

# TEMPERING CIVIL RIGHTS CONFLICTS: COMMON LAW FOR THE MORAL MARKETPLACE

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## ABSTRACT

*Property law is not only sexy but also loaded with moral conflict. Many market transactions are suddenly politically weighted acts. Can law provide a peaceful solution to the present conflict between sexual-identity right claims and conscience? This Article argues that law, understood in its textured, common law contours, may provide a more peaceful and reasonable solution than (a) peremptory claim-rights, (b) positive rules, and (c) markets unmediated by law. Properly understood, the common law doctrines of public accommodations and contractual licenses are not the source of the problem; they offer a potential solution. Authority to adjudicate common law liberties should be returned to common law institutions such as the license and the civil jury, which are both more competent and constitutionally empowered to settle the rights and duties of the parties consistent with the requirements of equality and conscience.*

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## I. CONFLICT AND MEDIATION IN THE MARKETPLACE

A generation ago, state courts gave a gift to editors of property casebooks: They began issuing interesting property opinions. Property students spend much of their first year of law school learning the idiosyncratic rules of possessory estates and future interests, easements, adverse possession, and riparian rights, the origins of which are often shrouded in the mists of ancient English history. Property law is not typically the stuff of drama, scandal, or even anachronistic moral scruples. So, students tend to snap to attention when they encounter in a case the word “fornication.”<sup>1</sup> The cases concern whether the law will recognize a right to be a fornicator in an apartment owned by a conscientious landlord.<sup>2</sup>

A couple of decades later, the sexiness of property law is diversifying. Conscience and sexual identity have collided more and more frequently in recent years, in more varied combinations: the

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1. See, e.g., *State v. French*, 460 N.W.2d 2, 5-8 (Minn. 1990).  
2. See *id.*

same-sex couple against the conscientious florist or baker; the adulterous employee against his conscientious employer; the transgender student against the religiously affiliated school. The stakes in these conflicts are high. Public accommodations are not merely locations for the exchange of goods and services but also important loci of self-constitution. Business owners and non-profit managers pour themselves into their businesses and charitable ventures, which come to constitute central aspects of who they are, not only as professionals but also as persons. And customers also can be personally invested in a transaction, especially where it concerns a wedding, a job, or a home. Both sides think that the transaction affects much more than what they want to buy or sell; it affects who they *are* as persons.

Neutral resolutions seem unlikely. Proposals to allow markets<sup>3</sup> or plural institutions<sup>4</sup> to avoid these conflicts are obviously attractive, and they are advanced by very capable, scholarly proponents. But the desire remains for some institution or mechanism to resolve questions of justice—what is right or wrong to do in each case. Both sides in these conflicts agree that principles of justice are at stake, though they disagree radically about what those principles entail. Both sides claim the authority of civil rights for incompatible right claims.

The *lingua franca* of American legal discourse—rights<sup>5</sup>—does nothing to lower the stakes. If rights of conscience, property, and nondiscrimination are understood as absolute and peremptory, then conflicts between them must be framed as zero-sum contests, in which one right wins at the expense of the other.<sup>6</sup> These contests

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3. E.g., Richard Epstein, *Freedom of Association and Antidiscrimination Law: An Imperfect Reconciliation*, LIBR. L. & LIBERTY (Jan. 2, 2016), <http://www.libertylawsite.org/liberty-forum/freedom-of-association-and-antidiscrimination-law-an-imperfect-reconciliation/> [<https://perma.cc/P7TU-MPYR>]; Richard A. Epstein, *The Problem With Antidiscrimination Laws*, HOOVER INSTITUTION (Apr. 13, 2015), <http://www.hoover.org/research/problem-antidiscrimination-laws> [<https://perma.cc/N8JT-TLEC>].

4. E.g., ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE* (2010) [hereinafter CCG].

5. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 3-4 (1991).

6. These conflicts are framed by some as contests “between gay rights and religious liberty,” Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 619 (2015) [hereinafter *Purposes of Antidiscrimination*], and by others as conflicts between different civil rights, because and insofar as religious liberty is a civil right. See Richard W. Garnett, *Religious Accommodations and—among—Civil Rights:*

leave civil rights vulnerable. In a zero-sum contest, someone's right must either not be given juridical recognition or be justifiably infringed. A right that is given no legal effect is not a legal right in a meaningful sense.<sup>7</sup>

Fortunately, conscience, property, and equality rights are not all absolute, vested rights in their general, abstract form. Unlike truly absolute rights, such as the right not to be enslaved<sup>8</sup> and the inviolability of human life,<sup>9</sup> they do not correlate with fully conclusive and absolute duties of abstention. They share some of the essential characteristics of absolute rights in that they rule out of deliberation various potential first-order reasons for action. But they do not prohibit action based on *all* first-order reasons. Stated differently, they are categorical rights rather than absolute rights.

In our common law tradition of rights and liberties, inherited from England and incorporated within the fundamental law of both the several states and our national constitutional order,<sup>10</sup> rights of equality, property, and religious exercise are not reified as two-term, fully specified trumps<sup>11</sup> over all other legal reasons. They become fully conclusive reasons for action, eliminating from consideration all first-order reasons and imposing a binding obligation, only after they are specified in context as three-term, Hohfeldian jural relations<sup>12</sup> in reasoned conclusions of practical judgment.<sup>13</sup> Before

*Separation, Toleration, and Accommodation*, 88 S. CAL. L. REV. 493, 494-95 (2015). For present purposes the label "civil" attached to "right" is not as important as the normative function of the right and the institution that has the authority to settle and specify the right's normative contours.

7. GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 55-116 (2009).

8. *See, e.g.*, *Buckner v. Street*, 4 F. Cas. 578 (E.D. Ark. 1871); *Forbes v. Cochrane*, (1824) 2 B & C 446 (Eng.); *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499.

9. *See* *Washington v. Glucksberg*, 521 U.S. 702, 705-06 (1997); NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 32 (2006); JOHN KEOWN, *THE LAW AND ETHICS OF MEDICINE: ESSAYS ON THE INVIOABILITY OF HUMAN LIFE* (2012); Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 148-242 (1985).

10. *See* JAMES R. STONER, JR., *COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM* 1 (2003); Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 222 (2010).

11. *Compare* Paul Yowell, *A Critical Examination of Dworkin's Theory of Rights*, 52 AM. J. JURIS. 93, 133 (2007), *with* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (2d ed. 1977).

12. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN*

their full specification, they direct judgment by ruling out of deliberations specified *categories* of first-order reasons, thus limiting and defining the types of first-order reasons that can be asserted against them.<sup>14</sup>

So, the rights at stake in these disputes are not as absolute and unyielding to external considerations as some other rights, such as inviolable rights not to be killed, maimed, or enslaved.<sup>15</sup> Because rights of equality and conscience exclude from deliberation certain categories of reasons, they direct practical deliberation and judgment in meaningful and forceful ways and are therefore properly considered rights. Yet because they do not exclude from consideration *all* first-order reasons, they are not absolute and conclusive until fully specified as judgments in three-term jural relations identifying duty-bearer, right-holder, and the action or inaction that is required or forbidden.

The first cut at specification is performed not by the blunt instruments of positive rules and administrative action, but rather by three of the common law's customary institutions of private ordering: private property ownership (especially the powers of ownership and license), the contract for services, and the civil jury. Taken together, these institutions produce not the sole and despotic dominion attributed to common law private property<sup>16</sup> but rather

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JUDICIAL REASONING AND OTHER LEGAL ESSAYS 65 (Walter Wheeler Cook ed., 1923).

13. WEBBER, *supra* note 7, at 116-46; Bradley W. Miller, *Justification and Rights Limitations*, in *EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY* 93 (Grant Huscroft ed., 2008).

14. ADAM J. MACLEOD, *PROPERTY AND PRACTICAL REASON* 173-241 (2015) [hereinafter P&PR].

15. The rights at stake in public accommodations disputes are what can be called (drawing on the work on perfectionist liberal theorists Joseph Raz and James Penner) categorical, exclusionary reasons for action. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35-48, 73-89 (1999); JOSEPH RAZ, *PRACTICAL REASONING* 128-43 (1978); J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 9, 23-31 (1997). In any particular deliberation about what is (not) to be done, they exclude from deliberation and judgment definite *categories* of first-order reasons, but not all possible, first-order reasons for action. *Id.*

16. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." II WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*2 (Philadelphia, J.B. Lippincott Co. 1893) (1769). As Carol Rose has pointed out, reading the Commentaries as a whole reveals that Blackstone's understanding of property rights was far more nuanced than this oft-quoted line would suggest. Carol M. Rose,

mediated dominion.<sup>17</sup> Mediated dominion specifies the boundaries of liberties, immunities, claim-rights, and powers all consistent with the requirements of religious conscience, integrity, personal autonomy, authenticity, and the other requirements of justice, without the need for zero-sum warfare.

On this view, the good precedes the right. No abstract, reified, two-term right claim trumps conclusively for all purposes and in all cases. The well-formed judgment about rights is always informed by reasons, which in central and just judgments will consist of all the relevant considerations of the common good<sup>18</sup> and will not arbitrarily exclude legal norms that bear upon the question. This is true even where posited rules are in play. Legislation is purposeful action to change some part of a complex and comprehensive system of laws,<sup>19</sup> which takes the existing law as background informing the meaning of legal change.<sup>20</sup> Legislation changes law in some respects but not others. So, legislation that declares, codifies, and even partially abrogates common law norms can only be understood in light of those norms.<sup>21</sup>

Statutory protections for religious liberty and nondiscrimination rights are best understood as declarations, codifications, and alterations of common law norms. Those norms are settled and specified by common law institutions governing public accommodations; posited norms guide deliberation and judgment, but do not completely determine it. This comprehensive view of the doctrines allows many conflicts over public accommodations to be resolved case-by-case according to reason, rather than settled once and for all in a conclusory fashion. The Free Exercise Clause and statutory protections for conscience and religious exercise, such as the Religious Land Use and Institutionalized Persons Act (RLUIPA)<sup>22</sup> and state and federal

*Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603-06 (1998).

17. P&PR, *supra* note 14, at 37-38.

18. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 161-225 (2d ed. 2011) [hereinafter NLNR].

19. See generally NEIL DUXBURY, ELEMENTS OF LEGISLATION (2013); RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012); Daniel Mark, *Legislative Intent and Purposive Interpretation*, 60 AM. J. JURIS. 227 (2015) (reviewing RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012); NEIL DUXBURY, ELEMENTS OF LEGISLATION (2013)).

20. EKINS, *supra* note 19.

21. I BLACKSTONE, *supra* note 16, at \*42, \*54, \*86-\*87, \*254.

22. 42 U.S.C. § 2000cc (2012).

Religious Freedom Restoration Acts (RFRAs),<sup>23</sup> impose burdens of justification on state actors who suppress liberties of conscience and use. They do not create blanket exemptions for religiously motivated discrimination. Nondiscrimination laws prohibit exclusion from public accommodations for motivations that are not valid reasons. Exclusion based on valid reasons, especially religious liberty claims and distinctions that find support in fundamental law, is not prohibited.

Nor is judgment completely determined by abstract right claims. The right of equal access under constitutional equal protection safeguards and nondiscrimination statutes does not vest in the holder an absolute right to enter others' private property, even if that private property is held open for public accommodation. Rather, the equal protection and nondiscrimination rights identify discrete characteristics (race, for example) that are invalid justifications for termination of a license to enter. Likewise, rights of religious liberty under free exercise constitutional safeguards and religious freedom statutes are not blanket exemptions from laws of general application. The precise contours of common law religious liberties in America are contested. But two propositions seem uncontroversial. On one hand, at least some states rejected usages of the English common law that were hostile to what early American statesmen and jurists called the liberty of conscience,<sup>24</sup> which was understood to impose non-contingent duties upon officials and state actors. "The rights of conscience are, indeed, beyond the just reach of any human power," insisted Joseph Story.<sup>25</sup> On the other hand, those liberties do not give rise to a right to act for any justification that can be characterized as religious. Individual "rights of private judgment"<sup>26</sup> cannot be sacrosanct against basic requirements of the public good.<sup>27</sup>

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23. 42 U.S.C. § 2000bb (2012).

24. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW \*35-\*36 (12th ed., Boston, Little, Brown & Co. 1884) (1826); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1870 (4th ed., Boston, Little, Brown & Co. 1873) (1833); St. George Tucker, *Of the Right of Conscience; and of the Freedom of Speech and of the Press*, in VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 371-76 (1999).

25. STORY, *supra* note 24, at § 1870.

26. Tucker, *supra* note 24, at 373.

27. Roger Williams, one of the most forceful early American champions of freedom of conscience, used the metaphor of a ship, in which "none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers or worship," yet all must obey the rules and authority of the ship's captain and fulfill their duties to maintain "justice, peace and sobriety." Roger Williams, *Letter to the Town of*

The positivist assumption that law essentially consists of posited rules that are fully determinate giving rise to uniform, conclusive (often affirmative) duties is not benign. Expansive interpretations of positive rules have generated a zero-sum warfare, especially when prosecuted, adjudicated, and administered by unelected commissions and administrative agencies. All conflicts in public accommodations must be resolved the same way, regardless of the actors' reasons for action, how public the venue is, the size and circumstances of the relevant market, and many other valid considerations that common law norms and institutions are able to take into account when specifying the rights and duties of the parties in each case.

In short, to mediate these conflicts reasonably, we need fewer rules and more law, less power and more liberty. This Article is a step toward that goal.

## II. THE CASES

The first generation of cases concerns whether a landlord discriminates on the basis of marital status when he or she declines to lease an apartment to an unmarried couple who intends to cohabit, thereby acting unlawfully under nondiscrimination statutes in several states.<sup>28</sup> In many cases the landlords have won because their (direct) motivation was not the prospective tenants' marital status but rather an intention to avoid complicity in what they believed to be inherently immoral conduct.<sup>29</sup> The landlords, mostly devout Christians, were willing to lease to unmarried individuals and pairs who had no intention to engage in immoral conduct—friends,

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*Providence*, in THE SACRED RIGHTS OF CONSCIENCE: SELECTED READINGS ON RELIGIOUS LIBERTY AND CHURCH-STATE RELATIONS IN THE AMERICAN FOUNDING 155 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

28. See, e.g., *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *withdrawn*, 192 F.3d 1208 (9th Cir. 1999); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979, 979-83 (1994) (Thomas, J., dissenting); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996); *Jasniowski v. Rushing*, 685 N.E.2d 622 (Ill. 1997), *rev'g* 678 N.E.2d 743 (Ill. App. Ct. 1997); *Att'y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998), *vacated and remanded on other grounds*, 593 N.W.2d 545 (Mich. 1999).

29. E.g., *Mister v. A.R.K. P'ship*, 553 N.E.2d 1152, 1159 (Ill. App. Ct. 1990); *N.D. Fair Hous. Council, Inc. v. Peterson*, 625 N.W.2d 551 (N.D. 2001); *McFadden v. Elma Country Club*, 613 P.2d 146, 152 (Wash. Ct. App. 1980); *Cty. of Dane v. Norman*, 497 N.W.2d 714, 715-18 (Wis. 1993).

siblings, or college classmates.<sup>30</sup> As a state high court observed about one set of conscientious landlords, they would even “have rented to any of the prospective tenants, regardless of their individual ‘marital status,’ if they had not intended to live together.”<sup>31</sup> Unmarried *cohabitation* “is ‘conduct,’ not ‘status.’”<sup>32</sup>

Naturally, a conscientious landlord who refuses to be complicit in nonmarital sexual intimacy affects the market in rental housing.<sup>33</sup> An unmarried couple who cannot rent from a conscientious objector has one fewer rental option. This might not be a problem in a large city but could be consequential in a small market.<sup>34</sup> Perhaps viewing their role as declaring and applying law instead of making policy, courts that rule in favor of the conscientious landlord have not addressed this problem.

In a few cases, the tenants won because state nondiscrimination commissions and appellate courts did not accept the status–conduct distinction.<sup>35</sup> They insisted that to distinguish marital sexual conduct from nonmarital sexual conduct is to discriminate on the basis of marital status.<sup>36</sup> The assumption here, usually implied, is that marital and nonmarital sexual conduct is all the same conduct, and so the only difference between the cohabitating married couple and the cohabitating unmarried couple is that the latter is unmarried. That assumption is contrary to the conscientious objectors’ idea of marriage as a moral institution. It reduces the incentives for marriage to pragmatism. And it is precisely that reductionist vision of marriage to which the conscientious landlords object. Perhaps in an effort to avoid being dragged by law into endorsing traditional moral views, courts that rule for tenants have ignored this difficulty.

These latter cases are curious outliers: The status–conduct distinction is foundational to Anglo-American law. “Laws are made for the government of actions,” explained the Supreme Court when it allowed the criminalization of polygamy more than a century ago, “and while they cannot interfere with mere religious belief and

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30. *E.g.*, *Swanner*, 874 P.2d at 278.

31. *Norman*, 497 N.W.2d at 717.

32. *Id.*

33. *See Desilets*, 636 N.E.2d at 240-41.

34. *Id.*

35. *E.g.*, *Swanner*, 874 P.2d at 278, 285.

36. *See id.* at 278. The conscientious objectors in these cases follow traditional religious teachings that marital sexual intimacy and nonmarital sexual intimacy are two different acts. Of course, marital status is derivatively relevant for discerning what kind of conduct the couple is engaged in. But the primary motivating fact is the conduct, not marital status.

opinions, they may with practices.”<sup>37</sup> And the distinction is foundational to the Supreme Court’s contemporary religion clauses jurisprudence which, since *Employment Division v. Smith*,<sup>38</sup> has held that secular laws of general application that govern conduct prevail over the religious status of the objector.<sup>39</sup>

The abrogation of the status–conduct distinction in contemporary cases involving sexual-identity rights is a striking development. It suggests that sexual identity carries great force in contemporary law. In fact, it appears to carry considerably more normative weight than other rights claims and performs a normative task that very few, if any, other legal reasons can perform.<sup>40</sup>

The primary directiveness of law toward action, rather than status, is essential to legal judgment. Great jurists from Aquinas<sup>41</sup> to Blackstone<sup>42</sup> to Hart<sup>43</sup> have recognized that law by its nature governs choice and *action* because law *is a reason* for (or against) action.<sup>44</sup> In the Anglo-American tradition as expressed by Blackstone, law consists of rules of action governing “civil

37. *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

38. 494 U.S. 872, 888 (1990).

39. See Christopher Wolfe, *Free Exercise, Religious Conscience, and the Common Good*, in CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY 93, 94-96 (Gerard V. Bradley ed., 2012).

40. Sexual identity is now assuming a power in law that is denied to conscience and religious liberty since *Smith* and is even more forceful than the normative strength that conscience enjoyed during the era of *Sherbert v. Verner*, 374 U.S. 398 (1963). As explained below, the strict scrutiny review mandated by *Sherbert* and similar cases, and now codified in state and federal religious freedom statutes, does not allow conscientious objections to trump general rules in a categorical, much less an absolute, manner. See *infra* notes 53-54 and accompanying text.

41. “*I answer that*, Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting . . . Now the rule and measure of human acts is the reason, which is the first principle of human acts. . . .” ST. THOMAS AQUINAS, TREATISE ON LAW: SUMMA THEOLOGICA, QUESTIONS 90-97, at 3 (Regnery 1996) (1485).

42. BLACKSTONE, *supra* note 16, at \*44.

43. Hart’s foundational insight was that the scientific approach to law obscures the internal point of view of the person who obeys law’s obligation. That person takes a law not as a prediction of her own behavior but as a “reason” for conforming her conduct to the standard of behavior posited by the rule. H.L.A. HART, THE CONCEPT OF LAW 90 (2d ed. 1994) [hereinafter CONCEPT].

44. “Making, acknowledging, and complying with law involves acts of rational judgment.” JOHN FINNIS, PHILOSOPHY OF LAW: COLLECTED ESSAYS: VOLUME IV 1 (2011) [hereinafter POL]. The judgment concerns in each case what should or should not be done. *Id.* at 23-45.

conduct.”<sup>45</sup> Indeed, this is one reason why racial status is an invalid ground for legal discrimination and judgment; law addresses itself to the choices and actions of persons—moral agents who act for reasons, a capacity shared by humans of all races<sup>46</sup>—and being a racial minority is not something one can choose to do or not do.<sup>47</sup> By the same token, judgment concerning *action* is not per se invalid because action is the practical point of practical deliberation and judgment, and therefore of law. To eliminate the status–conduct distinction altogether would be to do away with practical judgment concerning (un)lawful action, and that would defeat law’s very purpose.

The status–conduct distinction is as foundational to nondiscrimination law<sup>48</sup> and public accommodation doctrine<sup>49</sup> as it is

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45. I BLACKSTONE, *supra* note 16, at \*44. The law does not deprive people of life, liberty, or property because they are criminals; those in authority may punish only for commission of a crime by a person who is proven beyond all reasonable doubt to have performed the prohibited action while possessing the relevant intent, and they must make the punishment proportionate to the offense. Courts do not make people pay damages because they are wrongdoers; legal powers hold people liable if and to the extent that they have committed a tort and caused cognizable damages.

More precisely, what Hart called *primary* rules govern conduct because, as John Finnis has explained at some length, norms of obligation concern what is to be done or not done. See FINNIS, NLNR, *supra* note 18; FINNIS, POL, *supra* note 44, at 23-45. What Hart called *secondary* rules confer powers to make valid, change, or adjudicate primary rules. See HART, CONCEPT, *supra* note 43, at 79-99. One who holds one or more of those powers enjoys a status that is defined in part by the power (e.g., a corporate executive is one who holds executive power over the corporation). But power-holders also are bound by primary rules, unless they are above the law.

46. See generally Patrick Lee, *The Basis for Being a Subject of Rights*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS (John Keown and Robert P. George eds., 2013). See also Gerard V. Bradley, *Constitutional and Other Persons*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 249, 265-66 (John Keown and Robert P. George eds., 2013).

47. See W. Kamau Bell, *Black Skin: A Uniform We Can't Take Off*, CNN.COM (July 11, 2016), <http://www.cnn.com/2016/07/11/opinions/cant-quit-being-black-can-quit-cop-w-kamau-bell/>.

48. John Finnis, *Equality and Differences*, 56 AM. J. JURIS. 17, 27-35 (2011).

49. So, an innkeeper cannot prevent a stagecoach driver from soliciting passengers in his inn for the reason that the stage coach is a rival of the innkeeper’s contracted coach, but he can exclude him for misconducting himself or committing an assault. See *Markha v. United Parcel Serv., Inc.*, 504 A.2d 53, 55, 56-57 (N.J. Super. Ct. App. Div. 1986) (deciding whether the discharge of a man carrying on an adulterous affair constituted marital status employment discrimination was a question for the jury).

to all law, including cases where the reason for the discrimination is sexual conduct. For example, discrimination on the basis of adultery is not marital status discrimination. And the distinction is not only a valid, but also a fundamental, reason for the specification of rights and duties arising out of sexually intimate relations.<sup>50</sup> The distinction is particularly important, for example, in ensuring parental responsibility for, and the well-being of, children.<sup>51</sup> Men and women are not assigned random marital and parental obligations by virtue of being heterosexual; they incur specific natural duties if they get married and have children, respectively. It follows that their duties run to that spouse and those children, respectively.

The abolition of the status–conduct distinction in landlord-tenant cases is therefore more than a little out of line with Anglo-American law. To collapse the status–conduct distinction in a case of unmarried cohabitation<sup>52</sup> but not in a case of adultery<sup>53</sup> is to make the status of unmarried cohabiter an absolute, trumping reason in a way that the status of adulterer is not. The effect of these cases has been to invent a *sui generis* suspect classification for unmarried, cohabitating couples.<sup>54</sup> Unlike other suspect classifications, such as race<sup>55</sup> and religion,<sup>56</sup> this one cannot be answered by showing a compelling reason for the discrimination. In states that have ruled for the unmarried cohabitating couples, courts have vested in them either an absolute claim-right to rent from the objecting landlord<sup>57</sup> or an absolute claim-right not to be denied housing within the community combined with a power to require the landlord to refute the government’s showing of the lack of availability of other housing.<sup>58</sup>

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50. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971 (1997). See generally, Helen M. Alvaré, *Marriage and Family as the New Property: Obergefell, Marriage, and the Hand of the State*, 28 REGENT U. L. REV. 49 (2015); Adam J. MacLeod, *Rights, Privileges, and the Future of Marriage Law*, 28 REGENT U. L. REV. 71 (2015).

51. E.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

52. See *McCready v. Hoffius*, 586 N.W.2d 723, 727 (Mich. 1998), *vacated and remanded on other grounds*, 593 N.W.2d 545 (Mich. 1999).

53. See *Veenstra*, 645 N.W.2d at 645, 647; *Kessler*, 388 N.W.2d at 560-63.

54. See *Veenstra*, 645 N.W.2d at 647-48.

55. See *Gruetter v. Bollinger*, 539 U.S. 306, 327 (2003).

56. See *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

57. E.g., *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 285 (Alaska 1994); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 914, 931 (Cal. 1996).

58. E.g., *Att’y Gen. v. Desilets*, 636 N.E.2d 233, 241 (Mass. 1994).

These rights generate conflicts where landlords and other property owners within the community share traditional-moral, Jewish, Christian, or Muslim convictions about marriage and sexuality.

A landmark in this line-out-of-line of cases is *Attorney General v. Desilets*.<sup>59</sup> Paul Desilets and Ronald Desilets, brothers, together owned a four-unit apartment building. The Desilets were Roman Catholics and had “a policy of not leasing an apartment to any person who intends to engage in conduct” within the apartment that violated Catholic moral doctrines.<sup>60</sup> A state commission found that, as applied to an unmarried couple to whom the Desilets would not lease an apartment, this policy constituted discrimination on the basis of marital status, even though the Desilets were willing to lease to unmarried people.<sup>61</sup> The Desilets’ intentions, the reasons for their policy, and the objective strength of their reasons, were all irrelevant.

A couple of decades since *Desilets*, the sexiness of property law is diversifying. In some cities and states, a person’s sexual identity can constitute a suspect classification.<sup>62</sup> It might even be the basis of an absolute claim-right to receive the estate, good, or service sought.<sup>63</sup> Nor are such claim-rights asserted only against landlords. Conscientious objectors now include bakers, photographers, and farmers. This latest round of the culture war has sprawled out of the apartment complex and into the marketplace.

A typical example is the case *Elane Photography, LLC v. Willock*,<sup>64</sup> which originated from the New Mexico Human Rights Commission. Elane Photography, a small business owned and operated by a Christian couple, the Huguenins, was found liable for violating a nondiscrimination norm after declining to photograph a same-sex commitment ceremony. The offense was discrimination on the basis of sexual orientation in a public accommodation, which is prohibited by statute.<sup>65</sup> But the Huguenins did not discriminate because of sexual orientation. Rather, they distinguished between relationships that naturally partake of the nature of marriage and those that do not, a distinction grounded in their religious convictions, and one that was affirmed by New Mexico state law,

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59. *Id.* at 233.

60. *Id.* at 234.

61. *Id.* at 235.

62. *E.g.*, ATLANTA, GA., CODE OF ORDINANCES §§ 94-112(a), 114-121(a).

63. *E.g.*, *State v. Arlene’s Flowers, Inc.*, No. 13-2-00871-5, 2015 WL 720213, \*14-16 (Wash. Super. Feb. 18, 2015).

64. 309 P.3d 53 (N.M. 2013).

65. *Id.* at 77.

which at the time defined marriage as the union of a man and a woman. Nevertheless, the New Mexico Supreme Court ruled against the Huguenins, holding that a state rule prohibiting sexual orientation discrimination also “protects conduct that is inextricably tied to sexual orientation,” such as participating in a same-sex commitment ceremony.<sup>66</sup>

No corner of the marketplace is untouched by these disputes. Take, for example, Boston Catholic Charities,<sup>67</sup> District of Columbia Catholic Charities,<sup>68</sup> Evangelical Child and Family Agency,<sup>69</sup> Gordon College,<sup>70</sup> the Sisters of St. Joseph of Boston,<sup>71</sup> Melissa and Aaron Klein,<sup>72</sup> Jack Phillips,<sup>73</sup> Barronelle Stutzman,<sup>74</sup> Betty and Dick Odgaard,<sup>75</sup> Donald and Evelyn Knapp,<sup>76</sup> and Cynthia and Robert Gifford.<sup>77</sup> All of these parties, and many more, have found the new sexual-identity rights at the doors of their enterprises.

The policies of these organizations and businesses raise difficult questions about the reasons for discrimination, particularly about which reasons are valid legal reasons. None of those conscientious objectors named above were generally unwilling to serve people attracted to the same sex. Many of them employed and shared friendships with homosexual individuals.<sup>78</sup> Rather, the accused drew the line at refusing to participate in what they understood to be a falsehood: The celebration or commemoration of a marriage between two people of the same sex. They remained willing and ready to serve same-sex customers for other purposes. But is there still room in the law for such nuanced distinctions?

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66. *Id.* at 62.

67. *See* RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 88 (2015).

68. *See id.*

69. *See id.* at 89.

70. *See id.* at 91-92; Tina McCormick, *Gordon College Prevailed, but Will the Country?*, NEW BOS. POST (Dec. 8, 2015, 3:11 PM) <http://newbostonpost.com/2015/12/08/gordon-college-prevailed-but-will-the-country/> [https://perma.cc/6T3F-PASP].

71. *See* ASSOCIATED PRESS, *Judge Rules Against Milton Catholic School in Gay-Hiring Retraction*, NEW BOS. POST (Dec. 17, 2015, 3:28 PM) <http://newbostonpost.com/2015/12/17/judge-rules-against-milton-catholic-school-in-gay-hiring-retraction/> [https://perma.cc/8GT9-TQ87].

72. *See* ANDERSON, *supra* note 67, at 93-95.

73. *See id.* at 95-96.

74. *See id.* at 96-98.

75. *See id.* at 98-99.

76. *See id.* at 100.

77. *See id.* at 100-01.

78. *See id.* at 96-99.

## III. THE CONFLICT

These disputes will not resolve themselves. Conscience and sexual identity both have a non-negotiability about them. Both sides are intellectually, emotionally, and morally invested in the outcome because both sides understand the transaction to reflect upon their deepest commitments and personal identities. Both religious-liberty claimants and sexual-identity right claimants describe their motivations in personal terms of self-constitution, integrity, authenticity, first principles, moral or religious duty, and personal liberty.

A classic statement of the tradition on conscience espouses that conscience, as a capacity of practical reason, guides us toward perfection not by determining our choices and actions but rather by giving us knowledge of those first principles that direct us toward our fulfillment, leaving open (many of) our own judgments about the implications of those principles.<sup>79</sup> Commenting on this tradition, Christopher Tollefsen says, “Judgments of conscience are our final verdict on how we are to constitute ourselves.”<sup>80</sup> And the capacity for the sort of self-constitution of which conscience partakes is, the tradition teaches, the ontological and moral foundation of our rights.<sup>81</sup>

Echoing that older tradition of religious conscience, LGBT activist, law professor, and EEOC commissioner Chai Feldblum has encouraged LGBT people to consider the implications of LGBT rights for what she calls *belief liberty*<sup>82</sup>—a liberty to constitute oneself according to one’s moral judgments. Belief liberty protects the right to be true to that aspect of one’s identity which is bound up in those beliefs one holds that “form a core aspect of the individual’s

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79. Thomas Aquinas, *Summa Theologiae*, I.2 Q.91, A.2, Q.94 A.4, and Q.95 A.2 (Blackfriars ed. 2007).

80. Christopher Tollefsen, *Conscience, Religion, and the State*, in CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY 111, 113-14 (Gerard V. Bradley ed., 2012).

81. Tollefsen explains that a human being’s two-fold capacity for self-constitution—judgment and freedom—“is surely the respect in which we differ most profoundly from the other animals—and the feature by virtue of which we are to be considered persons, not things, creatures with dignity and subjects of rights, beings made in the image of God.” *Id.* at 114. Compare John Finnis, *The Priority of Persons Revisited*, 58 AM. J. JURIS. 45, 53 (2013), with Patrick Lee and Robert P. George, *The Nature and Basis of Human Dignity*, 21 RATIO JURIS. 173, 173 (2008).

82. Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 83 (2006).

sense of self and purpose in the world,” whatever those beliefs may be.<sup>83</sup>

Furthermore, both sides believe that they are constituting themselves according to commitments that are objectively *true*. Religious believers and sexual-identity claimants both seem to think that the moral status that grounds their right claims is beyond the competence of human agents to alter. With such immutable, and in some cases inscrutable, commitments at stake, the disputants in these conflicts are unlikely to compromise on their own.

Those who assert religious liberty claims generally understand their rights to be grounded in a prior duty to obey their conscience, which is in turn grounded in understanding of, and conformity of mind and will to, an objective moral order, natural law, or the commands of God himself. They can appeal to rich traditions concerning moral conscience (stretching at least back to Socrates) and religious conscience (found in the Hebrew scriptures, among other ancient sources). Classic statements of these traditions, including Sophocles’ *Antigone*, Martin Luther King Jr.’s *Letter From a Birmingham Jail*, and Pope Paul VI’s *Dignitatis Humanae*, all begin not with one’s rights but rather with one’s obligation to some higher source of truth and meaning. Jesus Christ’s admonition that his followers must render to Caesar what is Caesar’s and to God what is God’s<sup>84</sup> presupposes that it is a matter of obligations all the way down. Though one’s obligations might come into conflict, the most supreme of them is always binding, often immutable, and sometimes non-contingent.

Three aspects of this tradition deserve attention. First, moral and religious conscience instantiate an important part of practical reasonableness,<sup>85</sup> that architectonic good in which people participate when they order their lives according to chosen goods (and not other possible goods) and particular plans of action for achieving those goods (as opposed to other possible plans of action), all consistent with basic moral principles and commitments.<sup>86</sup> The exercise of practical reason, and participation in the good of practical

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83. *Id.*

84. *Mark* 12:17; *Matthew* 22:21.

85. Tollefsen, *supra* note 80, at 112-13.

86. See FINNIS, NLNR, *supra* note 18, at 81-133; JOHN FINNIS, *Practical Reason’s Foundations*, in REASON IN ACTION: COLLECTED ESSAYS: VOLUME I 19-40 (2012).

reasonableness, resembles the good of personal autonomy<sup>87</sup> in that it entails self-constitution in what Thomas Aquinas called the “order that reason in deliberating establishes in the operation of the will.”<sup>88</sup> Unlike the order of the material world, one can sensibly speak of constituting oneself in the order of the will as one chooses and acts for reasons, making those reasons one’s own reasons for acting, while rejecting or abjuring other possible reasons.

Obedience to moral conscience is self-constituting in this way. By acting for certain reasons one constitutes oneself as someone willing to act for those reasons. By not acting for certain reasons one does not allow those reasons to become part of one’s willing or to be grasped by one’s will, and thereby one excludes those reasons from one’s character. Religious conscience also shares this self-constituting aspect.<sup>89</sup> To act for the reason of pleasing God is to become a religious adherent. To act in obedience to God’s commands as expressed by the Muslim faith is to become a Muslim, or by the Roman Catholic faith to become a Roman Catholic. The identity constituted by religious adherence determines future actions.<sup>90</sup> One who understands Islam to be true acts with integrity only by obeying the teachings of Islam.

Obedience to conscience is not a relinquishment or abandonment of self-constitution and personal identity. For each person is free to choose whether or not to follow a being whom they are taught or come to understand is God. The choice to allow (one’s understanding of) God to order one’s goods, to author at least some part of one’s plans of action, and to rule out those reasons for action that one will not execute, if it is made freely and without coercion, is itself a choice and plan of action of one’s own authorship. And after that choice is made, the conscientious person enters into a cooperating agency with God.<sup>91</sup> So, in central, non-defective instances of religious belief, the act of choosing not to constitute all aspects of one’s identity and to leave some of the authorship up to God is itself an exercise of self-constitution and self-authorship.

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87. About the value of personal autonomy, compare JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986) [hereinafter *MoF*], with ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993).

88. THOMAS AQUINAS, COMMENTARY ON ARISTOTLE’S *NICOMACHEAN ETHICS* 1-2 (C. J. Litzinger trans., Notre Dame: Dumb Ox 1993).

89. Tollefsen, *supra* note 80, at 113-14.

90. *Id.* at 117.

91. *Id.* at 118.

Nevertheless, the tradition teaches that one must submit to the truth that one encounters. The correspondence of conscience to one's understanding of moral or religious truth highlights the second aspect of the tradition, which holds that conscience must be at liberty because it has a prior obligation to obey truth.<sup>92</sup> "Conscience has rights," Newman explained to the Duke of Norfolk, "because it has duties."<sup>93</sup> Those duties are to testify about and obey what is objectively true. Thus, the architectonic role that moral and religious conscience play in ordering the values and commitments of one's life is supposed to be secondary to the proper ordering of conscience itself. Conscience is not its own boss. It is supposed to be oriented toward the truth about matters moral and religious.<sup>94</sup>

There is a third aspect to religious conscience that it does not generally share with moral conscience, self-constitution, and practical reasonableness. The ordering of one's will toward the will of one's creator in a way that is (from the internal perspective of the religious believer) uniquely good and right<sup>95</sup> is a value that is not reducible to personal identity or self-constitution. It is not even fully discerned or measured by reference to morality and practical reasonableness. Religious people grasp as truth that religious exercise, and obedience to religious conscience in particular, has value that is unique and transcendent. It involves harmony with the uncaused Cause of all goodness, which the major religions identify as God, and is therefore not reducible to human will, nature, or genetic determinism.<sup>96</sup> The identity that results in the will from those

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92. *Id.* at 114-16.

93. Letter from John Henry Newman to the Duke of Norfolk (Dec. 27, 1874), in *A LETTER ADDRESSED TO HIS GRACE THE DUKE OF NORFOLK ON OCCASION OF MR. GLADSTONE'S RECENT EXPOSTULATION* 58 (1875) [hereinafter *LETTER TO NORFOLK*].

94. This was the understanding of conscience that served as the justification for religious freedom expressed in *DIGNITATIS HUMANAE*:

It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom.

POPE PAUL VI, *DIGNITATIS HUMANAE* ¶ 2 (1965).

95. Tollefsen, *supra* note 80, at 116-19.

96. *LETTER TO NORFOLK*, *supra* note 93, at 57. Thus, Newman wrote,

choices and actions is an identity of one's own authorship. By contrast, obedience to religious conscience is a willful choice to make another being, a superior and benevolent being, at least part author of one's identity.

The conscience tradition holds that everyone is obedient to something. To be obedient to one's desires and passions is to serve those desires and passions. It is to be enslaved to vice, Aristotle thought,<sup>97</sup> or to sin, thought Saint Paul.<sup>98</sup> By contrast, a person obedient to Divine Law follows and participates in promulgating "the voice of God in the nature and heart of man."<sup>99</sup> The Word of God coming from the voice of God is, according to the tradition, both the law written on every human heart<sup>100</sup> and the means by which God brought all good things into existence.<sup>101</sup> The Word of God authors all good things and continues to sustain all good things.<sup>102</sup> Obedience to conscience is therefore to allow the Author of all good things to co-author one's own life.

The more recent idea that sexual identity is a meaningful source of obligations tends to jettison that third aspect of the older tradition. Yet it resembles the older teachings about conscience in other ways. Like conscience, sexual orientation and gender identity are often described from a first-person perspective in terms of being faithful to enduring truths. To be open about one's sexual orientation is to recognize an "inherent or immutable enduring emotional, romantic or sexual attraction to other people," according to the leading LGBT rights group, Human Rights Campaign.<sup>103</sup> Sexual

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Conscience is not a long-sighted selfishness, nor a desire to be consistent with oneself; but it is a messenger from Him, who, both in nature and in grace, speaks to us behind a veil, and teaches and rules us by His representatives. Conscience is the aboriginal Vicar of Christ, a prophet in its informations, a monarch in its peremptoriness, a priest in its blessings and anathemas, and, even though the eternal priesthood throughout the Church could cease to be, in it the sacerdotal principle would remain and would have a sway.

*Id.*

97. ARISTOTLE, NICHOMACHEAN ETHICS 23 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000).

98. *Romans* 7.

99. LETTER TO NORFOLK, *supra* note 93, at 56.

100. *Romans* 2:1-16.

101. *Genesis* 1-2.

102. *John* 1:1-5.

103. *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [<https://perma.cc/YP8W-GGW5>] (last visited Oct. 24, 2016).

identity looks very much like a self-constituting judgment about what makes one flourish. This is an equal denominator to which aspects of the older conscience tradition and sexual-choice beliefs can be reduced.<sup>104</sup>

Nevertheless, the difference between the older conscience tradition and the newer sexual-identity belief tradition has important implications for the present conflict between the traditions. The truths that inform a well-formed moral or religious conscience are found in natural law or in the laws of nature's God, external to the believer. By contrast, the truths that inform sexual identity seem to come from no source other than the first person and are found within. With regard to sexual identity, the enduring truths are truths about oneself, and especially about one's feelings and desires.

Feldblum's notion of belief liberty is self-referential in this way. She explains,

From a liberty perspective, whether these beliefs stem from a religious source or from a secular source is irrelevant. What is common among these belief systems, and what should be relevant for the liberty analysis, is that these beliefs form a core aspect of the individual's sense of self and purpose in the world.<sup>105</sup>

Feldblum places no special value in religious belief as opposed to secular beliefs.<sup>106</sup> The value of a belief is derived not from its correspondence with theological, metaphysical, or moral truths but

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104. Martha Nussbaum argues that conscience liberty, understood as a principle of equality, would counsel in favor of the freedom of nineteenth-century Mormons to practice polygamy. See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 175-98 (2008).

105. Feldblum, *supra* note 82, at 83.

106. Feldblum's view that religion is not a distinct good, valuable in its own right, but is reducible to authenticity, self-constitution, free choice, integrity, or some other architectonic good or practice is shared by Ronald Dworkin, Christopher Eisgruber, Lawrence Sager, and Micah Schwartzman, among others. See generally RONALD DWORKIN, RELIGION WITHOUT GOD (2013); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012). Against that view, defenders of the older tradition consider religion as a basic good in its own right, irreducible to and incommensurable with other human goods. See FINNIS, NLNR, *supra* note 18, at 81-97, 371-410; JOHN FINNIS, RELIGION AND PUBLIC REASONS: COLLECTED ESSAYS: VOLUME V (2011); Christopher Tollefsen, *Conscience, Religion and the State*, 54 AM. J. JURIS. 93 (2009); Melissa Moschella, *Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom*, J. L. & RELIGION (forthcoming, March 2017).

rather from the fact that it is an individual's belief, and therefore part of that individual's identity.<sup>107</sup>

In other words, Feldblum's belief liberty secures the architectonic aspect of moral and religious conscience, that aspect of religious obedience and exercise that religion shares with practical reasonableness and self-constitution generally: The ordering of goods and plans of action in one's life that makes person A into Person A, rather than some other person. The referent here is not the truth of the belief—its correspondence with an objective good or standard outside the person who holds it—but rather its authenticity—that the person who holds it is true to her own identity.

This might make sexual identity claims particularly resistant to conflict-free resolution and antithetical to live-and-let-live liberties. As Sherif Girgis explains, "If your most valuable, defining core just *is* the self that you choose to express, there can be no real difference between you as a person, and your acts of self-expression; I can't affirm you and oppose those acts."<sup>108</sup> Sexual identity cannot leave others free not to affirm the acts of self-expression that arise out of obligation to, and partly constitute, the self. For a conscientious objector to abstain from affirming the expressed self of the sexual identity claimant is, from the claimant's perspective, to deny that claimant's very existence.<sup>109</sup> To refuse to participate in the sexual-identity claimant's act of self-expression is the same as affirmatively condemning that person.<sup>110</sup>

This account resets the baseline from liberty to identity-affirmance, so that "laws that depart from traditional sexual morality"<sup>111</sup> are viewed as the primary source of obligation and the

107. She argues,

An individual's deeply held beliefs may derive from religious sources, from purely secular sources or from spiritual sources that are not traditionally viewed as religious. If these beliefs are an integral part of the person's sense of self, my argument is that they constitute belief liberty. . . . A belief derived from a religious faith should be accorded no *more* weight—and no *less* weight—than a belief derived from a non-religious source.

Feldblum, *supra* note 82, at 102.

108. Sherif Girgis, Obergefell and the New Gnosticism, FIRST THINGS (June 28, 2016), <https://www.firstthings.com/web-exclusives/2016/06/obergefell-and-the-new-gnosticism> [<https://perma.cc/4ZMJ-VERB>].

109. *Id.*

110. This is the view assumed in Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2516 (2015).

111. *Id.* at 2520.

liberty of conscientious objectors not to affirm the *new* sexual morality can be viewed as “exemptions” from law.<sup>112</sup> A liberty of conscience, when invoked by a culturally powerful group such as traditional Christians, amounts to a “special advantage.”<sup>113</sup> This reset shifts the burdens of proof and persuasion against liberty. Furthermore, those liberty “exemptions” are viewed as costly. Accommodating the conscience claimant in her desire not to participate in affirming another’s sexual identity is a source of “dignitary harm” imposed on the sexual-identity claimant.<sup>114</sup>

As Douglas NeJaime and Reva B. Siegel explain, “[T]he bakery owner who turns away a same-sex couple treats that particular couple as sinners.”<sup>115</sup> That treatment demeans the same-sex couple from the couple’s perspective; it leaves them feeling “low,” “hurt and disgusted,” “shell-shocked,” and “horrible.”<sup>116</sup> The feelings are evidence that the same-sex couple’s very identity is jeopardized by the religious baker’s refusal to participate in its expression. The dignitary harm suffered here is what Girgis calls “*moral stigma*—the harm of being told (even just by deeds) that decisions central to your identity are immoral.”<sup>117</sup> (Of course, the same stigma attaches to the conscientious objector who is forced by the state to bake the cake; she is being condemned for violating the norm against discrimination, after all. It seems, therefore, that dignitary harm should weigh on both sides, if not equally then at least in some measure proportionate to the stigma).<sup>118</sup>

This is all quite mysterious from the Christian bakery owner’s perspective. In her view, her abstention is not demeaning to anyone

112. *Id.*

113. *Id.* at 2584. Girgis argues that this characterization is “tendentious.” Sherif Girgis, *Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel*, *YALE L.J. F.* 399, 403 (Mar. 16, 2016). “It assumes that the default in a constitutional democracy is not to protect conscience claims that might make a political splash. Only then does protecting them anyway seem like favoritism.” *Id.*

114. NeJaime & Siegel, *supra* note 110, at 2574-78.

115. *Id.* at 2576.

116. *Id.* at 2577.

117. Girgis, *Nervous Victors*, *supra* note 113, at 404.

118. Girgis identifies two problems with counting moral stigma against religious liberty. “First, counting it can be self-undermining because fear of it can be self-fulfilling. The more that we—or officials, in weighing complicity claims—say that a policy or belief expresses disdain for a group, the more it will take on that social meaning.” *Id.* The second problem is that “in many disputes, both sides could claim with equal force that a decision against them would morally stigmatize them.” *Id.*

because Christians believe that *everyone* is a sinner,<sup>119</sup> including her. An essential function of religious and moral conscience according to the Christian tradition is precisely to inform the sinner when he or she is sinning.<sup>120</sup> Far from demeaning the Christian, the conviction that the Christian is sinning is an essential aspect of being human and a first step toward repentance and restoration to God.<sup>121</sup> Therefore, to many religious believers the notion that they are causing dignitary harm by abstaining from participation in the same-sex couple's self-expression is incomprehensible.

Yet from the same-sex couple's perspective, the religious believer's abstention is not merely a moral expression about the conduct and the nature of marriage but also a "status-based judgment[]." <sup>122</sup> The existential urgency of the sexual-identity claimant's self-expression and the conscientious objector's refusal to participate in it combine to "extend, rather than settle, conflict."<sup>123</sup> The conflict must be resolved by removing the stigma. So on this view, the law justly forces the conscientious objector to act; it imposes on the baker an affirmative duty, eliminating her liberty of abstention.

Belief liberty claims might be less amenable to mediation than conscience claims for another reason. The older tradition teaches that conscience concerns practical reason<sup>124</sup>—a knowledge of the good that corresponds with and is directed toward goods that are both within and external to the conscientious person, and accessible to all through reason.<sup>125</sup> The external referent for moral and religious conscience makes conscience claims contestable on mutually accessible grounds. Claims of moral conscience are grounded in the teachings of reason or the natural law, and can be critiqued on that footing (see, e.g., *The Crito* by Plato and King's *Letter From a Birmingham Jail*). Claims of religious conscience can be assessed by reference to the religious tradition from which they are drawn or sacred texts in which they are grounded (see, e.g., Sophocles' *Antigone*, Sir Thomas More, and Dietrich Bonhoeffer).

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119. *Romans* 3:23.

120. *Romans* 2.

121. 1 *John* 1:9.

122. NeJaime & Siegel, *supra* note 110, at 2576-77.

123. *Id.* at 2520.

124. Michael P. Moreland, *Practical Reason and Subsidiarity: Response to Robert K. Vischer, Conscience and the Common Good*, 49 *J. CATH. LEGAL STUD.* 319, 321-23 (2010).

125. FINNIS, NLNR, *supra* note 18, at 59-96.

Robert Vischer puts it concisely: “The moral convictions that make up conscience connect the individual to something outside herself, to a perception of self-transcendent reality.”<sup>126</sup> That perception can be shared, even where there is disagreement about, or imperfect understanding of, its contents. Friends of (fictional) Antigone and (historical) Socrates, King, More, and Bonhoeffer, who shared many of their moral and religious convictions, judged differently than they did and offered reasons for their differing judgments. Though none of those individuals was ultimately persuaded to change his mind, they all in turn offered reasoned explanations for their choices and actions, which can be assessed as true or false, right or wrong, on the basis of shared moral commitments.<sup>127</sup>

By contrast, claims of belief liberty in general, and expressions of one’s sexual identity in particular, are grounded in the claimant herself. They refer to the claimant’s emotions, attractions, and most of all her “innermost concept of self” (as the Human Rights Campaign describes the source of gender identity).<sup>128</sup> It is not a matter of fidelity to justice, or virtue, or natural law, or Divine Law, but rather a matter of authenticity. Only the self can evaluate such truths. They must remain inscrutable to anyone other than the self. And they certainly cannot be evaluated by anyone else as reasonable or unreasonable, much less true or false. The only possible arbiter of the truth of the sexual-identity claim is the individual claimant. So there arises a danger that reason might not be able to evaluate, mediate, or moderate a claim of sexual identity.

Both sides think they are not just acting with integrity but are actually right. Both sides believe that they are right with references

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126. VISCHER, CCG, *supra* note 4, at 45.

127. For example, King opened his classic statement on natural law and conscience by explaining why he was taking time to respond to those who criticized his civil disobedience:

Seldom, if ever, do I pause to answer criticism of my work and ideas. If I sought to answer all the criticisms that cross my desk, my secretaries would be engaged in little else in the course of the day and I would have no time for constructive work. But since I feel that you are men of genuine goodwill and your criticisms are sincerely set forth, I would like to answer your statement in what I hope will be patient and reasonable terms.

Martin Luther King, Jr., *Letter From a Birmingham Jail*, NATURAL LAW, NATURAL RIGHTS, AND AMERICAN CONSTITUTIONALISM 1 (last visited Oct. 28, 2016) <http://www.nlrc.org/american/american-civil-rights-movements/primary-source-documents/letter-form-a-birmingham-jail>.

128. HUMAN RIGHTS CAMPAIGN, *supra* note 103.

to a binding source of obligation. And, at least in the case of sexual-identity claimants, those binding obligations require others to participate in their acts of self-expression by which their identity is vindicated. This is not the sort of conflict that can be resolved easily.

#### IV. ATTEMPTS AT MEDIATION: RIGHTS, RULES, AND MARKETS

The resources of liberalism and positivism have not proven themselves able to resolve the conflict. Rights discourse obscures more than it reveals largely because claimants tend not to distinguish different kinds of rights. Rules are either too determinate, unamenable to the requirements of reason, or indeterminate, requiring the exercise of judgment based on reasons other than rules. And market-based solutions have not fully accounted for the moral claims at stake.

##### A. The Failure of Rights

The vernacular of rights does not lend itself to tempering this conflict. And the particular rights asserted compound the problem. Not all disputants are equally interested in liberty and immunity. The assertion of claim-rights and powers by claimants in these disputes makes conflict unavoidable and difficult to resolve.

Liberties and immunities are often referred to as “negative” rights, which means simply that they correlate with duties of abstention—duties specified as no-rights and disabilities, in Hohfeldian terms.<sup>129</sup> Though enforced by claim-rights and powers in the event of breach, they require only inaction to obey. Duties of abstention are legal obligations to refrain from acting in certain ways (punching people in the face), or upon certain persons (using curse words around children), or for certain reasons (performing surgery in order to cause physical injury).

Because one can honor one’s duties of abstention by *not* doing, these rights can be honored without causing conflict or harm. A liberty, immunity, or other negative right claim can be good against the world without altering anyone’s legal status, requiring anyone to do anything, or depriving anyone of any right or entitlement. If all rights were liberties and immunities, and all liberties and immunities were honored, then there would be no legal justification for coercing anyone to *do* anything.

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129. See Hohfeld, *supra* note 12, at 65.

Conscience claimants in public accommodations cases generally assert liberties and immunities. The owners who do not want to lease to an unmarried, cohabitating couple, or photograph a same-sex wedding, or bake a cake bearing a political message that they find morally problematic, are asking for the right to be left alone, to not be acted upon, to not have their legal status altered. This seems not to be a coincidence. The fully determinate duties of conscience in natural law and religious traditions, known as moral absolutes, are duties of abstention.<sup>130</sup> And those traditions teach that conscience has its strongest claim when it is trying to avoid being complicit in violating a moral absolute, an action that is intrinsically wrong.<sup>131</sup>

This is not to suggest that moral and religious duties do not also include duties of action. But given the limitations of time and other resources, the plurality and prioritization of human relationships and personal obligations, and other variables, duties of action are inherently indeterminate as two-term generalizations. In Thomist terms, they are often matters of *determination*;<sup>132</sup> in the language of the jurists, they are matters of indifference.<sup>133</sup> General, affirmative obligations can reasonably be specified as fully conclusive, three-term duties in various ways. One possible specification might be more or less reasonable than an alternative. Or one might be determined by some other, prior obligation (my duty to feed my own children before feeding someone else's). But none is absolutely determined as a universal, good-against-the-world duty of general application.<sup>134</sup>

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130. See, e.g., JOHN FINNIS, MORAL ABSOLUTES: TRADITION, REVISION, AND TRUTH 3 (1991).

131. Tollefsen, *supra* note 80, at 124-27.

132. AQUINAS, TREATISE ON LAW, *supra* note 41, at 78-79.

133. I BLACKSTONE, *supra* note 16, at \*126.

134. John Finnis explains,

Where these duties are negative duties of respect—duties not to intentionally damage or destroy persons in basic aspects of their flourishing—they can be unconditional and exceptionless: “absolute rights.” Where they are affirmative responsibilities to promote well-being, they must inevitably be conditional, relative, defeasible, and prioritized by rational criteria of responsibility such as parenthood, promise, interdependence, compensation and restitution, and so forth.

John Finnis, *The Priority of Persons Revisited*, *supra* note 81, at 53. And even after the specification of such a norm as a settled duty, the obligation can be contingent upon conditions beyond one's control.

The duties arising out of sexual-identity claims are therefore unique. Sexual-identity claimants assert that others owe them conclusive, fully determined, affirmative duties of action because they hold a universal claim-right, good against the world, by virtue of their sexual identity. Those who seek a legal right to lease the apartment of their choice or obtain a cake from the bakery of their choice are asserting what are known in jurisprudence as powers and affirmative claim-rights. In Hohfeldian terms, an affirmative claim-right or power is specified in a conclusive, three- or four-term jural relation requiring a person to do something or requiring a person to be placed under some legal disability.<sup>135</sup> Claim-right: person A has a right that person B must perform action x. Power: person A has a right that court C shall compel person B to perform x or impose liability on B for failing to perform x.

Affirmative claim-rights correlate with legal duties to do something. Powers to enforce claim-rights correlate with affirmative changes (called disabilities) in the legal statuses of those who do not act as the claim-rights require. An affirmative claim-right entails that some particular duty-bearer must satisfy the claim by taking the particular action specified. A power entails that the holder of the power can alter the legal status of another person, imposing upon that person a legal disability (such as the loss of a right not to provide service or a judgment of liability) and that adjudicatory authorities must give legal effect to that altered legal status.

Thus, though sexual-identity activists use the term “liberty” (possibly for rhetorical and political purposes), it is clear that they are not satisfied with liberty but instead seek affirmative claim-rights against and powers over conscientious business owners. Sexual-identity activists, in essence, want their claim-rights and powers to be good against the world, like a liberty. These are super-claim-right liberties.<sup>136</sup> So, Feldblum has argued that the belief liberty of persons in same-sex relationships requires laws coercing owners of public accommodations to provide service to same-sex couples that makes the owners complicit in conduct that they view as “sin.”<sup>137</sup>

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135. See Hohfeld, *supra* note 12, at 65.

136. In one totalitarian-sounding proposal, a law professor recently argued that states have a constitutional duty to force conscientious objectors to provide wedding-related services to same-sex couples. See generally James M. Oleske, Jr., “State Inaction,” *Equal Protection, and Religious Resistance to LGBT Rights*, 87 U. COLO. L. REV. 1 (2016).

137. Feldblum, *supra* note 82, at 61-62.

This also seems not to be a coincidence; it appears to be inherent in the nature of sexual-identity right claims. Sexual-identity claimants view their intimate expressions as moral goods, on par with the fundamental rights of natural marriage and biological parentage.<sup>138</sup> And the fundamental rights of marriage and family entail public recognition and approbation. So, a privacy right—a liberty to be left alone—is insufficient.

Feldblum argues that there is no neutral position with respect to the legal status of homosexual conduct between imposing legal disabilities upon those who engage in that conduct and requiring everyone to affirm the moral value of such conduct.<sup>139</sup> It is not enough for the state simply not to punish acts of homosexual intimacy. To stop short of making same-sex intimacy the same in law as marital intimacy is to take sides on the underlying moral question, and it is not “the side that helps gay people.”<sup>140</sup> So Feldblum argues that if same-sex intimacy is a good with the “same moral valence as heterosexual activity” then the right of same-sex intimacy is a right to receive the affirmation that lawmakers and courts have traditionally bestowed upon important “moral goods [such] as family and marriage.”<sup>141</sup>

What sort of right would that be, and what duties would it impose on others? In the public accommodations context, this Roman Catholic landlord must lease this apartment to that cohabitating couple; this evangelical Protestant photographer must take pictures of that same-sex wedding. And the corollary power asserted always entails an affirmative change in the duty-bearer’s legal status. If this landlord and this photographer do not perform the action specified, then they are duty-breakers and must be held liable, or perhaps even enjoined, by those who exercise judicial power. These rights make conflict unavoidable. Furthermore, the conflict travels with the claimant. If the claim-right is good against the world, like a liberty, then the claim-right bearer is vested with a power to

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138. See generally MacLeod, *Rights, Privileges, and the Future of Marriage Law*, *supra* note 50.

139. She insists that “the government is *necessarily* taking a stance on the moral question every time it *fails* to affirmatively ensure that gay people can live openly, safely and honestly in society.” Feldblum, *supra* note 82, at 88.

140. *Id.* at 89.

141. *Id.* at 70.

abrogate anyone else's liberty or immunity simply by asserting the claim.<sup>142</sup>

## B. The Problems with Positive Law

The difficulties discussed thus far seem intractable if the contours of rights and duties in public accommodations law are drawn by positive law—law enacted by legislative and regulatory authorities. Mutually inconsistent rights cannot be reconciled in generally applicable positive law without abolishing someone's rights. There is a present danger that all group enterprises will become public accommodations, all law governing public accommodations will become positive law, and all adjudication of disputes concerning public accommodations will be adjudicated by commissions and administrative authorities.<sup>143</sup>

The reconciliation of conflicting rights is unlikely to be satisfactory for at least three additional reasons. First, the contours of liberty must be drawn afresh every time the sovereign lawmaker considers whether any particular liberty or claim-right is to be recognized. If that is the case, then liberty and rights are not actually liberty or rights, they are what Jeremy Bentham called concessions of privilege from the sovereign lawmaker.<sup>144</sup> If law is only *posited* law then the very tools for checking power are fashioned by the sovereign. From the perspective of such a sovereign, privileges are not laws; they impose on the sovereign no binding obligation.

Second, if liberty is merely a function of positive law then it need not have any essential connection to practical reasonableness.

142. There is irony here. The gay rights movement got its start by organizing behind liberties of property and association, often in places that were held open as public accommodations. *See, e.g.*, *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 663 (1st Cir. 1974); *One Eleven Wines & Liquors, Inc. v. Div. of Alcoholic Beverage Control*, 235 A.2d 12, 19 (N.J. 1967). John Inazu notes, “[P]rotections for gay social clubs and gay student groups . . . were vital to the early gay rights movement.” John D. Inazu, *A Confident Pluralism*, 88 S. CAL. L. REV. 587, 590 (2015). Sexual-identity activist and scholar Andrew Koppelman also seeks both “a regime in which it’s safe to be gay” and “one that’s safe for religious dissenters.” Koppelman, *Purposes of Antidiscrimination*, *supra* note 6, at 621.

143. *E.g.*, *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm’n on Human Rights & Opportunities*, 528 A.2d 352, 360 (Conn. 1987) (upholding commission’s ruling that boy scout troop is a public accommodation); *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1230 (N.J. 1999), *rev’d*, 530 U.S. 640 (2000).

144. JEREMY BENTHAM, *OF LAWS IN GENERAL* (H. L. A. Hart ed., 1970)), *reprinted in* THE COLLECTED WORKS OF JEREMY BENTHAM 1, 16 (J.H. Burns ed., 1970).

Obedience to one's conscience in matters of controversial moral issues and sexual ethics might seem just as arbitrary and unjustifiable as racial discrimination. In segregationist regimes, positive laws have often required racial segregation, even against the common law rights and duties of those who act within domains of private ordering. Today, by the same positivist logic that gave rise to slavery and racial segregation, the person seeking liberty to obey her conscience or to express her sexual identity might be required to carry the segregationist's baggage if she cannot persuade those who do not share her moral convictions.

Third, and equally problematic, posited public rules function as laws by establishing determinate reasons of general application. They are preemptory in a way that private rights, wrongs, and duties need not be. They are unyielding to reasons and considerations that might differ from case to case. They do not leave space for mediating conflicts between actors within the domains of private ordering. Instead, they turn all important questions into zero-sum contests and raise the stakes even higher. So, if public accommodations law is positive law then there seems little hope of mediating these conflicts reasonably and peacefully.

Fortunately, the right claims asserted go well beyond the degree of determination found in positive law. Neither religious liberty rules nor nondiscrimination rules are fully conclusive, preemptory reasons, absolute in normative force for all purposes. Rather, they are reasons of particular weight that act categorically to allow into legal deliberations a limited category of countervailing reasons, often called compelling state interests (e.g., racial diversity in a law school), and to require that any action taken in furtherance of those interests be the least restrictive means of achieving or securing those interests. Or they forbid acting for a particular reason (e.g., marital status) while allowing the same action when undertaken on the basis of a different reason (that the couple is engaged in adultery).

The legal standard known among lawyers as "strict scrutiny" is a device for excluding from deliberation most, but not all, categories of primary reasons. Similarly, posited rules governing religious liberty and equality rights are not absolute and preemptory but rather categorical exclusionary reasons for action. Both types of standards guide deliberation and judgment in meaningful, but not fully conclusive or determinate ways.

The standard structure of strict scrutiny is incorporated in the federal Religious Land Use and Institutionalized Persons Act

(RLUIPA),<sup>145</sup> Religious Freedom Restoration Act (RFRA),<sup>146</sup> state RFRAs,<sup>147</sup> and similar laws.<sup>148</sup> The burden of justification for state actions that place a substantial burden on religious exercise is shifted to the state actor.<sup>149</sup> And the possible reasons that can justify the action are limited to ends that are compelling and means that are narrowly tailored.<sup>150</sup> But countervailing reasons are not entirely preempted or excluded from consideration, as they would be if proffered against an absolute right.<sup>151</sup>

Nor does resolution of the legal issues alone determine the outcome of any dispute. Whether the claimant's motivation was religious,<sup>152</sup> what counts as a "substantial burden" on religious exercise,<sup>153</sup> what counts as a "compelling interest" justifying that burden,<sup>154</sup> and whether the state action that imposes the burden is the least restrictive means of achieving that interest,<sup>155</sup> are all fact questions to be resolved in each case.

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145. 42 U.S.C. § 2000cc(a) (2012).

146. 42 U.S.C. § 2000bb(a) (2012).

147. See the legal materials compiled in *STATE RELIGIOUS FREEDOM RESTORATION ACTS: A COMPILATION OF ENACTED AND RECENTLY PROPOSED LEGISLATION* (William H. Manz ed., 2016).

148. Compare ALA. CONST. art. I, § 3.01 (2016), with La., Exec. Order No. BJ 2015-8 (2015) (prohibiting outright any state actor from taking enumerated adverse actions against any person "on the basis that such person acts in accordance with his religious belief that marriage is or should be recognized as the union of one man and one woman").

149. See Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 784 (1999).

150. See Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47 (2000); Shelley Ross Sager, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 615-30 (2008).

151. See Laycock, *supra* note 149, at 784.

152. See *State v. White*, 271 P.3d 1217, 1221, 1226-27 (Idaho Ct. App. 2011).

153. See *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1213-15 (9th Cir. 2008) (upholding federal agency's factual finding that agency's licensing decision did not substantially burden Indian tribe's religious exercise); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002); *Rocky Mountain Christian Church v. Bd. of Cty. Comm'rs*, 612 F. Supp. 2d 1163, 1172 (D. Colo. 2009) (allowing jury to determine substantiality of the burden on a RLUIPA claimant's religious exercise); *Reaching Hearts Int'l, Inc. v. Prince George's Cty.*, 584 F. Supp. 2d 766, 785-87 (D. Md. 2008); *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 320 (D. Mass. 2006).

154. See *Snell v. City of York*, 564 F.3d 659, 666-68 (3d Cir. 2009); *Att'y Gen. v. Desilets*, 636 N.E.2d 233, 241 (Mass. 1994).

155. See *Murphy v. Zoning Comm'n*, 148 F. Supp. 2d 173, 189-91 (D. Conn. 2001).

The standards protecting religious liberty are even less normatively forceful in practice. Because RLUIPA and RFRAs treat religious actors better than similarly situated non-religious actors, some scholars and jurists have concluded that they create potential conflicts with the Supreme Court's Establishment Clause jurisprudence.<sup>156</sup> To avoid those conflicts, lower federal courts have invented creative ways to disregard the plain language of RLUIPA and RFRAs and, for this and other reasons, the statutes are routinely under-enforced.<sup>157</sup>

Like religious and conscience liberties, rights and duties of equality and nondiscrimination are under- or un-determined as legal norms.<sup>158</sup> They do not forbid all discrimination, not even on the basis of race, and not even when performed by a state actor.<sup>159</sup> Racial discrimination is constitutionally justified when used to reverse the legacy of previous discrimination by the same institution<sup>160</sup> or to achieve diversity in an elite law school.<sup>161</sup> Most other forms of discrimination are justifiable on the basis of far less compelling reasons.

Equality is neither absolutely right nor universally good.<sup>162</sup> Indeed, discrimination and inequality are often requirements of justice; if, as often happens, two possibilities or persons are relevantly *different* “then it would be arbitrary to treat them *equally*.”<sup>163</sup> Discrimination is another word for judgment, and right

156. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 439 (1994); Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2 (1998); Marci A. Hamilton, *RLUIPA Is a Bridge Too Far: Inconvenience Is Not Discrimination*, 39 FORDHAM URB. L.J. 959, 960-61 (2012); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL'Y 717, 724 (2008).

157. See Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 FORDHAM URB. L.J. 1021, 1025 (2012); Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRAs*, 55 S.D. L. REV. 466, 468 (2010); Adam J. MacLeod, *Resurrecting the Bogeyman: The Curious Forms of the Substantial Burden Test in RLUIPA*, 40 REAL EST. L.J. 115, 134-37 (2011).

158. See generally HART, CONCEPT, *supra* note 43, at 155-84; Finnis, *Equality and Differences*, *supra* note 48; Sherif Girgis, *Equality and Moral Worth in Natural-Law Ethics and Beyond*, 59 AM. J. JURIS. 143 (2014).

159. Finnis, *Equality and Differences*, *supra* note 48, at 20-21.

160. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989).

161. See *Gutter v. Bollinger*, 539 U.S. 306, 343 (2003).

162. Girgis, *Equality and Moral Worth*, *supra* note 158, at 146-49.

163. *Id.* at 153.

judgment entails right discrimination. “[T]o act without discrimination” is to act “without good judgment, indiscriminately.”<sup>164</sup>

All norms governing action discriminate, including rights, duties, rules, and legal judgments. Nondiscrimination rules and judgments themselves discriminate—between those distinctions that are arbitrary and unjust, and those that rightly treat different things differently. Right judgment requires distinguishing and discriminating between things and actions that are relevantly different. Right judgment and valid laws will therefore treat as equal those things and actions that are equal with respect to the relevant first-order reasons that make them equal, and will distinguish and discriminate between things and actions where the relevant primary reasons for acting are not the same.<sup>165</sup> Insofar as many laws and judgments are good and just, the distinctions and discriminations on which they rest are good and just;<sup>166</sup> insofar as some laws and judgments are evil or unjustified, some discrimination is evil or unjust.<sup>167</sup>

So, the standards protecting equality are not fully determinate legal norms in the abstract; they specify no conclusive rights or duties as a matter of general law and universal application. The indeterminacy of these norms, even those codified in statutes, is well illustrated by the earlier generation of sexual-identity cases, discussed above. Whether an act of fornication or adultery is a reason in itself or rather is pretext for another’s unmarried status, and whether the conscientious landlord or employer acted for the reason of the conduct or the status, are questions that must be resolved before judgment is determined in a jural relation: A had a liberty not to x for B; A had a duty to x for B.<sup>168</sup>

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164. Finnis, *Equality and Differences*, *supra* note 48, at 27.

165. Girgis, *Equality and Moral Worth*, *supra* note 158, at 149-55.

166. Nathan Berkeley observes that “refusing to affirm sexual expressions and associated relational forms, or forms of gender identity that may reduce human maleness and femaleness to matters of individual autonomy, are not *prima facie* offenses against human dignity and may be rooted in genuine religious convictions.” Nathan A. Berkeley, *Religious Freedom and LGBT Rights: Trading Zero Sum Approaches for Careful Distinctions and Genuine Pluralism*, 50 GONZ. L. REV. 1, 15 (2015).

167. Berkeley also affirms, “[b]oth individuals and institutions should affirm and respect the inherent dignity and infinite value of all persons. This is a matter that the state and the polity over which it governs can have only one view—a plurality of viewpoints is unacceptable here.” *Id.*

168. By its specification of these norms, the jury thus cooperates with what Nathan Chapman calls courts’ “law-defining function” in constitutional

In nondiscrimination disputes, the actor's actual motivation is a determinative fact question,<sup>169</sup> which is within the province of the jury<sup>170</sup> or other trier of fact.<sup>171</sup> In mixed-motivation cases, whether any prohibited motivation was a proximate cause of the act of discrimination<sup>172</sup> and whether there existed a legitimate, non-prohibited reason for the action are also fact questions for a jury or other trier of fact.<sup>173</sup> Whether the discriminatory motivation comes within the prohibited category of reasons involves questions of legal interpretation, which requires some specification of the legal standard.<sup>174</sup>

In nondiscrimination cases predicated upon public accommodation duties, additional fact questions must also be resolved by the jury, including whether the defendant's enterprise is a public accommodation,<sup>175</sup> and whether any exclusion was for a valid reason.<sup>176</sup> A posited rule prohibiting discrimination on the basis of a specified reason thus remains undetermined as a legal norm until applied in the particular case. And the same case-by-case

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adjudication, which consists at the trial level of instructing the jury about the law and at the appellate level of reviewing the trial judge's jury instructions and the jury's verdict for consistency with the law. Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 235-36 (2015). Courts thus patrol the outer boundaries of norm specification to ensure that the jury does not stray beyond those first-order reasons that the law *does* determine. *Id.*

169. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000); *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982).

170. *Haddad v. Wal-Mart Stores, Inc.* (No. 1), 914 N.E.2d 59, 72 (Mass. 2009).

171. *Viering v. Fla. Comm'n on Human Relations*, 109 So. 3d 296, 298-99 (Fla. Dist. Ct. App. 2013).

172. *Boyd v. State*, 349 P.3d 864, 873-74 (Wash. Ct. App. 2015).

173. *Fell v. Spokane Transit Auth.*, 911 P.2d 1319, 1330-31 (Wash. 1996).

174. *See, e.g., Mister v. A.R.K. P'ship*, 553 N.E.2d 1152, 1156 (Ill. App. Ct. 1990).

175. *See, e.g., Mena v. Lifemark Hosps. of Fla., Inc.*, 50 So. 3d 759, 761 (Fla. Dist. Ct. App. 2010); *Eckerd Drug Co. v. Gordie*, 14 Ohio Law Abs. 513, 513 (Ohio Ct. App. 1933); *Fell*, 911 P.2d at 1329.

176. *Compare Noble v. Higgins*, 158 N.Y.S. 867, 867 (N.Y. Sup. Ct. 1916) (ordering judgment for defendant where undisputed evidence showed refusal to serve was "on purely personal grounds" and not because of race, creed, or color), *with Tobias v. Riehm*, 162 N.Y.S. 976, 978 (N.Y. App. Div. 1917) (holding that a trial judge improperly dismissed claim where evidence was sufficient to show discrimination because of race), *and Beckett v. Pfaeffle*, 157 N.Y.S. 247, 248 (N.Y. App. Div. 1916) (finding no evidence of discrimination because of race; evidence showed that delay in service before which claimants left restaurant was due to waitress making tea).

specification is required whether the prohibited reason is marital status, sexual orientation, or any other specific reason.

The conflict between right claims introduces an additional level of indeterminacy into the general law. For when indeterminate norms of religious liberty and indeterminate norms of equality conflict, one norm must give way.<sup>177</sup> Consider the conflict between the ruling in *Elane Photography* and RLUIPA.<sup>178</sup> The judgment of the New Mexico Human Rights Commission constituted an individualized assessment<sup>179</sup> that imposed a substantial burden on the Huguenins' religious exercise.<sup>180</sup> Assuming *arguendo* that New Mexico has a compelling interest in ensuring the existence of public accommodations for same-sex weddings, even where state law defines marriage as the union of a man and a woman, surely that interest can be advanced by less restrictive means where other market actors are willing and able to perform. To suppose that the ruling in *Elane Photography* was determined by law would be to misunderstand the nature of the legal norms at play.

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177. Consider by analogy the conflict between sexual-identity rights and free speech rights. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557 (1995).

178. See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); 42 U.S.C. § 2000cc(a) (2012).

179. A determination by a nondiscrimination commission is an "individualized assessment" within the meaning of 42 U.S.C. 2000cc(a)(2)(C). And there is authority for reading the term "land use regulation" in (a)(2)(C) to include, but not be exhausted by, the examples "zoning or landmarking law, or the application of such a law," within the definitional provision of 2000cc-5(5). Shelley Ross Saxon, *Eminent Domain Actions Targeting First Amendment Land Uses*, 69 MO. L. REV. 653, 668-69 (2004). See also G. David Mathues, Note, *Shadow of a Bulldozer?: RLUIPA and Eminent Domain After Kelo*, 81 NOTRE DAME L. REV. 1653, 1664-66 (2006). It is a land use regulation because, like eminent domain, a discrimination judgment burdens the religious landowner as landowner. See *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1232 (C.D. Cal. 2002). It is for the same reason *unlike* a marijuana ban, which is not a land use regulation, because a narcotics ban burdens the landowner in his capacity as marijuana smoker, not his capacity as property owner. *Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007).

180. Fuller discussions of these standards and their specifications by inferior federal tribunals can be found in Shelley Ross Saxon, *Assessing RLUIPA's Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623 (2009). See also Adam J. MacLeod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41 (2010); Adam J. MacLeod, *Resurrecting the Bogeyman*, *supra* note 157.

### C. Markets and Moral Marketplaces

Given the stakes, lawyers do well who desire a neutral solution to the conflict between conscience and sexual identity. And some have proposed the marketplace as a possible neutral ground.<sup>181</sup> Neutrality is achieved by prescinding from normative judgment. The Sisters of St. Joseph of Boston want to run a school that teaches their Catholic beliefs;<sup>182</sup> Jonathan and Elaine Huguenin want to run their photography business without violating their belief in marriage as a man–woman union;<sup>183</sup> the racist Maurice Bessinger wants to use his barbeque sauce to express his pro-slavery beliefs;<sup>184</sup> the segregationist Lester Maddox wants to exclude African-Americans from his restaurant;<sup>185</sup> and homosexual bakers want to operate their businesses without casting doubt on their support for same-sex marriage.<sup>186</sup> The liberty of nuns, Christian business owners, and gay bakers carries the same weight as the liberty of the racist and the segregationist. Liberty for one, liberty for all.

Thomas Sowell, for one, is quite explicit in tying together the liberty of the nuns, the evangelicals, the racist, and the segregationist. “If you say that Lester Maddox has to serve his chicken to blacks, you’re saying that the Boy Scouts have to have gay scout masters. You’re saying—ultimately—that the Catholic Church has to perform same-sex marriages.”<sup>187</sup>

181. See, e.g., Epstein, *Freedom of Association*, *supra* note 3.

182. Milton J. Valencia, *Gay Married Man Says Catholic School Rescinded Job Offer*, BOS. GLOBE (Jan. 30, 2014), <https://www.bostonglobe.com/metro/2014/01/29/dorchester-man-files-discrimination-against-catholic-school-says-lost-job-because-was-gay-married/0KswVITMsOrruEbhsOsOeN/story.html> [https://perma.cc/ATQ8-YDKM]. Not least is § 2000cc-3(g), requiring broad construction of RLUIPA’s terms in favor of religious landowners. 42 U.S.C. § 2000cc-3(g) (2012).

183. See *Elane Photography*, 309 P.3d at 59; *Client Story: Elane Photography v. Willock*, ALLIANCE DEFENDING FREEDOM, (last visited Oct. 28, 2016), <https://www.adflegal.org/detailspages/case-details/elane-photography-v.-willock>.

184. See John Monk, *Barbecue Eatery Owner, Segregationist Maurice Bessinger Dies at 83*, THE STATE (Feb. 24, 2014, 8:59 AM), <http://www.thestate.com/news/business/article13839323.html> [https://perma.cc/L8AQ-MEML].

185. See Justin Nystrom, *Lester Maddox (1915-2003)*, NEW GA. ENCYCLOPEDIA (Aug. 16 2016), <http://www.georgiaencyclopedia.org/articles/government-politics/lester-maddox-1915-2003> [https://perma.cc/5E3V-CTU3].

186. See Kirsten Andersen, *This Evangelist Asked a Gay Bakery to Make a Traditional Marriage Cake. Now He May Face Charges.*, LIFE SITE NEWS (Apr. 9, 2015, 4:59 PM), <https://www.lifesitenews.com/news/this-evangelist-asked-a-gay-bakery-to-make-a-traditional-marriage-cake.-now> [https://perma.cc/93XA-A9KH].

187. Kyle Peterson, *The March of Foolish Things*, WALL ST. J. (September 4, 2015, 5:56 PM) (quoting Thomas Sowell), <http://www.wsj.com/articles/the-march->

The suggestion is that law should stay out of these matters. We need not concern our legal and political institutions with the (im)morality of actors in the marketplace because, Richard Epstein argues, “[I]f competitive market forces are allowed to work, the problem of discrimination will be solved by the entry of new firms who will cater to mass markets, wholly without legal compulsion.”<sup>188</sup> The nondiscrimination norm should attach only to “areas of monopoly power,”<sup>189</sup> such as common carriers, public utilities, governments, and markets that are de facto monopolies, such as the Jim Crow South in the 1960s.<sup>190</sup> Otherwise, according to the marketplace proposal, discrimination of all sorts should be permitted.

Epstein’s proposal is grounded in a sophisticated understanding of the role that free association and cooperation play in human flourishing. Freedom of association is to be preferred over coercion, he argues, because unlike legal coercion, “voluntary cooperation is never a zero-sum game, but always operates in expectation as a positive-sum game for its participants.”<sup>191</sup> Epstein might be heard to echo the insights of natural law philosophers, who observe that a shared or common good is good not just for each but for all, and its value to each is enhanced precisely because, and insofar as, it is shared by others.<sup>192</sup> Cooperation among members of an association or group for a common good enables both or all members of the group to participate in and realize goods that are not possible in isolation and are not reducible to the goods of each individual member or any aggregation of them. Those goods are realized in intermediary and associational institutions, including economic and market actors, behind the protection of economic and associational liberties.<sup>193</sup> And the goods are shared not only by insiders within the group or association but also often in some degree by outsiders.<sup>194</sup>

Because many of those goods are reflexive in nature, and because they require cooperation for their realization, legal coercion

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of-foolish-things-1441407396 [https://perma.cc/3MCP-AW3V]. See also Epstein, *Freedom of Association*, *supra* note 3.

188. Epstein, *The Problem With Antidiscrimination Laws*, *supra* note 3.

189. Epstein, *Freedom of Association*, *supra* note 3.

190. Epstein, *The Problem With Antidiscrimination Laws*, *supra* note 3.

191. Epstein, *Freedom of Association*, *supra* note 3.

192. John Finnis, for example, explains that when A and B cooperate in a shared good, such as friendship, then “what A wants for himself he wants (at least in part) under the description ‘that-which-B-wants-for-himself’, and vice versa.” FINNIS, NLNR, *supra* note 18, at 141.

193. Epstein, *Freedom of Association*, *supra* note 3.

194. *Id.*

destroys both the economic and the moral value of those plural practices and institutions of private ordering.<sup>195</sup> Yet Epstein wants to count these goods on a single scale of commensuration, and that scale is economic. So, there remains a concern that Epstein's economic account does not encompass all the goods and requirements of practical reasonableness. Andrew Koppelman agrees with Epstein that freedom of association should be the default position and that any departure from that norm bears the "burden of proof."<sup>196</sup> But not all of the goals of law are economic, and nondiscrimination law serves a deeper purpose. "It helps reshape culture in order to eliminate patterns of stigma and prejudice that constitute some classes of persons as inferior members of society."<sup>197</sup>

Similarly, Marc Degirolami doubts that neutrality is possible between competing conceptions of justice and the good. "Law gives direction; it teaches, orders, and ranks; it creates hierarchies. The classical liberal model of law is no exception."<sup>198</sup> Epstein's economic reductionism puts us on "uncomfortable footing."<sup>199</sup> Not all associations derive from contract<sup>200</sup> and the classical liberal model that Epstein champions privileges some associations and values over others. A "conception of associations, in which friendship, loyalty,

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195. Compare MACLEOD, P&PR, *supra* note 14, at 91-145, with Epstein, *Freedom of Association*, *supra* note 3.

196. Andrew Koppelman, *Richard Epstein's Imperfect Understanding of Antidiscrimination Law*, LIBR. OF L. & LIBERTY (Jan. 12, 2016), <http://www.libertylawsite.org/liberty-forum/richard-epsteins-imperfect-understanding-of-antidiscrimination-law/> [<https://perma.cc/UA8U-CKYE>].

197. *Id.*

198. Marc Degirolami, *Classical Liberalism: Teaching Its Own Undoing*, LIBR. OF L. & LIBERTY (Jan. 6, 2016), <http://www.libertylawsite.org/liberty-forum/classical-liberalism-teaching-its-own-undoing/> [<https://perma.cc/NV7N-5FBB>].

199. *Id.*

200. Degirolami argues,

Association may be a subset of contract in certain utilitarian arrangements of the economic market and the business world. But many kinds of association are not obviously derived from contract. Indeed, they are not contractual at all. The associations of friendship, romantic love, family, religious community, and even conversation come to mind. Sometimes, associational structures like these can result in contractual arrangements (suggesting that the latter might be "a subset" of the former), while at other times there is no natural connection between association and contract. The highest form of friendship in Aristotle's account is an association in which each member "loves the other for what he is" and which endures "so long as they remain good."

*Id.*

devotion, and even love, all take a back seat to market-driven choice-making,” results in “active disrespect for all existing truths.”<sup>201</sup>

Leaving aside for present purposes which conceptions of sexual identity, conscience, and liberty are among those existing truths, it seems uncontroversial to observe that nondiscrimination on the basis of race is prominent among them. Allowing racial discrimination in public accommodations causes real harm not only to the person discriminated against, but also to the people and institutions who discriminate on racial grounds, and that harm is as just and proper a subject of concern for law as harm to others.<sup>202</sup> A person or group that refuses to cooperate with others on the basis of racial differences constitutes himself, herself, or itself as a racist person or group. As Martin Luther King Jr. observed, “[S]egregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority.”<sup>203</sup> The duty not to allow racial difference to motivate one’s choices and actions is a duty that one owes to those who are different and to oneself.

Others have proposed market solutions or classical liberal norms supplemented by more robust roles for the mediating institutions of civil society—all those groups, associations, and communities that sit between the individual and the state. Ryan Anderson,<sup>204</sup> Nathan Berkeley,<sup>205</sup> Sherif Girgis,<sup>206</sup> Andrew Koppelman,<sup>207</sup> and John Inazu<sup>208</sup> are among those who call for pluralistic resolutions. The objective is a solution that differentiates between different institutions and intentions. The nuns and the

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201. *Id.*

202. *See* GEORGE, *supra* note 87.

203. Martin Luther King, Jr., *Letter From a Birmingham Jail* (1963), <http://www.nlnrac.org/american/american-civil-rights-movements/primary-source-documents/letter-form-a-birmingham-jail> [<https://perma.cc/F78C-8F8Z>].

204. *See* ANDERSON, *supra* note 67.

205. *See* Berkeley, *supra* note 166, at 15 (arguing that “refusing to affirm sexual expressions and associated relational forms, or forms of gender identity that may reduce human maleness and femaleness to matters of individual autonomy, are not *prima facie* offenses against human dignity and may be rooted in genuine religious convictions”). “Both individuals and institutions should affirm and respect the inherent dignity and infinite value of all persons. This is a matter that the state and the polity over which it governs can have only one view—a plurality of viewpoints is unacceptable here.” *Id.*

206. *See* Girgis, *Nervous Victors*, *supra* note 113, at 400.

207. *See* Koppelman, *Purposes of Antidiscrimination*, *supra* note 6, at 655.

208. *See generally* Inazu, *supra* note 142.

evangelicals would be insulated from the scrutiny of law within their domains of liberty, but not Maurice Bessinger or Lester Maddox.

As Andrew Koppelman frames the matter, there is a difference between religious ideas that are false and those religious ideas that are “not only false, but also destructive.”<sup>209</sup> Koppelman thinks natural-marriage advocates are “obviously wrong,” and natural-marriage advocates think the same of Koppelman.<sup>210</sup> He observes that “each side’s most basic beliefs entail that the other group is in error about moral fundamentals and that the other’s entire way of life, predicated on that error, ought not to exist.”<sup>211</sup> The solution is mutual toleration. Unless destructive, both sides in the identity-versus-conscience conflicts should be at liberty to “seek space in society wherein they can live out their beliefs, values, and identities.”<sup>212</sup> To avoid dignitarian harms, Koppelman proposes, among other things, that religious businesses be accommodated with exemptions from some nondiscrimination norms if they “announce their religious concerns in advance.”<sup>213</sup>

One impressive effort that has quickly become a landmark in this genre is the proposal advanced by Robert Vischer. In his book, *Conscience and the Common Good*,<sup>214</sup> Vischer champions a robust, but not impervious, “moral marketplace”<sup>215</sup> sitting between individual and state, in which different groups and institutions are free to constitute themselves around plural moral values.

Vischer contends that American law has tended to elevate individual conscience at the expense of “the communal venues through which the full flourishing of conscience is most likely to occur.”<sup>216</sup> Vischer thinks we should “break conscience out of the individual-versus-state paradigm.”<sup>217</sup> Conscience cannot flourish if it is coerced by the state. But in order to flourish, conscience also needs to be formed, articulated, and implemented, and this is done within relationships, communities, associations, and traditions.<sup>218</sup>

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209. See Koppelman, *Purposes of Antidiscrimination*, *supra* note 6, at 626.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* at 628, 646-49.

214. VISCHER, CCG, *supra* note 4.

215. *Id.* at 4.

216. *Id.* at 36.

217. *Id.* at 43.

218. *Id.* at 44.

This pluralism of our conscience-formation should be reflected in our laws. Vischer argues the following:

If our concern for conscience prompts (as it should) concern for the formative power of religious tradition and religious community, we also must take care not to obstruct the points of entry into those traditions and communities, whether entry is motivated by eternal or more pedestrian considerations, like curiosity.<sup>219</sup>

On this basis, Vischer lays out “the contours of a marketplace in which moral convictions are allowed to operate and compete without invoking the trump of state power.”<sup>220</sup> Because conscience is formed in communities, associations, and families that sit between the individual and the state, liberty of conscience requires an associational and institutional pluralism—a vigorous civil society, which will allow “the commercial sphere to reflect our moral pluralism.”<sup>221</sup>

Generally, Vischer argues that coercion should be discouraged, even when exercised on behalf of individuals (whose rights claims might damage the associational freedom of intermediary groups), and the role of state power should be limited to ensuring a functioning market by ensuring access.<sup>222</sup> Where state power is needed to correct a market failure, coercion may be used to thwart the self-constitution of conscientious persons and groups that causes discrimination.<sup>223</sup> But coercion should not be used unless certain criteria are established, one of which is that the claimed exercise of conscience is “incompatible with securing goods that are foundational to participation in our society.”<sup>224</sup> This criterion would support nondiscrimination laws governing the market for housing, but not for more fungible goods.

Access is one of the goods that segregated markets denied to black Americans during Jim Crow, and Vischer thinks that the civil rights statutes of the middle twentieth century, especially the Civil Rights Act of 1964, were justified responses to market failures.<sup>225</sup> Because the markets were broken, they functioned like monopolies.<sup>226</sup> It follows that the same rules that prohibited racial

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219. *Id.* at 39.

220. *Id.* at 5.

221. *Id.*

222. *Id.* at 28.

223. *Id.* at 29-30, 171-76.

224. *Id.* at 28.

225. *Id.* at 29.

226. *Id.* at 29-30.

discrimination by common carriers and public utilities were justifiably extended to those segregated markets that exhibited monopolistic behaviors,<sup>227</sup> notwithstanding that the civil rights legislation overrode the associational freedoms of those who defended segregation.<sup>228</sup>

The attractions of Vischer's proposal are manifest.<sup>229</sup> But some might reasonably worry that market-based models might not perform the work desired of them. If constructed as a legally and morally neutral venue of associational freedom, unmediated by the basic requirements of justice, then a moral marketplace might *in practice* preserve space for associations and practices that practice unjust actions and constitute what Vischer calls "their own distinct—even deviant—moral identities."<sup>230</sup> (Vischer accepts this possibility.)

On the other hand, a moral marketplace might leave no room *in principle* for liberty of conscience. Vischer wants to place legal limits on liberty in the marketplace to the extent of prohibiting racial discrimination by the "aggressive"<sup>231</sup> means of the 1964 Civil Rights Act. Yet once he has made that concession, friends of religious freedom might reasonably worry, and proponents of sexual-identity right claims might reasonably hope, that he has introduced a principle that undermines the pluralism of moral marketplaces. Many view insistence on traditional sexual ethics as tantamount to bigotry, indistinguishable from racism for all public purposes. Those same activists argue that the same dignitary harms to racial minorities that justified coercive civil rights laws now justify coercive sexual ethics laws to protect sexual minorities.<sup>232</sup> Epstein's and Vischer's arguments that sexual-identity claimants do not suffer the same

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227. See Epstein, *The Problem With Antidiscrimination Laws*, *supra* note 3.

228. See VISCHER, CCG, *supra* note 4, at 26-27.

229. Michael Moreland observes that Vischer's model of a moral marketplace makes "a powerful rejoinder to a certain Hobbesian picture of sovereignty." Moreland, *supra* note 124, at 324.

230. VISCHER, CCG, *supra* note 4, at 115. This causes one of Vischer's readers to wonder if Vischer has ignored or elided the associational uniqueness of the Church in forming conscience. See Patrick McKinley Brennan, *Conscience and the Common Good: An Alternative Perspective*, 49 J. CATH. LEGAL STUD. 307, 310 (2010). Brennan states, "In the eyes of Catholic social doctrine, 'deviant' associations—if by deviant we mean associations whose aims and/or practices violate the moral law—do not have *rights* against legitimate 'centralized authority,' though it may of course sometimes be prudent for that ruling authority to let them alone." *Id.* at 313.

231. VISCHER, CCG, *supra* note 4, at 29.

232. See NeJaime & Siegel, *supra* note 110, at 2574-75.

*material* harms as African-Americans during Jim Crow do not respond to the arguments raising subjective belief liberty and dignitary harm.

If the state has a sufficient interest to intrude into the private sphere to eliminate racial discrimination then it seems that it also has a sufficient interest to breach that sphere to prevent discrimination on the basis of sexual identity and the nature of marriage. Intrusion might seem particularly justifiable where it is undertaken to correct a market failure.<sup>233</sup> But even without evidence of a market failure, sexual identity claims might demand action if dignitary harm is a basis for legal coercion, as some now claim.<sup>234</sup> This might lead to what one reader has called “a slow-motion descent into a widespread use of state coercion that [Vischer himself] says will undermine the common good and make it impossible for moral communities to live out their share[d] convictions in the marketplace.”<sup>235</sup>

Is there a way to preserve the integrity of the marketplace both as a neutral venue for pluralism and as a morally bounded venue for justice? On one hand, leaving these disputes entirely to market actors leaves real, fundamental rights and duties unvindicated. On the other hand, entrusting to Leviathan the power to regulate the moral boundaries of liberty without resort to practical reasonableness and fundamental law, even only to the extent of correcting what Leviathan determines are market failures, leaves liberty at the mercy of Leviathan’s will.

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233. See Nora O’Callaghan, *Death by a Thousand Cuts: Why Market Mechanisms Won’t Solve the Culture Wars*, 49 J. CATH. LEGAL STUD. 335, 337-39 (2010).

234. See NeJaime & Siegel, *supra* note 110, at 2575.

235. O’Callaghan, *supra* note 233, at 339.

## V. A PERFECTIONIST APPROACH: THE MEDIATED DOMINIONS OF COMMON LAW

### A. Mediated Dominion: Liberty and Morality Mediated by Common Law Institutions

Fortunately, our civil rights derive from more textured and plural legal sources than Leviathan's will. These include the law of the license, discrimination and equality norms in public accommodations doctrine, contracts for services, and the verdicts of civil juries. The common law sources of civil rights, of which posited rules are a part, when taken as a whole, are far more capable of resolving the present conflicts peacefully and reasonably than are statutes mandating one-size-fits-all religious liberty or nondiscrimination. These doctrines rule out truly unjust acts of discrimination, such as racial discrimination, while nevertheless mediating the boundaries of the owner's right to exclude and the customer's license in pluralistic fashion, on a case-by-case basis, according to the reason for creation of the license.

To see how this works, it is useful to back up and put public accommodation rights in their common law civil rights context. The common law governing property generally, and public accommodations specifically, does not operate by imposing uniform rules on a whole population. Instead it arises from the practical judgment of customary institutions—the bailment, the tenancy, the license, the civil jury<sup>236</sup>—and consists of flexible but meaningful norms—liberties, wrongs, duties, claim-rights, privileges, immunities, and the boundaries provided by right reason<sup>237</sup>—to mediate potential conflicts within public accommodations on private property. Working together, these institutions and norms secure liberties, create presumptions and burdens of justification, and limit the categories of justifications that may be offered for or against an action.<sup>238</sup>

By these means, the common law allows mediation between competing assertions of rights consistent with the requirements of religious conscience, identity, and justice generally. Only where a particular justification—e.g., the race of the licensee or the religious

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236. See generally THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY (Dennis Patterson ed., 2010).

237. See MACLEOD, P&PR, *supra* note 14, at 197-215.

238. *Id.* at 190.

character of the licensor—is per se not a valid reason for excluding or requiring inclusion, given the purposes for the creation of the bailment, tenancy, or license, does the common law impose a general, uniform, and absolute rule. So, to think of public accommodation rules in strictly positivist terms as conclusive rules is to miss most of the complexity, pluralism, and context-dependency of public accommodations law in our common law tradition.

Not only racial and ethnic differences, but also differences of moral identity—differences concerning the ends and means to which individuals and groups have committed themselves and around which they have thereby constituted their plans of action and their identities—are sure to become more prominent in the coming years and will play a more significant role in the specification of communities' exclusionary reasons for action. If these groups and communities cannot agree with each other in the selection and specification of exclusionary reasons, then they will increasingly require autonomous domains within which they can commit to exclusionary reasons that others do not value and would even reject.

On the other hand, we will still need moral norms to guide our choices and actions. And at least some of these norms will find their way into law as they are called upon to mediate conflicts between those in competing domains who have different convictions and who make conflicting rights claims. In other words, perfectionist pluralism should become more highly valued, particularly the pluralism that results from private law norms and institutions.<sup>239</sup>

The solution has long existed in our laws and legal institutions, though it laid largely dormant during the positivist and realist eras. The domains of common law private property ownership have the potential to rehabilitate pluralism.<sup>240</sup> The decentralizing effects of private ownership are, of course, well understood and, because local and private authority can be abused just as government power can, those effects are viewed in some corners as inimical to liberty. Yet apples should be compared to apples. To compare focal exercises of government power with defective exercises of local and private authority amounts to special pleading. Focal cases of plural authorities should first be examined. And well-functioning instances of property norms conduce to freedom far more than central cases of public-law rules, regulatory norms, and two-term individual rights.

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239. See Hanoeh Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1421-46 (2012).

240. See *id.* at 1442-44.

The proposal offered here is perfectionist in that it is an account in which the good precedes the right.<sup>241</sup> It is pluralist in that it is non-paternalistic, except where conclusive moral requirements demand legal determination and coercion.<sup>242</sup>

Common law domains of property (like private law generally in the common law) are perfectionist in the sense that they rule out those potential first-order reasons for action that are deemed wrong and direct those that are deemed right.<sup>243</sup> The resulting norms are what the perfectionist liberal Joseph Raz has called exclusionary reasons for action.<sup>244</sup> Exclusionary reasons are those second-order reasons that direct practical choice and action by excluding from deliberation, judgment, and choice possible first-order reasons for action. The norms of private property law—rights, wrongs, duties—exclude from future deliberation potential first-order reasons for action. They impose obligations.

Those obligations are seldom completely and conclusively determined before judgment. The full determination and specification of private law norms requires and entails judgment. Except for a few absolute duties—such as the duties not to maim and enslave—most private law norms are not fully determinate in the abstract. Rather, they are fully settled and specified as complete jural relations in particular judgments in particular cases.<sup>245</sup> So unlike public law, which must be uniform, universal, and general in its application,<sup>246</sup> private law and private ordering can mark the moral boundaries of free choice and action in particular cases according to the circumstances and the requirements of reason in each case,

241. Perfectionist accounts of law say that rights cannot be settled and specified without a prior statement of what is good and bad, right and wrong, to do or not do. *See, e.g.*, RAZ, MOF, *supra* note 87; GEORGE, *supra* note 87.

242. In the words of Bradley Miller, “Typically, [the non-paternalistic perfectionists] hold that there is a *range* of morally valuable choices and a *range* of morally valueless choices, and an individual’s autonomy is not threatened but advanced by state action that rightly identifies, discourages, and (in a limited class of cases) prohibits the morally valueless.” Bradley W. Miller, *Proportionality’s Blind Spot: “Neutrality” and Political Philosophy*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 391 (Grant Huscroft, Bradley W. Miller, & Grégoire Webber eds., 2014).

243. *See* I BLACKSTONE, *supra* note 16 and accompanying text.

244. RAZ, MOF, *supra* note 87 at 165-92; RAZ, PRACTICAL REASON AND NORMS, *supra* note 15 at 35-48, 73-89; RAZ, PRACTICAL REASONING, *supra* note 15, at 128-43.

245. *See* Benjamin C. Zipursky, *The Inner Morality of Private Law*, 58 AM. J. JURIS. 27, 42 (2013).

246. *See generally* LON L. FULLER, THE MORALITY OF LAW (1964).

without imposing zero-sum or one-size-fits-all solutions on all cases.<sup>247</sup>

Mediated dominion is a way to describe the common law's way of specifying property rights and duties consistent with basic moral values and requirements, the plurality of basic reasons and the basic requirements of practical reasonableness.<sup>248</sup> Apart from a few absolute norms ruling out never-reasonable conduct (slavery, racial segregation), the institutions and norms of property in the common law tradition respond to the moral needs of human beings not with one-size-fits-all rules of general application but rather with plural forms and reasons, which are not products of positive enactments, but rather have grown organically from maxims, customs, and institutions that are foundational within our law. So, unlike positive rules, which emanate from a sovereign lawmaker and govern all individual subjects alike, mediated dominion within common law is not unitary and preemptory but rather pluralistic and categorical.<sup>249</sup>

## B. Nondiscrimination in Common Law

Viewed as a posited rule, public accommodations doctrine might appear to impose a one-size-fits-all solution to all questions of access. But in fact the statutes codify only one small set of the duties that mark the contours of the public accommodation license rights. Understood in its common law dimensions, the license is a limited right, marked out at its boundaries by the rationality of the owner's reasons for action. Common law rights of equal access do not vest in their holders an absolute right to enter others' private property, even private property held open as public accommodation.<sup>250</sup> Rather, they require that any license extended to visitors of a public accommodation be extended on equal terms to all, without regard to arbitrary considerations (race, for example).<sup>251</sup>

Unfortunately, many public law officials act as if public accommodations consists of closed sets of positive rules. And state and federal judiciaries have sometimes endorsed that view. For example, a positivist conception of public accommodations law has

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247. See Zipursky, *supra* note 245, at 31-33; Dagan, *supra* note 239, at 1411; Adam J. MacLeod, *Strategic and Tactical Totalization in the Totalitarian Epoch*, 5 BR. J. AM. LEGAL STUD. 57, 74 (2016) [hereinafter *Totalization*].

248. See generally MACLEOD, P&PR, *supra* note 14.

249. *Id.*

250. See MERRILL & SMITH, *supra* note 236, at 65-66.

251. *Id.* at 79-80.

clouded the United States Supreme Court's public accommodations jurisprudence since the landmark case *Bell v. Maryland*.<sup>252</sup> Bell et al. had staged a sit-in at a segregated restaurant.<sup>253</sup> Convictions for criminal trespass against them were punished by fines of \$10 each, and these sentences were suspended.<sup>254</sup> After the convictions were affirmed by the Maryland courts and before the United States Supreme Court ruled, Maryland enacted a statute prohibiting racial discrimination in public accommodations.<sup>255</sup>

The U.S. Supreme Court then remanded for the Maryland Supreme Court to consider whether the new statutes required reversal of the convictions under Maryland state law.<sup>256</sup> Writing for a plurality, Justice Brennan speculated that state law grounds would be sufficient to reverse.<sup>257</sup> He reasoned, "A legislature that passed a public accommodations law making it unlawful to deny service on account of race probably did not desire that persons should still be prosecuted and punished for the 'crime' of seeking service from a place of public accommodations which denies it on account of race."<sup>258</sup>

On remand, the Maryland high court found itself bound by Justice Brennan's logic to conclude "that the passage of the public accommodations law by the Maryland Legislature brought about a fundamental change in the State trespass act."<sup>259</sup> The new public accommodations statute and the trespass prohibition "cannot stand together and both be executed, and to that extent, the two are repugnant and in irreconcilable conflict."<sup>260</sup> (The Maryland high court nevertheless affirmed the convictions on the ground that the legislature did not expressly extinguish existing criminal liabilities incurred before enactment of the new public accommodations statute.)<sup>261</sup>

In fact, the "fundamental change" in Maryland law was an illusion, as Justices Douglas and Goldberg, writing separately,

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252. *Bell v. Maryland*, 378 U.S. 226 (1964) [hereinafter *Bell II*].

253. *Id.* at 227.

254. *Bell v. State*, 176 A.2d 771, 771 (Md. 1962) [hereinafter *Bell I*].

255. *Bell II*, 378 U.S. at 228.

256. *Id.* at 242.

257. *Id.* at 232-35.

258. *Id.* at 235.

259. *Bell v. State*, 204 A.2d 54, 58 (Md. 1964) [hereinafter *Bell III*].

260. *Id.*

261. *Id.* at 61.

recognized.<sup>262</sup> Properly understood, the proprietor had no property right to refuse to serve the protesters because of their race, before or after passage of the statute.<sup>263</sup> Though he had no general duty to serve, he had no power to terminate their license on account of race. So, the patron who remains on the premises in compliance with the owner's reasonable rules and regulations<sup>264</sup> and who is denied service on the basis of race has been deprived of a property right.<sup>265</sup>

The property right belonged to the customers not because positive law said so but because the proprietor had carved out of his estate a license for paying customers and the common law license enjoyed by a customer in a public accommodation cannot be terminated on the basis of the customer's race. A license to enter a public accommodation can be terminated by the owner for any valid reason, but only for a valid reason. Because it is not relevant to the purpose for which the business is conducted, race is not relevant to the reason for the license. And the scope of the license is determined by the reasons for which it is created.

This is why Justice Douglas noted in his *Bell* concurrence that segregation "is barred by the common law as respects innkeepers and common carriers."<sup>266</sup> Civil remedies for violation of the bar against racial discrimination "were made by judges who had no written constitution."<sup>267</sup> The unwritten common law constitution of British North America held racial segregation, slavery, and other forms of racial discrimination contrary to reason, and therefore contrary to law. Justice Douglas could discern no reason to read the Fourteenth Amendment, which contains a *written* guarantee of equal protection, to leave restaurateurs free to discriminate on grounds that are forbidden to common carriers at common law.<sup>268</sup>

In his separate concurrence, Justice Goldberg went further. The fundamental right at stake was itself a common law liberty, and the Fourteenth Amendment was designed to secure "the rights and guarantees of the good old common law."<sup>269</sup> The common law duty to provide service on equal terms is expressed as a duty upon

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262. *Bell II*, 378 U.S. at 254 (Douglas, J., concurring); *Id.* at 293-94 (Goldberg, J., concurring).

263. *See* *Donnell v. State*, 48 Miss. 661, 682 (1873).

264. *See* *Shepard v. Milwaukee Gas Light Co.*, 6 Wis. 539, 547 (1858).

265. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 157 (1873).

266. *Bell II*, 378 U.S. at 254 (Douglas, J., concurring).

267. *Id.*

268. *Id.* at 255.

269. *Id.* at 293-94 (Goldberg, J., concurring) (internal quotations omitted).

common carriers but is not limited to them. The correlative right is a natural right to travel freely, embodied in our common law heritage, which encompasses “the right of the citizen to be accepted and to be treated equally in places of public accommodation”<sup>270</sup> generally. Thus, “at the heart of the Fourteenth Amendment’s guarantee of equal protection, was the assumption that the State by statute or by ‘the good old common law’ was obligated to guarantee all citizens access to places of public accommodation. This obligation was firmly rooted in ancient Anglo-American tradition.”<sup>271</sup>

## VI. MEDIATED DOMINION IN PUBLIC ACCOMMODATIONS

Applying the general lessons of mediated dominion to public accommodations disputes specifically suggests a way forward. Pluralism is possible. So is justice. Common law norms and institutions can incorporate both.

### A. Public Accommodation as License

The understanding of property law that Justice Goldberg expressed in his *Bell* concurrence has room for both liberty and just nondiscrimination norms. A marketplace governed by a robust common law conception of law, rather than merely positive rules, takes in both justice and liberty. Our fundamental laws incorporate the pluralism of the common law norms and institutions because the rights and duties of mediated dominion are foundational to the law that we inherited from England, which became the fundamental, organic law of the original colonies.<sup>272</sup> Those laws are at odds with neither liberty nor nondiscrimination rules, and a marketplace governed by law rather than rules need not be devoid of morals or liberty.

In the marketplace, the common law norms and institutions of property and contract can mediate between potentially conflicting interests. For starters, common law licenses settle and specify the respective rights and duties of the parties not once and for all according to a uniform rule, but in each case according to the parties’ reasons for action and the requirements of reason.

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270. *Id.* at 293 n.10.

271. *Id.* at 296-97.

272. *See* STONER, *supra* note 10, at 55, 58-59.

The license of a customer to enter a public accommodation does not originate in nondiscrimination statutes or other positive enactments of governments. It is a private law device, shaped and specified by institutions of private ordering. Because the norms are not promulgated in the first instance by positive lawmakers, the public's license to enter a public accommodation is derived neither from the sovereignty of the state, nor from the constitutional guarantees of equal protection, but from the property owner's authority to include and exclude.<sup>273</sup> As the U.S. Supreme Court explained in *Christian Legal Society v. Martinez*, a licensee's license is a legal privilege carved out of the owner's dominion by the owner's consent, given when the owner opened his private property to some person, group, or the public at large.<sup>274</sup> The licensor's right to determine the scope of the license is the right that that secular universities, such as University of California at Hastings and Vanderbilt University, use to exclude student groups who adhere to traditional, theistic moral teachings and thus to constitute themselves as institutions committed to the principles of left liberalism.<sup>275</sup> It is the same right that religious colleges, such as Gordon College, use to constitute themselves according to religious beliefs.<sup>276</sup> Private property makes pluralism possible.<sup>277</sup>

The licensor determines the scope of the license by determining the purposes for which entry will be permitted.<sup>278</sup> Yet once the purposes of the license are established, the owner's authority to exclude becomes bounded by those purposes.<sup>279</sup> Whereas the owner of a private residence can exclude anyone for any reason or no reason, a property owner who opens his land to the public, say as a barbershop,<sup>280</sup> may exclude only for good reasons related to operation

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273. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 678-79 (2010).

274. *Id.*

275. See Michael Stokes Paulsen, *Vanderbilt's Right to Despise Christianity*, PUB. DISCOURSE (Mar. 14, 2012), <http://www.thepublicdiscourse.com/2012/03/4930/> [<https://perma.cc/45PZ-6HQJ>].

276. See Adam J. MacLeod, *Gordon College and Pluralism in Higher Education*, PUB. DISCOURSE (July 30, 2014), <http://www.thepublicdiscourse.com/2014/07/13600/> [<https://perma.cc/HAC3-XN5S>].

277. Compare Dagan, *supra* note 239, with Adam J. MacLeod, *Universities as Constitutional Lawmakers (And Other Hidden Actors in Our Constitutional Orders)*, 17 U. PA. J. CONST. L. ONLINE 1, 13-15 (2014).

278. See *State v. Steele*, 11 S.E. 478, 483-84 (N.C. 1890).

279. See Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255, 260 (2011).

280. See, e.g., *State v. Sprague*, 200 A.2d 206, 208 (N.H. 1964).

of a barbershop. So, what Justice Goldberg called the “good old common law” has long prohibited racial discrimination in public accommodations where race is irrelevant to the purpose for which the property is held open to the public (i.e., almost always).

Blackstone gave us the paradigmatic account of the doctrine. He explained that opening one’s doors as a public accommodation vests in the public a license to enter. “[A] man may justify entering into an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors.”<sup>281</sup> The license is not a universal right to enter.<sup>282</sup> But to justify any limitation a reason must be offered:

[I]f an inn-keeper, or other victualler, hangs out a sign and opens his house for travellers [sic], it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action will lie against him for damages, if he without good reason refuses to admit a traveller.<sup>283</sup>

Two opposing errors must be avoided here. On one hand, it would be a mistake to assume that anyone has a right to be served in any business establishment. A duty to provide access to public accommodations on equal terms is not a duty to provide services.<sup>284</sup> On the other hand, cases such as *Wood v. Leadbitter*<sup>285</sup> and *Marrone v. Washington Jockey Club*<sup>286</sup> have long been read for the broad proposition that a license is revocable at the will of the licensor without reason.<sup>287</sup> The lesson drawn from this is that the common law nondiscrimination norm attaches only to common carriers and public utilities at common law.<sup>288</sup> But Joseph Singer has called that view

281. II BLACKSTONE, *supra* note 16, at \*212.

282. *Markham v. Brown*, 8 N.H. 523, 528 (N.H. 1837) (“Holding it out as a place of accommodation for travellers [sic], [an innkeeper] cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them. But he is not obliged to make his house a common receptacle for all comers, whatever may be their character or condition.”).

283. III BLACKSTONE, *supra* note 16, at \*166.

284. *See Fell v. Spokane Transit Auth.*, 911 P.2d 1319, 1329 (Wash. 1996).

285. 13 M. & W. 838, 845 (Eng. 1845).

286. 227 U.S. 633, 637 (1913).

287. *See Ralph W. Aigler, Revocability of Licenses—The Rule of Wood v. Leadbitter*, 13 MICH. L. REV. 401, 402 (1915).

288. *See, e.g., Alfred Avins, What Is a Place of “Public” Accommodation?*, 52 MARQ. L. REV. 1, 2-7 (1968); Earl M. Maltz, “Separate But Equal” and the Law of Common Carriers in the Era of the Fourteenth Amendment, 17 RUTGERS L.J. 553, 553-54 (1986).

“almost certainly wrong,”<sup>289</sup> arguing that the rules of Jim Crow permitting and requiring owners to exclude without valid reason was in important respects a departure from, not a continuation of, the common law norms governing public accommodations.<sup>290</sup>

Some of the common law’s complexity has not fully emerged in those competing accounts. The nondiscrimination norms of common law are plural and vary according to the kind of enterprise conducted and the type of property utilized. Common carriers (railroads and public utilities with delegated monopoly power) alone have a general duty to serve.<sup>291</sup> Owners of public accommodations (barbershops, inns) have no general duty to *serve*,<sup>292</sup> though they do have a duty to give good reason for any denial of equal *access*.<sup>293</sup> Any good reason will suffice, even a personal reason.<sup>294</sup> And those engaged in a private calling (professionals and service professionals, amusement and sporting venues) have no common law duty to serve or to provide reasons for refusing to serve.<sup>295</sup>

The record has perhaps grown clouded in part because courts have not always expressly distinguished between and among (1) licenses emanating from state-created monopolies, (2) licenses emanating from a delegation of the owner’s own authority in private property, and (3) licenses emanating from contract. The licenses in *Leadbitter* and *Marrone* were created by tickets, in the nature of contracts, giving rise to revocable privileges, and the powers of ownership remained with the private owners.<sup>296</sup> As Justice Holmes

289. See Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1294 (1996).

290. *Id.* at 1303-73. For the reasons stated below, Singer’s conclusion, that owners of public accommodations do not enjoy a right to exclude, does not follow from this and in fact is contrary to the law. *Id.* at 1312-19.

291. See Avins, *supra* note 288, at 2-3.

292. See *Feldt v. Marriott Corp.*, 322 A.2d 913, 915 (D.C. Ct. App. 1974); *Curtis v. Murphy*, 22 N.W. 825, 827 (Wis. 1885).

293. *Id.* What that duty entails depends upon further distinctions, as between a restaurant, an inn, a retail store, etc. *Id.* at 916. Even finer gradations emerge upon closer examination of ancillary duties; a restaurant, for example, is found more to resemble a retail store than an inn. See *Davidson v. Chinese Republic Rest.*, 167 N.W. 967, 969 (Mich. 1918).

294. See *Noble v. Higgins*, 158 N.Y.S. 867, 867-68 (N.Y. Sup. Ct. 1916).

295. See *Hurley v. Eddingfield*, 59 N.E. 1058, 1058 (Ind. 1901); *Tamelleo v. N.H. Jockey Club, Inc.*, 163 A.2d 10, 12-13 (N.H. 1960); *Madden v. Queens Cty. Jockey Club*, 269 A.D. 644, 645-46 (N.Y. App. Div. 1945); *Rice v. Rinaldo*, 119 N.E.2d 657, 659 (Ohio Ct. App. 1951).

296. 8 THOMPSON ON REAL PROPERTY §§ 64.03(c), (d) (David A. Thomas ed., 3d ed. 2016).

explained in *Marrone*, “The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker, but does not create an interest in the property that it may concern, unless it also operates as a conveyance.”<sup>297</sup> The scope of the license is determined by the contract, not by a right *in rem*, and the remedy for revocation sounds in breach of contract.<sup>298</sup>

The racetrack owners in *Leadbitter* and *Marrone*, who required a ticket purchase to gain entrance, were precisely not opening their premises to the general public; rather they were opening only to those who purchased tickets.<sup>299</sup> Even in cases of contractual licenses, the general arbitrariness of *racial* discrimination might protect those who are willing and able to satisfy the terms on which contracts are extended because the rights of citizenship include a right not to be denied service for reasons that do not apply alike to all persons. But race is *sui generis*; the law contains no general duty not to discriminate.<sup>300</sup>

Blackstone explained that where a license derives from contract—either implied contract with someone engaged in a general undertaking or a special agreement with someone who is in a private vocation—the terms are determined by express or implied covenants in the agreement.<sup>301</sup> No one has a duty to contract with anyone else. And no one has a duty to contract on any particular terms. It follows that no one has a right to require someone else to do business with someone. Any business that is voluntarily contracted is governed by the terms of the contract.

By contrast, if the license derives from opening property to the public, then the license is a delegation of part of the owner’s dominion over the premises, and the scope of the licensee’s right is shaped by the purpose for which the owner holds open.<sup>302</sup> In such cases, the licensor may only refuse access for a “good reason.”<sup>303</sup>

297. *Marrone v. Wash. Jockey Club*, 227 U.S. 633, 636 (1913).

298. *Id.*

299. See 8 THOMPSON ON REAL PROPERTY, *supra* note 296, at § 64.03(d).

300. Compare *Valle v. Stengel*, 176 F.2d 697, 702-03 (3d Cir. 1949) (holding that African-Americans had right to access private swimming pool which was opened to whites), with *Hedding v. Gallagher*, 57 A. 225, 226-27 (N.H. 1903) (holding truckmen have no common law right to solicit baggage-transfer business at railroad station, though others are allowed to do so).

301. See III BLACKSTONE, *supra* note 16, at \*164.

302. Commenting on cases such as *State v. Shack*, 277 A.2d 369 (N.J. 1971), Adam Mossoff has observed that farmers who house migrant workers on their farms have vested in those workers a license, which entails the right to receive on the premises others whose “presence [is] related to [their] work.” Mossoff, *supra* note

Refusing to serve alcohol to an intoxicated person or to admit to an inn a known thief are valid reasons for discrimination.<sup>304</sup> By contrast, the racial identity of the would-be licensee is per se *not* a valid reason.<sup>305</sup> As the Supreme Court of Michigan put it, to refuse service to a person “for no other reason than” that person’s race is contrary to the “absolute, unconditional equality of white and colored men before the law.”<sup>306</sup> It is, therefore, “not for the courts to cater to or temporize with a prejudice which is not only not humane, but unreasonable.”<sup>307</sup>

In that case, a restaurateur had refused to serve black patrons in one part of his establishment, though he offered to serve them in another; white patrons were permitted to be served wherever they wanted.<sup>308</sup> In a subsequent civil action by the black patrons, the trial judge allowed the claim to go to a jury with the instruction that the owner had “no right to make a rule providing for an unjust discrimination, still he would have the right, under the law, to make proper and reasonable rules for the conduct of his business.” He might reasonably, for example, maintain separate parts of his dining facilities for ladies and gentlemen, or segregate restaurant patrons from boarders. The trial judge told the jury that “whether this was a reasonable rule I will submit to you for determination.”<sup>309</sup>

In reversing, the Supreme Court of Michigan stated that the trial “judge was eminently sound in his reasoning, and correct in his law, but in his application of the law to this particular case he was in error. The jury, under the defendant’s own version of the transaction,

279, at 260. As the Maine high court recognized in the analogous case of *State v. DeCoster*, 653 A.2d 891, 893-94 (Me. 1995), property devices such as licenses and leases contain implied covenants, and therefore the limitations on the owner’s right to exclude are built in by private ordering, prior to any state action.

303. See III BLACKSTONE, *supra* note 16, at \*164; *Markham v. Brown*, 8 N.H. 523, 529 (1837). The racetrack owners in *Leadbitter* and *Marrone*, who required a ticket purchase to gain entrance, were not opening their premises to the general public but rather opening only to those who purchased tickets. See *supra*, notes 285-86 and accompanying text.

304. See *Markham*, 8 N.H. at 528-29.

305. *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 154 (1873) (“The doctrines of natural law and of christianity forbid that rights be denied on the ground of race or color; and this principle has become incorporated into the paramount law of the Union.”); *Messenger v. State*, 41 N.W. 638, 639 (Neb. 1889).

306. *Ferguson v. Gies*, 46 N.W. 718, 719-20 (Mich. 1890).

307. *Id.* at 721.

308. *Id.* at 718-19.

309. *Id.* at 719.

should have been instructed to find a verdict for the plaintiff.”<sup>310</sup> A statute making it a misdemeanor to fail to provide “full and equal accommodations” meant not identical accommodations but rather the same accommodation.<sup>311</sup> The restaurant owner’s counsel noted that the statute imposed criminal liability and argued that it could therefore not be the basis of a civil action.<sup>312</sup> But the court rejected this characterization of the law. It was not necessary for the legislature to specify a civil remedy because the unwritten law of property prohibited racial discrimination. The statute was “only declaratory of the common law.”<sup>313</sup>

This statement is a key to understanding the common law doctrine of public accommodations. “Declaratory” is a term of art in common law jurisprudence signifying what is already commanded or prohibited by the unwritten law, which includes the laws of nature and of nature’s God, customs so ancient that the memory of man runs not to the contrary, and the maxims. By the declaratory part of civil law are the “rights to be observed, and the wrongs to be eschewed” specified and expressly posited,<sup>314</sup> but they are not made law by being declared and posited. They exist before they are posited. They are derived not from the legislature’s will but rather from the natural rights, natural duties, general and local customs, and acts of private ordering (including the creation of licenses) that precede positive law. They would be authoritative even without being declared by positive lawmakers.<sup>315</sup>

Some of that ancient, unwritten law which the municipal (positive) law declares is universal and immutable.<sup>316</sup> And “upon the

310. *Id.*

311. *Id.*

312. *Id.* at 720.

313. *Id.*

314. I BLACKSTONE, *supra* note 16, at \*53.

315. *Id.* at \*42, \*54, \*86.

316. Blackstone explained the idea this way:

Those rights then which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land.

*Id.* at \*54.

whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.<sup>317</sup> The positive enactment (the municipal law) simply declares what is already required and prohibited. Because we are obligated to obey our natural duties and to respect others' natural rights, we are "bound by superior laws, before those human laws were in being, to perform the one and abstain from the other."<sup>318</sup> Natural rights and duties thus stand in contrast to positive privileges and obligations, which bind us only because and insofar as positive law attaches sanction to particular conduct, and to those matters about which natural and divine law are indifferent.<sup>319</sup>

The Michigan Supreme Court thus used a concise phrase to communicate the commonplace notion that the duty to make public accommodations equally available to blacks and whites is grounded in natural and divine law. It is required by right reason, whatever positive law provides. This does not entail that one has a natural right to enter private property, even if that property is a public accommodation. The rights and duties of private law are specified by private law authorities—e.g., property owners—just as the rights and duties of what Blackstone called municipal law are specified by public authorities. But all rights and duties must be specified within the bounds of what reason will allow. Reason forbids arbitrary distinctions, such as racial discrimination. Because it is intrinsically unreasonable, and therefore wrong, to discriminate on the basis of race, whatever privileges a property owner extends to a white person must also be extended to a black person.

The Michigan court explained,

The common law as it existed in this state before the passage of this statute, and before the colored man became a citizen under our constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places. It must be considered that, when this suit was planted, the colored man, under the law of this state, was entitled to the same rights and privileges in public places as the white man, and must be treated the same there; and that his right of action for any injuries arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen.<sup>320</sup>

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317. *Id.*

318. *Id.* at \*57.

319. See generally MacLeod, *Rights, Privileges, and the Future of Marriage Law*, *supra* note 50.

320. *Ferguson v. Gies*, 46 N.W. 718, 720 (1890).

No reason could be found for the racial segregation, and therefore, racial segregation was not among the powers of the restaurant owner. The Michigan Court acknowledged that other state courts had permitted racial segregation in public accommodations, but did not concede that those decisions were consistent with the common law governing public accommodations. “The cases which permit in other states the separation of the African and the white races in public places can only be justified on the principle that God made a difference between them, which difference renders the African inferior to the white . . . .”<sup>321</sup> That idea “does not commend itself either to the heart or judgment.”<sup>322</sup> It “is not only not humane, but unreasonable.”<sup>323</sup> Even accepting the contorted premise that being born black was some sort of deformity, reason forbids inferior treatment. “Because it was divinely ordained that the skin of one man should not be as white as that of another furnishes no more reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed, or otherwise deformed.”<sup>324</sup>

#### B. Categorical, Not Absolute, Rights and Privileges

None of this necessarily makes public accommodations law *public*; these remain private rights and duties unless and until criminal sanction is added to them. It must be remembered that any duty to serve runs not to the state or the political community as a whole but to one’s customers. Furthermore, the common law nondiscrimination norm is not one-size-fits-all. The customers’ license is limited by any good reason that the owner can articulate for exclusion. That an owner’s dominion is circumscribed by duties, limitations on his rights, and other norms of obligation does not entail that the state has the power to enforce those norms on its own initiative or to determine and specify the content and scope of those norms in its own judgment.<sup>325</sup> As shown in previous Parts, the positive law norms are undetermined in the abstract. Any claim to determine them for some collective good, once for everyone, is

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321. *Id.*

322. *Id.* at 721.

323. *Id.*

324. *Id.*

325. Compare Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748-49 (2009), with MACLEOD, P&PR, *supra* note 14, at 198, 216-17.

incoherent because the basic human goods at stake are incommensurable.<sup>326</sup>

A property owner who holds her resource open to the public accepts a new limitation on her right to exclude, which did not exist when her property was not open to the public. On the other side, though a customer's license to enter a public accommodation is not a right, it is a privilege subject to the owner's right to revoke for any good reason. The owner's categorical duty not to discriminate on the basis of race makes the customer's license *look* like an absolute right in cases of racial discrimination. But the license remains revocable for other, valid reasons. The license is not an absolute right; far from it. Discrimination and exclusion are permitted, even right and proper in some cases.

What counts as a good or valid reason for exclusion is determined in the first place according to the purpose for which the license or tenancy was created because the reason for admitting some entails that it would be arbitrary or irrational to exclude some others.<sup>327</sup> The validity of reasons can also be determined by other context-specific factors, and there is no basis in law to exclude from these the owner's moral convictions. A pub owner might reasonably and lawfully exclude a potential patron who has already had three or four drinks and who the pub owner knows is sometimes abusive toward his wife when drunk. The pub owner might have no legal obligation to prevent domestic violence in the patron's home, yet a jury could quite reasonably conclude that the pub owner acted within his right by sending the patron home without serving him any more alcohol.

Therefore, the line between the owner's right and the customer's license is not settled once and for all as matter of uniform conclusiveness. The scope of a property license is a fact question.<sup>328</sup> The judgment varies from case to case according to the purpose for the license or estate, the owner's moral convictions, local customs and traditions, and many other case-specific facts.<sup>329</sup> In cases of

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326. Compare Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 858 (2009), with FINNIS, NLNR, *supra* note 18, at 113; MACLEOD, P&PR, *supra* note 14, at 217-18.

327. See *State v. DeCoster*, 653 A.2d 891, 894 (Me. 1995); MacLeod, P&PR, *supra* note 14, at 37-63. See also *Curtis v. Murphy*, 22 N.W. 825, 826-27 (Wis. 1885) (man not entitled to be guest of inn where he went for purpose of engaging prostitute).

328. See *Jackson v. Rounseville*, 46 Mass. 127, 130 (1842).

329. *Id.* at 130-31.

dispute, adjudication of the boundaries between the customer's privilege and the owner's right is entrusted to another common law institution of private ordering, the civil jury,<sup>330</sup> which is comprised of members of the owner's and customer's community. The liberty of the owner and privilege of the customer are thus both settled in law prior to any interference by the state.

The rule against racial discrimination is a particularly conclusive, universal judgment drawn from this otherwise-indeterminate body of property law. Because race is an arbitrary characteristic, to refuse service to a person for no reason other than that person's race has always been unreasonable at common law. The common law secures the owner's right to exclude for any good reason, and race is *per se* not a good reason. Therefore, Reconstruction-era statutes that prohibited racial discrimination by common carriers and in public accommodations neither created new rights nor deprived owners of any property. That is why they did not implicate the Takings Clause and other constitutional limitations on expropriations; nothing was expropriated.

### C. Recovering the Plural Norms of Public Accommodations Law

Three important implications follow from this. First, sexual identity might in many cases be similar to race in the sense that it is generally irrelevant to the purpose for which a public accommodation is held open. As with race, there are likely to be few cases in which sexual identity constitutes a valid reason for exclusion. So a state might reasonably prohibit discrimination in public accommodations for the reason of sexual identity.

Second, many valid reasons for discrimination and exclusion remain valid, even right, though the effects of an owner's policy might fall disproportionately on people who identify with a particular sexual orientation. Distinctions between natural marriage and other sexual relations, and between status and conduct, are valid reasons, which are grounded in law. So, for example, those state courts that have affirmed a property owner's refusal to rent to an unmarried, cohabitating couple have observed that long-standing state laws, which codify common law norms against unmarried cohabitation, reinforce the status–conduct distinction.<sup>331</sup> These distinctions are also

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330. *Id.* at 131-32.

331. *E.g.*, N.D. Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 557 (N.D. 2001).

grounded in religious beliefs,<sup>332</sup> moral convictions,<sup>333</sup> philosophical arguments,<sup>334</sup> and combinations of those reasons.<sup>335</sup> Further, reasoned arguments are made today in favor of traditional man-woman (or “conjugal”) marriage,<sup>336</sup> same-sex marriage,<sup>337</sup> plural marriages,<sup>338</sup> and even minimalist marriage.<sup>339</sup>

The distinction that Muslims, Jews, Christians, and others draw between traditional marriage and all other relationships is another valid reason for exclusion, which is grounded in law. Indeed, it is foundational to the laws of all fifty states; the jural relations of the natural family precede positive law and have been basic within the fundamental law of the states since before the ratification of the Constitution and Bill of Rights.<sup>340</sup> Even States that have redefined marriage to extend legal recognition to same-sex couples, such as Massachusetts and New York, retain in their laws the distinction

332. See generally TIMOTHY KELLER & KATHY KELLER, *THE MEANING OF MARRIAGE* (2013); *Nashville Declaration on “Same-Sex Marriage”*, ETHICS & RELIGIOUS LIBERTY COMMISSION, (Mar. 9, 2005), <http://mail.erlc.com/article/nashville-declaration-on-same-sex-marriage> [<https://perma.cc/D3GP-H5GS>].

333. See generally ELIZABETH FOX-GENOVESE, *MARRIAGE: THE DREAM THAT REFUSES TO DIE* (Sheila O’Connor-Amrose ed., 2008).

334. See generally SHERIF GIRGIS, RYAN T. ANDERSON, & ROBERT P. GEORGE, *WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE* (2012); PATRICK LEE & ROBERT P. GEORGE, *CONJUGAL UNION: WHAT MARRIAGE IS AND WHY IT MATTERS* (2014).

335. See generally CHRISTOPHER KACZOR & JENNIFER KACZOR, *THE SEVEN BIG MYTHS ABOUT MARRIAGE: WHAT SCIENCE, FAITH, AND PHILOSOPHY TEACH US ABOUT LOVE AND HAPPINESS* (2014).

336. See GERARD V. BRADLEY, *ESSAYS ON LAW, RELIGION, AND MORALITY* 61 (2014); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 139 (1999); Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245 (2011); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135 (1997). See also *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

337. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Andrew Koppelman, *Judging the Case Against Same-Sex Marriage*, 2014 U. ILL. L. REV. 431 (2014).

338. See generally RONALD C. DEN OTTER, *IN DEFENSE OF PLURAL MARRIAGE* (2015).

339. See generally ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* (2012).

340. See *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 845 (1977); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); STONER, *supra* note 10, at 83; David F. Forte, *The Framers’ Idea of Marriage and Family*, in *THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS* 100, 102 (Robert P. George & Jean Bethke Elshtain eds., 2006).

between natural marriage and same-sex marriages for many purposes, especially the presumption of paternity,<sup>341</sup> incest prohibitions,<sup>342</sup> and other incidents of marriage that connect children to their biological parents.<sup>343</sup> If it is reasonable for the Commonwealth of Massachusetts to maintain the distinction between natural marriage and same-sex marriages, then surely reasonable jurors could conclude that an evangelical Protestant innkeeper or a school operated by Roman Catholic nuns enjoys the liberty to refrain from abrogating that distinction.

Third, the parties have a constitutional right to have any remaining dispute submitted to a civil jury. What the owner's actual motivation was and whether it is a valid reason are fact questions. And because the owner's property right and the customer's license are common law rights, the jury trial right pertains to their adjudication. Statutory and equitable rights (which are more properly called concessions of privilege) are entirely creations of positive law or the exercise of equitable discretion, respectively, and may therefore be adjudicated by whatever proceeding is appropriate to the venue.<sup>344</sup> By contrast, rights and duties that precede positive law in their origin and that are not inherently equitable, especially customary common law rights and duties, are specified and settled as conclusive judgments by the institution that the common law has always employed for the purpose, the jury.<sup>345</sup> The fundamental right to a jury trial is an important security for those rights that are part of our fundamental law.

The Supreme Court of the United States has muddled this distinction in part with its "public rights" exception to the Seventh

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341. *E.g.*, MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1) (2016).

342. *E.g.*, ch. 272, § 17; *Nguyen v. Holder*, 21 N.E.3d 1023, 1025-26 (N.Y. 2014) (Smith, J., concurring).

343. *See generally* MacLeod, *Rights, Privileges, and the Future of Marriage Law*, *supra* note 50, at 71-72.

344. *E.g.*, *Stevenson v. King*, 10 So. 2d 825, 826 (Ala. 1942); *Franchise Tax Bd. v. Superior Court*, 252 P.3d 450, 452 (Cal. 2011); *Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 752-53 (Ill. 1994); *State v. Burns*, 602 N.W.2d 477, 482-84 (Neb. 1999); *Young v. City of LaFollette*, 479 S.W.3d 785, 793 (Tenn. 2015).

345. *E.g.*, *Ex Parte Moore*, 880 So. 2d 1131, 1137 (Ala. 2003); *People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 843-44 (Cal. 1951); *Wisden v. Superior Court*, 21 Cal. Rptr. 3d 523, 527 (Cal. Ct. App. 2004); *Anzaldúa v. Band*, 550 N.W.2d 544, 554 (Mich. Ct. App. 1996), *aff'd*, 578 N.W.2d 306 (Mich. 1998); *FUD's, Inc. v. State*, 727 A.2d 692, 695-99 (R.I. 1999).

Amendment trial right,<sup>346</sup> and in part because it has mistakenly characterized some common law civil rights as statutory and public rights.<sup>347</sup> This confusion has spread to some state courts, which, when interpreting their state constitutions, have failed to identify the common law foundations of discrimination norms in public accommodations.<sup>348</sup> Nevertheless, the U.S. Supreme Court has correctly held that either the owner or the licensee may invoke the Seventh Amendment jury trial right in a civil rights dispute concerning access to a public accommodation.<sup>349</sup> And many state courts have been even clearer that the civil jury trial right attaches to civil rights disputes that sound in common law doctrines, such as property and contract norms,<sup>350</sup> that vindicate common law rights and duties,<sup>351</sup> such as property rights,<sup>352</sup> or that arise out of an action, right, or duty that is “analogous to”<sup>353</sup> or a “modern variant of”<sup>354</sup> a common law action, right, or duty. And the jury trial right attaches even if the action is adjudicated before a nondiscrimination commission.<sup>355</sup>

#### D. Mediating the Boundaries of Rights and Wrongs: The Civil Jury

If the reader is now persuaded (or at least open to the idea) that the source of the difficulty is not public accommodations law, we can look elsewhere for sources. The public accommodations doctrine went off course when state and federal legislatures and judges pulled

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346. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450-55 (1977).

347. See generally *Bell v. Maryland*, 378 U.S. 226 (1964). See *id.* at 255-57 (Douglas, J., concurring); *id.* at 293-94 (Goldberg, J., concurring).

348. See, e.g., *Stonehill Coll. v. Mass. Comm'n Against Discrimination*, 808 N.E.2d 205, 215 n.16 (Mass. 2004); *Franklin Lodge of Elks v. Marcoux*, 825 A.2d 480, 489-90 (N.H. 2003).

349. See *Curtis v. Loether*, 415 U.S. 189, 195-96 (1974).

350. See, e.g., *Loomis Elec. Prot., Inc. v. Schaefer*, 549 P.2d 1341, 1345 (Alaska 1976); *Broward Cty. v. La Rosa*, 505 So. 2d 422, 424 (Fla. 1987); *Hoshijo v. Caracaus*, 284 P.3d 932, 939-43 (Haw. Ct. App. 2012); *State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288, 291-93 (Tex. 1975).

351. See, e.g., *FUD's, Inc. v. State*, 727 A.2d 692, 698 (R.I. 1999).

352. See, e.g., *La Rosa*, 505 So. 2d at 424; *Hoshijo*, 284 P.3d at 939-43; *Hanlon v. Town of Milton*, 612 N.W.2d 44, 49 (Wis. 2000).

353. *State v. O'Malley*, 95 S.W.3d 82, 86 (Mo. 2003).

354. *Id.* at 87.

355. See *SCI Mgmt. Corp. v. Sims*, 71 P.3d 389, 397-98 (Haw. 2003).

it into the realm of public administration.<sup>356</sup> Severed from its native institutions of license and civil jury, the doctrine was separated from practical reason<sup>357</sup> and placed in the hands of rule-bound bureaucrats—nondiscrimination commissioners, executive agency officials, administrators of state-run universities—to which adjudication of public accommodations questions has increasingly been entrusted for the last half century or so. In their hands, a customer's license is always transformed into an absolute claim-right if the customer identifies as a racial or sexual minority; one searches in vain for a case in which a nondiscrimination commission has *not* found unlawful discrimination.<sup>358</sup>

In the hands of nondiscrimination commissars, the positive rule against discrimination on certain prohibited bases is almost universally transformed into a conclusive judgment that the owner has violated the rule. There is nothing left to adjudicate, and the owner's dominion is extinguished without reference to the owner's reasons for action; reasonableness has nothing to do with it. Indeterminacy is eliminated in part by bending facts toward the desired outcome. Nondiscrimination commissions have not yet shown themselves capable of rendering factual findings reliably consistent with the evidence. Indeed, they create the impression that

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356. Epstein observes that the 1964 Civil Rights Act “authorizes administrative action by various government agencies, most notably the Department of Justice, the Office of Civil Rights in the Department of Education, and the Equal Employment Opportunity Commission.” Epstein, *Freedom of Association*, *supra* note 3. And he reports that there “are civil rights divisions in virtually every government agency, most notably in the agencies that regulate housing, education, and employment.” *Id.*

357. Epstein notes:

Substantively, the application of the antidiscrimination norms is not tethered by any requirement that the government or a private claimant show there was any conscious intent to discriminate. It is easy for administrative agencies and courts to impose sanctions on practices that look innocent enough in themselves, but which are said to have a disparate impact on any of various groups—often measured only by statistical inference, without any direct evidence.

*Id.*

358. This author perceives that such commissions are not always truly adjudicatory bodies, but rather are often advocates for claimants that are entrusted with investigatory, prosecutorial, and adjudicatory powers. One court characterized the advocacy of a nondiscrimination commission colorfully, “Anxious to fulfill its destiny as destroyer of discrimination, the Commission made ready to do battle, apparently to provide surcease for the sensitivities of those whom they cleft ‘Complainants.’” *Prince George’s Cty. v. Greenbelt Homes, Inc.*, 431 A.2d 745, 746 (Md. Ct. Spec. App. 1981).

they will find illegal discriminatory motive no matter what the evidence shows.<sup>359</sup>

A classic example is *Attorney General v. Desilets*,<sup>360</sup> discussed above, which began in the Massachusetts Commission Against Discrimination (“Commission”). The Desilets testified that they were willing to rent to anyone, married or unmarried.<sup>361</sup> What they could not do in good conscience was facilitate fornication. This testimony was uncontroverted.<sup>362</sup> Nevertheless, the Commission found probable cause to believe that the Desilets had discriminated against Lattanzi and Tarail on the basis of marital status.<sup>363</sup> The Commission’s fact finding was picked up by the Attorney General of Massachusetts, who filed suit against the Desilets on behalf of the complaining, cohabitating couple.<sup>364</sup> And it was adopted uncritically by the trial court, which ruled that “the Attorney General had established a prima facie case of housing discrimination based on marital status” in violation of a state nondiscrimination statute.<sup>365</sup> The trial court then granted summary judgment for the Desilets on the tenuous ground that the First Amendment Free Exercise Clause entitled the Desilets to discriminate on that prohibited basis.<sup>366</sup> When the Attorney General appealed the trial court’s summary judgment ruling to the Massachusetts Supreme Judicial Court, the Commission’s counterfactual finding of fact was thus annealed in the record.<sup>367</sup>

The Court vacated and remanded, ruling that the Commonwealth could require the Desilets to violate their conscience if it could articulate a compelling interest for doing so.<sup>368</sup> The majority briefly mentioned the predicate factual finding that the Desilets had in fact discriminated on the basis of marital status.<sup>369</sup> But it dismissed rather nonchalantly the Desilets’ argument “that they are not discriminating on the basis of marital status but rather on the

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359. In addition to the cases cited above and the *Desilets* case discussed below, see *Viering v. Fla. Comm’n on Human Relations*, 109 So. 3d 296, 298-99 (Fla. Dist. Ct. App. 2013).

360. *Att’y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994).

361. *Id.* at 235.

362. *Id.*

363. *Id.*

364. *Id.*

365. Brief for Plaintiff–Appellant at \*2-3, *Att’y Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (No. SJC 06284), 1993 WL 13156912.

366. *Id.* at \*3.

367. *Desilets*, 636 N.E.2d at 243.

368. *Id.*

369. *Id.* at 235.

basis of conduct and that consequently they are not discriminating in a way forbidden by” the statute.<sup>370</sup> “There is no merit to this argument,” the majority declaimed.<sup>371</sup> It reasoned that:

[A]nalysis of the defendants’ concerns shows that it is marital status and not sexual intercourse that lies at the heart of the defendants’ objection. If married couple A wanted to cohabit in an apartment owned by the defendants, they would have no objection. If unmarried couple B wanted to cohabit in an apartment owned by the defendants, they would have great objection. The controlling and discriminating difference between the two situations is the difference in the marital status of the two couples.<sup>372</sup>

This is a mischaracterization of the Desilets’ reasoning. The difference between couple A and couple B under the Desilets’ religiously informed policy is that the two couples are engaging in different conduct; marital status is only derivatively significant. The error is exposed by a hypothetical. Had two Roman Catholics nuns, having taken vows of chastity, applied to lease an apartment from the Desilets, they would have qualified under the Desilets’ policy though they were unmarried. For the same reason, had an adulterous couple, both married to other people, sought to rent an apartment they would have been declined though they were married. So, the Desilets’ policy did not prevent leasing to unmarried people. The Desilets objected to being forced to facilitate unmarried sexual intercourse, a particular kind of conduct.

In dissent, Justice O’Connor correctly observed,

In keeping with their sincerely held religious beliefs, the defendants consider an unmarried couple’s living together in a sexual relationship to be an offense against God. Also in keeping with their sincerely held religious beliefs, the defendants consider enabling or assisting another in the commission of an offense against God to be itself an offense against Him. Responding to those religious convictions, and out of respect for the will of God, the defendants refused to rent an apartment to an unmarried couple living in a sexual relationship (cohabiting couple).<sup>373</sup>

The majority, as O’Connor pointed out, had invented a right of unmarried couples to use others’ property to engage in unmarried cohabitation and given that right priority over the fundamental right freely to exercise one’s religion, which is expressly guaranteed in the Massachusetts Constitution.<sup>374</sup>

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370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 246 (O’Connor, J., dissenting).

374. *Id.* at 246-47.

It does not take an expert in nondiscrimination rules to perceive the Desilets' reasoning. The high courts of Minnesota,<sup>375</sup> North Dakota,<sup>376</sup> and other states have proven themselves capable of perceiving the distinction between married and unmarried cohabitation. They have been aided not by commissions and administrative agencies, which have uniformly proven incapable of grasping the distinction,<sup>377</sup> but rather by legislative history.<sup>378</sup>

This is not to suggest that owners are free to refuse to rent apartments for any reason. Of course the contours of a license to enter a leasehold or accommodation, and the correlative boundaries of the owner's right, must be specified in particular cases by some authority. Public authorities went wrong when they arrogated the power to perform this specification away from common law—private ownership, the license, and civil juries—and placed it in the hands of those experts who fail to perceive common-sense distinctions, such as the difference between marriage and non-marriage (see *Elane Photography v. Willock*),<sup>379</sup> orientation and action (see *Christian Legal Society v. University of California*),<sup>380</sup> and status and conduct (see *Attorney General v. Desilets*).<sup>381</sup> Those are distinctions that normal people—the people who own property and sit on civil juries—routinely perceive and act upon without difficulty.

The civil jury deserves reconsideration as an institution with potential to temper and resolve these conflicts in a principled way. In our legal tradition, the jury has long been viewed as both a representative of the conscience of the community and a bulwark of liberty. Its moral authority rests in its primary duty to discern, recognize, and declare the truth of the matter, whether the matter is a question of fact, a question of customary law, or a mixed question of fact and law.<sup>382</sup> Its friendship with liberty is thought to consist partly

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375. See, e.g., *State v. French*, 460 N.W.2d 2 (Minn. 1990).

376. See, e.g., *N.D. Fair Hous. Council v. Peterson*, 625 N.W.2d 551 (N.D. 2001).

377. See *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909, 912-14 (Cal. 1996); *French*, 460 N.W.2d at 4; *McFadden v. Elma Country Club*, 613 P.2d 146, 151 (Wash. Ct. App. 1980).

378. See *Peterson*, 625 N.W.2d at 559-62; *French*, 460 N.W.2d at 6-7.

379. 309 P.3d 53 (N.M. 2013).

380. 561 U.S. 661 (2010).

381. 636 N.E.2d 233 (Mass. 1994).

382. SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, I *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 147-49* (2d ed., Liberty Fund 2010) (1898).

in its sympathy with the customs and norms of the community, bearing the community's common sense.<sup>383</sup> Thus, it is the voice of both justice and conventional morality.

A judgment resting upon the jury's verdict is thought to result in neither merely order nor merely liberty, but ordered liberty. What Nathan Chapman calls "the early American jury's near-mythical status as 'the grand Bulwark of LIBERTY,'"<sup>384</sup> owes much to its resistance to overreaching governments, which Chapman recently chronicled,<sup>385</sup> and the (civil) jury's contributions to the virtues of civic republicanism, famously described by Tocqueville.<sup>386</sup> Yet the jury also secures liberty in a much more prosaic way by specifying its boundaries consistent with the requirements of reason, the customs of the community, and other demands of conventional and critical morality. Liberty specified in this way is less likely to devolve into license than absolute liberty, and therefore poses a lesser threat to the common good.

In a morally pluralistic age, it is sometimes denied that the community has any conscience to be expressed. Nor, if there is a community conscience, is there much confidence that the jury is capable of expressing it. For example, Robert Vischer concedes that the jury does not impose oppressive, top-down norms and is therefore less likely to threaten liberty than the state. But he thinks the notion of the jury as community conscience is "unhelpful."<sup>387</sup> Without a shared understanding of wrongs, only our positive laws can be said to identify "sins," Vischer suggests.<sup>388</sup> Therefore, it is not the jury verdict but rather the judge's instructions to the jury that can be said to express the community conscience, to the extent that any such conscience exists.

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383. Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 163-64 (2002); STONER, *supra* note 10, at 93-94.

384. Chapman, *supra* note 168, at 191 (quoting JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 49 (1986) (quoting Maryland Resolves, 28 Sept. 1765, in Maryland Votes and Proceedings 10 (Sept. 1765)).

385. Chapman, *supra* note 168, at 201-12.

386. "Juries, especially civil juries, help to instill into the minds of all the citizens something of the mental habits of judges, which are exactly those which best prepare the people to be free." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 320 (Gerald E. Bevan trans., Penguin 2003) (1835).

387. VISCHER, CCG, *supra* note 4, at 32.

388. *Id.* at 31.

Yet the jury does not only apply positive law to the facts of cases. It also applies common law. As shown in previous Parts, much of that common law, and the positive law derived from it, is partly indeterminate in a way that not only invites, but actually requires the jury to exercise moral judgment and also directs that judgment at the boundaries. Examples abound. Reasonableness standards exist throughout the law, as do standards that require juries to adjudicate what intentions and actions are outrageous, unconscionable, or simply wrong. These standards are either undetermined or partially under-determined as legal norms until the jury determines all or some of their content. But they are not meaningless.

In other words, the jury makes moral judgment as part of its normal function because many legal standards constitute exclusionary reasons that are not fully absolute, not completely peremptory, but only partly or categorically exclusionary of first-order reasons for action. The jury is authorized and required to sift through many, or even all, of the first-order reasons offered as justifications by the parties, and to judge which of those first-order reasons for action are wrongful and which are right. This does not require any particular theological commitment. It simply requires jurors to exercise practical reason and draw upon their wisdom about the common good.

## VII. CONCLUSION

The resources to resolve the conflict between conscience and sexual identity are at hand. Though perhaps a little dull and dusty from lack of use, they have been sharpened somewhat by renewed scholarly interest in property as a meaningful, normative institution and by the United States Supreme Court's reinvigorated property jurisprudence over the last couple of decades. Common law norms and institutions can help us construct a moral marketplace in which principles of justice are vindicated and pluralism allows individuals and communities to flourish.