

A ROOM FOR “ADAM AND STEVE” AT MRS. MURPHY’S BED AND BREAKFAST: AVOIDING THE SIN OF INHOSPITALITY IN PLACES OF PUBLIC ACCOMMODATION

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Abstract

This article aims to encourage a vital and evolutionary step forward in understanding how multifaceted legal processes shape, and should shape, thinking about gay and lesbian couples within religious communities and the body politic. The article begins by providing context that illustrates the place-based and diffuse nature of an ongoing culture war between civil rights and religious freedom, further exposing the painful irony inherent in using misinterpretations of the Sodom and Gomorrah parable to reinforce inhospitality. The article describes a state-by-state patchwork of nondiscrimination laws governing places of public accommodation and explores the Jim Crow origins of the “Mrs. Murphy” exception that has been incorporated into a handful of state nondiscrimination laws. The article then examines how existing legal frameworks address claims of sexual orientation discrimination alongside defenses based upon religious freedom. Finally, this article seeks to accelerate an emerging trend toward including sexual orientation as a protected category in our nation’s nondiscrimination laws, by highlighting an opportunity to counter religious misinterpretations currently reflected in the prevailing cultural narrative.

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I. Re-Introducing “Adam and Steve”

Since at least the 1970s, the phrase “Adam and Eve, not Adam and Steve” has been used by conservative Christians (and others) to express opposition to civil rights claims by gays and lesbians.² During Save Our Children, Inc.’s campaign against a 1977 Dade County, Florida ordinance adopted to prohibit discrimination based upon sexual orientation, singer Anita Bryant appeared at a rally in Little Havana. Addressing the gathered crowd, Bryant said: “The Cuban people left one enemy to come to a free country. It would break my heart if Miami became another *Sodom and Gomorrah* and you would have to leave.”³ During debate over the Civil Rights Restoration Act of 1988, the Reverend Jerry Falwell invoked the same biblical story by denouncing the proposed legislation as a “Civil Rights Sodom and Gomorrah Act.”⁴ Nearly a decade later, Professor (and former Court of Appeals judge)

2 Mark G. Toulouse, *Muddling Through: The Church and Sexuality/Homosexuality*, in *HOMOSEXUALITY, SCIENCE, AND THE “PLAIN SENSE” OF SCRIPTURE* 6, 22 n.37 (David L. Blach ed., 2000). A former dean of the Brite Divinity School at Texas Christian University, Reverend Toulouse observes that Jerry Falwell used this phrase during a 1979 press conference. *Id.* (citing *CHRISTIANITY TODAY*, 16 Nov. 1979, at 48); Stuart Grudgings, *Evangelist Jerry Falwell Dies at 73*, *REUTERS*, May 15, 2007, <http://www.reuters.com/article/2007/05/15/us-usa-falwell-idUSN1542579420070515?sp=true> (reporting that Moral Majority founder Jerry Falwell was “[f]ond of quipping that the Bible referred to Adam and Eve, not Adam and Steve” in his battles against homosexuality); see also Judy Klemesrud, *Equal Rights Plan and Abortion Are Opposed by 15,000 at Rally; Like a Black Baptist Church*, *N.Y. TIMES*, Nov. 20, 1977, <http://select.nytimes.com/gst/abstract.html?res=F10F12F73F581A718DDDA90A94D9415B878BF1D3> (contending that the phrase “Adam and Steve” first appeared on a protest sign at a November 19, 1977, rally in Houston, Texas). Although this phrase is sometimes attributed to Anita Bryant, she instead referred to “Adam and Bruce” during the Save Our Children, Inc. protest against a Dade County ordinance that prohibited discrimination based upon sexual orientation. Toulouse, *supra*, at 22 n.37. See also Panel 11 of *Days Without Sunshine: Anita Bryant’s Anti-Gay Crusade*, *STONEWALL NAT’L MUSEUM & ARCHIVES*, <http://www.stonewall-library.org/anita/panel11.html> (last visited Sep. 30, 2011) (quoting Bryant, “If homosexuality were the normal way, God would have made Adam and Bruce.”). Approximately seven years before Bryant, a San Francisco graffiti writer apparently wrote: “If God had wanted homosexuals, he would have created Adam and Freddy.” Toulouse, *supra*, at 22 n.37 (citing *CHRISTIANITY TODAY*, 4 Dec. 1970, at 40–41). More than a quarter of a century later, during debates on the Defense of Marriage Act in 1996, anti-gay Senator Jesse Helms quoted an unnamed Baptist minister when he used the phrase “‘Adam and Eve’ not ‘Adam and Steve’” on the Senate floor. Marc R. Poirier, *The Cultural Property Claim Within the Same-Sex Marriage Controversy*, 17 *COLUM. J. GENDER & L.* 343, 354 n.38 (2008) [hereinafter Poirier, *Cultural Property Claim*] (citing Sen. Jesse Helms, in *SAME-SEX MARRIAGE PRO & CON: A READER* 21 (Andrew Sullivan ed., rev. ed. 2004)); see also Jay Michaelson, *Chaos, Law, and God: The Religious Meanings of Homosexuality*, 15 *MICH. J. GENDER & L.* 41, 48 n.20 (2008) [hereinafter Michaelson, *Chaos, Law, and God*] (observing that the widespread cliché is now available on bumper stickers, t-shirts, and more).

3 FRED FEJES, *GAY RIGHTS AND MORAL PANIC: THE ORIGINS OF AMERICA’S DEBATE ON HOMOSEXUALITY* 130 (2008) (emphasis added).

4 JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* 358 n.55 (1991); see also ROBERT H. KRAPPOL & CHARLES H. LIPPY, *THE EVANGELICALS: A HISTORICAL, THEMATIC, AND BIOGRAPHICAL GUIDE* 137

Robert Bork published his book *Slouching Towards Gomorrah*, which refers to “angry activists . . . of homosexuality” as one of the many “disadvantage[ous]” outgrowths of “the Sixties generation’s fixation on equality[.]”⁵ More recently, the Rev. Dr. Clenard H. Childress, Jr., senior pastor of The New Baptist Calvary Church in Montclair, New Jersey, wrote:

And now we are even seeing homosexuality bandied about as a civil right that should be guaranteed under the Constitution similar to some of the rights being sought through the modern “Civil Rights Movement.” They are not the same, but be that as it may, the same Jesus condemned Sodom and Gomorrah for their lifestyle.⁶

This ongoing conflict between religious convictions and civil rights for the lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) community is particularly ironic in the context of discrimination against homosexual couples by proprietors of bed and breakfast establishments (B&Bs). The B&B industry itself recognizes that “[t]he tradition of extending hospitality to traveling strangers goes back to the earliest recorded history for almost all religions and cultures worldwide.”⁷ Yet B&B owners have repeatedly invoked religious convictions to justify their refusals to accommodate gay and lesbian couples.⁸ Many of these proprietors appear to believe that the story of Sodom and Gomorrah condemns homosexuality, even though numerous scholars and commentators have explained that the parable instead provides a dire warning about the sins of selfishness and inhospitality.⁹ But the irony does not end there.

(1999) (“For Falwell, . . . any legal action making homosexuality appear normal or natural and therefore acceptable invites divine judgment on the nation more severe than what Scripture describes as the destruction of Sodom and Gomorrah.”).

5 ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 52, 54 (1996).

6 Clenard Childress, *Why Homosexuality Is Wrong*, RENEW AMERICA, May 5, 2011, <http://www.renewamerica.com/columns/childress/110505>.

7 *History of the B&B Industry in the United States*, BEDANDBREAKFAST.COM, <http://www.bedandbreakfast.com/about/pressFaq.aspx> (last visited July 31, 2011) [hereinafter *History of B&Bs*].

8 See, e.g., *infra* notes 68–70, 82, 89, 94, 98, 112, 117, 121, 126, 130, and accompanying text.

9 See, e.g., *infra* notes 139–140, 145–148, and accompanying text.

A. The Discriminatory Origins of the “Mrs. Murphy” Exemption to Federal Law Prohibiting Discrimination in Places of Public Accommodation

The prohibition against discrimination in places of public accommodation under Title II of the Civil Rights Act of 1964 (Title II)¹⁰ resulted from a legislative compromise that

10 See 42 U.S.C. § 2000a (2006). The subsection entitled “Equal access” provides that “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of *any place of public accommodation, as defined in this section*, without discrimination or segregation on the ground of race, color, religion, or national origin.” *Id.* § 2000a(a) (emphasis added). The term “place of public accommodation” is later defined as follows:

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment

(A)

(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or

(ii) within the premises of which is physically located any such covered establishment, and

(B) which holds itself out as serving patrons of such covered establishment.

42 U.S.C. § 2000a(b) (emphasis added). The provision is entitled “Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.” *Id.*

codified exclusionary policies rooted in our nation's infamous Jim Crow era.¹¹ In order to pass the proposed bill,¹² proponents of this federal legislation created a so-called "Mrs. Murphy" exemption that allows resident owners of small, transient accommodations to discriminate against prospective patrons. This provision defines "place of public accommodation" to include "any inn, hotel, motel or other establishment which provides lodging to transient guests," *except* for "an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence[.]"¹³

During the congressional debates, Senator George D. Aiken of Vermont suggested that Congress "integrate the Waldorf and other large hotels, but permit the 'Mrs. Murphys,' who run small rooming houses all over the country, to rent rooms *to those they choose*."¹⁴ During the 1960s, the image of an "ancient widow operating a three or four room tourist home who would, by force of the bill, be required to accommodate transients without

11 State and local "Jim Crow" laws mandated racial segregation in "public facilities, in response to the enactment of federal civil rights laws after the Civil War:

Jim Crow has been said to have established an etiquette of discrimination. It was not enough for blacks [and other "colored" persons, including but not limited to Filipinos] to be second class citizens, denied the franchise and consigned to inferior schools. Black subordination was reinforced by a racist punctilio dictating separate seating on public accommodations, separate water fountains and restrooms, separate seats in courthouses, and separate Bibles to swear in black witnesses about to give testimony before law. The list of separations was ingenious and endless. Blacks became like a group of American untouchables, ritually separated from the rest of the population.

Raymond T. Diamond & Robert J. Cottrol, *Codifying Caste: Louisiana's Racial Classification Scheme and the Fourteenth Amendment*, 29 LOY. L. REV. 255, 264–65 (1983), quoted in CRITICAL RACE THEORY: THE CUTTING EDGE 152 n.15 (Richard Delgado ed., 1995).

12 Harry T. Quick, *Public Accommodations: A Justification of Title II of the Civil Rights Act of 1964*, 16 W. RES. L. REV. 660, 672 (1965), cited in James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 609 & nn.15–16 (1999).

13 See 42 U.S.C. § 2000a(b)(1) (2006) (emphasis added).

14 ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 51 (1990), cited in Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1136–37 (2010) (emphasis added); see also Walsh, *supra* note 12, at 605 n.3. "Mrs. Murphy" appeared again during debate on the federal Fair Housing Act of 1968 (i.e., Title VIII), see 42 U.S.C. § 3603(b)(2); however, this article focuses on places of public accommodation as distinguished from housing.

regard to race”¹⁵ resonated with the average American.¹⁶ According to Senator (and, later, Vice President) Hubert Humphrey of Minnesota:

The so-called Mrs. Murphy provision results from a recognition of the fact that a number of people open their homes to transient guests, often not as a regular business, but as a supplement to their income. The relationships involved in such situations are clearly and unmistakably of a much closer and more personal nature than in the case of major commercial establishments.¹⁷

Harvard Law School professor Joseph William Singer subsequently explained that the right of a business to exclude customers has “less than dignified origins” in the Jim Crow period.¹⁸ According to Singer, this judicially-crafted right accomplished a “*change in the law* [that] had the effect—and without doubt the purpose—of enabling businesses to continue to serve white customers while choosing to exclude black customers.”¹⁹ More specifically, Singer argues that the courts “redistributed property rights in order to promote

15 Quick, *supra* note 12, at 672, *cited in* Walsh, *supra* note 12, at 608 n.13 (emphasis omitted). *But see* Walsh, *supra* note 12, at 613 (“Forcing Mrs. Murphy to rent to those she would otherwise reject would not open her doors to the public. She has already chosen to open them.”).

16 Loevy, *supra* note 14, at 52, *cited in* Walsh, *supra* note 12, at 609 n.14.

17 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 1154, 1194 (Bernard Schwartz ed., 1970), *quoted in* Walsh, *supra* note 12, at 608 & nn.10–11.

18 Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1294 (1996) (quoting Justice Morris Pashman’s opinion in *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982)). Professor Singer clerked for Justice Pashman from 1981 to 1982. *See Joseph William Singer*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/faculty/directory/index.html?id=69> (last visited June 30, 2011). *See also* Bell v. Maryland, 378 U.S. 226, 296–97 (1964) (Goldberg, J., concurring), *cited in* Singer, *supra*, at 1294. For a definition of “Jim Crow,” *see supra* note 11.

19 Singer, *supra* note 18, at 1295 (emphasis added). “[T]here is a substantial argument that the duty to serve the public extended to all businesses that held themselves out as open to the public.” *Id.*; *see also* H.R. REP. NO. 88-914 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2495, 1963 WL 4735, at *77.

[E]ven if freedom of association is considered to be affected to some degree by the application of title II, there is no question that the courts will uphold the principle that the right to be free from racial discrimination outweighs the interest to associate freely *where those making the claim of free association have knowingly and for profit opened their doors to the public.*

Id. (emphasis added).

a racial caste system”²⁰ by taking “a property right belonging to the public—an easement of access to businesses open to the public with a concomitant duty on businesses to serve the public—and replac[ing] it with a business right to exclude[.]”²¹

The Mrs. Murphy exemption stems from a belief that the nature of small B&Bs (and similar places of public accommodation for transient guests) is more intimate and personal than major commercial establishments.²² Although sexual orientation is not a protected category under Title II, a growing number of states and localities have extended protection to gays and lesbians under their respective public accommodations laws.²³ However, a handful of these jurisdictions have also adopted Mrs. Murphy exemptions analogous to federal law, essentially authorizing discriminatory practices against all protected categories (including, but not limited to, gays and lesbians).²⁴

B. “Place-Based” and “Diffuse” Responses to the Perceived Conflict Between Religious Freedom and Civil Rights for the LGBTQI Community

Dukeminier Award-winning professor Marc Poirier is a leading scholar in numerous fields including law, gender, and sexuality.²⁵ Professor Poirier contends that the “beachhead federalism” inherent in the state-by-state patchwork of civil rights laws described above is simply the manifestation of an ongoing societal culture war, or *Kulturkampf*,²⁶ the core dynamics of which are both place-based and diffuse²⁷: “place-based” in the sense that “the *Kulturkampf* is also engaged at lower jurisdictional levels—city, county, public

20 Singer, *supra* note 18, at 1295 & n.33.

21 *Id.* at 1295 & n.32.

22 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS, *supra* note 17.

23 *See infra* note 174.

24 *See infra* note 177.

25 *See Faculty Profile, Marc R. Poirier, SETON HALL LAW*, http://law.shu.edu/Faculty/display-profile.cfm?customel_datapageid_4018=22647 (last visited June 25, 2012) (noting that Professor Poirier is the Martha Traylor Research Scholar at Seton Hall Law and won his second Dukeminier Award in 2008 for authoring one of the year’s best law review articles in the field of law and sexual orientation).

26 *See generally* Marc R. Poirier, *Same-Sex Marriage, Identity Processes, and the Kulturkampf: Why Federalism Is Not the Main Event*, 17 TEMP. POL. & CIV. RTS. L. REV. 387, 387–88 (2008) [hereinafter Poirier, *Federalism Not the Main Event*]; Jay Michaelson, *On Listening to the Kulturkampf, or How America Overruled Bowers v. Howick, Even Though Evans v. Romer Didn’t*, 49 DUKE L.J. 1559 (2000) [hereinafter Michaelson, *Listening to the Kulturkampf*].

27 Poirier, *Federalism Not the Main Event*, *supra* note 26, at 390–91.

university”²⁸—and “diffuse” as a result of the “mobility of signal” that has been made possible by the internet age.²⁹

Among other things, Poirier argues that applying nondiscrimination laws to privately owned businesses held open to the public serves an important function—namely, helping to establish the “presence”³⁰ and visibility that is needed to produce greater equality for same-sex couples over time.³¹ Similarly, writer-scholar-activist Jay Michaelson³² observes that some commentators believe Christian thinking about homosexuality will evolve just as it did with respect to slavery: “While prior to the war, Christians were divided as to whether the Bible condoned or forbade slavery, today almost none would say that the Bible approves of slavery in the American context.”³³

Michaelson explains that “the case for homosexuality should be a positive moral one, not just a negative liberal case for formal equality.”³⁴ Suggesting that purely legal efforts likely will not be sufficient to address issues relating to homosexuality,³⁵ he exhorts gay

28 *Id.* at 390 & n.17 (citing cases).

29 *Id.* at 396, 404–05 (discussing the breadth of diffusion made possible by “mobility of signal” during the internet age).

30 *Id.* at 391, 397, 403–04, 411–13, 416–17, 419. *But see* Poirier, *Cultural Property Claim*, *supra* note 2, at 365 nn.91–93, 383 & n.154 (examining ways in which the presence and visibility of legally recognized same-sex unions could be understood to contaminate a traditionalist ritual and culture); *see also id.* at 381, 396 n.209, 414. *Accord* Michaelson, *Chaos, Law, and God*, *supra* note 2, at 110 (“the more ‘gay rights’ is about marriage, the more even moderates will be . . . against it”).

31 Poirier, *Federalism Not the Main Event*, *supra* note 26, at 406 & n.105.

32 Jay Michaelson has been a visiting professor at Boston University Law School (2007–08), held teaching positions at Yale University and City College of New York, and was a Golieb Fellow in legal history at NYU Law School. *About Jay Michaelson*, JAYMICHAELSON.NET, <http://www.jaymichaelson.net/about/> (last visited June 25, 2012).

33 Michaelson, *Chaos, Law, and God*, *supra* note 2, at 100–01 & nn.189–91 (footnotes omitted).

34 *Id.* at 116 n.228; *cf.* Josiah N. Drew, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-Discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 *BYU J. PUB. L.* 287, 289 (2002) (“gay rights advocates should look to religion rather than spurn religion in their quest for equality”); *id.* at 308–13 (proposing a “culture shift” that builds upon the common history of persecution and prejudice suffered because of religion and sexual orientation).

35 Michaelson, *Chaos, Law, and God*, *supra* note 2, at 106 & n.201 (citing Larry Catá Backer, *Constructing a “Homosexual” for Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 *TUL. L. REV.* 529, 568–86 (1996), and William N. Eskridge, Jr., *Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion*, 57 *FLA. L. REV.* 1011, 1029–39 (2005), regarding religious influences on secular law in the area of sexuality); *see also id.* at 109 & n.213 (citing Nathaniel Persily

rights supporters to “embrace the moral and the religious, because that is how most people seem to conceive of the issue.”³⁶ Prior to her appointment as Commissioner of the Equal Employment Opportunity Commission (EEOC), Georgetown University law professor Chai Feldblum likewise observed that:

Those who advocate for laws prohibiting discrimination on the basis of sexual orientation tend to talk simply about “equality.” Those who seek to stop such laws from coming into existence, or who seek religious exemptions from these laws, tend to talk about “morality” and/or “religious freedom.” These groups tend to talk past each other, rather than with each other.³⁷

Accordingly, Feldblum posits that “[t]he only way to justify prohibiting . . . landlords and business owners from discriminating against gay people is to make the prior moral assessment that acting on one’s homosexual orientation is not so morally problematic as to justify private parties discriminating against such individuals in the public domain.”³⁸

et al., *Gay Rights*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 234, 255–56 (Nathaniel Persily et al., eds., 2008), for the observation that “the public is influenced more by broad signals and media coverage than actual holdings”).

36 Michaelson, *Chaos, Law, and God*, *supra* note 2, at 112; *see also* Kathleen Sands, *Homosexuality, Religion, and the Law*, in HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA 3, 17 (Jeffrey Siker ed., 2006) (“For those who oppose gay rights, . . . an explicit reliance on religion in their judicial battles soon may become counterproductive. In the battle for gay rights, the opposite may be the case.”); *id.* (observing that both *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), reject morals legislation and “a number of scholars now contend that all morals legislation, whether religiously based or not, runs afoul of the Establishment clause”).

37 Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 62–63 (2006); *cf.* Michaelson, *Chaos, Law, and God*, *supra* note 2, at 101 (“much of our culture’s ‘debate’ about homosexuality more closely resembles a shouting match among different world views separated by a common language”). President Barack Obama appointed Professor Feldblum to the U.S. Equal Employment Opportunity Commission in March 2010; her term is scheduled to expire on July 10, 2013. Chai Feldblum, *Commissioner*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/feldblum.cfm> (last visited Nov. 11, 2011).

38 Feldblum, *supra* note 37, at 85–86; *see also* Peter Lineham, *Genesis 19: Sodom*, ANGLICANTAONGA (June 30, 2010), http://anglicantaonga.org.nz/Features/sodom#_ftnref (“[W]hen scripture is used savagely to destroy people’s identity and values and to create in them a complete conflict between their identity and their faith, then the damage to Christian ministry and evangelism is massive. I know from the work I am constantly engaged in holding [B]ible studies and outreach for gay people along with [m]y brothers and sisters at Auckland Community Church. Again and again we confront the combination of the discovery of sexual identity and the denial of faith.”).

Meanwhile, the cultural performance³⁹ continues. The push and pull between gay civil rights and religious freedoms experienced in judicial and legislative arenas (sometimes described as equality versus morality) illustrates the tensions inherent in this ongoing culture war.

C. A Framework for Further Analysis

Part II of this article sets the context for further analysis by recounting recent incidents of alleged discriminatory conduct against gay and lesbian couples at bed and breakfast establishments, or B&Bs. These examples help to illustrate both legal and emotional responses in the ongoing Kulturkampf between religious beliefs and civil rights for gays and lesbians.⁴⁰ Part II then exposes the irony inherent in relying upon the biblical parable of Sodom and Gomorrah (i.e., the sin of inhospitality) to justify discrimination in places of public accommodation.⁴¹ This part concludes by describing a long-standing misinterpretation of the Nativity Scene, in order to reinforce the recurring biblical value of hospitality.⁴²

Part III provides a bridge to the subsequent legal analysis by: first, acknowledging arguments that judicial resolution of the conflict between religious freedom and equality for the LGBTQI community is a “zero-sum” game, but concluding that prohibitions against discrimination in places of public accommodation because of sexual orientation do not compel infringement upon religious beliefs;⁴³ second, listing the growing number of states (and localities) that prohibit such discriminatory conduct;⁴⁴ and third, identifying

39 See, e.g., Eric K. Yamamoto et al., *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 17 & n.45 (1996) [hereinafter Yamamoto, *Cultural Performance*] (quoting Sally E. Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 892 (1991)); *id.* at 20 n.50 (quoting Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 658 (1991), for the proposition that “a ‘cultural performance,’ and more specifically ‘a court’s cultural performance,’ as we use the term, addresses a performance (actions, interactions) that in some fashion impacts upon the ways in which often differing communities construct their frameworks, however shifting and regenerating, ‘within which a range of choices and values [about the subject or event portrayed] can be considered and evaluated[.]’”).

40 See *infra* notes 54–138 and accompanying text (Part II.A–B).

41 See *infra* notes 139–148 and accompanying text (Part II.C).

42 See *infra* notes 149–159 and accompanying text (Part II.D).

43 See *infra* notes 160–167 and accompanying text.

44 See *infra* notes 169–174 and accompanying text.

the handful of states that provide an exception analogous to the so-called “Mrs. Murphy” exemption under federal law.⁴⁵ Part III concludes by describing the Jim Crow origins of the Mrs. Murphy exemption, as a prelude to analyzing the legal issues addressed when this cultural performance plays out in our nation’s courts.⁴⁶

In Part IV, this Article briefly analyzes constitutional challenges to public accommodation laws based upon religious liberties that may be raised by B&B owners including freedom of speech, freedom of association (intimate and expressive), as well as “hybrid rights.”⁴⁷ Part IV also considers the impact of Religious Freedom Restoration Acts adopted in some states.⁴⁸

Finally, Part V seeks to move beyond debates about equality by explicitly addressing how the legal process contributes to evolving public understandings of the moral and religious elements inherent in the ongoing cultural conflict.⁴⁹ It aims to encourage a vital and evolutionary step forward in understanding how multifaceted legal processes shape, and should shape, thinking about gays and lesbians (not to mention bisexual, transgender, queer, and intersex persons) within religious communities and the body politic. In the context of discrimination in places of public accommodation, a unique opportunity⁵⁰ exists to transform public consciousness by framing gay rights claims and arguments through a

45 See *infra* notes 177–179 and accompanying text.

46 See *infra* notes 181–182 and accompanying text.

47 See *infra* notes 183–238 and accompanying text (Part IV.A–C).

48 See *infra* notes 239–258 and accompanying text (Part IV.D).

49 See *infra* notes 259–308 and accompanying text (Parts V, V.A).

50 The author did not uncover any judicial decisions or pleadings that discuss the sin of inhospitality as revealed in the parable of Sodom and Gomorrah. See *infra* Part II.C. However, two amici curiae briefs reflect the master-narrative of this oft-incorrectly-told biblical story. See, e.g., Brief for Center for the Original Intent of the Constitution as Amicus Curiae Supporting Respondent at *8, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 674354 (“Contrary to the assertion in the Historians Brief at 5, Paul’s lack of reference to Sodom does not negate his condemnation of what we now term sodomy. . . . The Leviticus prohibition against sodomy made no reference to the destruction of the city of Sodom, but the command was clear nevertheless. Those who drafted early state and colonial laws drew on this Biblical background as the best means to express what was otherwise deemed unspeakable.”) (footnotes omitted); *id.* at *8 n.9 (“[a]lthough the Apostle Paul did not refer to Sodom and Gomorrah in *Romans* 1:26–27 (the ‘crime against nature’ passage); later in the same epistle, Paul referenced the towns of Sodom and Gomorrah in an obviously negative light. See *Romans* 9:29.”); Motion of Charles H. Keating, Jr., for Leave to File A Brief as Amicus Curiae in Support of Respondent with Brief Annexed at *16, *Heller v. New York*, 413 U.S. 483 (2003) (No. 71-1043), 1972 WL 137574 (arguing that the Blue Movie and other hard core films represented “autotypical evidence that we are presently pursuing the moral standards of biblical Sodom and Gomorrah”).

counter-narrative⁵¹ that addresses enduring misinterpretations of the Sodom and Gomorrah parable previously discussed in Part II. More specifically, Part V explores the sin of inhospitality through the lens of courts and legislatures as “sites of cultural performances” where contestations over laws bear the potential for transforming public consciousness about topics of controversy.⁵²

51 In an unpublished decision, the United States District Court for the District of Idaho acknowledged the assertion in a prison litigant’s affidavit that numerous Christian denominations share his view that homosexuality is not a sin. *Mintun v. Peterson*, No. CV06-447-S-BLW, 2010 WL 1338148, at *6 (D. Idaho Mar. 30, 2010); *see also id.* at *8, *27 (denying the institutional Defendants’ motion for summary on both Plaintiff’s First Amendment free exercise claims as well as his claims under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc).

RLUIPA provides that “[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest[] and . . . is the least restrictive means of furthering that compelling governmental interest.”

Id. at *7 (quoting 42 U.S.C. § 2000cc-1(a)). Plaintiff claimed that the correctional employee defendants violated his rights by: (1) prohibiting him from singing, preaching, teaching, or testifying during the investigation of his complaint, (2) recommending that he not return to the choir or the fellowship, and (3) refusing to allow him to organize a fellowship for gay Christians. *Id.* at *8. However, the court ultimately granted the Defendants’ Renewed Motion for Summary Judgment on Plaintiff’s RLUIPA and Free Exercise Clause claims, explaining that

there were eight other Christian worship services Plaintiff could have attended (including two Pentecostal services), Defendants’ decisions to keep Plaintiff from attending the non-denominational fellowship and to refuse to implement a service for gay Christians did not substantially burden his religious exercise. Plaintiff makes only general allegations about the environments at these other services and offers no evidence that other inmates requested or even desired a gay Christian worship service.

Mintun v. Peterson, No. 1:06-CV-447-BLW, 2010 WL 3540117, at *7 (D. Idaho Sept. 3, 2010). One additional amicus curiae brief presents a counter-narrative concerning the story of Sodom and Gomorrah; however, that pleading does not directly discuss the “sin of inhospitality” as presented in this Article. *See* Brief for Professors of History George Chauncey et al. as Amici Curiae Supporting Petitioners at *5, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152350 (“‘Unnatural acts’ is the older category, because it comes directly from Paul in *Romans* 1, but Paul does not associate such acts with (or even mention) the story of Sodom (*Genesis* 19) and appears not to have considered that story to be concerned with same-sex activity. (Cf. *Ezekiel* 16:49–50, where the sin of Sodom is the arrogant and inhospitable refusal to share wealth and leisure.) Later Christian authors did combine *Romans* 1 with *Genesis* 19, but they could not agree on what sexual practices were meant by either ‘unnatural acts’ or ‘sodomy.’”).

52 *See infra* notes 309–323 and accompanying text (Part V.B); *see, e.g.*, Michaelson, *Chaos, Law, and God*, *supra* note 2, at 113–14, 118 & n.234; *id.* at 116 n.228 (citing Feldblum, *supra* note 37, at 62–85, 100–122);

Finally, the Article circles back to the Mrs. Murphy exception introduced above in Part I.A. and discussed further in Part III, alongside the place-based and diffuse cultural performances involving B&Bs detailed in Parts II.A. and II.B., in order to conclude by reinforcing the need to transform public conscience and pursue justice through social healing.⁵³

II. Refusing to Accommodate Gay and Lesbian Couples at Bed & Breakfast Establishments (B&Bs) for Religious Reasons

B&Bs in the United States “began as informal, inexpensive places to stay with shared baths and minimal amenities, [but] they are now largely luxury accommodations with high levels of comfort, service, and luxury.”⁵⁴ The website *bedandbreakfast.com* lists nearly 20,000 B&Bs in the country as of 2010.⁵⁵ However, this B&B boom unfortunately has also increased the likelihood that travelers may encounter proprietors citing religious convictions to justify refusals to accommodate prospective gay and lesbian patrons.⁵⁶ The stigmatizing injuries that result, and the accompanying denials of equal opportunity, are felt as strongly by persons suffering discrimination on the basis of their sexual orientation as by those treated differently because of their race or other protected status.

The next two subsections provide examples of alleged discriminatory conduct both within the United States and abroad, illustrating the place-based and diffuse nature of our ongoing culture war between equality and religious freedom. These incidents are taking place in diverse locations across the globe, suggesting an increased awareness about civil

see also Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375, 1414 (2010) (concluding that “negative intuitions, impulses, and instincts about lesbians and gay men loom large as barriers to equality, . . . we do ourselves a disservice by leaving these intuitions underexplored”; adding that pressing questions “about the role of intuitions in decisionmaking, the reasons for their stickiness, and the strategies advocates might deploy to grapple with them . . . demand our vigorous engagement”).

53 *See infra* notes 309–328 and accompanying text (Parts V.B, VI).

54 *History of B&Bs, supra* note 7 (observing that “[t]he 1980s saw a rapid growth in the numbers of B&Bs in the U.S., but despite considerable media coverage, advertising was expensive, and getting listed in the many B&B guidebooks took a year or more. The growth of the Internet provided the biggest boost to the B&B industry, and leveled the playing field so that a bed and breakfast could afford to compete with area hotels”).

55 *Id.*

56 *See infra* notes 57–138 and accompanying text. Because bisexual, transgender, queer, and intersex identities are less apparent to the casual observer, this article focuses on incidents of discrimination involving gay and lesbian couples.

rights claims against B&B owners that is empowering more and more gay and lesbian couples to seek justice and equality. However, enduring reliance upon religious beliefs by proprietors who seek to exclude gays and lesbians remains essentially unaddressed and unresolved through these legal processes. The third subsection exposes the painful irony of relying upon the biblical parable of Sodom and Gomorrah (i.e., the sin of inhospitality) to justify discrimination in places of public accommodation. The fourth subsection then draws upon common misinterpretations of the Nativity Scene to highlight the fact that hospitality is a recurring biblical value and theme.

A. The Ongoing Culture War Pitting Equality Against Religious Conviction: Incidents of Alleged Discrimination Involving B&Bs in the United States

The following examples illustrate both the legal and emotional responses that arise in relation to the ongoing conflict between religious beliefs and civil rights in our country. In early 2011, two separate B&Bs in Illinois refused service to the same gay couple.⁵⁷ Todd

⁵⁷ Ross Forman, *Gay Couple Takes Action Against B&Bs*, WINDY CITY TIMES (Chicago), Mar. 2, 2011, <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=30763>; see also James Scalzitti, *Gay Couple File Complaints After Refused Space to Host Their Ceremony*, CHICAGO SUN-TIMES, Feb. 23, 2011, <http://www.suntimes.com/news/metro/3958932-418/gay-couple-file-complaints-after-bed-and-breakfasts-refuse-to-host-their-ceremony.html>; Gary Barlow, *Complaints Filed Against B&Bs over Civil Unions Refusal*, GAY CHICAGO MAGAZINE, Feb. 25, 2011, available at http://www.edgeboston.com/news////116597/complaints_filed_against_b&bs_over_civil_unions_refusal; Timothy Fitz, *Gay Illinois Couple Files Lawsuit After Businesses Refuse to Host Gay Wedding Ceremony*, CHICAGO NEWS REPORT (Feb. 22, 2011, 10:39 PM), <http://www.chicagonewsreport.com/2011/02/gay-illinois-couple-files-lawsuit-after.html>; Laurie Higgins, *Homosexuals Sue Christian Bed and Breakfast Owner for Refusing "Civil Union" Ceremony*, ILLINOIS FAMILY INSTITUTE (Feb. 24, 2011, 7:46 AM), <http://www.illinoisfamily.org/news/contentview.asp?c=35169>; Michael Jones, *Two Illinois Bed and Breakfasts Say Gay Customers are Sinful and Immoral*, CHANGE.ORG (Feb. 24, 2011), <http://news.change.org/stories/two-illinois-bed-breakfasts-say-gay-customers-are-sinful-and-immoral>; Ann Rubin, *Same-Sex Couple Says Bed and Breakfast Won't Host Civil Union Ceremony*, KSDK (Feb. 23, 2011, 11:54 PM), <http://www.ksdk.com/news/local/story.aspx?storyid=245659>; *Tsamis Law Firm Represents Gay Men Denied Civil Union Ceremony in Illinois*, TSAMIS LAW FIRM, P.C. (Feb. 19, 2011), <http://www.tsamislaw.com/civilunioncase.html> [hereinafter Tsamis Press Release].

Five months after the Wathens filed their administrative complaints in Illinois, a lesbian couple filed a lawsuit against a bed and breakfast establishment in Vermont that allegedly refused to host their wedding reception. Complaint, *Baker v. Wildflower Inn*, No. 183-7-11 CACV (Vt. Sup. Ct. filed July 19, 2011), http://acluvt.org/legal/docket/files/baker_v_wildflower_inn/2011-07-13_complaint.pdf. The court denied the inn owners' motion to dismiss, permitted plaintiffs Kate Baker and Ming Linsley to seek an award of punitive damages against the defendants, and allowed the Vermont Human Rights Commission to intervene in the proceeding. *kestrel9000, Wildflower Inn: It Gets Worse*, GREEN MOUNTAIN DAILY (Apr. 14, 2012 7:56 AM), <http://www.greenmountaindaily.com/diary/8673/wildflower-inn-it-gets-worse>. The amended complaint alleges that the inn's owners reaffirmed their discriminatory policy in a statement explaining that "[w]e do not . . . feel that we can offer our personal services wholeheartedly to celebrate the marriage between same sex couples

Wathen and his partner Mark Wathen⁵⁸ contacted the Beall Mansion Bed and Breakfast in Alton, Illinois, and the TimberCreek Bed and Breakfast in Paxton, Illinois,⁵⁹ days after Illinois Governor Pat Quinn signed the Illinois Religious Freedom Restoration and Civil Union Act into law.⁶⁰ The couple had held a commitment ceremony eight years earlier, but

because it goes against everything we as Catholics believe in.” Third Amended Complaint at para. 29, *Baker v. Wildflower Inn*, No. 183-7-11 (Vt. Sup. Ct. filed Mar. 5, 2012), http://acluvt.org/legal/docket/files/baker_v_wildflower_inn/2012-03-05_proposed_third_amended_complaint.pdf.

58 Todd’s partner initially requested that his identity not be publicly disclosed, highlighting an issue of privacy that sometimes results in the suppression of complaints about unlawful discriminatory conduct. Scalzitti, *supra* note 57. Mark Wathen had not previously come out to his employer and apparently was concerned that disclosure of his sexual orientation might create unwanted problems at work; however, because he received an “amazing” response after coming out to his employer, Mark publicly identified himself two days later. Betty Tsamis, *The Other Side*, PRIDE LAW (Feb. 24, 2011, 11:22 AM), <http://pridelaw.blogspot.com/2011/02/other-side.html>. According to Mark:

Everyone who I love and care for knows about my sexual orientation. My family and friends all have known about Todd and our relationship. They have been supportive every step of the way. I chose not to disclose my sexual orientation, to my employer, because my sexual orientation should not be an issue at my place of employment. I don’t want to be judged by my sexual orientation; I want to be judged by my work performance.

I was planning on disclosing my sexual orientation [to] my employer when Todd and I have our civil union [later this summer], because of wanting to put Todd on my health insurance. But, I decided to tell them before they found out in the media[.]

Forman, *supra* note 57 (noting that Mark was “happy and relieved” by the supportive response from the owner of the company he works for).

59 Fitz, *supra* note 57.

60 Illinois Religious Freedom Protection and Civil Union Act, Public Act 096-513, 2010 Ill. Legis. Serv. P.A. 96-1513 (S.B. 1716) (West) (effective June 1, 2011) [hereinafter Civil Union Act], *available at* <http://www.ilga.gov/legislation/publicacts/fulltext.asp?name=096-1513&GA=96&SessionId=76&DocTypeId=SB&DocNum=1716&GAID=10&Session=>; see Press Release, Pat Quinn, Governor of Illinois (Jan. 31, 2011), *available at* <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=9194>. Among other things, Illinois’ Civil Union Act provides as follows:

Section 15. Religious freedom. Nothing in this Act shall interfere with or regulate the religious practice of any religious body. Any religious body, Indian Nation or Tribe or Native Group is free to choose whether or not to solemnize or officiate a civil union.

Section 20. Protections, obligations, and responsibilities. A party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.

they “had been waiting . . . to have the same rights and benefits as a married couple.”⁶¹

Under Illinois law, discrimination because of sexual orientation in places of public accommodation is generally prohibited.⁶² However, the Beall Mansion website lists five units for rent⁶³ and further states that its proprietors live on the premises,⁶⁴ arguably qualifying the B&B for the so-called “Mrs. Murphy exception” available under Illinois law.⁶⁵ The Beall Mansion reportedly responded to the Wathens’ inquiry by stating via email that “[a]t this point we will just be doing traditional weddings . . . as opposed to civil unions.”⁶⁶ In a subsequent email to a television news station, the owners of Beall Mansion stated:

We apologize for any misunderstanding.

Illinois['] civil union bill is not just for same-sex couples. It’s for opposite sex couples as well. At this time we don’t do civil unions (same sex or

Civil Union Act, *supra*.

61 Scalzitti, *supra* note 57.

62 See 775 ILL. COMP. STAT. 5/1-102, 5/5-102(A), and 5/5-102(B) (West, Westlaw through 2011 Reg. Sess.). On or about September 23, 2011, the Illinois Department of Human Rights issued the couple a notice of right to sue. Jeremy Dryn, *Homosexual Couple Prepares to Sue Two Illinois Bed and Breakfasts*, LIFE SITE NEWS.COM (Sep. 23, 2011), http://www.lifesitenews.com/news/homosexual-couple-prepares-to-sue-two-illinois-bed-and-breakfasts?utm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=67b6f83413-LifeSiteNews_com_US_Headlines09_23_2011&utm_medium=email.

63 *Guest Rooms*, THE BEALL MANSION, <http://www.beallmansion.com/Leisure/guestroomsandrates.html> (last visited July 18, 2011) (listing four rooms and a suite).

64 *Frequently Asked Questions*, THE BEALL MANSION, <http://www.beallmansion.com/about/faq.html#bborboutiquehotel> (last visited July 19, 2011) (“Do the owners live on the premises? Yes, and we love it.”). The Beall Mansion homepage identifies James and Sandy Belote as “Host and Hostess.” See THE BEALL MANSION, <http://www.beallmansion.com/> (last visited July 18, 2011); *Your Host & Hostess*, THE BEALL MANSION, <http://www.beallmansion.com/about/hostandhostess.html> (last visited July 18, 2011) (“Jim & Sandy Belote are frequent public speakers for the bed & breakfast and hospitality industry.”).

65 775 ILL. COMP. STAT. 5/5-501(1) (West, Westlaw through 2011 Reg. Sess.) (defining “Place of public accommodation” as including, but not limited to, “an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains *not more than 5 units* for rent or hire *and* that is *actually occupied* by the proprietor of such establishment *as the residence of such proprietor*.”) (emphasis added). See also *supra* text accompanying note 12 (quoting the Mrs. Murphy exemption under the federal law prohibiting discrimination in places of public accommodation).

66 Scalzitti, *supra* note 57.

opposite sex). Nor do we do wedding rehearsal dinners (same sex or opposite sex[.]) Nor do we do many other types or events (same sex or opposite sex[.]) Additional events and services may or may not be added to our repertoire at some time in the future.

All couples (same sex and opposite sex) and singles (male and female) have come and enjoyed our elegant overnight accommodations and all are most genuinely welcome.⁶⁷

By comparison, TimberCreek owner Jim A. Walder reportedly replied to Mark Wathen via email stating: “We will never host same-sex civil unions. We will never host same-sex weddings even if they become legal in Illinois. We believe homosexuality is wrong and unnatural based on what the Bible says about it. If that is discrimination, I guess we unfortunately discriminate[.]”⁶⁸ When informed about Illinois’ recently adopted Civil Union Act, Walder replied, “The Bible does not state opinions, but facts. It contains the highest laws pertinent to man. It trumps Illinois law, United States law, and global law should there ever be any.”⁶⁹ Three days later, Walder sent Wathen an unsolicited email containing links to Bible passages: “Hi Todd, I know you may not want to hear this, but I thought I would send along a couple of verses in Romans 1 detailing how the Creator of the Universe looks at the gay lifestyle. It’s not to[o] late to change your behavior.”⁷⁰

67 Rubin, *supra* note 57; Barlow, *supra* note 57. *But see* Scalzitti, *supra* note 57 (observing that the B&B touted its “elegant accommodations for pleasure or business, weddings and receptions . . . corporate retreats . . . anniversary parties, fund-raising events, bridal and baby showers”).

68 Scalzitti, *supra* note 57; *see also* Fitz, *supra* note 57.

69 Barlow, *supra* note 57; Scalzitti, *supra* note 57.

70 Barlow, *supra* note 57; Scalzitti, *supra* note 57; *see also* Jones, *supra* note 57; Tsamis Press Release, *supra* note 57. It is unclear which version of the Bible, and which specific verses, Walder forwarded to Wathen. In any event, the verses most often cited for this proposition are set forth in the American Standard Version of the Bible as follows:

For this cause God gave them up unto vile passions: for their women changed the natural use into that which is against nature:

and likewise also the men, leaving the natural use of the woman, burned in their lust one toward another, men with men working unseemliness, and receiving in themselves that recompense of their error which was due.

Romans 1:26–27. But see Michaelson, *Chaos, Law, and God*, *supra* note 2, at 69 & n.103 (citing ROBIN SCROGGS, *THE NEW TESTAMENT AND HOMOSEXUALITY* 29–43, 114, 115 (1983), and Mark D. Smith, *Ancient Bisexuality and the Interpretation of Romans 1:26–27*, 64 *J. AM. ACAD. RELIGION* 225, 226–27 (1996), for the proposition based on the original Greek language version of these passages, that “Paul was not condemning homosexuality in

Even assuming that TimberCreek's proprietors "actually occup[y]" the establishment as their residence, it does not appear that the Mrs. Murphy exception would apply to them because at least six units are listed for rent on the B&B's website.⁷¹ In a news report following announcements about the lawsuit, Todd Wathen observed: "First, I was shocked, then angry and hurt that these businesses would treat a customer this way, that they would try to put their religious beliefs even into this When I want to be a paying customer at a business . . . I should be able to use all the[ir] services and not have to pick and choose, because of who we are, and have the owners['] religious views come in between that."⁷² Wathen added, "When they talk to you like that you feel about an inch tall,"⁷³ and "I don't want no one else to have to go through something like this[.]"⁷⁴ Todd asserted further that he and Mark would not have minded being turned down, "If they'd just sent the e-mail back and said, 'Hey, I'm uncomfortable with this,' or 'I wouldn't be the best (place) for this, but I wish you luck'[.]"⁷⁵ Instead, Todd said he was "almost at the point where I'm scared of contacting anybody else. I don't want those (kind of) responses."⁷⁶

general, but . . . [what was then a] widespread and socially acceptable practice of pederasty [i.e., men having sex with young boys]").

71 Jim and Beth Walder are described as "Innkeepers" and Connie Bahler as "hostess" for their "upscale Christian country Bed & Breakfast." *TIMBERCREEK BED & BREAKFAST*, Home Page, <http://www.timbercreekbb.com/> (last visited July 16, 2012). In any event, their website lists six suites and a cabin, in addition to a "Gathering Room, Breakfast Room, Covered Porch, and Stone Patio[.]" *TIMBERCREEK BED & BREAKFAST*, Rooms and Rates, <http://www.timbercreekbb.com/rooms.htm> (last visited July 16, 2012).

72 Barlow, *supra* note 57.

73 Rubin, *supra* note 57.

74 *Id.*

75 Scalzitti, *supra* note 57.

76 *Id.* Another bed and breakfast in Alton helped to relieve at least some of Todd's anxiety by calling and offering to host the Wathens' civil union ceremony. Rubin, *supra* note 57 ("Wathen says he got a phone call today from another bed and breakfast in Alton offering to host his civil union ceremony. He says he's considering it. He and his partner were hoping to have the event in late June."); *see also* Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Provisions for Gay People Should Have Religious Exemptions*, 72 *BROOK. L. REV.* 125, 135 (2006) [hereinafter Koppelman, *You Can't Hurry Love*] ("If I am denied a . . . room . . . because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a . . . [another] room . . . from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens. That assault is not mitigated by the fact that others might not treat me in the same way."); *cf.* *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996).

To say that the prospective tenants may rent elsewhere is to deny them the full choice of available housing accommodations enjoyed by others in the rental market. To say they may rent elsewhere is also to deny them the right to be treated equally by commercial

A second example took place just one month later, when the Stafford House in Fairfax, Virginia,⁷⁷ allegedly refused to accommodate a legally married same-sex couple.⁷⁸ After having been together for thirty-five years, horse-breeder Russell Williams and physician David Schaeffer married in 2006, in Boston, Massachusetts.⁷⁹ When the Hanover, Pennsylvania couple tried to make reservations in February 2011 to facilitate their attendance at a nephew's wedding, they were denied a room because of their same-sex relationship.⁸⁰ According to Williams, Stafford House is a husband-and-wife operation and the wife told Schaeffer over the telephone, "Well, we don't accept non-traditional couples[.]" then remained firm in denying the reservation even after Schaeffer tried to "push back a bit[.]"⁸¹ Williams acknowledged that "[t]here were no harsh words, . . . [a]pparently, the husband is a minister and it's a religion-based policy that they have. And that was that."⁸²

Williams added that, "The first thing that popped into my head was now I knew how black people felt 50 years ago, . . . [i]t was bizarre. David felt the same way."⁸³ Despite feeling that he had faced discrimination, Williams asked sympathizers not to retaliate against the Stafford House owners: "I would not want to see the people at the B&B persecuted, . . . I think it's wrong and I think they're ignorant, but I hope that—and I've talked about this with a lot of friends—gay people should not retaliate against this kind of thing. I think we should just go ahead and do what we have to do to get our civil rights and make sure that people comply."⁸⁴

enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere.

Id. at 928.

77 See *Rooms and Amenities*, STAFFORD HOUSE BED & BREAKFAST, <http://www.staffordhouse.net/rooms.html> (last visited Nov. 10, 2011) (listing two rooms for rent).

78 Chris Johnson, *Va. B&B Rejects Gays, Couple Claims*, WASHINGTON BLADE, Mar. 22, 2011, <http://www.washingtonblade.com/2011/03/22/va-bb-rejects-gays-couple-claims/>.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.*

84 Johnson, *supra* note 78.

Although the State of Virginia does not prohibit discrimination because of sexual orientation (whether in places of public accommodation, employment, housing, or otherwise),⁸⁵ Stafford House owner Donna Stafford subsequently indicated that the B&B had changed its policy: “[w]e’re not going to put restrictions on anyone that stays.”⁸⁶ Although Stafford insisted that the prior policy was within the letter of all relevant state and local housing laws, she claimed that her B&B was already in the process of changing the policy prior to news reports about the incident.⁸⁷ Williams and Schaefer subsequently reserved a room at the Stafford House, adding that “[t]olerance doesn’t require agreement about everything and if they learned that across the river in Congress the whole country would be better off.”⁸⁸

A third incident took place approximately three years earlier in Honolulu, Hawai‘i. Aloha Bed & Breakfast (Aloha B&B) owner Phyllis Young refused to accommodate Diane Cervelli and Taeko Bufford because of their sexual orientation, later explaining that homosexuality is “detestable” and “defiles our land.”⁸⁹ Cervelli and Bufford were seeking accommodations near a friend whose newborn baby had been experiencing health issues.⁹⁰ After the friend recommended nearby B&Bs (including Aloha B&B), Cervelli contacted Aloha B&B in mid-October, then received an email from Young the same day affirming the availability of a room during the first week of January 2008.⁹¹ Cervelli telephoned Aloha B&B a few weeks later; Young confirmed that the room was still available, asked whether

85 See VA. CODE ANN. § 2.2-3901 (2011) (defining unlawful discriminatory practice as “[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability”); *id.* (“[T]he terms ‘because of sex or gender’ or ‘on the basis of sex or gender’ or terms of similar import when used in reference to discrimination in the Code and acts of the General Assembly include because of or on the basis of pregnancy, childbirth or related medical conditions. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all purposes as persons not so affected but similar in their abilities or disabilities.”).

86 Johnson, *supra* note 78.

87 *Id.*

88 *Id.*

89 Complaint at 8, *Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 ECN (Haw. 1st Cir. Ct. Dec. 19, 2011) [hereafter *Cervelli Complaint*], available at http://www.lambdalegal.org/in-court/legal-docs/cervelli_hi_20111219_complaint.

90 *Id.* at 5–6.

91 *Id.* at 6.

anyone would be staying with Cervelli, then requested the second person's name.⁹² When Cervelli responded that "her name is Taeko Bufford," Young pointedly asked "Are you lesbians?"⁹³ Young then refused to accommodate the couple, repeatedly explaining that she felt uncomfortable renting a room to homosexuals based upon her personal religious views.⁹⁴ Cervelli and Bufford eventually rented a condo far from their friend's home, but were able to visit with her only a few times.⁹⁵ Following an administrative investigation of the complaint filed by Cervelli and Bufford, the Hawai'i Civil Rights Commission (HCRC) issued a Notice of Reasonable Cause to Believe That Unlawful Discriminatory Practices Have Been Committed on March 3, 2010.⁹⁶ On November 21, 2011, the HCRC issued notices of right to sue, after which Cervelli and Bufford timely filed their lawsuit.⁹⁷ Plaintiffs' counsel includes Lambda Legal, while the defendants' counsel includes the Alliance Defense Fund (an organization of attorneys representing people whose religious freedoms have been infringed upon).⁹⁸

92 *Id.*

93 *Id.*

94 *Id.* at 7.

95 Cervelli Complaint at 8.

96 *Id.* at 9. Hawai'i law prohibits discrimination on the basis of sexual orientation in places of public accommodation. Haw. Rev. Stat. § 489-3 (West, Westlaw through 2011 session). The term "[p]lace of accommodation" is defined to include "[a]n inn, hotel, motel, or other establishment that provides lodging to transient guests[.]" *Id.* § 489-2(2). Language analogous to the Mrs. Murphy exception available under federal public accommodations law is not included in this state law.

97 Cervelli Complaint at 9. On February 8, 2012, the Circuit Court for the First Circuit of the State of Hawai'i held a hearing then denied the defendant's motion to the lawsuit. *Cervelli v. Aloha Bed & Breakfast*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast> (last visited May 24, 2012). The court later rejected the defendant's attempt to appeal from that decision. Order Denying Defendant's Motion for Leave to Take Interlocutory Appeal of Order Denying Motion to Dismiss and for a Stay Pending Appeal, *Cervelli v. Aloha Bed & Breakfast*, Civ. No. 11-1-3103-12 (Haw. 1st Cir. Mar. 29, 2012), available at <http://hoohiki1.courts.state.hi.us/Search.jsp> (search "Case ID" for "1CC111003103"; then follow the "Document List" button; then follow the "0000033" hyperlink).

98 Cervelli Complaint at 1; see also Jennifer Sinco Kelleher, *Diane Cervelli and Taeko Bufford, Gay Couple, Sues Hawaiian B&B For Discrimination*, HUFFPOST L.A., Mar. 3, 2012, http://www.huffingtonpost.com/2011/12/19/diane-cervelli-taeko-bufford-lawsuit_n_1159190.html (noting Lambda Legal's assertion that Aloha B&B "is not on a list of properties approved for transient vacation unit or bed and breakfast use that have been issued nonconforming use certificates by Honolulu's Department of Planning and Permitting"); Minna Sugimoto, *Alliance Defense Fund to Defend Bed and Breakfast Owner Accused of Discrimination*, HAWAII NEWS NOW (Dec. 20, 2011), <http://www.hawaiinewsnow.com/story/16366607/alliance-defense-fund-to-defend-bed-and-breakfast-owner-accused-of-discrimination> (quoting ADF legal counsel Dale Schowengerdt for the argument that "no business owner should be forced to violate his or her religious beliefs because

A fourth example did not involve a refusal to accommodate based upon sexual orientation, but is likewise revealing with regard to the conflict between religious beliefs and civil rights for gays and lesbians. Local townspeople in Meade, Kansas, boycotted the Lakeway Hotel Bed and Breakfast after its (heterosexual) owners displayed a rainbow flag outside their business in 2006.⁹⁹ The B&B owners' twelve-year-old son gave them the flag after visiting a museum about the Wizard of Oz, explaining that the flag reminded him of the song "Over the Rainbow."¹⁰⁰ Lakeway owners J.R. and Robin Knight previously moved to Kansas from California, in order to pursue their dream of operating a B&B.¹⁰¹ They put the flag up as a "symbolic way to have their son nearby"¹⁰² after sending him back to California to live with his grandparents in order to "get away from" "closed minded bigots" they had encountered in Meade.¹⁰³ The townspeople subsequently interpreted the flag as representing support for gays, and "[t]he local radio station threatened to remove his ads if he didn't remove the flag."¹⁰⁴ When J.R. Knight refused, someone vandalized the flag and cut most of it down,¹⁰⁵ after which Knight vowed to replace the flag and keep it flying

someone is offended by those beliefs").

99 Laura Amato, *Bed and Breakfast Affected By Anti-Gay Town Boycott*, LAURA'S PLAYGROUND, http://www.lauras-playground.com/lakeview_hotel.htm (last visited July 19, 2011); see also *Rainbow Flag Causes Flap in Small Town*, LJWORLD.COM, Aug. 7, 2006, http://www2.ljworld.com/news/2006/aug/07/rainbow_flag_causes_flap_small_town/ [hereinafter *Rainbow Flag Flap*].

100 Amato, *supra* note 99; see, e.g., Judy Garland, *Over the Rainbow*, on THE WIZARD OF OZ: THE ORIGINAL MOTION PICTURE SOUNDTRACK (101 Distribution 2008). The song is often mistakenly referred to as "Somewhere Over the Rainbow."

101 *Rainbow Flag Flap*, *supra* note 99.

102 *Id.*

103 Amato, *supra* note 99.

104 *Id.*; see also *Rainbow Flag Flap*, *supra* note 99.

Local resident, Keith Klassen says the flag is a slap in the face to the conservative community of Meade. "To me it's just like running up a Nazi flag in a Jewish neighborhood. I can't walk into that establishment with that flag flying because to me that's saying that I support what the flag stands for and I don't[.]"

Austin Cline, *Kansas Bigots Show True Colors, Equate Rainbow Flag with Nazi Flag*, ABOUT.COM (Aug. 3, 2006), <http://atheism.about.com/b/2006/08/03/kansas-bigots-show-true-colors-equate-rainbow-flag-with-nazi-flag.htm>.

105 Amato, *supra* note 99 ("Last night, July 30, 2006 some 'person' cut it down, well most of it anyway. Robin & I want you all to know that as soon as we can get a replacement here, the rainbow will proudly fly again."); see also Fridays Child, *An Email from JR Knight of the Meade, KS Rainbow Flag Controversy*

as a protest against discrimination.¹⁰⁶

Indeed, two days after the Knights put up their flag, a lesbian couple moving from New York to Los Angeles showed up at their doorstep and told them that, “Driving across country they had been nervous about finding an inn for the night, [but] saw our flag and let out a sigh of relief.”¹⁰⁷ The Knights subsequently proclaimed, “Our new Rainbow flag will wave . . . [t]o all of the people traveling on hwy 54 who are afraid to stop in these hick towns because they don’t think they’ll be accepted or worse.”¹⁰⁸ Approximately five years later, however, the Lakeway Hotel Bed and Breakfast was “closed to the public and for sale.”¹⁰⁹

B. The Place-Based and Diffuse Nature of this Culture War is Further Illustrated by Allegations of Discrimination at B&Bs in Other Countries

The Kulturkampf between conservative religious beliefs and civil rights for gays and lesbians is certainly not confined to the United States. For example, in January 2011, a Bristol County Court in England awarded Martyn Hall and his civil partner Steven Preddy damages of £1,800—i.e., a little more than \$2,900—as a result of a discriminatory incident that took place in September 2008.¹¹⁰ Defendants Peter and Hazelmary Bull, owners and residents of the Chymorvah Private Hotel, believed—as Christians—that unmarried couples should not share a room.¹¹¹ The Bulls explained that they refused service to the same-sex couple based upon “a moral duty to our Lord to carry out his wishes and what

(Aug. 01, 2006, 03:12 PM), http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=364x1790349.

106 *Rainbow Flag Flap*, *supra* note 99; *see also* Amato, *supra* note 99 (“Any gay or lesbian people that do stop by will be treated with the best service I can give you. When this rainbow flag shreds, I will buy another one, and another one, and another one—just like my American flag, I’ll buy another one.”).

107 Amato, *supra* note 99.

108 *Id.*

109 *See* LAKEWAY HOTEL BED & BREAKFAST INN, <http://www.lakewayhotel.com/> (last visited Nov. 10, 2011).

110 *Gay Couple Win in Court After Being Denied B&B Room*, BBC NEWS ENGLAND, Jan. 18, 2011, <http://www.bbc.co.uk/news/uk-england-12215255> [hereinafter BBC News, *Gay Couple Win*]; *see also* *Court Finds Hotel Owners Discriminated Against Gay Couple*, EQUAL. & HUM. RTS. COMM’N (Jan. 18, 2011), <http://www.equalityhumanrights.com/news/2011/january/court-finds-hotel-owners-discriminated-against-gay-couple/> (observing that the Equality Act 2010 came into force on October 1, 2010, and “made marriage and civil partnership a protected characteristic”).

111 BBC News, *Gay Couple Win*, *supra* note 110.

he wants. We try to be fair in everything we do, but this item is our respect for married rights[.]”¹¹² The trial court judge reportedly acknowledged that “both sides hold perfectly honorable and respectable, albeit wholly contrary, views”;¹¹³ however, the judge concluded that the Bulls’ policy nevertheless violated laws banning discrimination based on sexual orientation.¹¹⁴

In response to a news story about the decision, Anthony Ryan sent a note to the *Guardian* threatening to shoot a number of people:

With regard to the recent so-called victory that evil sexual weirdos Steven Preddy and Martyn Hall had against decent law-abiding B&B owners Peter and Hazemary Bull It is my duty to inform your evil organization that, despite what the government says, according to the holy Christian Bible, homosexuality is in fact illegal. I have therefore decided to embark upon a campaign of terror against you Chief Executive Dame Ben Summerskill and all those that seek to support the so-called human rights of the Homosexual community It is going to give me great pleasure to put a bullet in the head of Dame Ben Summerskill, Steven Preddy and Martyn Hall and any other homosexual vermin that I have the misfortune to come across. . . . I suggest that the people mentioned in this email and indeed all evil bigoted homosexual scum start making their funeral arrangements.¹¹⁵

Passions were also inflamed among persons sympathetic to Messrs. Preddy and Hall. The B&B’s owners reportedly received abusive and menacing telephone calls, including

112 *UK Hotel Owners to Appeal Gay Couple Case*, CBN NEWS, Jan. 26, 2011, <http://www.cbn.com/cbnnews/world/2011/January/UK-BB-Owners-to-Appeal-Gay-Couple-Case/> [hereinafter CBN News, *UK Hotel Owners to Appeal*] (observing that the appeal is scheduled to be heard in late 2011).

113 *Id.* Among other things, “[t]he Equality Act 2010 (UK) prohibits discrimination . . . in provision of services, on grounds of . . . sexual orientation.” Elspeth Berry, *The Zone of Interaction Between Partnerships, LLPs and Human Rights in United Kingdom Law*, 11 HUM. RTS. L. REV. 503, 522 nn.12 & 16 (2011) (citing § 4 of the Equality Act, which entered into force on October 1, 2010).

114 CBN News, *UK Hotel Owners to Appeal*, *supra* note 112.

115 Kilian Melloy, “Terror” Threat Against British Equality Leader Results in Suspended Sentence, EDGE N.Y. (Sep. 9, 2011), <http://www.edgenewyork.com/index.php?ch=news&sc=&sc2=news&sc3=&id=124349> (“Ryan was sentenced to eight months in jail, but the sentence was suspended for a period of a year and a half.”).

nuisance calls to a hospital where Mr. Bull was recovering from heart surgery.¹¹⁶ When announcing their decision to appeal the ruling, Mrs. Bull noted that “Christianity is being marginalized in Britain. Much is said about ‘equality and diversity,’ but it seems some people are more equal than others.”¹¹⁷ Although the plaintiffs’ attorneys initially filed a cross-appeal concerning the proper method for calculating damages, they subsequently withdrew the erroneously-filed cross-appeal along with an explanation by the plaintiffs that they “have always believed that the original award was a fair one, and are not seeking any further compensation.”¹¹⁸

A second example from the United Kingdom involved an incident that took place in March 2010, and resulted in the filing of a lawsuit by a gay couple against the owners of a Cornish guesthouse less than two weeks after the Bristol County Court ruling.¹¹⁹ Upon arrival at the Swiss B&B, Michael Black and his partner, John Morgan, were turned away by owner Susanne Wilkinson despite having previously a reservation.¹²⁰ The B&B’s owner explained, “I don’t see why I should change my mind and my beliefs I’ve held for years just because the government should force it on me. I am not a hotel, I am a guest house and this is a private house.”¹²¹ According to patrons Michael Black and John Morgan, Mrs.

116 *Christian Hotel Owners Who Turned Away Gay Couple Face Business Ruin After Torment by Hate Callers*, DAILY MAIL, Jan. 26, 2011, <http://www.dailymail.co.uk/news/article-1350607/Christian-hotel-owners-turned-away-gay-couple-face-business-ruin.html>.

117 *Id.*

118 *Dramatic U-Turn as Gay Couple who Won £3,600 from Christian B&B Owners Ditch Taxpayer-Funded Fight for More Cash*, DAILY MAIL, May 9, 2011, <http://www.dailymail.co.uk/news/article-1365168/Gay-couple-won-3k-Christian-B-B-owners-ditch-taxpayer-funded-fight.html> (reporting that the filing was an “error in judgment” by the legal team from the taxpayer-funded Equality and Human Rights Commission, which represented the plaintiffs); *see also id.* (noting that the Newcastle-based Christian Institute footed more than £45,000—in excess of \$73,000—in legal bills for the defendants).

119 *Second Gay Couple Sue B&B After Being Turned Away by Owner who Said Her “Convictions” Didn’t Allow Two Men to Share a Bed*, DAILY MAIL, May 9, 2011, <http://www.dailymail.co.uk/news/article-1350764/Second-gay-couple-sue-B-amp-B-turned-away-owner-said-convictions-didnt-allow-men-share-bed.html>.

120 *Gay Couple Turned Away from B&B in Cookham*, BBC NEWS ENGLAND, Mar. 21, 2010, http://news.bbc.co.uk/2/hi/uk_news/england/8578787.stm [hereinafter BBC News, *Gay Couple Turned Away*].

121 *Id.*; *Tory Minister Backs Cookham B&B Owners Who Turned Away Gay Couple*, BUCKS FREE PRESS (Apr. 3, 2010, 9:48 PM), <http://www.bucksfreepress.co.uk/news/7984140>. The *Observer* website reportedly quoted Tory minister Chris Grayling at a meeting of the Centre for Policy Studies as follows:

I think we need to allow people to have their own consciences. I personally always took the view that, if you look at the case of should a Christian hotel owner have the right to exclude a gay couple from a hotel, I took the view that if it’s a question of somebody

Wilkinson “immediately acted in a cold, unwelcoming way” and it was “the first time either of us had experienced homophobia at first hand, despite being aged 56 and 62. We were shocked and embarrassed.”¹²² Mr. and Mrs. Wilkinson later received more than four hundred abusive and threatening emails, including a threat to burn down their house.¹²³ Black and Morgan responded by saying, “we’re horrified by, and totally condemn, the abuse and threats that the Wilkinsons have apparently received, and certainly haven’t had any hand in it.”¹²⁴

A third example occurred in the aftermath of the Swiss B&B incident, when a Scottish B&B owner acknowledged refusing service to a gay couple who wanted to share a double bed and would not accept a room with twin beds.¹²⁵ Cromasaig Bed and Breakfast owner Tom Forrest explained that he “do[es] not approve of the homosexual act and any act of intercourse should be between a man and a woman.”¹²⁶ He denied engaging in discrimination and explained, “We have people into our house, we have dinner with them, we learn about each other. Many become friends. Indeed, there are homosexual people who have become

who’s doing a B&B in their own home, that individual should have the right to decide who does and who doesn’t come into their own home.

If they are running a hotel on the high street, I really don’t think that it is right in this day and age that a gay couple should walk into a hotel and be turned away because they are a gay couple, and I think that is where the dividing line comes.

Id. Grayling was later passed over for the cabinet position of Home Secretary. Andrew Porter, *Coalition Government: David Cameron Appoints Theresa May as Home Secretary*, THE TELEGRAPH, May 12, 2010, <http://www.telegraph.co.uk/news/politics/david-cameron/7714718/Coalition-Government-David-Cameron-appoints-Theresa-May-as-Home-Secretary.html> (observing that Grayling “annoyed the party leadership with comments he made about a gay couple being turned away from a bed and breakfast, [and] seems to have been punished”).

122 BBC News, *Gay Couple Turned Away*, *supra* note 120.

123 *We’ve Been Vilified for Turning Away Gays, Say Christian B&B Couple*, DAILY MAIL, Mar. 23, 2011, <http://www.dailymail.co.uk/news/article-1259646/Gay-couple-turned-away-guest-house-owner-let-share-bed.html>.

124 Oliver Evans, *Gay Couple “Horrified” at Threats to Cookham B&B*, THIS IS LOCAL LONDON (Mar. 25, 2010, 3:40 PM), http://www.thisislocallondon.co.uk/news/5084315.Gay_couple__horrified__at_threats_to_B_B/.

125 *Row Continues Over Tory B&B Gay Ban Comments*, STV NEWS (Apr. 5, 2010, 12:19 GMT), <http://news.stv.tv/scotland/167877-row-continues-over-tory-bb-gay-ban-comments/>.

126 *Id.* (“It’s nothing to do with the [B]ible, it’s to do with nature. . . . It’s a lifestyle choice at the end of the day. You’re born black, you’re born white, that’s the way we are and that’s perfectly natural. But being gay is nothing more than a lifestyle choice.”).

friends, who say they would not insult us by insisting on sharing a bed in our house and come in support of what we have done.”¹²⁷ Forrest added that he feels “it’s about time that people decided to live and let live. What you want to do under your own roof is your own business. What I want to happen under my own roof should also be my business.”¹²⁸

A fourth incident took place in Canada. In March 2010, the British Columbia Human Rights Tribunal refused to dismiss a complaint involving the Riverbend Bed and Breakfast, which had cancelled a prior booking by Shaun Eadie and Brian Thomas after the B&B’s owners called the couple back to confirm suspicions that they were gay.¹²⁹ According to news reports, owner Les Molnar said that “to allow a gay couple to share a bed in my Christian home would violate my Christian beliefs and would cause me and my wife great distress,” then added that to allow the booking would be “encouraging something which I believe to be wrong according to my religious beliefs and my understanding of scripture.”¹³⁰

In declining to exercise his discretion to dismiss the complaint, Tribunal Member Murray Geiger-Adams explained that “balancing competing rights is a legally and factually complicated exercise, for which the Tribunal requires detailed evidence, including expert evidence, as to the nature, sincerity and importance of the beliefs involved, and the impact on all parties of a decision to reconcile the rights in any particular way.”¹³¹ An attorney for the owners confirmed that the B&B was closed as a result of the complaint and further noted that the retired couple receives “emails and threatening letters, nasty letters” every time the issue comes out in the press.¹³² A June 2010 hearing was postponed when the plaintiffs’

127 *Id.*

128 *Id.*

129 Brandy Spears, *Another B&B Demands the Right to Discriminate—Canada*, RATIONALSKEPTICISM.ORG (June 9, 2010, 4:19 PM), <http://www.rationalskepticism.org/news-politics/another-b-b-demands-the-right-to-discriminate-canada-t8301.html>.

130 *Id.*; see also *Canadian B&B Owners on Trial over Same-Sex Stance*, THE CHRISTIAN INST. (June 17, 2010), <http://www.christian.org.uk/news/canadian-bb-owners-on-trial-over-same-sex-stance/>.

131 *Eadie v. Molnar*, 2010 BCHRT 69, ¶ 23 (Can.), available at http://www.bchrt.bc.ca/decisions/2010/pdf/march/69_Eadie_and_Thomas_v_Molnar_and_others_2010_BCHRT_69.pdf; see also *id.* at ¶ 26 (holding that “it is not a respondent’s intention, but the effects of their conduct on a complainant, which is relevant in considering whether discrimination has occurred”), cited with approval in *Garrow v. Strata Plan LMS-1306*, 2012 BCHRT 4, ¶ 164 (Can.), available at http://www.bchrt.bc.ca/decisions/2012/pdf/jan/4_Garrow_v_Strata_Plan_LMS_1306_No_3_2012_BCHRT_4.pdf.

132 Mona Mattei, *Molnar Human Rights Hearing Postponed*, THE BOUNDARY SENTINEL (June 10, 2010), <http://boundarysentinel.com/node/6101>.

attorney became ill,¹³³ but the hearing eventually took place October 17-19, 2011.¹³⁴ The British Columbia Human Rights Tribunal (BCHRT) issued its decision on July 17, 2012, concluding that the complainants established a prima facie case of discrimination and the respondents failed to establish a bona fide reasonable justification for their discriminatory conduct; the BCHRT awarded a total of \$3,000 in dignitary damages and \$1,530 in actual damages associated with attending the hearing (travel and accommodation costs, in addition to lost wages).¹³⁵

As evidenced in these stories, the breadth of diffusion made possible by “mobility of signal” during the internet age¹³⁶ is arguably helping to establish the necessary “presence” and visibility leading toward equality for same-sex couples over time.¹³⁷ In other words, awareness about gays and lesbians around the world willing to pursue—and achieving some success with—civil rights claims against B&B owners (who rely upon religious beliefs to justify their refusals to accommodate same-sex couples) seems to be empowering other victims of discrimination to seek justice in administrative and judicial fora.¹³⁸ However,

133 Nathaniel Christopher, *Gay Rights vs. Religious Rights: Can Christian B&B Owners Refuse a Gay Couple a Room?*, XTRA, Nov. 3, 2011, at 9, available at <http://www.nathaniel.ca/blog/wp-content/uploads/2011/04/bedandbreakfast.pdf> (“A decision is not expected for several months due [to] a backlog at the tribunal.”).

134 Peter Baklinski, *Elderly B&B Couple Still in Limbo After Refusing Lodgings to 2 Homosexual Men*, LIFESITENEWS.COM (Oct. 20, 2011, 15:41 EST), <http://www.lifesitenews.com/news/elderly-bb-couple-still-in-limbo-after-refusing-lodgings-to-2-homosexual-me/>.

135 *Eadie v. Molnar*, 2012 BCHRT 247 (Can.), available at http://www.bchrt.bc.ca/decisions/2012/pdf/july/247_Eadie_and_Thomas_v_Riverbend_Bed_and_Breakfast_and_others_No_2_2012_BCHRT_247.pdf.

136 See Poirier, *Federalism Not the Main Event*, *supra* note 26, at 396, 404–05 (discussing the breadth of diffusion made possible by “mobility of signal” during the internet age).

137 See, e.g., Poirier, *Federalism Not the Main Event*, *supra* note 26, at 406 & n.105; *id.* at 391, 397, 403–04, 411–13, 416–17, 419.

138 The timing of the international and domestic incidents described above (*see supra* Part II.A–B) arguably suggest a loose analogy to a cultural shift currently taking place in France. In the wake of a New York chambermaid’s allegation that she was sexually assaulted/harassed by former International Monetary Fund chief, and putative French presidential candidate, Dominique Strauss-Kahn (DSK), “a behavior revolution in France is indeed underway[.]” Bruce Crumley, *In Post-DSK France, Minister Falls to Accusations of Sexual Harassment*, TIME (May 30, 2011, 10:37 AM), <http://globalspin.blogs.time.com/2011/05/30/in-post-dsk-france-minister-falls-to-accusations-of-sex-charges/> (noting, however, that “some observers are already warning that if the budding offensive by French women to call out predatory males unfolds too rapidly, it could produce a backlash seeking to safeguard the abusive status quo”); *see also id.* (quoting an anonymous French woman whose subsequent allegations of sexual harassment prompted another French minister to resign, “When I see that a little chambermaid is capable of taking on Dominique Strauss-Kahn, I tell myself I don’t have the right to stay silent[.]”). The charges against DSK in New York were later dismissed after the Prosecutor’s Office concluded that the alleged victim could not be believed beyond a reasonable doubt as a result of lies she

the relief provided through these legal processes does not effectively address or resolve the enduring conflict between civil rights and religious freedoms.

C. Correcting a Painfully Ironic Biblical Misinterpretation: The Wickedness that Destroyed Sodom and Gomorrah Was Not Homosexuality, but Sexual Violence and the Sin of Inhospitality

Peter Lineham poignantly laments, “Have not gay people a right to be distressed that the very passage that talks of a sin of inhospitality is used to reinforce inhospitality to them?”¹³⁹ Indeed, the story of Sodom and Gomorrah is “[o]ne of the most widely cited examples of sacred condemnation of homosexuality”¹⁴⁰ by persons opposed to civil rights for gays and

had told the prosecution and authorities. *Many Relieved, Others Outraged, that DSK Rape Charges Dropped*, CNN WORLD, Aug. 23, 2011, http://articles.cnn.com/2011-08-23/world/france.dsk.reaction_1_tristane-banon-anne-mansouret-david-koubbi?_s=PM:WORLD. After he was arrested and charged in New York, Ms. Tristane Banon filed charges of attempted rape and sexual assault against DSK in France based upon an incident that allegedly took place almost eight years earlier. Following an investigation, French prosecutors dropped the rape charge for lack of sufficient evidence because it was “one person’s word against another’s[.]” John Lichfield, *Dominique Strauss-Kahn “Guilty” of Sex Assault—But Escapes Shame of a Trial*, THE INDEPENDENT, Oct. 14, 2011, <http://www.independent.co.uk/news/world/europe/dominique-strausskahn-guilty-of-sex-assault-ndash-but-escapes-shame-of-a-trial-2370349.html>. During the investigation, DSK admitted sexually assaulting Ms. Banon, but he could not be prosecuted because the three year statute of limitations had expired. *Id.*

139 Lineham, *supra* note 38 (“it has been recognised by almost all commentators that this [i.e., Genesis 19] is not an anti-homosexual text”). See also *id.* & nn.4 & 5 (citing DERRICK SHERWIN BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 2–5 (Longmans Green 1995), and JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY, GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (U. Chicago Press 1980)). Lineham acknowledges that Derrick Bailey’s original 1955 publication overstated the case, but contends that Boswell more effectively developed the understanding that “the sin of Sodom was in fact a sin against the responsibility of hospitality” a quarter-century later. *Id.* (citing MICHAEL CARDEN, *SODOMY: A HISTORY OF A CHRISTIAN BIBLICAL MYTH* 73–76 (Equinox 2004)). Like Feldblum and Michaels, see *supra* notes 31–36 and accompanying text, Lineham argues further that “exploring the mis-hearing of the Sodom story is essential if we are to move on.” *Id.* (citing *Ezekiel* 16:49–50, *Matthew* 10:14–15 and *Luke* 10:10–12, to support the argument that Sodom’s sin was inhospitality).

140 Kathy Morton, *Stonewalling Social Justice: Sex, Sin, and Family Values in Sodom and Gomorrah*, RELIGION NERD (June 28, 2011), <http://religionnerd.com/2011/06/28/stonewalling-social-justice-sex-sin-and-family-values-in-sodom-and-gomorrah/> (“A contextual reading of the Genesis 19 narrative shows that what was of utmost importance at the time was maintaining strict hospitality codes Using the Sodom and Gomorrah account to condemn homosexuality without addressing the issues of social injustice, particularly the disregard for the welfare of young women, is a case of theological stonewalling. How ironic that the Stonewall Inn was the place where those so greatly oppressed by the interpretation of Genesis 19, as the definitive Biblical condemnation of homosexuality, finally defied that oppression.”); see also *id.* (contending that *Isaiah* 1:10–17 demonstrates that the “sin of Sodom and Gomorrah was worship divorced from social justice”).

lesbians. In this parable (Genesis 19),¹⁴¹ God rains fire and brimstone to destroy the cities of

In 1969, at a bar known as the Stonewall Inn in Greenwich Village, New York, NY, police conducted an early morning raid of one of the most prominent hangouts for homosexuals in the city. . . . Instead of docilely accepting their arrest in the face of these raids, the patrons of the Stonewall fought back against the police and attracted a group that began to riot. . . . That group continued to riot intermittently until it became a more organized effort to promote the idea that homosexuals should be able to live openly without fear of being arrested.

Anthony Marroney Noto, *Lawrence and the Morality of "Don't Ask, Don't Tell" After Lofton, Witt, and Cook: The Law Before and After Repeal*, 7 SETON HALL CIRCUIT REV. 155, 199 (2010) (citing DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (1st ed. 2004)).

141 In pertinent part, the parable provides as follows:

¹ And the two angels came to Sodom at even; and Lot sat in the gate of Sodom: and Lot saw them, and rose up to meet them; and he bowed himself with his face to the earth;

² and he said, Behold now, my lords, turn aside, I pray you, into your servant's house, and tarry all night, and wash your feet, and ye shall rise up early, and go on your way. And they said, Nay; but we will abide in the street all night.

³ And he urged them greatly; and they turned in unto him, and entered into his house; and he made them a feast, and did bake unleavened bread, and they did eat.

⁴ But before they lay down, the men of the city, even the men of Sodom, compassed the house round, both young and old, all the people from every quarter;

⁵ and they called unto Lot, and said unto him, Where are the men that came in to thee this night? bring them out unto us, that we may know them.

⁶ And Lot went out unto them to the door, and shut the door after him.

⁷ And he said, I pray you, my brethren, do not so wickedly.

⁸ Behold now, I have two daughters that have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes: only unto these men do nothing, forasmuch as they are come under the shadow of my roof.

⁹ And they said, Stand back. And they said, This one fellow came in to sojourn, and he will needs be a judge: now will we deal worse with thee, than with them. And they pressed sore upon the man, even Lot, and drew near to break the door.

¹⁰ But the men put forth their hand, and brought Lot into the house to them, and shut to the door.

¹¹ And they smote the men that were at the door of the house with blindness, both small and great, so that they wearied themselves to find the door.

Genesis 19:1–11 (American Standard Version).

Sodom and Gomorrah after its men gather at the door of Lot's home demanding to "know" (i.e., engage in sexual intercourse with) two strangers invited to stay in his home.

As explained by former Professor of New Testament and Head of the Biblical Department of the Near East School of Theology in Beirut, Dr. Kenneth Bailey,¹⁴² "[t]he more familiar we are with a biblical story, the more difficult it is to view it outside of the way it has always been understood. And the longer imprecision in the tradition remains unchallenged, the deeper it becomes embedded in Christian consciousness."¹⁴³ Along these lines, internationally-recognized Fred T. Korematsu Professor of Law and Social Justice Eric Yamamoto stresses that (i) articulating group harms and (ii) acknowledging "the deeply embedded prejudices in the stock stories we tell about others" are two important components in a search for justice that will foster social healing by recognizing "the historical roots of group-to-group grievances."¹⁴⁴ The harm identified by Lineham above results from socially-constructed prejudices against homosexuality that obscure the moral obligation to provide hospitality, which appears as a recurring theme and value throughout the Bible.

In an article included in his encyclopedia on homosexuality and religion, Jeffrey Siker explains that "the story of Sodom and Gomorrah appears to be more about same-sex rape and inhospitality than about homosexuality per se."¹⁴⁵ Siker contends further that "[e]ven most conservative Christians who oppose homosexual practices agree that the story of Sodom is not really about homosexuality, but addresses the wickedness of the people of the city because of their desire to commit sexual violence against two strangers who should be shown hospitality."¹⁴⁶ Jay Michaelson likewise observes that "[n]otwithstanding its familiar

142 See, e.g., *Dr. Kenneth Bailey, Biography*, SHENANGO.ORG, <http://www.shenango.org/Bailey/bio.htm> (last visited Aug. 1, 2011).

143 KENNETH E. BAILEY, *JESUS THROUGH MIDDLE EASTERN EYES: CULTURAL STUDIES IN THE GOSPELS* 25 (2008).

144 Eric K. Yamamoto, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 38, 48 (2007) [hereinafter Yamamoto, *Reparations Crossroads*]; *Eric Yamamoto Awarded Prestigious Fred T. Korematsu Professorship*, UNIVERSITY OF HAWAI'I AT MĀNOA WILLIAM S. RICHARDSON SCHOOL OF LAW (April 16, 2012), <http://www.law.hawaii.edu/news/2012/04/16>.

145 Jeffrey S. Siker, *The Bible, in HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA* (2006), *supra* note 36, at 64, 66 [hereinafter Siker, *The Bible*] ("many scholars argue that to say God condemned the sexual violence of the men of the city should not be equated with a general condemnation of God against all consensual same-sex relations"; "the men of Sodom violated a strong cultural value of offering hospitality to strangers who travel through town"). The B&B industry itself recognizes that "[t]he tradition of extending hospitality to traveling strangers goes back to the earliest recorded history for almost all religions and cultures worldwide." *History of B&Bs*, *supra* note 7. Cf. Singer, *supra* note 18, at 1304 (citing *White's Case*, 2 Dyer 343 (1586), as the earliest statement in English common law recognizing the duty of an innkeeper to admit guests if the inn was not full).

146 Siker, *The Bible*, *supra* note 145, at 66. See also Morton, *supra* note 140 (observing that the wickedness

association with homosexuality, the ‘sin of Sodom’ is not on its face, and was almost never understood by other Biblical texts or Biblical commentators, to be such.”¹⁴⁷ Instead, “[s]cholars have generally understood the sin of Sodom as selfishness and inhospitality, a reflection of a naturally critical value in Ancient Near Eastern culture, as in many others.”¹⁴⁸

Thus, B&B owners who refuse to accommodate gay and lesbian couples are committing the sin of inhospitality based upon socially-constructed prejudices against homosexuality

at issue was the “establishment of *social dominance* of one group of people over another more than sexual gratification”) (emphasis in original); *id.* (citing religious historian David Carr for the assertion that “Genesis 19 is specifically concerned with the maintenance of hospitality laws” as supported by “Judges 19, which states that a man might choose to offer his daughter[*s*] or concubine[*s*] to be raped in order to provide protection for a guest”). Siker observes further that translation of the Greek word *malakoi* in 1 *Corinthians* 6:9-10 and 1 *Timothy* 1:10 as sodomite “introduces a connection that was not present in the original passage from Paul” and that “the term ‘homosexual’ has a rather different meaning and connotation in the twenty-first century than the terms *arsenokoitai* and *malakoi* had in the first century.” Siker, *The Bible, supra* note 145, at 69–70; *see also* Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants on Bowers v. Hardwick*, 97 *YALE L.J.* 1073, 1088 (1988), *cited in* Michaelson, *Chaos, Law, and God, supra* note 2, at 62 (observing that the term “homosexuality” was invented in the nineteenth century, and elaborating to conclude that “[t]he notion of Biblical ‘homosexuality’ is an anachronistic oxymoron”). In addition, the term “sodomy” was coined in the eleventh century. Sands, *supra* note 36, at 10–11 (noting the collaboration of religious and secular authorities in the systematic persecution of sodomites during the Crusades as well as the Inquisition, and later extended to indigenous peoples in the New World); *see also id.* at 18 (citing MARK JORDAN, *THE INVENTION OF SODOMY IN CHRISTIAN THEOLOGY* (1997)).

147 Michaelson, *Chaos, Law, and God, supra* note 2, at 60 & n.71 (citing STEVEN GREENBERG, *WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION* 66–69 (2004)); *see also* Timothy D. Litton, *Shall Not the Judge of the Earth Deal Justly?: Accountability, Compassion, and Judicial Authority in the Biblical Story of Sodom and Gomorrah*, 18 *J.L. & RELIGION* 31, 48 (2002) (noting that God’s judgment of Sodom and Gomorrah is placed between two stories about hospitality involving Abraham and Lot); *id.* at 49 (suggesting a link between judgment and hospitality); *cf.* Elizabeth Burleson, *From Non-Discrimination to Civil Marriage*, 19 *CORNELL J.L. & PUB. POL’Y* 383, 423 (2010) (observing that “[o]nly through an inaccurate translation of the Hebrew term ‘qadheshim’ into the word ‘sodomite’ have these passages [from Deuteronomy and Kings] come to be associated with condemning homosexuality. . . . ‘Qadheshim’ means ‘holy,’ and in these texts, the term refers to the ‘sacred ones’ who were temple prostitutes in Canaanite fertility ceremonies. As God’s ‘chosen people,’ Israelites were bound to God by a covenant. This pact required Jewish people to refrain from participating in the religious practices of Gentiles. This included not taking part in conduct, such as male homosexual activity, which was associated with Canaanite rituals.”) (footnotes omitted).

148 Michaelson, *Chaos, Law, and God, supra* note 2, at 61 & n.73 (citing MICHAEL CARDEN, *SODOMY: A HISTORY OF A CHRISTIAN BIBLICAL MYTH passim* (2005); J. HAROLD ELLENS, *SEX IN THE BIBLE* 106–17 (2006); DANIEL HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY* 43–50 (Millennium ed., 2000); SODOM’S SIN: GENESIS 18–19 AND ITS INTERPRETATIONS *passim* (Ed Noort & Eibert Tigchelaar eds., 2004)). *But see* DONALD WOLD, *OUT OF ORDER: HOMOSEXUALITY IN THE BIBLE AND THE ANCIENT NEAR EAST* 77–89 (1998) (maintaining that the sin of Sodom is homosexual intercourse, not inhospitality to strangers), *cited in* Michaelson, *Chaos, Law, and God, supra* note 2, at 61 n.73.

that conflict with the obligation reflected throughout the Bible calling upon followers to provide strangers with hospitality.

D. Correcting Another Biblical Misinterpretation Embedded in Master-Narratives About the Nativity Scene: Mary and Joseph Were Not Turned Away from an “Inn”

Indeed, Dr. Bailey’s observation about the need to challenge biblical misinterpretations occurs at the beginning of his chapter on the story of Jesus’ birth.¹⁴⁹ Joseph travels to his ancestral home in Bethlehem with his wife to be, the pregnant virgin Mary, in order to register for the census. While in Bethlehem, Mary gives birth, wraps the child in swaddling clothes, and lays him in a manger. Notwithstanding the time-honored Christmas pageant and countless sermons about “no room in the inn,”¹⁵⁰ the birth of baby Jesus is not a story about a fallen world casting the holy family out into the cold; instead, the parable is about a family making do when more relatives than expected suddenly show up on their doorstep.¹⁵¹

The ongoing failure to recognize this distinction has been demonstrated in cases involving discrimination based on sexual orientation in places of public accommodation,¹⁵² along with a multitude of other contexts.¹⁵³ Indeed, the author nearly made the same

149 Bailey, *supra* note 143, at 25.

150 Ben Witherington III, *No Room in the What?*, CHRISTIANITY TODAY (Dec. 19, 2007 9:03 AM), <http://www.christianitytoday.com/ct/2007/decemberweb-only/151-33.0.html> (“I must tell you that I have heard endless sermons on how there was ‘no room in the inn’ and how it was typical of a cold, fallen world to cast the holy family and Jesus out into the cold The problem with the Christmas-pageant version is, this is not at all likely to be what Luke intends to tell us in this much beloved and belabored Christmas tale. . . . It’s a story about a family making do when more relatives than expected suddenly show up on the doorstep. . . . Jesus was born in his relative’s home, in the place where they kept the most precious of their animals.”).

151 *Id.* See also Llewellyn H. Rockwell, Jr., *The Economic Lessons of Bethlehem* (Nov. 3, 2000), <http://www.lewrockwell.com/rockwell/bethlehem2.html> (“Many renditions of the story conjure up images of the couple going from inn to inn only to have the owner barking at them to go away and slamming the door. In fact, the inns were full to overflowing in the entire Holy Land because of the Roman emperor’s decree that everyone be counted and taxed.”).

152 See, e.g., Laura Searles, *No Room at the Inn—Sexual Orientation Discrimination*, EMPLOYMENT LAW WORLDWIDE (June 10, 2011), <http://www.employmentlawworldview.com/discrimination/no-room-at-the-inn--sexual-orientation-discrimination/> (discussing a case in Brighton, England, involving a lesbian couple turned away by an increasingly aggressive hotel manager who raised his voice and bundled them out of the hotel saying “I don’t accept rejects in my hotel”).

153 Numerous authors have used similar analogies to frame their articles, apparently including a Supreme Court Justice. Clarence Thomas, *No Room at the Inn: The Loneliness of the Black Conservative*, POL’Y REV., Fall 1991, at 72, cited in Catherine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV.

mistake when considering possible titles for this Article. Borrowing from the common (mis)understanding of the nativity scene, an initial draft title read, “*No Room in the Inn for Mar[k] and Joseph: Legalized Discrimination in Places of Public Accommodation.*”

The relevant biblical passage reads: “And she brought forth her firstborn son and wrapped him in swaddling clothes and laid him in a manger because there was *no room for them in the inn.*”¹⁵⁴ As explained by Dr. Bailey, however:

The Greek word in Luke 2:7 that is commonly translated as “inn” is *katalyma*. This is not the ordinary word for a commercial inn. . . . If Luke expected his readers to think Joseph was turned away from an “inn” he would have used the word *pandocheion*, which clearly meant a

117, 124 n.21 (1993); *see also, e.g.*, Karen Scott-Hill, *No Room at the Inn: The Crisis in Child Care Supply*, in *CARING FOR CHILDREN: CHALLENGE TO AMERICA* 197, 206–09 (Jeffrey S. Lande et al. eds., 1989); Joanmarie Ilaria Davoli, *No Room at the Inn: How the Federal Medicaid Program Created Inequities in Psychiatric Hospital Access for the Indigent Mentally Ill*, 29 *AM. J.L. & MED.* 159, 170 (2003) (arguing that the institutions for medical disease exclusion, under 42 U.S.C. § 1396d(a), “prompted the relocation of psychiatric patients to inappropriate settings . . . and contributed to the perception of discrimination on the basis of diagnosis”); Martin F. Murphy, *No Room at the Inn? Punishing White Collar Criminals*, *Bos. B.J.*, May/June 1996, at 4, 16 (concluding that “state and federal prisons should always have room for at least a short stay by someone like Charles Lee[.]” co-chair of a charity fundraising event who pled guilty to stealing more than \$119,000 from the Jimmy Fund); Erik J. Olson, *No Room at the Inn: A Snapshot of an American Emergency Room*, 46 *STAN. L. REV.* 449, 451 (1994) (“Like the Biblical figure Mary 2000 years ago, many Americans are finding no room at the inn, no place of comfort, and in many cases, no place to deliver their babies.”); *id.* at 498 (“Unless the delivery of health care changes, the poor and the indigent may soon find the door to the inn closed for the night. One baby born in a manger is enough”); *see also* Cmty. for Creative Non-Violence v. Reid, 652 F. Supp. 1453, 1454 (D.D.C. 1987) (describing the plaintiff’s plan to “dramatize the plight of the nation’s homeless . . . [with] a sculpture of a modern Nativity scene” consisting of two black adults and an infant “huddled on a streetside steam gate . . . atop a platform ‘pedestal’” bearing the legend “and still there is no room at the inn”), *rev’d*, 846 F.2d 1485 (D.C. Cir. 1989), *aff’d*, 490 U.S. 730 (1989); *No Room at the Inn for Smokers? More Hotels Go Smoke-Free by Choice or by Law*, *USA TODAY*, Feb. 17, 2011, at 1B, available at http://www.usatoday.com/printedition/money/20110217/smokehotels17_cv.art.htm (discussing the smoke-free hotel trend); *No Room at the Inn for Too-Young Bakersfield Honeymooners*, *L.A. TIMES*, Nov. 19, 2010, <http://latimesblogs.latimes.com/lanow/2010/11/honeymooners.html> (reporting that an eighteen-year-old marine and his wife were turned away on their honeymoon, pursuant to a Bakersfield, California hotel’s age policy, while he was on leave from boot camp); Ryan J. Bell, *Killing the DREAM Act: Still No Room in the Inn*, *HUFFPOST RELIGION* (Dec. 20, 2010, 12:40 PM), http://www.huffingtonpost.com/ryan-j-bell/still-no-room-in-the-inn_b_798721.html (“It is more than a little ironic that Jesus, within days of his birth, found himself immigrating to Egypt with his family to escape the tyranny of King Herod the Great who ordered the execution of all male children in Judea. Had he grown up in similar circumstances in our country, Jesus would have been the perfect candidate for the DREAM Act. . . . Meanwhile we will have to admit that in the United States of America there is still no room in the inn for folks like Jesus.”).

¹⁵⁴ Luke 2:7, *Text Analysis*, *BIBLOS.COM*, <http://biblos.com/luke/2-7.htm> (last visited Nov. 10, 2011) (emphasis added); *see also id.* (providing a Greek transliteration that concludes with the term *katalumati*).

commercial inn. . . .

Literally, a *katalyma* is simply “a place to stay” and can refer to many types of shelters. The three options for this story are *inn* (the English translation tradition), *house* (the Arabic biblical tradition of more than one thousand years), and *guest room* (Luke’s choice). . . .

. . . In Luke 2:7 Luke tells his readers that Jesus was placed in a *manger* (in the family room) because in that home *the guest room* was already full.¹⁵⁵

Dr. Joseph Grimes¹⁵⁶ similarly explains that “*katályma* . . . as in Lk 2:7 . . . has . . . the sense of ‘guest-room.’”¹⁵⁷ He adds that “the –ti [in *katalumati*] is a locative ending, ‘in

155 Bailey, *supra* note 143, at 32; *id.* at 33 & n.14 (agreeing with ALFRED PLUMMER, GOSPEL ACCORDING TO S. LUKE 54 (5th ed. International Critical Commentary 1960)); accord William E. Hull, *In Defense of an Innkeeper*, THE BRIDGE, Dec. 2006, at 4, 4, 13, available at http://www.kbclthebridge.org/bridge/December_Bridge.pdf (“The ordinary word for inn (*pandochein*) is not used in this account; instead, a term is employed (*kataluma*) which Luke always uses in both the noun and verb forms to refer to hospitality in a private home (cf. Luke 19:7; 22:11). For example, this is the very word used to describe the guest room which Jesus reserved for the Last Supper with his disciples (cf. Luke 22:11; Mark 14:14).”); Witherington, *supra* note 150 (“Luke [2:1-7] does not say there was no room in the inn. Luke has a different Greek word for inn (*pandeton*), which he trots out in the parable of the Good Samaritan. The word he uses here (*kataluma*) is the very word he uses to describe the room in which Jesus shared the Last Supper with his disciples—the guest room of a house.”); see also Joan Huyser-Honig, Kenneth E. Bailey on Jesus Through Middle Eastern Eyes, CALVIN INSTITUTE OF CHRISTIAN WORSHIP (May 7, 2008), <http://worship.calvin.edu/resources/resource-library/kenneth-e-bailey-on-jesus-through-middle-eastern-eyes/> (“the Greek word (*katalyma* or *kataluma*) translated as *inn* in Luke 2:7 does not mean a commercial building with rooms for travelers. It’s a guest space, typically the upper room of a common village home.”).

156 Dr. Grimes is Professor Emeritus of Linguistics at Cornell University and Adjunct Professor of Linguistics at the University of Hawai‘i at Mānoa. See Joseph E. Grimes, NFLRC.HAWAII.EDU, <http://nflrc.hawaii.edu/ldc/biographies/grimes.html> (last visited Aug. 1, 2011); see also Laura Spinney, *God-Loving Linguists*, MORE INTELLIGENT LIFE (THE ECONOMIST), <http://moreintelligentlife.com/content/ideas/laura-spinney/god-loving-linguists> (last visited May 26, 2012) (discussing Dr. Grimes’ work with his wife Barbara on the language catalog, *Ethnologue*, and observing that the couple have been living in Hawai‘i since 1986).

157 E-mail from Joe Grimes, to author (June 20, 2011, 6:56 PM) (on file with author) (citing JAMES HOPE MOULTON & GEORGE MILLIGAN, THE VOCABULARY OF THE GREEK TESTAMENT: ILLUSTRATED FROM THE PAPYRI AND OTHER NON-LITERARY SOURCES (1930), and comparing *Exodus* 4:24, *1 Kings* 1:13, and *Mark* 14:14). Dr. Grimes also cites Bailey, *supra* note 143, as follows:

Note Bailey’s reading of “*katályma*” as “guest room,” not “inn.” The scenario is that Joseph had relatives in Bethlehem, his family town of origin. Their guest room (*katályma* is also translated “upper room” in the Last Supper story) was already occupied with other relatives who had come in for the registration, so Joseph and Mary lived with the family

the guest room[.]”¹⁵⁸ In other words, there was not enough space for Mary and Joseph in the guest room of his relative’s home, so they were accommodated in the next best place available.

Mary and Joseph were not refused service by a discriminatory innkeeper and relegated instead to a cold, lonely and dirty stable (or even a cave). Rather, they were welcomed into a poor peasant family’s living room, a place where the family’s cow, donkey, and a few sheep would typically be brought in at night to escape the cold of winter and to keep them safe from theft.¹⁵⁹ Thus, the parable concerning Jesus’ birth is not about exclusion but *hospitality*, a recurring value and theme throughout the Bible.

By condemning the sin of inhospitality and seeking to reinforce the biblical value of hospitality, advocates can begin to address the perceived conflict between gay rights and religious freedoms in a more productive manner than the zero-sum game currently playing out in court as well as in our national and state legislatures.

III. A Growing Number of States Are Stepping in to Fill the Gap Left by the Failure to Include Sexual Orientation as a Protected Category Under Federal Law Prohibiting Discrimination in Places of Public Accommodation

Several years prior to her appointment as an EEOC Commissioner, Professor Feldblum began one of her articles with a hypothetical involving a B&B that refused to accommodate a same sex couple.¹⁶⁰ Based in part upon her experiences representing Catholic Charities USA for thirteen years,¹⁶¹ Feldblum expressed sympathy for evangelical Christian couples

on the ground floor, in the raised living area bordered by a dirt area for the animals, whose mangers were built into the outside wall. It sounds as if they were in Bethlehem for some time, because it was “during” (en tooi einai autous ekei) that time that the baby came due.

158 E-mail from Joe Grimes to author (Aug. 15, 2011, 1:51 PM) (on file with author).

159 See Bailey, *supra* note 143, at 29, 31, 34; see also *id.* at 35 (adding that the “unclean . . . shepherds who were close to the bottom of the social scale in their society” but were the first to hear of Jesus’ birth—from angels who eased their anxieties by telling them that the baby would be wrapped, like shepherds did with their own newly born children—were invited into the home “in spite of their ‘low degree’ (*Lk* 1:52)” and “left ‘praising God for all that they had heard and seen.’ The word *all* obviously included *the quality of the hospitality* that they witnessed on arrival.”); *id.* at 37 (“[T]he holy family was welcomed into a peasant home. These people did their best and it was enough. At his birth the common people sheltered him. . . . The shepherds were welcome at the manger. The unclean were judged to be clean. The outcasts became honored guests.”).

160 Feldblum, *supra* note 37, at 61–62.

161 *Id.* at 122 n.163.

who wish to exclude persons from their B&Bs on religious grounds.¹⁶² Nevertheless, she concluded that society should come down in favor of gay people in this “zero-sum” game.¹⁶³ Feldblum explained that, “[o]nce individuals choose to enter the stream of economic commerce by opening commercial establishments, I believe it is legitimate to require that they play by certain rules.”¹⁶⁴

Indeed, in *United States v. Lee*,¹⁶⁵ the United States Supreme Court held that “[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.”¹⁶⁶

¹⁶² *Id.* at 119.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 119 & n.158. In this particular footnote, Feldblum cites the following writers who argue that entering the stream of commerce should legitimately subject an enterprise to civil rights laws: Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN. L. REV. 129, 157 (2002) (contending that “[o]rganizations engaged in commerce should not be cloaked with fundamental or First Amendment freedom to exclude members on any bases they see fit”); Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 549–52 (1998) (suggesting that the government need not show a compelling state interest test for antidiscrimination laws in free exercise cases in which religious people have engaged in voluntary commercial activity); Shelley K. Wessels, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1231 (1989) (urging protection for religious groups from civil rights laws when the group looks “inward” to itself as a religious community, but not when the group “turns outwards” in providing services to others in the community).

¹⁶⁵ 455 U.S. 252 (1982). In *United States v. Lee*, the Court upheld the constitutionality of social security taxes applied to an Amish employer and his employees notwithstanding violation of their religious beliefs. *Id.* at 261 (“Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.”); accord *Braunfeld v. Brown*, 366 U.S. 599 (1961) (upholding Sunday-closing laws against the claim that such laws burdened the religious practices of those whose religions precluded them from working on other days); *N. Coast Women’s Care Med. Grp. v. San Diego Cnty. Superior Court*, 189 P.3d 959, 967 (Cal. 2008) (holding that incidental affect of state civil rights act on right to free exercise of religion did not justify physicians’ refusal to provide fertility treatment to lesbian couple); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 81, 93 (Cal. 2004) (upholding—as a neutral, generally applicable law supported by a rational basis or, in the alternative, because it survived strict scrutiny—statutory requirement that employers include coverage for prescription contraceptives where they already provide group health care and disability insurance prescription coverage for their employees); *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 925, 929 (Cal. 1996) (refusing to exempt landlord from fair housing laws based on constitutional free exercise and enjoyment of religious clauses and upholding prohibition against landlord refusing to rent to prospective tenants because they were not married).

¹⁶⁶ *Lee*, 455 U.S. at 261, quoted in *Catholic Charities*, 85 P.3d at 93. Civil rights laws—and other laws that regulate the marketplace to protect consumers—would become meaningless if each religious believer could demand that society’s laws yield to individual convictions. See *Emp’t Div., Dep’t of Human Res. of Or. v.*

Thus, prohibitions against discrimination in places of public accommodation because of sexual orientation do not *force* residential property owners to invite guests into their homes contrary to their religious consciences. Instead, these laws merely require that once a decision has been made to allow transient guests into one's home for commercial purposes, proprietors of these establishments may not discriminate against potential customers based upon their sexual orientation. Of course, federal law does not currently prohibit discrimination because of sexual orientation in places of public accommodation.¹⁶⁷

Title II of the Civil Rights Act of 1964,¹⁶⁸ expressly enumerates only four protected categories: race, color, religion, or national origin. However, a growing number of states (and localities¹⁶⁹) have since included sexual orientation as a protected category in their

Smith, 494 U.S. 872, 879 (1990), cited in *Catholic Charities*, 85 P.3d at 81.

167 See Civil Rights Act of 1964, Title II, § 201 (codified at 42 U.S.C. § 2000a (2006)). "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of *race, color, religion, or national origin.*" *Id.* § 2000a(a) (emphasis added).

The federal Fair Housing Act (or Title VIII), see *supra* note 14, adds the protected classes of sex, disability, and familial status. The U.S. Department of Housing and Urban Development (HUD) "now utilizes its authority under the . . . Act's prohibition of sex discrimination to pursue complaints of gender identity housing discrimination." John Trasvina, *HUD and the Illinois Department of Human Rights (IDHR) Work to Gain Equal Access for LGBT Americans – One Home at a Time*, THE HUD DLE (June 27, 2012), available at <http://blog.hud.gov/2012/06/27/hud-illinois-department-human-rights-idhr-work-gain-equal-access-lgbt-american-home-time/> ("Additionally, HUD no longer provides discretionary funds to entities that violate state and local laws . . . that specifically prohibit sexual orientation, gender identity, and marital status housing discrimination"); see also 77 Fed. Reg. 5661 (Feb. 3, 2012) (Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity; Final Rule), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-03/pdf/2012-2343.pdf>. But see *infra* note 227 (quoting the Mrs. Murphy exemption that applies under federal fair housing law).

168 See 42 U.S.C. § 2000a (2006).

169 In addition, "close to 200" local equal rights ordinances—along with county and/or municipal ordinances in "almost all of the nation's largest cities"—include prohibitions against discrimination because of sexual orientation in places of public accommodation. See Brian DeWitt, *Over Half the Nation Will Be Covered by an Equality Law*, GAY PEOPLE'S CHRONICLE, May 11, 2007, <http://www.gaypeopleschronicle.com/stories07/may/0511071.htm>. Kentucky law, for example, authorizes "[c]ities and counties . . . to adopt and enforce ordinances, orders, and resolutions prohibiting *all forms of discrimination*, including discrimination on the basis of race, color, religion, disability, familial status, or national origin, sex, or age, and to prescribe penalties for violations thereof, such penalties being in addition to the remedial orders and enforcement herein authorized." KY. REV. STAT. ANN. § 344.300(1) (West 2010) (emphasis added); see *Rogers v. Fiscal Court of Jefferson Cnty.*, 48 S.W.3d 28, 30–31 (Ky. Ct. App. 2001) (remanding for entry of judgment declaring "Jefferson County Ordinance No. 36, Series 1999 prohibiting discrimination in . . . public accommodation . . . on the basis of sexual orientation and gender identity . . . to be enforceable throughout the entire area of the county, including

respective public accommodation laws,¹⁷⁰ beginning with the State of Massachusetts in 1989¹⁷¹

the City of Louisville and other incorporated areas”). A more comprehensive accounting of relevant county and municipal ordinances is beyond the scope of this article.

170 The Commonwealth of Massachusetts enacted the nation’s first public accommodations law in 1865. Act Forbidding Unjust Discrimination on Account of Color or Race, 1865 Mass. Acts ch. 277 (May 16, 1865), *cited in* Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 571 (1995). Although the first federal public accommodations law—viz., the Civil Rights Act of 1875 (Act of March 1, 1875, 18 Stat. 335, 336)—was invalidated in the *Civil Rights Cases*, 109 U.S. 3 (1883), eighteen states subsequently enacted public accommodation laws, most of which were copied verbatim from the Civil Rights Act of 1875. Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591, 1635 (2001).

171 1989 Mass. Legis. Serv. 516 (Westlaw); *see* MASS. GEN. LAWS. ch. 272, §§ 92A, 98 (West, Westlaw through Chapter 32 of the 2011 1st Annual Session). However, California previously extended such protection via judicial decision. *See* Hubert v. Williams, 184 Cal. Rptr. 161, 163, 133 Cal. App. 3d. Supp. 1, 5 (Cal. App. Dep’t Super. Ct. 1982) (holding that homosexuals are protected from arbitrary discrimination by business establishments under § 51—i.e., the “Unruh Act”).

In 1993, the Hawai’i Supreme Court held that a statutory prohibition against same-sex marriage presumptively violated a state constitutional prohibition against discrimination because of sex and clarified that it would be the defendant’s burden on remand to overcome the presumption of unconstitutionality. *See* Baehr v. Lewin, 852 P.2d 44, 74 (Haw. 1993), *cited in* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 205 (1994) (explaining that Associate Justice Steven Levinson’s plurality opinion in *Baehr* “effectively became the opinion of the court” following the appointment of Associate Justice Paula Nakayama, when she joined the court’s order clarifying the plurality opinion). Effective January 1, 2012, same-sex couples are authorized to enter into civil unions in the State of Hawai’i after Governor Neil Abercrombie signed Senate Bill 232 into law on February 23, 2011. B.J. Reyes, *Hawaii Now Seventh State to Legalize Civil Unions*, HONOLULU STAR-ADVERTISER, Feb. 23, 2011, <http://www.staradvertiser.com/news/breaking/116776119.html?id=116776119>. Toward the end of 2011, however, a lesbian couple and a gay couple who were denied marriage licenses jointly filed a lawsuit in federal court challenging the constitutionality of Hawai’i’s civil unions law. *See* Jackson v. Abercrombie, Civ. No. CV11-00734 ACK/KSC (D. Haw. complaint filed Nov. 18, 2011). The Attorney General for the State of Hawai’i later filed separate answers to this complaint, on behalf of Governor Neil Abercrombie and Department of Health Director Lorretta Fuddy, respectively. News Release, Department of the Attorney General, State of Hawai’i, The Department of the Attorney General Files Answers to Same-Sex Marriage Lawsuit (Feb. 21, 2012), *available at* <http://www.scribd.com/towleroad/d/82459636-News-Release-2012-04>. Among other things, Governor Abercrombie admitted that: (1) the application of state law to prohibit same sex couples from marrying “violates the Due Process Clause and Equal Protection Clause of the United States Constitution”; (2) “there is no legitimate reason to deny otherwise qualified couples the ability to marry simply because they are of the same sex”; and (3) “denying all same sex couples the ability to marry . . . discriminates on the basis of sexual orientation, and there are no compelling, substantial, or even rational bases for such discrimination.” *Id.* at 2 (adding that Abercrombie is, nevertheless, defending the state against any liability under 42 U.S.C. § 1983 and against any money damages claims). To the contrary, Director Fuddy responded that “[a]bsent any ruling to the contrary by competent judicial authority regarding constitutionality, the [civil union] law will be enforced” and defended. *Id.*

and, most recently, the State of Maryland in 2009.¹⁷² In addition to the District of Columbia,¹⁷³ a total of twenty-one states now include express prohibitions against discrimination because of sexual orientation in places of public accommodation.¹⁷⁴ Furthermore, in the context of legislation creating a commission to study, analyze, and recommend solutions to address various forms of discrimination,¹⁷⁵ the State of Wisconsin recently declared that sexual orientation “ought not to be made [a] test[] in the matter of the right of any person to . . .

172 2009 Md. Laws ch. 120 (H.B. 51); *see* 2005 Cal. Legis. Serv. ch. 420 (A.B. 1400) (West); 2008 Colo. Legis. Serv. ch. 341 (S.B. 08-200) (West); 1991 Conn. Legis. Serv. P.A. 91-58 (S.H.B. 7133) (West); 77 Del. Laws, ch. 90, § 4 (2009); 1998 D.C. Legis. Serv. 12-242, § 2(a) (West); 2006 Haw. Sess. Laws 76; 2004 Ill. Legis. Serv. P.A. 93-1078 (S.B. 3186) (West); 2007 Iowa Legis. Serv. ch. 191 (West); 2005 Me. Legis. Serv. ch. 10 (S.P. 413) (L.D. 1196) (West); 1989 Mass. Legis. Serv. 516 (West); 1993 Minn. Sess. Law Serv. ch. 22 (H.F. 585) (West); 2009 Nev. Laws ch. 195 (S.B. 207) (West); 1997 N.H. Rev. Stat. Ann. Adv. Legis. Serv. 108 (LexisNexis) (effective Jan. 1, 1998); 1991 N.J. Sess. Law Serv. ch. 519 (SENATE 3758) (West); 2003 N.M. Laws Ch. 383 (S.B. 28); 2002 Sess. Law News of N.Y. Ch. 2 (A. 1971) (McKinney); OR. REV. STAT. ANN. §§ 659A.400 and 659A.403 (West, Westlaw through ch. 139 of the 2011 Regular Session); 1995 R.I. Pub. Laws ch. 95-32 (95-H 6678); 1992 Vt. Acts & Resolves P.A. 243 (S.B. 403); 2006 Wash. Legis. Serv. ch. 4 (S.H.B. 2661) (West).

173 D.C. CODE § 2-1402.301(a)(1) (West, Westlaw through May 10, 2011).

174 Specifically: California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *See* CAL. CIV. CODE §§ 51(b), 51(e)(6) (West, Westlaw through Ch. 25 of 2011 Reg. Sess. and Ch. 2 of 2011-2012 1st Ex. Sess.); COLO. REV. STAT. ANN. §§ 24-34-601(1), (2) (West, Westlaw through laws effective May 5, 2011); CONN. GEN. STAT. ANN. §§ 46a-63(1), 46a-81d(a) (West, Westlaw through Jan. 1, 2011); DEL. CODE ANN. tit. 6, §§ 4504(a), (b) (West, Westlaw through 78 Laws 2011); HAW. REV. STAT. §§ 489-2(2), 489-3 (West, Westlaw through 2011 Regular Session); 775 ILL. COMP. STAT. 5/1-102, 5/5-102(A), 5/5-102(B) (West, Westlaw through 2011 Reg. Sess.); IOWA CODE ANN. §§ 216.7(1)(a), (b) (West, Westlaw through 2011); ME. REV. STAT. ANN. tit. 5 § 4592(1) (West, Westlaw through 2011); MD. CODE ANN., STATE GOV’T § 20-304 (West, Westlaw through all chapters of the 2011 Regular Session of the General Assembly, effective through June 6, 2011); MINN. STAT. ANN. §§ 363A.03(34), 363A.11(1)(a)(1) (West, Westlaw through laws of the 2011 Regular Session through Chapter 10); NEV. REV. STAT. § 651.070 (Westlaw through 2010 Sp. Sess.); N.H. REV. STAT. ANN. § 354-A:17 (Westlaw through 2011 legislation); N.J. STAT. ANN. §§ 10:5-4, 10:5-5(f) (West, Westlaw through L.2011, c. 71 and J.R. No. 5); N.M. STAT. ANN. §§ 28-1-7(F), (H) (West, Westlaw through all 2010 legislation); N.Y. EXEC. LAW §§ 292(9), 296(2)(a) (West, Westlaw through 2011 legislation, chapters 1 to 18 and 50 to 54); R.I. GEN. LAWS ANN. §§ 11-24-2, 11-24-3(1) (West, Westlaw through chapter 321 of the January 2010 session); VT. STAT. ANN. tit. 9 §§ 4501(1), 4502(a), 4502(d) (West, Westlaw through 2011 legislation); WASH. REV. CODE ANN. §§ 49.60.030(1)(b), 49.60.040(2) (West, Westlaw through 2011 Legislation effective through May 31, 2011). *But see* *Monson v. Rochester Athletic Club*, 759 N.W.2d 60 (Minn. Ct. App. 2009) (holding that a same-sex couple failed to demonstrate differential treatment where health club refused to allow them to join at the family membership rate); *infra* note 178 (citing municipal ordinance in Denver, Colorado, which provides exemption for two unit dwellings where one of the units is owner-occupied).

175 WIS. STAT. ANN. § 66.0215(3)(a) (West, Westlaw through 2011 legislation).

enjoy the equal use of public accommodations and facilities[.]”¹⁷⁶

Five¹⁷⁷ of the twenty-one states mentioned above (in addition to counties and municipalities in other areas¹⁷⁸) include an exception analogous to the so-called “Mrs. Murphy” exemption for proprietors of small transient accommodations under federal law,¹⁷⁹ further demonstrating the “place-based” nature of this ongoing Kulturkampf between religious freedom and civil rights.

176 *Id.* § 66.0125(9); *see also* Hatheway v. Gannett Satellite Info. Network, Inc., 459 N.W.2d 873, 876–77 (Wisc. App. 1990) (recognizing a 1989 legislative amendment that replaced the term “hotels, motels and resorts” with “lodging establishments,” which was defined to include a “bed and breakfast establishment”).

177 Specifically: Delaware, Illinois, Iowa, Maine and Nevada. DEL. CODE ANN. tit. 6, § 4502(13) (West, Westlaw through 78 Laws 2011) (providing that the definition for “‘place of public accommodation’ . . . shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with *less than 10 rental units* catering to the transient public”) (emphasis added); IOWA CODE ANN. § 216.7(2)(b) (West, Westlaw through 2011) (“The rental or leasing to transient individuals of *less than six rooms* within a single housing accommodation by the occupant or owner of such housing accommodation *if the occupant or owner or members of that person’s family reside therein*”) (emphasis added); ME. REV. STAT. ANN. tit. 5, § 4592(3) (West, Westlaw through 2011) (“This subsection does not apply to the owner of a lodging place: *A. That serves breakfast; B. That contains no more than 5 rooms* available to be let to lodgers; and *C. In which the owner resides* on the premises”) (emphasis added); NEV. REV. STAT. ANN. § 651.050(2)(a) (West, Westlaw through 2010 Sp. Sess.) (“except an establishment located within a building which contains *not more than five rooms* for rent or hire *and which is actually occupied* by the proprietor of the establishment *as the proprietor’s residence*”) (emphasis added); *see also supra* note 65 (quoting the exemption available under Illinois law).

178 In addition to these states, county and municipal ordinances containing similar exemptions have also been adopted in jurisdictions including, but not necessarily limited to, Colorado (Denver) and Texas (Austin and Fort Worth). *See, e.g.*, DENVER, COLO., REV. MUN. CODE art. IV, §§ 28-95(b)(2), 28-96(b)(2) (1991), *cited in* Evans v. Romer, 882 P.2d 1335, 1345 (Colo. 1994) (“Denver’s antidiscrimination ordinance exempts from its housing and public accommodation provisions multiple unit dwellings of *not more than two units* where one of the units is *owner occupied*”) (emphasis added), *aff’d*, 517 U.S. 620 (1996); AUSTIN, TEX., CITY CODE § 5-2-2(8)(a) (1992) (defining “public accommodation” to mean “an inn, hotel, motel or other lodging establishment for transient guests, excluding an establishment located in a building with *not more than five rooms* for rent or hire *and occupied by the owner or operation as a primary residence*”) (emphasis added); Fort Worth, Tex., Ord. No. 14344, § 17-46 (Sep. 26, 2000), *available at* http://www.fortworthgov.org/uploadedFiles/City_Secretary/City_Council/Official_Documents/14344.pdf (“Hotel and motel shall mean every establishment offering lodging to transient guests for compensation, but such terms *shall not apply to any such establishment if the majority of occupants are permanent residents and have their fixed place of domicile therein.*”) (emphasis added); *see id.* § 17-48(a)(1) (“It shall be unlawful . . . [t]o discriminate against, withhold from or deny any person, because of . . . sexual orientation any of the advantages, facilities or services offered to the general public by a place of public accommodation[.]”).

179 *See supra* text accompanying note 13 (quoting 42 U.S.C. § 2000a(b)(1)); *see also supra* notes 10–24 and accompanying text.

Thus, in the small minority of jurisdictions identified above that have adopted Mrs. Murphy exemptions¹⁸⁰ and in those states and localities that do not include sexual orientation as a protected category, the discriminatory vestiges of our federal public accommodations law continue to provide a safe haven for “Jim Crow’s Other Cousin”—viz., discrimination against the LGBTQI community.¹⁸¹ This state-by-state patchwork of civil rights laws reveals the “beachhead federalism”¹⁸² that results from our ongoing Kulturkampf between religious convictions and equality for gays and lesbians. Beyond the day-to-day and legislative venues, this cultural performance also continues to play itself out in the courts.

IV. Enforcement of State Laws Prohibiting Discrimination Based on Sexual Orientation in Places of Public Accommodation Does Not Infringe Upon Religious Freedoms

Legal prohibitions against discrimination because of sexual orientation do not force private property owners to invite guests into their homes contrary to their religious consciences. However, once a decision has been made to allow transient guests into a person’s home for commercial purposes, the proprietor may not discriminate based upon his or her customers’ sexual orientation.¹⁸³ Indeed, public accommodations are obligated to refrain from inflicting dignitary harm upon their prospective customers.¹⁸⁴

180 See *supra* note 177 (quoting analogous Mrs. Murphy exemptions from the states of Delaware, Illinois, Iowa, Maine, and Nevada) and 178 (quoting similar provisions under county and/or municipal laws in Denver, Colorado, as well as Austin and Fort Worth, Texas). At least one court has rejected an attempt to apply the Mrs. Murphy exemption under the federal Fair Housing Act (FHA) to a bed and breakfast. See *Schneider v. Cnty. of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002) (determining that the B&B was not a “dwelling” under the FHA). However, lengthier seasonal accommodations are subject to the Act’s provisions. Compare *Lauer Farms, Inc. v. Waushara Cnty. Bd. of Adjustment*, 986 F. Supp. 544, 559 (E.D. Wisc. 1997) (holding that structures intended to house migrant farm workers for four to five months constituted “dwellings”), with *Patel v. Holley House Motels*, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (holding that a hotel is not a “dwelling” because no plaintiffs intended to reside in the hotel).

181 See, e.g., Bryan K. Fair, *The Ultimate Association: Same-Sex Marriage and the Battle Against Jim Crow’s Other Cousin*, 63 U. MIAMI L. REV. 269, 270 (2008) (referencing the legal assault being waged by new equality advocates against “another Jim Crow cousin—discrimination against American citizens who are also gay”).

182 See Michaelson, *Listening to the Kulturkampf*, *supra* note 26; Poirier, *Federalism Not the Main Event*, *supra* note 26, at 387–88.

183 See *supra* notes 165–166 and accompanying text.

184 See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (observing that the “fundamental object” of laws prohibiting discrimination in places of public accommodation “was to vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments[.]’”).

A. Analyzing B&B Owners' Prospective Claims Based Upon Intimate and/or Expressive Freedom of Association

Some B&B owners presumably might argue that they engage in intimate and/or expressive association with their customers for religious—if not also economic and cultural—purposes,¹⁸⁵ based upon a high degree of selectivity and seclusion from others in critical aspects of the commercial relationship.¹⁸⁶ Rather than violate their religious convictions, the proprietors of such establishments likely would accept any adverse economic consequences associated with such discriminatory conduct.¹⁸⁷ Although the Court has yet to address the constitutionality of this particular issue, it has provided a framework for analyzing freedom of association claims.

In *Roberts v. United States Jaycees*,¹⁸⁸ the Court recognized a constitutionally protected freedom of association in two distinct senses: (1) *intimate association*, meaning “choices to enter into and maintain certain intimate human relationships”; and (2) *expressive association*, meaning “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”¹⁸⁹ Both forms of association arguably could be implicated “when the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor[.]”¹⁹⁰

The Court limited the scope of its holding, noting that a broad range of human relationships are entitled to constitutional protection,¹⁹¹ such as, personal affiliations

185 See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (recognizing the implicit “right to associate with others in pursuit of a wide variety of economic, religious, and cultural ends.”).

186 *Id.* at 620.

187 Koppelman, *You Can't Hurry Love*, *supra* note 76, at 134 (“Antigay discrimination is now sufficiently stigmatized that a business that openly discriminates is likely to pay an economic price for doing so.”).

188 468 U.S. 609 (1984).

189 *Id.* at 617–18 (rejecting freedom of association challenge to Minnesota civil rights statute prohibiting discrimination in places of public accommodation based on *sex*).

190 *Id.* at 618 (acknowledging that “the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which one or the other aspect of the constitutionally protected liberty is at stake in a given case”).

191 See *id.* at 622 (recognizing that “implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends”).

surrounding the creation and sustenance of a family (including marriage, childbirth, the raising and education of children, and cohabitation with one's relatives), which by their nature involve the sharing of distinctly personal aspects of one's life.¹⁹² These types of affiliations are relatively small and involve both a high degree of selectivity and seclusion from others in critical aspects of the relationship.¹⁹³

In determining whether a particular relationship is entitled to constitutional protection, the Court focused on: size, purpose, policies, selectivity, congeniality, and other pertinent characteristics in particular cases.¹⁹⁴ In this respect, the Court relied upon Justice Powell's concurring opinion in *Runyon v. McCrary*.¹⁹⁵ In the context of a racial discrimination claim under 42 U.S.C. § 1981, Justice Powell observed as follows:

In certain personal contractual relationships . . . such as those where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association (such as, for example, that between an employer and a private tutor, babysitter, or housekeeper), there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" *other than the desire to bar members of the Negro race*. Such a purpose, certainly in most cases, would invoke associational rights long respected.¹⁹⁶

192 *Id.* at 619–20 (citing *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978) (marriage); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–86 (1977) (childbirth); *Smith v. Org. of Foster Families*, 431 U.S. 816, 844 (1977) (the raising and education of children); and, *e.g.*, *Moore v. E. Cleveland*, 431 U.S. 494, 503–04 (1977) (cohabitation with one's relatives)).

193 *Id.* at 620 (distinguishing large business enterprises).

194 *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (describing "a spectrum from the most intimate to the most attenuated of personal attachments").

195 427 U.S. 160, 187–89 (1976). *Runyon* rejected a constitutional free association claim asserted by a private, commercially operated, *non-sectarian* school that held itself out to the public but sought to deny admission to prospective students based on their race. *See id.* at 167 ("these cases do not present . . . the application of [42 U.S.C. §] 1981 to private sectarian schools that practice Racial Exclusion on religious grounds"). The Court further clarified that "[a] small kindergarten or music class, operated on the basis of personal invitations extended to a limited number of pre-identified students, for example, would present a far different case." *Id.* at 188.

196 *Id.* at 188 (emphasis added). *But see id.* (observing that "[t]here is no reason to assume that the schools had any *special reason for exercising an option of personal choice among those who responded to their public offers*") (emphasis added); *Roberts*, 468 U.S. at 621 (observing that Jaycees chapters were "large and basically unselective groups" that "routinely recruited and admitted [new members] with no inquiry into their backgrounds").

Accordingly, the schools asserting free association rights in *Runyon* were not entitled to constitutional protection because:

“[t]heir actual and potential constituency, however, is more public than private.” . . . The schools extended a *public offer open, on its face*, to any child meeting certain minimum qualifications who chose to accept. They *advertised* in the “Yellow Pages” of the telephone directories and engaged extensively in general mail solicitations to attract students. The schools are *operated strictly on a commercial basis*, and one fairly could construe their open-end invitations as offers that matured into binding contracts when accepted by those who met the academic, financial, and other racially neutral specified conditions as to qualifications for entrance.¹⁹⁷

To the extent that B&Bs in general are likewise “operated strictly on a commercial basis,” and advertise their public accommodations to the public generally and widely,¹⁹⁸ they would not appear entitled to constitutional protection.

For B&Bs that instead offer their accommodations by personal invitation, the issue becomes whether a relatively small commercial enterprise—e.g., boarding house, rooming house, or bed and breakfast establishment—represents the kind of close, personal

197 *Runyon*, 427 U.S. at 188 (citation omitted, emphasis added); *id.* at 189 (distinguishing private contracts “not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship”); *see also* *Boy Scouts v. Dale*, 530 U.S. 640, 657 (2000) (noting that inclusion of membership organizations along with “clearly commercial activities” in the definition of “places of public accommodation” created an increased potential for conflict between state public accommodations laws and First Amendment rights); *cf.* *Pines v. Tomson*, 206 Cal. Rptr. 866, 877 (Ct. App. 1984) (holding that publisher of Christian Yellow Pages could not refuse advertising by non-Christians).

198 Alan Brownstein, *Gays, Jews, and Other Strangers in a Strange Land: The Case for Reciprocal Accommodation of Religious Liberty and the Right of Same-Sex Couples to Marry*, 45 U.S.F. L. REV. 389, 434 (2010) (“[T]he proprietor of a bed and breakfast should be required to notify a same-sex family that he refuses to provide them a place to stay before they attempt to check-in to a room after traveling hundreds of miles to their holiday destination.”). *But see id.* at 434 n.124 and accompanying text (acknowledging the problem that posting such notices “would reinforce resistance and embolden other merchants to post similar notices . . . mak[ing] such refusals even more common”); Feldblum, *supra* note 37, at 121 (“While I was initially drawn to the idea of providing an exemption to those enterprises that advertise solely in very limited milieus (such as the bed and breakfast that advertises only on Christian Web sites), I became wary of such an approach as a practical matter. The touchstone needs to be, I believe, whether LGBT people would be made vulnerable in too many locations across society. An ‘advertising exception’ seemed potentially subject to significant abuse”); *see also supra* note 76 (citing Koppelman, *You Can’t Hurry Love*, *supra* note 76, at 135, and *Smith v. Fair Emp’t & Hous. Comm’n*, 913 P.2d 909, 929 (Cal. 1996)).

association *without discriminatory motives*¹⁹⁹ that is sufficiently “private” and “selective” to enjoy constitutional protection (i.e., analogous to a private tutor, babysitter, or housekeeper hired under a personal services contract).²⁰⁰ None of these private/selective examples are analogous to the transient accommodations provided by a bed and breakfast establishment. The personal affiliations inherent in contracting for the provision of services within a private home are clearly distinguishable from deciding to open up one’s home to the public for commercial purposes. Moreover, the B&B proprietors’ religious freedoms would not be substantially burdened by application of antidiscrimination laws.²⁰¹ For example, the owners could instead rent their rooms out to preferred tenants for periods of thirty days or more and rely upon Mrs. Murphy exemptions expressly included in federal and state fair housing laws,²⁰² at least until these discriminatory vestiges of our nation’s Jim Crow laws

199 See *Roberts*, 468 U.S. at 628 (“acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection.”); *Runyon*, 427 U.S. at 187–88 (observing that association rights have long been respected where based on “‘a purpose of exclusiveness’ *other than the desire to bar members of the Negro race*”) (emphasis added).

200 See, e.g., *Dale*, 530 U.S. at 648 (observing that expressive association rights are not reserved for advocacy groups, but that the proponent must engage in public or private expression in order to claim First Amendment protection); *id.* at 657 (observing that places of public accommodation under the New Jersey statute “also include[] places that often may not carry with them open invitations to the public, like *summer camps* and *roof gardens*”) (emphasis added).

201 See also Robert O’Neil, *Religious Freedom and Non-Discrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 808 (1999) (“Even where the choice compelled by conscience may be a painful and costly one, as it undoubtedly has been for some landlords that find renting to unmarried couples abhorrent, the courts rightly demand more as the basis for finding that religious freedom has been ‘substantially burdened.’”); *cf. Smith*, 913 U.S. at 925 (“one who earns a living through the return on capital invested in rental properties can, if she does not wish to comply with an antidiscrimination law that conflicts with her religious beliefs, avoid the conflict, without threatening her livelihood, by selling her units and redeploying the capital in other investments”). *But see* O’Neil, *supra* at 806 (suggesting “a meaningful difference between a devout entrepreneur whose holdings include a chain of apartment houses, and a retired couple of similar conviction who seeks suitable tenants for a single guest bedroom in their small house”).

202 42 U.S.C. § 3603(b)(2) (2006) (exempting “rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence”); *id.* at § 3610(f)(3)(A) (providing for certification of state laws that are “substantially equivalent” to the federal Fair Housing Act or FHA). Religious organizations are exempt from the FHA, unless the property involved is being used for a “commercial purpose” or “membership in such religion is restricted on account of race, color, or national origin.” *Id.* at § 3607; see also *supra* note 167 (discussing application of the “affirmatively . . . further” requirement to incorporate state laws prohibiting discrimination based upon sexual orientation and a proposed rule to include sexual orientation and gender identity as protected statuses under the Act).

are repealed.²⁰³

B. Successful Challenges to State Laws Prohibiting Discrimination in Places of Public Accommodation

The United States Supreme Court has yet to consider the specific question of whether constitutional rights are violated by the application of a state law prohibiting discrimination because of sexual orientation to a B&B owner compelled by religious conviction to refuse service to a gay or lesbian couple. However, the Court has held on two occasions that the application of public accommodation laws to non-commercial enterprises violated constitutional rights to free speech and freedom of association.

In the first case, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,²⁰⁴ the Court held that application of Massachusetts' public accommodations statute—viz., requiring the private organizers of a parade to allow a group to join their march even though the organizers disagreed with that group's views—violated the parade sponsors' First Amendment right to free speech.²⁰⁵ In the B&B context, proprietors may attempt to reframe the issue as follows: whether requiring accommodation of gay or lesbian couples who wish to share a bed forces B&B owners to send a message that they accept homosexual conduct as a legitimate form of behavior, contrary to their religious beliefs and in violation of their constitutional rights.

However, the operation of a B&B is readily distinguishable from the expressive character of a private parade, which has the primary purpose of conveying a message.²⁰⁶ B&Bs are,

In *Patel v. Holley House Motels*, 483 F. Supp. 374 (S.D. Ala. 1979), the court held that a motel is not a "dwelling" under the FHA by distinguishing a "temporary or permanent dwelling place, abode or habitation to which one intends to return, . . . from a place of temporary sojourn or transient visit." *Id.* at 381 (quoting *United States v. Hughes Memorial Home*, 396 F. Supp. 544, 548–49 (W.D. Va. 1975)); *cf.* *Schneider v. Cnty. of Will*, 190 F. Supp. 2d 1082, 1087 (N.D. Ill. 2002) (holding that a B&B is not a "dwelling" under the Act).

203 See generally Walsh, *supra* note 12.

204 515 U.S. 557 (1995).

205 *Id.* at 573. The South Boston Allied Veterans Council, sponsors of a St. Patrick's Day-Evacuation Day Parade since 1947, refused to allow the respondents to march in their parade. *Id.* at 560–61. The respondents disavowed any claim of state action and, instead, rested their "claim for inclusion in the parade . . . solely on the Massachusetts public accommodations law." *Id.* at 566.

206 *Hurley*, 515 U.S. at 572–73 ("Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."); see also *id.* at 568 (acknowledging the "inherent expressiveness of marching"); *id.* at 573 (noting "the expressive character of both the parade and the marching GLIB contingent").

by comparison, more directly analogous to common inns, one of the quintessential places of public accommodation.²⁰⁷ Properly framed, the question is whether the owners of a B&B may assert a constitutional defense, notwithstanding *United States v. Lee*,²⁰⁸ when their *incidental* interest in religious expression is adversely affected by the application of a state nondiscrimination statute.²⁰⁹ For the reasons provided above at the end of subsection IV.A.,²¹⁰ the Court is not likely to uphold the constitutional defense in this context.

207 See Singer, *supra* note 18, at 1308 (distinguishing private owners who had no duty to house members of the public “even if they were in dire straits” from “common inns [that] had a duty to provide the necessity of shelter to travelers because, by holding themselves out as open to the public, they voluntarily undertook such obligations and travelers relied on their providing the service the inns had impliedly promised to provide”).

208 See *supra* text accompanying notes 165–166; see also *supra* note 164 (citing several writers who argue that entering the stream of commerce should legitimately subject an enterprise to civil rights laws); Edward A. Adler, *Business Jurisprudence*, 28 HARV. L. REV. 135, 158 (1914) (“the phrase ‘private business’ is a contradiction in terms Every man engaged in business is engaged in a public profession and a public calling”), quoted in Walsh, *supra* note 12, at 613 n.47. Of course, neither the parade sponsors in *Hurley*, 515 U.S. 557, nor the membership organization in *Boy Scouts v. Dale*, 530 U.S. 640 (2000), were commercial enterprises. A state administrative law judge ruled in favor of the same-sex couple in New Jersey. See Bernstein v. Ocean Grove Camp Meeting Ass’n, OAL Dkt. No. CRT 6145-09 (N.J. Admin. Jan. 12, 2012), available at http://www.aclu-nj.org/files/8713/2639/9826/CRT_6145-09_Bernstein_ID.pdf.

209 See, e.g., James M. Gottrey, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 1003 (2011) (urging courts to narrowly construe state public accommodation laws, “being careful not to find discrimination when the individual or business is simply refusing to endorse a particular message”); see also *id.* at 970 & n.51 (citing two flag-burning cases for the relevant test, whether “an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it”). For example, Gottrey takes issue with the application of New Mexico’s public accommodations law to a wedding photographer who refuses to take pictures at a same-sex commitment ceremony and the application of New Jersey’s public accommodations law to a religious organization that refused to allow a same-sex civil union ceremony at one of its facilities. *Id.* at 986–87 (discussing *Elane Photography v. Willock*, HRD No. 06-12-20-0685 (N.M. Human Rights Comm’n Apr. 9, 2008), *aff’d*, No. CV-2008-06632 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *aff’d*, No. 30,203 (N.M. Ct. App. May 31, 2002), and Finding of Probable Cause, *Bernstein v. Ocean Grove Camp Meeting Ass’n*, Docket No. PN34XB-03008 (N.J. Attorney General Dep’t of Law & Public Safety Div. on Civil Rights Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>); see also David M. Estes, *The Ocean Grove Boardwalk Pavilion: A Place of Public Accommodation?*, 11 RUTGERS J.L. & RELIGION 252 (2009), available at <http://www.lawandreligion.com/sites/lawandreligion.com/files/Dave%20Estes%20FINAL.pdf>. Even if constitutional challenges in the New Mexico and New Jersey cases are ultimately upheld, the expressive nature of photography and the character of the religious organization are readily distinguishable from the operation of a bed and breakfast by a homeowner.

210 See *supra* notes 199–203 and accompanying text.

In a second case, *Boy Scouts of America v. Dale*,²¹¹ the Court held that application of New Jersey's public accommodation statute to require the Boy Scouts to reinstate an assistant scoutmaster—after the organization had revoked the scoutmaster's membership following his public declaration of homosexuality—violated the organization's First Amendment right to freedom of association (i.e., the right to freedom *from* association).²¹² In reaching this conclusion, the *Dale* majority first deferred to the association's understanding of what would impair expression of its views,²¹³ then determined that the presence of an openly homosexual gay rights activist would "force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."²¹⁴ Although the Court acknowledged that states have a compelling interest in eliminating discrimination (at least against women),²¹⁵ application of New Jersey's public accommodations law amounted to a "severe intrusion" that directly and immediately affected the Boy Scouts' associational rights.²¹⁶

Once again, the commercial operation of a B&B is readily distinguishable from a private association. For the reasons provided above at the end of subsection IV.A.,²¹⁷ the Court is not likely to uphold a constitutional freedom of association defense in the face of such patently discriminatory motives.

211 530 U.S. 640 (2000).

212 See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. . . . Freedom of association therefore plainly presupposes a freedom not to associate").

213 *Dale*, 530 U.S. at 653.

214 *Id.*

215 *Id.* at 657–58. See *Presbytery of N.J. of the Orthodox Presbyterian Church v. Florio*, 902 F. Supp. 492, 521 (D.N.J. 1995) (finding state interest in eliminating discrimination on the basis of, inter alia, sexual orientation was "not only substantial but also [could] be characterized as compelling"); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987) (concluding that "[t]he eradication of sexual orientation discrimination is a compelling governmental interest").

216 *Dale*, 530 U.S. at 659 (applying traditional First Amendment analysis, rather than the intermediate standard of review otherwise applicable to government regulations that have only an incidental effect on protected speech).

217 See *supra* notes 199–203 and accompanying text.

C. Analyzing B&B Owners' Prospective Claims Based Upon "Hybrid Rights" and "Individualized Exemptions"

In *Employment Division v. Smith*,²¹⁸ the Court observed that a neutral, generally applicable law is not subject to First Amendment attack unless it: (1) interferes with "the Free Exercise clause in conjunction with other constitutional protections"—i.e., "hybrid-rights";²¹⁹ or, (2) creates a mechanism that calls for "individualized governmental assessment of the reasons for the relevant conduct"—i.e., "individualized exemptions."²²⁰ In *Sherbert v. Verner*,²²¹ the Court held that denial of unemployment benefits under a "without good cause standard" (i.e., a system of "individualized exemptions" for secular purposes) violated the constitution with respect to a plaintiff who refused to work on the day of her Sabbath.²²² The Court applied this standard once more in *Thomas v. Review Board of Indiana Employment Security Division*,²²³ with respect to a Jehovah's Witness who left employment at a steel mill when he was transferred to a department that worked on armaments in contravention of his religious convictions.²²⁴ Similarly, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,²²⁵ the Court held that application of a prohibition against "unnecessarily" killing animals violated the constitution where it was only enforced against animal sacrifice, but not hunting, slaughter for food, eradication of pests, or euthanasia.²²⁶ The state public

218 494 U.S. 872 (1990) (rejecting free exercise challenge to Oregon law making possession of peyote a crime without providing any exception for religious use). *Smith* involved two members of the Native American Church who were denied unemployment benefits because they had been discharged for "misconduct" as a result of ingesting peyote at a religious ceremony.

219 *Id.* at 881, 882; *see also* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (upholding challenge to compulsory school-attendance laws by Amish parents who refused to send their children to school on religious grounds); *Follet v. McCormick*, 321 U.S. 573 (1944) (invalidating flat tax on solicitation as applied to the dissemination of religious ideas); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (affirming injunction against enforcement of compulsory education act requiring attendance at public schools in violation of parents' right to choose schools where their children will receive appropriate mental and religious training).

220 *Smith*, 494 U.S. at 884.

221 374 U.S. 398 (1963).

222 *Id.* at 401 n.4.

223 450 U.S. 707 (1981).

224 *Id.* at 710–14, 719.

225 508 U.S. 520 (1993).

226 *Id.* at 524–30, 545.

accommodation provisions discussed in subsection III above²²⁷ do not contain systems of “individualized exemptions” for secular (but not religious) purposes. Thus, the remainder of this subsection will focus on the hybrid-rights exception, a question that is the subject of significant debate.²²⁸

227 See *supra* note 174.

228 For example, Justice Souter criticized the hybrid-rights exceptions as follows:

If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule. . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls hybrid cases to have mentioned the Free Exercise Clause at all.

Lukumi, 508 U.S. at 567 (Souter, J., concurring); see also *Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 246 (3d Cir. 2008) (dismissing hybrid-rights theory as dicta and, in any event, rejecting the plaintiff’s free exercise challenge to home-schooling requirements); *Leebaert v. Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) (declining to apply strict scrutiny to claim that refusing to excuse and failing child from mandatory health education course constitutionally burdened her religious rights); *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993) (holding that required course in veterinary surgery involving operations on live animals did not violate Ohio State student’s right to freely exercise her religion, based on rational basis review rather than compelling interest standard notwithstanding hybrid rights claim). The viability of constitutional rights asserted in conjunction with a free exercise claim arguably could become relevant at a later stage in the analysis, when balancing harms to the religious proponent against the government’s interests. *Cf. Stormans, Inc. v. Selecky*, 571 F.3d 960 (9th Cir. 2009) (upholding constitutionality of rules promulgated by pharmacy board prohibiting discrimination and requiring distribution of Plan B emergency contraceptives).

Numerous law review articles have criticized the hybrid-rights exception. See, e.g., Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 *FORDHAM L. REV.* 883, 902 (1994) (“Justice Scalia . . . apparently believed he couldn’t overrule anything . . . so he . . . distinguished everything away instead”); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 *U. CHI. L. REV.* 308, 309 (1991) (“Its use of precedent borders on fiction”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 *U. CHI. L. REV.* 1109, 1122 (1990) (“[A] legal realist would tell us . . . the *Smith* Court’s notion of ‘hybrid’ claims was not intended to be taken seriously”). *But see* Ariel Y. Graff, *Free Exercise and Hybrid Rights: An Alternative Perspective on the Constitutionality of Same-Sex Marriage Bans*, 29 *U. HAW. L. REV.* 23, 25, 43–54 (2006) (“conclud[ing] that religious exemptions from same-sex marriage bans are required under a hybrid rights analysis”).

Although several lower courts appear to recognize its existence,²²⁹ the only decision invalidating the application of a nondiscrimination statute under a hybrid-rights analysis was subsequently withdrawn. In *Thomas v. Anchorage Equal Rights Commission*,²³⁰ homeowners Kevin Thomas and Joyce Baker were “devout Christians . . . committed to carrying out their religious faith in all aspects of their lives, including their commercial activities as landlords.”²³¹ Thomas and Baker specifically believed that “cohabitation between an unmarried man and an unmarried woman is a sin . . . [and] facilitating the cohabitation of an unmarried couple is tantamount to committing a sin themselves.”²³² Accordingly, Thomas and Baker filed a lawsuit in federal court seeking declaratory and injunctive relief, specifically alleging that enforcement of Alaska’s (housing) antidiscrimination laws would

229 A few courts have relied upon hybrid-rights as an *alternative* ground to support rulings in favor of religious proponents. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that federal employment law did not require a Catholic educational institution to grant tenure to a professor of canon law under the ministerial exception and, alternatively, based on hybrid rights); *Hicks ex rel. Hicks v. Halifax Cnty. Bd. of Educ.*, 93 F.Supp.2d 649, 664 (E.D.N.C. 1999) (denying summary judgment and applying strict scrutiny to hybrid-rights claim based on parental right to educate children in accordance with their religious beliefs and, alternatively, based on the right to substantive due process); *First Covenant Church v. Seattle*, 840 P.2d 174, 181–82 (Wash. 1992) (holding that landmarks preservation ordinance placing specific controls on ability to alter exterior of structure violated church’s freedom of religion/speech and, alternatively, violated state constitutional provision that provides broader protection than the federal constitution).

In addition, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) has acknowledged the hybrid-rights exception on repeated occasions. See, e.g., *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) (rejecting free exercise challenge to land use regulations in conjunction with failure to establish “colorable” claims based on the rights to free speech and freedom of assembly); *Miller v. Reed*, 176 F.3d 1202, 1208 (9th Cir. 1999) (rejecting the exception in the context of a claimed “right to travel” by a driver’s license applicant who refused to provide his social security number on religious grounds); *Am. Friends Serv. Comm. v. Thornburgh*, 961 F.2d 1405, 1408–09 (9th Cir. 1991) (rejecting the exception in the context of an asserted violation of the “right to hire” combined with a free exercise claim); *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1299–1302 (9th Cir. 1991) (holding that the agency’s exercise of jurisdiction over the secular employees of a church-owned school did not violate the Constitution).

230 *Thomas v. Anchorage Equal Rights Comm’n*, 165 F.3d 692, 703–11 (9th Cir. 1999), *withdrawn and reh’g en banc granted*, 192 F.3d 1208 (9th Cir. 1999), *rev’d on reh’g on other grounds*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001). Although the Ninth Circuit en banc panel’s order granting rehearing en banc and withdrawing the previous opinion curiously omits the usual language “and may [or shall] not be cited as precedent,” a withdrawn and vacated opinion “is no longer controlling precedent.” *In re Alsberg*, 68 F.3d 312, 315 (9th Cir. 1995); see also *United States v. Ruiz*, 935 F.2d 1033, 1037 (9th Cir. 1993) (“Ruling on the basis of a decision that the court knows to have been withdrawn, however, is *sure grounds for reversal*. We cannot ask our district courts to cite obviously invalid precedent.”) (emphasis added).

231 *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1137 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

232 *Id.*; see also *Thomas*, 165 F.3d at 696.

violate their constitutional rights under the First Amendment.²³³

Initially, a majority of the three-judge panel of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed the trial court's ruling in favor of Thomas and Baker.²³⁴ However, the Ninth Circuit subsequently ordered an en banc rehearing and withdrew the earlier decision,²³⁵ then vacated the trial court's decision on the grounds that the landlords' pre-enforcement challenge was not ripe for review.²³⁶ Another landlord then joined Thomas and Baker in a state court action seeking to overrule an earlier Alaska Supreme Court decision, which had held that the right to free exercise of religion is not violated by the enforcement of antidiscrimination statutes prohibiting landlords from refusing to rent to persons because of their marital status.²³⁷

In a series of decisions regarding Alaska's laws prohibiting discrimination in housing, the United States Supreme Court repeatedly denied applications for certiorari filed by homeowners asserting violation of their constitutional protected religious freedoms.²³⁸ Given this precedent, it does not appear likely that similar assertions by B&B owners will be upheld against state statutes prohibiting discrimination because of sexual orientation in places of public accommodation—particularly in the absence of a statutory exemption from civil rights laws to protect religious beliefs.

233 *Thomas*, 165 F.3d at 697.

234 *Id.* at 692–718.

235 *Thomas v. Anchorage Equal Rights Comm'n*, 192 F.3d 1208 (9th Cir. 1999), *rev'd on reh'g on other grounds*, 220 F.3d 1134 (9th Cir. 2000), *cert. denied*, 531 U.S. 1143 (2001).

236 *Thomas*, 220 F.3d at 1142.

237 *Thomas v. Anchorage Equal Rights Comm'n*, 102 P.3d 937 (Alaska 2004), *cert. denied*; *Bubna v. Anchorage Equal Rights Comm'n*, 544 U.S. 1060 (2005); *see Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 513 U.S. 979 (1994); *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 979–83 (1994) (dissenting opinion by Justice Thomas). The California Supreme Court reached a similar conclusion in *Smith v. Fair Emp'l & Hous. Comm'n*, 913 P.2d 909, 929 (Cal. 1996), *cert. denied*, 521 U.S. 1129, *reh'g denied*, 521 U.S. 1144 (1997). Although the prospective tenants in *Smith* were not a same-sex couple, the court upheld a state law prohibition against refusing to rent to an unmarried couple and refused to exempt the landlord from fair housing laws based on the constitutional free exercise and enjoyment of religion clauses. *Id.* at 929. *But see McCready v. Hoffius*, 593 N.W.2d 545 (Mich. 1999) (vacating holding that Civil Rights Act did not violate religious freedoms of landlords seeking to exclude unmarried couples and remanding for further consideration of the issue); *Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (plurality) (holding that landlord's right to exercise his religion under Freedom of Conscience Provision of Minnesota Constitution outweighed any interest of tenant to cohabitate with her fiancé in rental property prior to her marriage).

238 *Bubna*, 544 U.S. 1060; *Thomas*, 531 U.S. 1143; *Swanner*, 513 U.S. 979.

D. The Unclear Impact of State Religious Freedom Restoration Acts (RFRA)

Following the Court's decision in *Smith, supra*,²³⁹ Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).²⁴⁰ RFRA provides a defense for persons whose religious exercises are substantially burdened by government and restores the compelling state interest test as set forth in *Sherbert v. Verner*²⁴¹ and *Wisconsin v. Yoder*.²⁴² This test applies "strict scrutiny" and requires the government to demonstrate a compelling state interest in order to justify infringements upon an individual's right to free exercise of religion. In *Sherbert*, the Court held that South Carolina failed to meet this test and, therefore, could not constitutionally apply the eligibility provisions of its unemployment compensation statute so as to deny benefits to a claimant who had refused employment instead of taking a job that would have required her to work on Sunday in violation of her religious beliefs.²⁴³ Similarly, in *Yoder*, the Court held that Wisconsin failed to meet the compelling state interests test and, therefore, could not constitutionally apply its compulsory education law to force Amish parents to attend high school in violation of their religious beliefs.²⁴⁴

In *City of Boerne v. Flores*,²⁴⁵ however, the Supreme Court held that RFRA violated the constitution as applied to state and local governments.²⁴⁶ More than a dozen

239 See *supra* notes 218–220 and accompanying text.

240 Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb et seq.). The Act specifically notes that "in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion[.]" 42 U.S.C. § 2000bb(a)(4). Accordingly, the stated purposes of RFRA were to:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b).

241 374 U.S. 398 (1963).

242 406 U.S. 205 (1972).

243 374 U.S. at 403, 406.

244 406 U.S. at 221, 228–29.

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

246 *Id.* at 536; see 42 U.S.C. §§ 2000bb-2(1), -3(a); see also *Boerne*, 521 U.S. at 534 (observing that the Act

states²⁴⁷ quickly moved into the breach by considering and adopting their own RFRA provisions.²⁴⁸

Four of these states—Connecticut,²⁴⁹ Illinois,²⁵⁰ New Mexico,²⁵¹ and Rhode Island²⁵²—nevertheless prohibit discrimination in places of public accommodation based on sexual

represented “a considerable intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens”). In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), the Court appears to have accepted that RFRA is constitutional as applied to the federal government. *Statutory Exemptions*, 120 HARV. L. REV. 341, 347 (2006) (observing that the *Gonzalez* decision “signals that the Justices no longer harbor significant concerns about the statute’s constitutionality”).

247 Specifically: Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, and Texas. See, e.g., James W. Wright, Jr., *Making State Religious Freedom Restoration Acts Effective*, 61 ALA. L. REV. 425, 426 n.4 (2010) (citing ALA. CONST. art. I, § 3.01); ARIZ. REV. STAT. ANN. § 41-1493 (1999) (West); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01–05 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/1–99 (West 2000); MO. REV. STAT. § 1.302 (2009); N.M. STAT. ANN. §§ 28-22-1 to -5 (LexisNexis 2000); OKLA. STAT. ANN. tit. 51, § 251 (West 2009); 71 PA. STAT. ANN. § 2404 (West 2008); R.I. GEN. LAWS §§ 42-80.1-1 to -4 (1998); S.C. CODE ANN. §§ 1-32-10 to -60 (1999); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001 to .012 (Vernon Supp. 2000); see also LA. REV. STAT. ANN. § 13:5233 (2010); TENN. CODE ANN. § 4-1-407 (2009); VA. CODE ANN. § 57-2.02 (2007).

248 O’Neil, *supra* note 201, at 786; cf. Alvin C. Lin, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 751 (2001) (cautioning that “religious exemptions from gay rights statutes undermine the basic purposes and doctrinal theories of those statutes”).

249 CONN. GEN. STAT. ANN. § 52-571b(b) (West 2005) (“The state or any political subdivision of the state may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.”).

250 775 ILL. COMP. STAT. ANN. 35 / 15 (West 2000) (“Government may not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.”). Illinois law also provides a “Mrs. Murphy” exemption for establishments like B&Bs that contain not more than five units for hire and are actually occupied by the proprietors as their residences; see *supra* note 65 (quoting 775 ILL. COMP. STAT. ANN. 5/5-501(1)).

251 N.M. STAT. ANN. § 28-22-3 (LexisNexis 2000) (“A government agency shall not restrict a person’s free exercise of religion unless: A. the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and B. the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.”).

252 R.I. GEN. LAWS § 42-80.1-3(b) (1998) (“A governmental authority may restrict a person’s free exercise of religion only if: (1) The restriction is in the form of a rule of general applicability, and does not intentionally discriminate against religion, or among religions; and (2) The governmental authority proves that application of the restriction to the person is essential to further a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.”).

orientation.²⁵³ Precisely how the potential conflict between religious freedoms and civil rights will be resolved in these four jurisdictions is unclear.²⁵⁴ In other words, to the extent that they interfere with the core judicial function of interpreting constitutional rights, state RFRA could be invalidated under state separation of powers doctrines for reasons similar to *Boerne*, *supra*.²⁵⁵ Indeed, both separation of powers and Establishment Clause issues are present because of the “fundamental problem inherent in all RFRA, including Illinois’: legislatures did not enact them to solve any actual, recognized problem of discrimination or burden on religious conduct.”²⁵⁶ However, one commentator has observed that the “Connecticut Act Concerning Religious Freedom *unwisely* purports ‘to reiterate the

253 See *supra* notes 62, 174. State court precedent in two additional states that prohibit discrimination because of sexual orientation in places of public accommodation—Massachusetts and Minnesota—have established “compelling interest” tests independent of the United States Supreme Court’s decisions in *Smith* and *Boerne*. See Attorney Gen. v. Desilets, 636 N.E.2d 233 (Mass. 1994) (reversing summary judgment for landlords and remanding for a determination whether the Commonwealth “has a compelling interest in eliminating housing discrimination against cohabiting couples that is strong enough to justify the burden placed on the defendants’ exercise of their religion”); Cooper v. French, 460 N.W.2d 2 (Minn. 1990) (plurality) (reversing judgment against landlord and holding that the right to exercise his religion under Freedom of Conscience Provision of Minnesota Constitution outweighed any interest of tenant to cohabit with her fiancé in rental property prior to her marriage). The concurring judge who provided the decisive fourth vote in *Cooper* did not reach the constitutional question; instead, he joined in the plurality’s conclusion that the prohibition against discrimination based on “marital status” was not meant to be applied to unmarried, cohabitating couples. *Id.* at 7–8, 11.

254 Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 239 (1998) (“the concept of strict judicial protection for religious liberty is beginning to flourish in the state courts”); see also Christopher E. Anders & Rose A. Saxe, *Effect of a Statutory Religious Freedom Strict Scrutiny Standard on the Enforcement of State and Local Civil Rights Laws*, 21 CARDOZO L. REV. 663, 671 (1999) (“courts have reached mixed results in determining whether preventing discrimination based on characteristics such as sexual orientation or marital status is compelling”); Gary S. Gildin, *A Blessing in Disguise: Protecting Religious Freedom Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL’Y 411, 458 (2001) (“Most of the state religious freedom acts . . . are silent as to the interface between the compelling interest test and state or local antidiscrimination laws. The failure to specify under what circumstances the prevention of discrimination is a compelling interest invites unpredictable results.”). Compare Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 12 CARDOZO L. REV. 565, 568 (2001) (concluding that state religious liberty legislation “simply may not do any good”), with Jack S. Vaitayanonta, *In State Legislatures We Trust?: The “Compelling Interest” Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 910 (2001) (observing that “gays and lesbians . . . are vulnerable to free religious exercise claims against state statutes according them protection from discrimination”).

255 *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), cited in Eugene Gressman, *RFRA: A Comedy of Necessary and Proper Errors*, 21 CARDOZO L. REV. 507, 536 (1999); see also Gildin, *supra* note 254, at 467–68 (explaining that “a state religious freedom act that instructs courts to apply strict scrutiny to religious claims under the state constitution risks suffering the same fate as Congress’s mandate in RFRA”).

256 Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Act: Why RFRA Don’t Work*, 31 LOY. U. CHI. L.J. 153, 157 (2000); see also Gildin, *supra* note 254, at 437–40 (analyzing drafting issues with state RFRA provisions that raise constitutional issues).

compelling interest test for freedom of religion claims under the state constitution' . . . [and, thus, creates a] *constitutional conflict* between the legislative and judicial branches of the state government."²⁵⁷ The New Mexico and Rhode Island statutes are similarly flawed, notwithstanding the absence of any substantive provisions purporting to "restore" prior judicial precedent.²⁵⁸

The push and pull between gay civil rights and religious freedoms experienced in judicial and legislative arenas illustrate the tensions inherent in this ongoing culture war. The next part of this Article seeks to provide a vital and evolutionary step forward by encouraging advocates to use multifaceted legal processes to shape thinking about gays and lesbians within religious communities and the body politic as a whole.

V. **Advocates Should Embrace the Opportunity to Transform Public Consciousness by Using Courts and Legislatures as "Sites of Cultural Performance"**

Although a measure of relief may be obtained for victims of discriminatory conduct based upon sexual orientation in a relatively rare (but, perhaps, increasing) number of cases, the sources of conflict remain tragically unaddressed and unresolved. In their seminal article on courts and the cultural performance,²⁵⁹ Eric Yamamoto et al. explain that "courts . . . not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages" that can either "reinforce or counter a prevailing cultural narrative in a given community."²⁶⁰ In addition to a variety of issues addressed by others, three scholars have specifically applied Yamamoto's theory to controversies involving gays and lesbians.²⁶¹ Danielle Hart draws attention to the use of courts by minority groups to assert counter-narratives that challenge existing power structures and systems of domination, by confronting entrenched vantage points that create and perpetuate those

257 Gildin, *supra* note 254, at 466–67 (emphases added).

258 *Id.* at 439; *see also id.* at 434 n.104 (observing that New Mexico's RFRA bill was reintroduced in 2000 following a gubernatorial veto in 1999).

259 Yamamoto, *Cultural Performance*, *supra* note 39.

260 *Id.* at 20–21.

261 *See, e.g.*, Hart, *supra* note 1, at 109–15; Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 441 n.156 (2000); Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61 OHIO ST. L.J. 867, 879 n.53 (2000).

structures and systems.²⁶² These counter-narratives “undermine[] the clarity and strength of current understandings, infusing complexity and providing a competing perspective.”²⁶³ According to Hart, even *unsuccessful* minority rights litigation:

builds community; it shapes public discourse over the meaning(s) of, and significance to be attached to, rights, values, and the differences among us; it educates and informs the public thereby raising public awareness of non-mainstream claims and perspectives; and it transmits a powerful political message “concerning ‘the kind of society we want to live in[’]” . . . [and] “. . . help[s] focus issues by compelling formal public statements of justification by those with decision-making power.”²⁶⁴

Thus, Hart argues that “if ending discrimination and oppression against lesbians and gay men in society is at least one objective, then the same-sex marriage debate must be framed in terms of sexual orientation discrimination as a form of sex discrimination.”²⁶⁵ More specifically,

advocates must themselves understand and then be able to explain to courts, legislatures and the general public that sex, gender and sexual orientation are conflated in society. . . [reflecting an ideology of] hetero-patriarchy . . . [that] is invidious, coercive, and premised on masculine, heterosexual male dominance and superiority . . . [and also] creates hierarchies that privilege and prefer masculine, heterosexual men and simultaneously subordinates all other sex/gender types, including homosexuals. Such a preference for things male/masculine is detrimental to all of us, but especially women and sexual minorities, and is constitutionally impermissible.²⁶⁶

262 Hart, *supra* note 1, at 109–10 (citing Yamamoto, *Cultural Performance*, *supra* note 39, at 21–22, and Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 408, 429 n.318 (1990) [hereinafter Yamamoto, *Efficiency’s Threat*]).

263 *Id.* at 110 (citing Yamamoto, *Cultural Performance*, *supra* note 39, at 22).

264 *Id.* at 110–12 (footnotes omitted) (citing among others Yamamoto, *Efficiency’s Threat*, *supra* note 262, at 405, 407–09, 412, 419, 429 n.312, 429 n.318); *see also id.* at 112 n.533 (citing Yamamoto, *Cultural Performance*, *supra* note 39, at 27).

265 *Id.* at 114.

266 *Id.* (footnotes omitted); *see also id.* at 12–26 (discussing Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995), and Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J.L. & HUMAN. 161, 167 (1996)).

Sherrilyn Ifill likewise cites Yamamoto's description of competing cultural narratives as "master narratives" and "counter-narratives."²⁶⁷ Ifill subsequently observes that "[a]dherence to 'master narratives' can impoverish judicial decision-making" as demonstrated in *Bowers v. Hardwick*.²⁶⁸ In that case, "the Court's rendition of the supposedly relevant facts and rationale for the decision engage[d] only the perspective of those not involved in same sex relationships" and, thus, implicitly and explicitly adopted "the view that homosexuals . . . are inherently deviant[.]"²⁶⁹ Ifill thus echoes the call by Professor Sylvia Lazos Vargas "for judges to reach out to include minority or outsider [counter-narratives] in their judicial decision-making . . . and ultimately . . . reconcile [these] competing voices to resolve effectively intergroup conflict cases."²⁷⁰

Similarly, Nancy Levit cites Yamamoto for the proposition that "courts in important instances not only decide disputes, they also transform particular legal controversies and rights claims into larger public messages."²⁷¹ Levit's reference to Yamamoto's theory is preceded by reference to the Supreme Court's decision in *Hurley*,²⁷² and coupled with her observation that "[a]t times the legal and the cultural are inextricable."²⁷³ In support of this conclusion, Levit quotes William Eskridge to help demonstrate how the Court reinforced prevailing cultural narratives about sexual orientation as distinguished from sex: "Doctrinally, the queerest feature of the [*Hurley*] opinion is the way the Court's governing precedent, *Roberts*,^[274] disappeared into a legal closet."²⁷⁵ Put another way, "negative cultural representations have more room to flourish" as a result of the *Hurley* decision,

267 Ifill, *supra* note 261, at 441 n.156 (citing Yamamoto, *Cultural Performance*, *supra* note 39, at 21–22).

268 478 U.S. 186 (1986) (upholding the constitutionality of a state law criminalizing sodomy).

269 Ifill, *supra* note 261, at 450 (citing Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 179, 180, 184 (1999)).

270 *Id.* (citing Vargas, *supra* note 269, at 155, 214–15).

271 Levit, *supra* note 261, at 879 n.53.

272 *See supra* notes 204–205.

273 Levit, *supra* note 261, at 878.

274 *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *see supra* notes 185–199 (discussing in Part IV.A how the *Roberts* Court rejected a freedom of association challenge to Minnesota's civil rights statute prohibiting discrimination in places of public accommodation).

275 Levit, *supra* note 261, at 879 n.52 (quoting William N. Eskridge, *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2457–58 (1997)).

which effectively sent a cultural message that gives “permission to hate[.]”²⁷⁶

A. The Cultural Conflict Between Religious Freedom and Civil Rights for the LGBTQI Community Continues to be Telescoped Into the Law and Legal Processes

The five-to-four split in *Boy Scouts*²⁷⁷ illustrates the Court’s reinforcement of a master narrative about gays and lesbians by disclaiming any need to inquire beyond the organization’s assertion that it “teach[es] that homosexual conduct is not morally straight[.]”²⁷⁸ The majority opinion relied, in part, on the Court’s oft-repeated observation that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”²⁷⁹ Accordingly, the majority noted a perceived consistency in the Boy Scouts’ position that “avowed homosexuals were not to be Scout leaders” as reflected in public statements over a fifteen year period, in addition to prior litigation involving similar facts.²⁸⁰ By comparison, the minority opinion undertook a searching, critical examination of the Boy Scouts’ expressive association claims.²⁸¹ Based upon the minority’s own independent inquiry, it countered that the group did not actually express any clear, unequivocal message burdened by New Jersey’s public accommodations law.²⁸²

276 *Id.* at 879 & n.54 (quoting COMER VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 81–82 (3d rev. ed. 1974)).

277 *See supra* notes 211–216 and accompanying text.

278 *Boy Scouts v. Dale*, 530 U.S. 640, 651 (2000). Nevertheless, the Court considered written evidence of the association’s views as instructive regarding the sincerity of their professed beliefs. *Id.*

279 *Id.* (quoting *Thomas v. Review Bd. of Indiana Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981)); *see also* *Thomas v. Review Bd.*, 450 U.S. at 716 (observing that “an honest conviction” that one’s religion prohibits the conduct required by law is all that is necessary to conclude that the purported religious beliefs are sincerely held). These decisions appear to have overruled *sub silentio* the contrary opinions in *Fiedler v. Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), and *Brown v. Dade*, 556 F.2d 310 (5th Cir. 1977). *See, e.g., Fiedler*, 631 F.2d at 1151 (“The *threshold question* in determining the validity of a free exercise defense is whether the belief called into question is in fact bona fide.”) (emphasis added); *Brown*, 556 F.2d at 313 (“[t]hough difficult, it is clearly the *duty* of the court to decide, as a matter of fact, whether or not any activity constitutes the exercise of religion”) (emphasis added).

280 *Dale*, 530 U.S. at 651–53.

281 *Id.* at 665–78 (Stevens, J., dissenting, joined by Justices Souter, Ginsburg, and Breyer); *see also id.* at 683–86 (criticizing the majority’s deference to the association’s view of how its expressive association is impaired as “an astounding view of the law”).

282 *Id.* at 688; *see also id.* at 684, 685 (concluding that the association did not demonstrate a “shared goal of

The cultural conflict over gay rights continues to be telescoped into law and the legal process, as illustrated by examples including but not limited to: the Solomon Amendment;²⁸³ California's Proposition 8;²⁸⁴ the military's "Don't Ask Don't Tell" policy;²⁸⁵ and the federal Defense of Marriage Act (DOMA).²⁸⁶ The Solomon Amendment denied certain

disapproving of homosexuality" and instead "speaks out of both sides of its mouth").

283 National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994) (codified as amended at 10 U.S.C. § 983 (Westlaw, through Aug. 12, 2011)).

284 See *infra* notes 290–299 and accompanying text.

285 National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (1993); see "*Don't Ask, Don't Tell*" Repeal Lets Gays, Lesbians Serve Openly in the Military, L.A. TIMES, Sept. 20, 2011, <http://latimesblogs.latimes.com/nationnow/2011/09/dont-ask-dont-tell-officially-repealed.html> ("Under the law, commanders were not allowed to ask about someone's sexual orientation, and gays and lesbians were expected to keep their orientation under wraps.").

286 Pub. L. No. 104-199, 110 Stat. 2419 (1996). DOMA § 2(a) provides that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C (Westlaw, through Aug. 12, 2011). DOMA § 3(a) provides that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (Westlaw, through Aug. 12, 2011). See, e.g., *In re Levenson*, 587 F.3d 925, 934 (9th Cir. 2009) (holding that "application of DOMA . . . to preclude the provision of health insurance coverage to a same-sex spouse of a legally married federal employee because of the employee's and his or her spouse's sex or sexual orientation, . . . contravenes the Fifth Amendment to the United States Constitution and is therefore unconstitutional"); *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011) (holding that "Debtors have demonstrated that DOMA violates their equal protection rights afforded under the Fifth Amendment of the United States Constitution, either under heightened scrutiny or under rational basis review. Debtors also have demonstrated that there is no valid governmental basis for DOMA. In the end, the court finds that DOMA violates the equal protection rights of the Debtors as recognized under the due process clause of the Fifth Amendment"); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 397 (D. Mass. 2010) ("[a]s irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA as applied to Plaintiffs violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution"); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (holding that DOMA "plainly encroaches upon the firmly entrenched province of the state [to recognize same-sex marriages among its residents, and to afford those individuals in same-sex marriages any benefits, rights, and privileges to which they are entitled by virtue of their marital status], and, in doing so, offends the Tenth Amendment"). The latter two decisions by the Massachusetts District Court were both affirmed in *Massachusetts v. United States Dept. of Health and Human Servs.*, 698 F.2d 234 (D. Mass 2010), *aff'd*, --- F.3d --- (1st Cir. May 31, 2012). See also *Windsor v. United States*, No. 1:10-cc-08345-BSJ-JCF (S.D.N.Y. June 6, 2012) (holding that application of DOMA to require payment of federal estate tax on a same-sex spouse's estate violated equal protection).

Department of Defense (DOD) funds to institutions of higher education that effectively prohibited access by DOD recruiters who engaged in discrimination because of sexual orientation.²⁸⁷ In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,²⁸⁸ the Court ultimately upheld the constitutionality of the amendment because “[a] military recruiter’s mere presence on campus does not violate a law school’s right to associate, regardless of how repugnant the law school considers the recruiter’s message.”²⁸⁹

Proposition 8 is a November 2008 voter-enacted amendment to the California Constitution providing that “[o]nly marriage between a man and a woman is valid or recognized in California.”²⁹⁰ United States District Court Judge Vaughan Walker held that:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.²⁹¹

Following Judge Walker’s retirement, the District Court case was reassigned to Chief Judge James Ware.²⁹² The Defendant-Intervenors then filed a motion to vacate the original judgment, arguing that Judge Walker failed to disclose that he was in a long-term same-sex relationship and should have recused himself or been disqualified because his impartiality could have been reasonably questioned.²⁹³ Chief Judge Ware concluded that a reasonable person/observer would not have questioned Judge Walker’s impartiality under the

287 See Charles G. Kels, *Free Speech and the Military Recruiter: Reaffirming the Marketplace of Ideas*, 11 NEV. L.J. 92, 93 (2010).

288 547 U.S. 47 (2006).

289 *Id.* at 70.

290 CAL. CONST. art. I, § 7.5 (2008), *cited in* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010), *aff’d*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *reh’g en banc denied*, 681 F.3d 1065 (9th Cir. 2012).

291 *Perry*, 704 F. Supp. 2d at 1003.

292 *Perry v. Schwarzenegger*, 790 F. Supp. 2d 1119, 1122 (N.D. Cal. 2011), *aff’d*, *Perry v. Brown*, 671 F.3d 1052 (9th Cir.), *reh’g en banc denied*, 681 F.3d 1065 (9th Cir. 2012).

293 *Perry*, 790 F. Supp. 2d at 1121, 1130.

circumstances and denied the motion.²⁹⁴ On February 7, 2012, the Ninth Circuit issued a unanimous opinion affirming Judge Ware's holding that Judge Walker was not obligated to recuse himself from the case.²⁹⁵ In addition, a majority of the three-judge panel concluded that Proposition 8's ban on same-sex marriage violated the Fourteenth Amendment to the United States Constitution.²⁹⁶ A stay pending appeal previously issued by the court remains in effect.²⁹⁷ Meanwhile, the sponsors of Proposition 8 unsuccessfully filed a request for reconsideration by an en banc panel of the Ninth Circuit,²⁹⁸ after previously announcing that they would appeal directly to the United States Supreme Court.²⁹⁹

In a pending challenge to DOMA,³⁰⁰ three Republican members of the Bipartisan Legal Advisory Group for the U.S. House of Representatives filed a brief as Intervenor-Defendants arguing that "[g]ays and lesbians are not entitled to the same heightened legal protection and scrutiny against discrimination as racial minorities and women in part because they are far from politically powerless and have ample ability to influence

294 *Id.* at 1130–33. In response to a certified question from the United States Court of Appeal for the Ninth Circuit during the appeal from Judge Walker's decision, *see Perry v. Schwarzenegger*, 639 F.3d 1191, 1193 (9th Cir. 2011) (accepting certified question), the California Supreme Court subsequently concluded that:

when the public officials who ordinarily defend a challenged state law or appeal a judgment invalidating the law decline to do so, under article II, section 8 of the California Constitution and the relevant provisions of the Elections Code, the official proponents of a voter-approved initiative measure are authorized to assert the state's interest in the initiative's validity, enabling the proponents to defend the constitutionality of the initiative and to appeal a judgment invalidating the initiative.

Perry v. Brown, 265 P.3d 1002, 1033 (Cal. 2011).

295 *Perry v. Brown*, 671 F.3d 1052, 1095–96 (9th Cir. 2012).

296 *Id.* at 1063. Chief Judge Stephen Roy Reinhardt (appointed by President James Carter in 1980) authored the majority opinion, joined by Judge Michael Daly Hawkins (appointed by President William Jefferson Clinton in 1994). Judge Norman Randy Smith (appointed by President George W. Bush in 2007) dissented from this portion of the opinion.

297 *Id.* at 1096 n.27; *see also Perry*, 681 F.3d at 1066–67 (providing that, if a petition for writ of certiorari is filed, the stay shall continue until final disposition by the Supreme Court).

298 *Perry*, 681 F.3d 1065; Ari Burack, *Prop 8 Sponsors Appeal to Full Ninth Circuit Court*, SAN FRANCISCO EXAMINER, Feb. 21, 2012, <http://www.sfexaminer.com/local/bay-area/2012/02/prop-8-sponsors-appeal-full-ninth-circuit-court>.

299 *See* Steve Williams, *Proposition 8 Supporters to Appeal to U.S. Supreme Court*, CARE2 MAKE A DIFFERENCE (Feb. 8, 2012), <http://www.care2.com/causes/proposition-8-supporters-to-appeal-to-u-s-supreme-court.html>.

300 Complaint, *Golinski v. U.S. Office of Pers. Mgmt.*, No. 10-cv-00257 (N.D. Cal. Jan. 1, 2010).

lawmakers[.]”³⁰¹ This argument reflects the kind of distorted legal framing that Yamamoto criticizes because it relies upon traditional principles that erect inordinately high barriers with long-term social consequences.³⁰²

Instead, Professor Yamamoto argues that to create a new community from one plagued by division, a nuanced multidisciplinary framework is needed that will: provide “a broader common language of social healing through justice that speaks to the hearts and minds of conflicting groups and the American public”;³⁰³ “serve[] as a strategic guide” that recasts “a history of injustice (collective memory)”;³⁰⁴ and “deploy[] litigation as public education, the garnering of political and community support, the building of coalitions, the handling of opposing groups, and the anticipation of likely material and psychological impacts of the process itself[.]”³⁰⁵ This multidisciplinary approach “invites scholars to look to disciplines

301 Andrew Harris, *Boehner-Led Group Defends Marriage Law in Benefits Lawsuit*, BLOOMBERG BUSINESSWEEK, Oct. 16, 2011, <http://www.businessweek.com/news/2011-10-16/boehner-led-group-defends-marriage-law-in-benefits-lawsuit.html> (observing that Democrats Nancy Pelosi and Steny Hoyer refused to join Republicans John Boehner, Eric Cantor, and Kevin McCarthy in the filing); Sudhin Thanawala, *US House Group Files Motion in Gay Marriage Lawsuit*, SALON, Oct. 16, 2011, http://www.dev6.salon.com/writer/sudhin_thanawala/ (discussing the Boehner group’s filing on October 14, 2011); see also Amanda Terkel, *DOMA Defense: Taxpayers on the Hook for \$1.5 Million to Defend Law Barring Same-Sex Marriage*, HUFF POST POLITICS (Oct. 14, 2011, 1:17 PM), http://www.huffingtonpost.com/2011/10/04/doma-defense-taxpayers-ma_n_994121.html (reporting that “[o]ne House Democratic staffer pointed out that 23 career employees in House operations have been laid off due to budget shortfalls. House Republicans have still not explained where the money they plan to use to pay [private law firm Bancroft PLLC] will come from”); Thanawala, *supra* (noting that the Obama administration filed a brief in July urging the court to find DOMA unconstitutional, arguing that the law reflected “Congressional hostility to gays and targeted an immutable characteristic—sexual orientation—that has nothing to do with someone’s ability to contribute to society. The administration also characterized gays and lesbians as minorities with limited political power. It had previously said it would not defend the marriage act.”).

302 Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 483, 487 (1998) [hereinafter Yamamoto, *Racial Reparations*]; Yamamoto, *Cultural Performance*, *supra* note 39, at 30 (observing that such barriers can have “long-term social consequences”). In the latter article, Yamamoto adds “in terms of communicative process,” that the transformation of minority rights claims “into narrow questions of legal process and procedure” often results in “distorted cultural performances” with regard to the heart of the controversy. *Id.* at 50.

303 Yamamoto, *Reparations Crossroads*, *supra* note 144, at 48.

304 *Id.* (citing Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History and Justice*, 47 UCLA L. REV. 1747, 1764 (2000) [hereinafter Hom & Yamamoto, *Collective Memory*]).

305 *Id.* (citing Julie A. Su & Eric K. Yamamoto, *Critical Coalitions: Theory and Praxis*, in CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 379, 382–84 (Francisco Valdes et al. eds., 2002), and Yamamoto, *Racial Reparations*, *supra* note 302, at 494–97). In the latter article, Yamamoto describes three components of the dark side or “underside of the reparations process”:

other than American law for insights into social healing” and develop common insights that “coalesce with American legal notions of equality and fairness[.]”³⁰⁶ A key component in this strategy is the insistence upon “the humanity of enemies even in their commission of dehumanizing deeds . . . [by valuing] the justice that restores political community above the justice that destroys it.”³⁰⁷ To paraphrase Yamamoto: every politically successful gay rights claim must be galvanized and informed by litigation that contributes to new understandings of past injustice and the present-day need for social healing.³⁰⁸

B. Shaping Public Consciousness: the Strategic Educational Value of Litigation that Contributes to Evolving Understandings of the Moral and Religious Elements of the Cultural Conflict

Yamamoto touts the “strategic educational value of litigation in achieving [justice through social healing] in political arenas.”³⁰⁹

- (1) “distorted legal framing” and resistance by those who hold social advantages, Yamamoto, *Racial Reparations*, *supra* note 302, at 487;
- (2) claims may “recreate victimhood by inflaming old wounds and triggering regressive reactions” and disappointment, *id.* at 494, 496–97; and
- (3) the “interest-convergence” theory, *id.* at 497 (citing Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980), for the ideology that minority rights will only be recognized when doing so benefits the dominant group’s larger interests, along with the danger of “leaving undisturbed the attendant social realities that created the underlying conflict” and neutralizing “the need to strive for justice”).

Id. at 501 (citing Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT’L L. & POL’Y 223, 232 (1992)).

306 Yamamoto, *Reparations Crossroads*, *supra* note 144, at 41.

307 *Id.* at 46 (quoting DONALD SHRIVER, AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 9 (1995)); *see supra* text accompanying notes 75, 84, 88, 124, 127–128; *see also id.* at 48 & n.240 (citing ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 176–77, 180–87 (1999)).

308 Yamamoto, *Reparations Crossroads*, *supra* note 144, at 56; *see also* Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1322 (2003). Suzanne Goldberg contends that greater attention must be paid to the development of “conscious, carefully constructed” efforts to “debias” some of the “sticky intuitions” related to sexual orientation. Goldberg, *supra* note 52, at 1389–1404 (describing intuitions relating to sexual relations and disgust, sexual orientation insecurity, sexual predation, disintegration of the social order, the end of monogamy, children, and gender insecurity); *id.* at 1413 (suggesting that “there may be more room for creative strategizing, particularly with new media, to expose and disrupt settled intuitions”).

309 Yamamoto, *Reparations Crossroads*, *supra* note 144, at 10; *see also id.* at 18 (citing Yamamoto, *Racial*

First, the harms of serious discrimination and violence are not isolated abstract ideas but are found in people's "lived experiences," grounded in their "every day lives." Second, those experiences are not only "very painful and stressful in the immediate situation . . . but also have a cumulative impact on particular individuals, their families, and their communities." The harms of injustice are "stored not only in individual memories but also in family stories and group recollections" over time. And third, individual and community experiences of [discrimination] shape both "one's way of living . . . and one's life perspective." They generate a picture of a fundamentally unjust society, where hard work and achieved status are inadequate protection against those with power and privilege.³¹⁰

Similarly, Michaelson offers cautious optimism³¹¹ that the assumptions of religious traditionalists can be shattered by "the force of experience" accumulated through personal encounters in a way that policy debates cannot.³¹² In other words, "the truth of subjective experience"³¹³ and "personal testimonies"³¹⁴ will, at least incrementally,³¹⁵ lead to a desired transformation of conscience. Michaelson's primary example is the story of Huck Finn, who has been told all his life that he will go to hell if he hides runaway slaves, but his sustained personal encounter with the fugitive slave Jim eventually leads Huck to say, "All right, then, I'll go to hell."³¹⁶

The analogy to Huck Finn provides a powerful reminder of Joe Singer's observations about the discriminatory origins of the "Mrs. Murphy" exception in our federal public

Reparations, *supra* note 302, at 47); *id.* at 38 (calling for "the deployment of litigation as public education").

310 *Id.* at 40 (footnotes omitted) (citing JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 15–17 (1994), and Hom & Yamamoto, *Collective Memory*, *supra* note 304, at 1757–60).

311 Michaelson, *Chaos, Law, and God*, *supra* note 2, at 44; *see also* Goldberg, *supra* note 52, at 1408 nn.142–43 and accompanying text (applying cognitive theory, specifically the "contact hypothesis" first developed in GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1954), and later elaborated upon by others).

312 Michaelson, *Chaos, Law, and God*, *supra* note 2, at 106.

313 *Id.* at 90; *see also id.* at 113–14, 116, 118.

314 *Id.* at 109; *see also id.* at 113–14, 116.

315 *Id.* at 106.

316 *Id.* at 115 & n.225 (citing MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 271 (Walter Blair & Victor Fisher eds., Univ. of Cal. Press 1996) (1884)); *see also id.* at 44, 117, 118.

accommodations law.³¹⁷ The handful of analogous exceptions incorporated into state public accommodation statutes,³¹⁸ combined with the glaring absence of sexual orientation as a protected status under federal law and in a majority of states, underscores Lineham's observation that:

gay people are another group alongside women, blacks and slaves, who have a problem with the text of the Old Testament. We need to learn from the approach of those who struggled for the liberation of women and of slaves to set the text in context and to appeal outside of the letter to the deeper principles of the law.³¹⁹

A quick review of the place-based and diffuse³²⁰ cultural performances involving B&Bs, above,³²¹ suggests that the necessary moral/religious conversations are not yet taking place in a meaningful way within these communities of conflict.³²² Thus, this Article presents a

317 See *supra* notes 18–21.

318 See *supra* note 177; see also *supra* note 178 (citing a few county/municipal ordinances that contain similar exceptions).

319 Lineham, *supra* note 38; see also *id.* (citing W.M. SWARTLEY, *SLAVERY, SABBATH, WAR AND WOMEN: CASE ISSUES IN BIBLICAL INTERPRETATION* (1983), and contending that the search for a redemptive movement hermeneutic in WILLIAM J. WEBB, *SLAVES, WOMEN AND HOMOSEXUALS: EXPLORING THE HERMENEUTICS OF CULTURAL ANALYSIS* (2007), can also be applied to gays and lesbians).

320 Compare Poirier, *Federalism Not the Main Event*, *supra* note 26, at 390–91, 396, 404–05, with Yamamoto, *Reparations Crossroads*, *supra* note 144, at 47–48 (noting that “all groups must participate in the process” of social healing, interacting “in two realms simultaneously—the intensely local, where people connect on a personal level, often face-to-face (classrooms, community halls, churches, area newspapers) . . . and also the social structural, where ideas of injustice are broadly shaped and cultural images of conflicting groups are formed (mass media, movies, music, scholarly publications). Mutuality of group action in these realms signals that all have a stake in healing—all in differing ways have a role to play and a benefit to derive.”).

321 Compare *supra* notes 68–70, 82, 89, 94, 98, 112, 117, 121, 121, 126, 130, and accompanying text (expressing the religious convictions of B&B owners accused of violating nondiscrimination laws), with *supra* notes 72–74, 76, 84, 122, and accompanying text (expressing the dignitary harms suffered by gays and lesbians denied service at places of public accommodation).

322 But see *supra* notes 75, 84, 127 (suggesting that the beginnings of such conversations are occasionally surfacing in the context of place-based conflicts); see also *supra* notes 85–88 (observing that the Stafford House B&B eventually rescinded its exclusionary policy even though Virginia's public accommodation law does not include sexual orientation as a protected status). Kathleen Sands has also identified a hopeful trend of religious support for lesbian, gay, bisexual, and transgender civil rights—including, for example, the Metropolitan Community Church founded in 1968, the United Church of Christ, the United Methodists, the Presbyterian Church USA, the Episcopal Church, and the Evangelical Lutheran Church in America, as well as liberal Judaism, the Unitarian Universalism Association, and organized groups within Catholicism,

framework of social healing through justice, encouraging advocates to use the courts and legislatures as sites of cultural performances to transform public consciousness.³²³

CONCLUSION

Mrs. Murphy exceptions to state laws prohibiting discrimination in places of public accommodation reflect discriminatory vestiges of the compromise forged to adopt Title II of the Civil Rights Act of 1964.³²⁴ As a result, Jim Crow and his Other Cousin (discrimination because of sexual orientation) continue to benefit from a legislative redistribution of property rights, under which a pre-existing easement of access to businesses open to the public (along with a concomitant duty on businesses to serve the public) was replaced with a new right to exclude certain members of the public.³²⁵ Nevertheless, among the growing number states that have expressly added sexual orientation as a protected category in their laws prohibiting discrimination in places of public accommodation, only a handful have incorporated these tainted Mrs. Murphy exceptions.³²⁶

Where the doors to an establishment (including an otherwise private home) are opened to the public for commercial purposes, these hospitality providers should not be allowed to slam their doors shut when a gay or lesbian couple approaches. B&Bs will remain free to decide which services to offer—e.g., where to allow guests within a particular establishment—as long as all guests are treated equally without invidious unlawful distinctions based on personal characteristics. Meanwhile, those who maintain sincerely held religious convictions regarding homosexuality can remain comfortably behind their closed private doors, without exposing gays and lesbians to the indignity of being turned away from businesses open to the public.

every Protestant denomination, and Orthodox Christianity. Sands, *supra* note 36, at 15. At the same time, of course, interventions in court cases continue to take place involving conservative religious groups including the Catholic Civil Rights League, the Islamic Society of North American, the Church of Jesus Christ of the Latter Day Saints, the Seventh Day Adventists, and Focus on the Family. *Id.* at 13.

323 See also Eric K. Yamamoto & Ashley Kaiào Obrey, *Reframing Redress: A "Social Justice Through Healing" Approach to United States-Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 *ASIAN AM. L.J.* 5 (2009); cf. Yamamoto, *Reparations Crossroads*, *supra* note 144, at 49, 84.

324 See *supra* notes 11–16 and accompanying text.

325 See *supra* notes 17–21 and accompanying text.

326 See *supra* notes 169, 171–178, and accompanying text.

Compelling incremental personal encounters between persons who choose to do business with the public, including gays and lesbians from all walks of life,³²⁷ will accomplish much more than simply affirming the principles of equality enshrined in our Constitution. Ultimately, engaging this cultural performance through legislatures and the courts has the power to transform public conscience—analogueous to the shift in biblical attitudes toward slavery (and, before that, patriarchal attitudes toward women)—in a manner that will contribute to justice through social healing. The necessary cultural shift is already under way as a result of the increased presence and visibility of homosexual couples, aided in part by the breadth of diffusion made possible during the internet age

The next step requires advocates to strategically frame LGBTQI civil rights claims as a counter-narrative designed to reinforce biblical values obscured by long-held misconceptions. Relying upon deeply-rooted (though currently distorted) common language involving the transcendent value of hospitality, the framework proposed in this Article seeks to recast the history of injustice (collective memory) that has resulted in the subordination of gays and lesbians. Using courts and legislatures as sites of cultural performance, advocates should strive to transform public consciousness while garnering political and community support, building coalitions, anticipating the dark side of the social healing process, and insisting upon recognition of religious opponents' humanity in order to place a greater value on justice that will restore political community rather than destroy it.³²⁸

A strategy that confronts the irony of using a parable about the sin of inhospitality to reinforce inhospitality to homosexuals can be particularly compelling in the context of cases involving discrimination in places of public accommodation because of sexual orientation. By undermining deeply embedded prejudices that have gone unchallenged for far too long, and by recognizing the resultant harm, social healing may be achieved by refocusing attention on the recurring biblical value of hospitality. Advocating for repeal of discriminatory Mrs. Murphy exceptions and enforcing state nondiscrimination laws in places of public accommodation must be essential components in a larger communicative process that seeks to heal our nation's wounds and bolster the ideals of American democracy.

327 See, e.g., Wendy Cage, *Homosexuality, Religion, and the Social Sciences*, in *HOMOSEXUALITY AND RELIGION: AN ENCYCLOPEDIA*, *supra* note 36, at 17 (citing Dan A. Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence From Available Systematic Data Sources*, 37 *DEMOGRAPHY* 139 (2000) (“People who have had sexual experiences with others of the same sex and/or identify as gay, lesbian, or bisexual today include people of all social classes, occupations, races, religions and political persuasions.”)).

328 See *supra* notes 303–316 and accompanying text.