76. Ira C. Lupu & Robert W. Tuttle, *Same-Sex Equality and Religious Freedom*, 5 NW. J. L. & SOC. POLY. 274, 285 (2010).

77. *Id.*

activity taking place in the Pavilion did not necessarily represent the views of the Methodist Church. Therefore, although OGCMA did have an interest in discriminating in the use of its property, it had not, with its present use, demonstrated a particularly strong interest.

However, again this interest is only partly recognized by the judgment. It did not see any conflict between the law and OGCMA's religious beliefs. The problems caused by *Smith* in recognizing and paying due attention to the religious interests in such situations are again obvious. It was held there was no relevant free exercise question because the Law Against Discrimination is a neutral law of general application designed to uncover and eradicate discrimination; it is neither focused on nor hostile to religion.<sup>78</sup> This is undoubtedly partly explained by the difficulty OGCMA had in demonstrating that it had historically shown any interest in making the use of the Pavilion compliant with its religious beliefs.

In contrast to the weak discriminatory interest, Bernstein and Paster's interest is strong. This is partly due to the "unfair surprise" they faced.<sup>79</sup> To them this was a quasi-public space, rather than a religious one, in the community to which they belonged. As the Administrative Judge put it, "[T]his was the first time in anyone's memory that a denial was based on a reason other than availability. During this period respondent maintained a Web page called *An Ocean Grove Wedding*, which advertised the Pavilion as a wedding venue. The page was silent regarding respondent's views on marriage."<sup>80</sup> Others who had married there were not informed there was any religious significance to their weddings taking place there, or asked whether their marriages conformed to Methodist teachings. To impose such a requirement only on a gay couple is therefore unfair and indeed may raise the question of whether OGCMA was really acting to protect its religious mission, or merely out of prejudice towards gay people. If that was the case, the situation ceases to be a "tragic choice" because there is no significant moral harm caused to them here by the requirement not to discriminate.

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78. *Smith*, 494 U.S. at 878.

79. Laycock, *supra* note 21, at 198 (urging "unfair surprise" is an important factor).

80. *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008 (N.J. Office of Admin. Law), available at <http://www.adfmedia.org/files/OGCMA-BernsteinRuling.pdf>.

Of course, none of this means that OGCMA necessarily had to allow anyone to use the Pavilion. Its obligation was only not to discriminate, not to actively provide places for same-sex weddings. It could reconsider its use and use it only as a religious space if it so wished, meaning that the laws on non-discrimination in public accommodations did not apply to it. Indeed, this was the choice it made after the case was brought. The Pavilion was then classified for tax purposes as a religious property rather than a public one. Another lesbian couple later tried to make a complaint to the State of New Jersey's Division of Civil Rights, when they tried to book the Pavilion for their wedding, but this was rejected on the basis there was no cause of action.<sup>81</sup> The choice OGMGA was put to, while difficult, was not therefore an unfair one.

#### CONCLUSION

In a way, the purpose of this article has been to complicate rather than to simplify this issue. It has argued that both discriminatory religious beliefs and the prohibition of sexual orientation discrimination are important rights, and that the conflict between the two should not be resolved by reducing the importance of the interest on one side and thus failing to see the existence of a deep conflict, something of which both courts and commentators have sometimes been guilty. A failure to see this as a "tragic choice," in the same way as Creon failed to see Antigone's dilemma, results in unfairness and in a moral failure to one of the parties. Rather, careful attention must be paid to elucidating the various interests, and whilst it will probably be necessary to protect one right over another, to acknowledge the difficulty this causes for one party.<sup>82</sup> What is clear though, is that these issues are likely to remain controversial for some time and that with same-sex marriage being recognized in more places and with the growth of other laws prohibiting discrimination, particularly in

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81. Lupu & Tuttle, *supra* note 76, at 279-80.

82. This article has not addressed the question of how and when conflicts can be avoided. However, this is an important question, and Nussbaum argues is an obligation where there is a tragic choice. This issue is discussed in Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781 (2007).



jurisdictions with significant conservative religious populations,<sup>83</sup> these issues are likely to continue to arise.

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83. Kelly Catherine Chapman, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1790 (2012) (arguing that it is necessary for “holdout” states to have greater religious exemptions for sexual orientation discrimination laws in public accommodations to be accepted).