FINDING THE RAINBOW CONNECTION: MOVING FROM TOLERATION TO HUMAN DIGNITY AND ACCEPTANCE IN AMERICAN LIFE AND LAW

by

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This thesis was prepared under the direction of the candidate's thesis advisor, Dr. Mark Tunick, and has been approved by the members of his/her supervisory committee. It was submitted to the faculty of The Honors College and was accepted in partial fulfillment of the requirements for the degree of Bachelor of Arts in Liberal Arts and Sciences.

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ABSTRACT

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The surge in granting equal rights to gays and lesbians in the United States is remarkable. Yet with this surge comes a conflict: the civil rights of gays and lesbians against the rights of religious individuals, predominantly Christians, refusing to tolerate a behavior they think immoral. My thesis focuses on two hypothetical situations: a county clerk refusing to issue a marriage license to an engaged lesbian couple and an inn owner refusing a night's stay to a gay couple. In both cases, the clerk and inn owner refuse service for religious reasons. Normatively, I argue that we must move beyond a framework of toleration to a system of equal respect and understanding of our fellow human beings. Legally, I argue that the rights of religious expression and exercise should not trump the civil rights of gays and lesbians in the public sphere.

TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

Imagine that a same-sex couple recently got married in the state of New Hampshire, a place where it is legal for two people of the same sex to enter into marriage and have it recognized by the state as a valid union. After their marriage ceremony, as most couples do, the couple goes on their honeymoon. They find a great bed and breakfast online, within their price range, in the state of Tennessee. The inn is specifically for couples and rents out ten rooms at a time to provide a small, intimate setting. Nothing on the bed and breakfast's website would make the couple believe that they would not be welcomed there. They book reservations through the inn's website. The couple arrives at the bed and breakfast wearing their wedding rings and calling one another "honey." When they arrive at the front desk, the owner asks if the couple is together and they respond in the affirmative. The owner is kind and courteous, but explains to the couple that they cannot stay at his establishment unless they agree to sleep in separate rooms and not engage in sexual activity during their stay. He explains that he is guided by his religion, according to which he is supposed to "love the sinner, but hate the sin." They are welcome to stay at his establishment but only if they abide by these conditions. The owner allows unmarried couples that are opposite-sex to share a single room and does not consider that to be a sin in his religion.[1]

Also consider the following scenario: A same-sex couple, living in New York, has lived there together for ten years. With the passage of the Marriage Equality Act,

[1] This scenario is a variation of one given in Chai Feldblum, "Moral Conflict and Conflicting Liberties," *Brooklyn Law Review* 72: 61 – 123 (2006), 61.

they plan to go to the town clerk to obtain a marriage license.[2] Upon arriving at the clerk's office, they are told by a female clerk that they must make an appointment with the deputy clerk at a later date. When they inquire as to why this clerk cannot issue the license herself, she states that she is a "self-described Bible-believing Christian" and that "God has condemned homosexuality as a sin." The clerk believes that the Marriage Equality Act violates her "religious freedom" and that she is not doing this to "[trash] gay people."[3]

In both scenarios, the owner and clerk have discriminated against a same-sex couple because of the couples' sexual orientation based on religious grounds. There is a conflict present between recognizing the rights of gays and lesbians against others who have a right to exercise their religion under the First Amendment to the U.S. Constitution. My thesis will show how the competing interests – between the freedom of gays and lesbians, on the one hand, and the freedom of individuals to live by the ethical precepts of their religion, on the other – can be balanced with one another normatively and legally. Normatively, I work the philosophical ideas of equality and toleration, eventually finding that toleration is not a satisfactory response to the friction presented in my hypotheticals. Legally, I discuss current guiding legal precedent to determine how my hypothetical cases would be decided if one or more parties brought suit against the other.

In both hypothetical situations, the homosexual couples are being discriminated against by being denied a good or a service. Goods and services

[2] The Marriage Equality Act recognized marriage as a "fundamental human right" that "same-sex couples should have the same access" to "help build a stronger society." A8354-2011, 24 June 2011.
[3] Thomas Kaplan, "Rights Collide as Town Clerk Sidesteps Role in Gay Marriages," *New York Times*, September 27, 2011, 1.

provided by public and private individuals are generally referred to as public accommodations, which this chapter will explore further. Currently, federal laws protect only the characteristics of race, previous conditions of servitude, gender, and religion. Only twenty-one states and the District of Columbia currently have laws that ban discrimination based on sexual orientation.[4] Upon examining how both federal and state laws provide protection for their targeted populations, I will define a model public accommodations law that can be used by the states to ban discrimination against gays and lesbians.[5] The main federal laws I will focus on here are those that are discussed in the U.S. Supreme Court cases of *The Civil Rights Cases* and *Heart of Atlanta Motel v. U.S.* – The Civil Rights Act of 1875 and the Civil Rights Act of 1964.[6] While both of these laws address racial discrimination, it is important to analyze their foundation and the types of protection that they provide for their targeted populations.

The 1875 Act was one of the first attempts by Congress to eliminate discrimination in public accommodations through the Fourteenth Amendment's Equal Protection Clause. Section 1 of the law stated that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters and other places of public amusement" adding that this was "applicable alike to citizens of every race and color, regardless of any previous

[4] Retrieved from http://thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_11.pdf on 29 November 2011.
[5] The federal government can also use the model public accommodations law if they do not wish to amend Title II of the Civil Rights Act of 1964.
[6] *The Civil Rights Cases,* 109 U.S. 3 (1883); *Heart of Atlanta Motel v. U.S.,* 379 U.S. 241 (1964).

condition of servitude."[7] However, the Supreme Court deemed the Amendment an inadequate basis for the law in *The Civil Rights Cases*, a group of five similar cases consolidated into one. The purpose of the law was to establish that "enjoyment of inns, public conveyances, and theaters shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude" while also punishing those who did not abide by this act.[8] Justice Joseph P. Bradley, writing for the Court's majority, stated that "no legislation of the United States under [the Fourteenth] [A]mendment, nor any proceeding under such legislation, can be called into activity, for the prohibitions of the amendments are against state laws and acts done under state authority."[9] The Court's opinion rests on the fact that the powers of the Fourteenth Amendment protect against prohibitions created by the state and it cannot be used to compel individuals and/or their businesses to accept people into their establishments because their behavior is not state action. The majority makes this point clear, writing that "[t]he wrongful act of an individual, unsupported by any such [state] authority, is simply a private wrong, or a crime of that individual."[10] The Court ruled the law unconstitutional to avoid granting Congress too broad a power. If we were to let Congress prohibit individuals from discrimination in private, Bradley asks "[w]hy may not [C]ongress, with equal show of authority, enact a code of laws for the enforcement and vindication of all rights of life, liberty, and property?"[11]

[7] 109 U.S. 3, p. 9.
[8] 109 U.S. 3, p. 27.
[9] 109 U.S. 3, p. 22.
[10] 109 U.S. 3, p. 25-26.
[11] 109 U.S. 3, p. 24.

John Marshall Harlan, the lone dissenter in *The Civil Rights Cases*, agreed with the majority as to the purpose of the law but believed that Congress had the authority to enact the law under the Fourteenth Amendment. Harlan believed that the federal government could and should legislate against a potential harm more proactively while the court's majority ruled that the federal government could not. Harlan states, "it is […] a grave misconception to suppose that the fifth section of the [14th] Amendment has reference exclusively to express prohibitions upon state laws or state actions."[12]

Congress eventually was recognized to have the power to prohibit discrimination through Title II of the Civil Rights Act of 1964, a law that was enacted through Article I, Section 8's Commerce Clause power. Title II of the Act states that "[a]ll 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…without discrimination or segregation on the ground of race, color, religion or national origin."[13] The law identified 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."[14] The owner of the Heart of Atlanta Motel refused to rent to African-Americans and intended to continue to do so after the Act's passage. He contended that Congress went too far with its commerce powers and that the Act "violate[d] the Fifth Amendment because [the owner] is deprived of the right to choose [his] customers

[12] 109 U.S. 3, p. 46.
[13] 379 U.S. 241, p. 247.
[14] 379 U.S. 241, p. 247.

and operate [his] business as [he] wishes, resulting in a taking" without due process and just compensation.[15] The Supreme Court upheld the constitutionality of the law 9-0 in *Heart of Atlanta Motel v. U.S.* In the majority opinion, Justice Clark clarifies the difference between the 1875 and 1964 Acts. He states that "Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved" while "certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce" to come under Congress's power to regulate commerce.[16] Based upon information presented to the Senate Committee on Commerce, "overwhelming evidence" shows that "discrimination by hotels and motels impedes interstate commerce."[17]

According to *Heart of Atlanta*, for the federal government to enact a law using their Commerce Clause powers, "the determinative test…is simply whether the activity sought to be regulated is 'commerce which concerns more States than one' and has a real and substantial relation to the national interest."[18] Justice Clark made it clear that there was no taking in this case, meaning the Fifth Amendment did not apply. After the issue of takings was dispensed with, the majority opinion presented evidence that Congress passed the determinative test. Clark stated that the only remaining questions are "(1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate the evil are reasonable and appropriate."[19]

[15] 379 U.S. 241, p. 243-244.
[16] 379 U.S. 241, p. 250-251.
[17] 379 U.S. 241, p. 253.
[18] 379 U.S. 241, p. 255.
[19] 379 U.S. 241, p. 258.

The Court would later rule that Congress did have a rational basis and that the Civil Rights Act was reasonable and appropriate.

Public accommodations laws can be enacted through Congress's power to regulate interstate commerce, as long as those laws pass both the determinative test mentioned above and the rational basis test elaborated on in *Heart of Atlanta*. In terms of sexual orientation and homosexuality, the federal government has not conducted hearings or studies to assess the magnitude of the effect on interstate commerce of discrimination on these bases. However, Congress should have an interest in protecting people with immutable characteristics within the purview of interstate commerce. It is my assumption here that sexual orientation is in fact an immutable characteristic of an individual person.[20] Just as with race or previous condition of servitude, sexual orientation is a basis for discrimination by many in a period where full equality is not guaranteed. Either by amending Title II of the Civil Rights Act of 1964 to include sexual orientation or creating a new law that addresses lesbian and gay access to public accommodations, Congress has the authority to extend protections to homosexual individuals.

The focus of my discussion now shifts to the analysis of states and their public accommodations laws. Unlike the federal government states only need to rely on their police powers to enact public accommodations laws. As stated above, twenty-one

[20] For the purposes of my thesis, I will not address the issue of whether sexual orientation is a choice. However, for those who may disagree with its immutability, the American Medical Association (H-160.991 Health Care Needs of the Homosexual Population), the American Psychiatric Association, the American Psychological Association (http://www.apa.org/helpcenter/sexual-orientation.aspx), the American Psychoanalytic Association (http://www.apsa.org/About_Psychoanalysis/Social_Issues.aspx), the American Academy of Pediatrics (http://www.aap.org/publiced/BR_GayTeen.htm), and the National Association of Social Workers (http://www.socialworkers.org/diversity/new/documents/Definitions%202011.pdf) have all released opinions stating that homosexuality is not a mental disorder, should not be treated as such, and that sexual orientation is not a choice.

states and the District of Columbia all have laws that ban discrimination based on sexual orientation, reaching that number this year with Connecticut and Nevada just passing laws banning discrimination in 2011.[21] All the states have language describing who is prohibited from actually discriminating, whether it is the employee or owner. I will use laws from Vermont and New Jersey to provide some examples for comparison and contrast. Title 9, § 4502 of Vermont states that "[a]n owner or operator of a place of public accommodation or employee of such owner or operator" cannot "refuse, withhold from, or deny to [someone under Vermont's protected classes] any of the accommodations, advantages, facilities, and privileges of the place of public accommodation." Compare that with New Jersey's Law Against Discrimination which "prohibits an owner, manager, or employee of any place that offers goods, services and facilities to the general public…from directly or indirectly denying or withholding any accommodation, service, benefit, or privilege to an individual" because of certain characteristics, such as religion, sex, gender, race, or sexual orientation.[22] Both state laws name owners, operators, and employees as people who cannot discriminate within public accommodations.

Both states also make an important exception to their laws, as do all of the other states in one form or another. For example, Vermont's law states "a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society, shall not be required to provide services, accommodations,

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[21] Retrieved from http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf on 1 February 2012

[22] Retrieved from http://www.nj.gov/oag/dcr/accom.html on 30 November 2011.

advantages, facilities, goods, or privileges to an individual."[23] Under New Jersey's law, "private clubs or schools operated or maintained by a bona fide religious organization or sectarian institution" are exempted from public accommodations statute.[24] This is an important part of each of the states' laws. Each state that includes sexual orientation as a protected class within their public accommodation statutes allows for a religious organization exemption.[25] This is likely due to the conflict between the liberty interests of gays and lesbians clashing with religious practices that has taken place over the course of lesbian and gay civil rights discourse. My thesis will address this tension in both a normative and legal analysis.

The states and the federal government who do not already have a public accommodations law in place can use a model law I will introduce later to create protections for those who identify as homosexual. Passing this model law through the Congress of the United States certainly would help the couple in the innkeeper hypothetical. However, the hypothetical involving the county clerk deals with a service the government provides that does not fall under the public accommodations category because the government is not within the category of business. However, we may ask, why should states and the federal government adopt this law? And in the absence of such a law, how should courts deal with gay and lesbian access to public accommodations and government services?

In chapter two, I address the competing interests in the hypothetical cases – the religious liberty interests of the inn owner and clerk against the civil rights claims

[23] 9 V.S.A. § 4502 (k) (1).
[24] Retrieved from http://www.nj.gov/oag/dcr/downloads/fact_sexordis.pdf on 30 November 2011.
[25] It is important to note that there is a difference between a school that adheres to religious values as part of its goals as a school and allowing individuals who are religious from discriminating against lesbian and gay individuals. This distinction will become clearer in chapters two and three.

of the gay and lesbian couples. I look at different ways of thinking about those interests and address who should have to concede in the hypothetical situations. Classical liberalism dictates that we are each our own persons and the state should have no hand in forcing interactions between people; interaction should be on the basis of mutual consent. A framework of toleration of one another can guide this mutual consent. I will define and expand on the idea of toleration, as well as what people and behaviors we should and should not tolerate, while also explaining why we should tolerate others, using the principles of John Stuart Mill, Joel Feinberg, and Jeremy Waldron. However, I will ultimately argue that we must move beyond a framework of toleration because of the problems and situations, like ours above, that simple toleration cannot solve. The solution I offer is combining the frameworks of John Rawls's overlapping consensus and Martha Nussbaum's politics of humanity approach. By moving to this framework, groups of people can find equal respect for one another in the decisions that are most vital to their sense of identity.

In chapter three, I will discuss the legal issues raised in both hypothetical cases. In the county clerk scenario, the couple is being denied a service by an elected official of the state. This is punishable by New York Penal Code.[26] However, the Clerk could challenge the law as burdening the free exercise of her religion. I will present the current guiding precedent of courts, specifically the U.S. Supreme Court, as to laws burdening religious practice. Based on current precedent, a Court would have to hold that the Penal Code is not a burden on the county clerk and that she would be required to issue the marriage license. In the inn owner scenario, absent a

[26] Official Misconduct, New York Penal Code Article 195 (2010), § 195.00.

public accommodations statute that would ban discrimination against gays and lesbians, the Court would side with the inn owner since he is a private actor. However, if an existing public accommodations law is in place, the couple may win their suit against the inn owner. I will show how precedent has effected the balancing of interests in cases that involve public accommodations laws and claims of burden on religious liberty. I will also argue that the Court would side with the couple in the county clerk case because the state has a compelling interest in preventing discrimination against gays and lesbians in the private sphere.

Finally, in chapter four, I will address and resolve the hypothetical situations presented at the beginning of this chapter based on the normative and legal frameworks I have elaborated on in chapters two and three. I will also present a model public accommodation law that the federal and individual state governments can adopt to prevent discrimination against homosexuals in those establishments and organizations deemed public accommodations. Normatively, the rights of both couples trump those of the inn owner and county clerk. Legally, the couple wishing to get a marriage license has a right to a license that cannot be abridged by the clerk's religious conviction. With a public accommodations statute in place, the right of the couple in the inn example trumps the religious objection of the inn owner.

CHAPTER TWO

In the hypothetical cases presented in the previous chapter, both the inn owner and county clerk refuse service to a homosexual couple, citing religious reasons as to why they will not provide service. These cases raise the question: In a liberal society, where people have a right to practice their religion freely, how can we balance the interests of the religious individuals on the one hand and the civil rights of the same-sex couple on the other? Upon first glance, the answer appears to lie in a framework of toleration. However, I will argue that we must move beyond toleration to a system of recognizing and respecting people's liberty to make intimate, personal choices that are crucial to the core of their being based on some merit other than mere toleration. This chapter will answer the following questions: What is toleration? Why should we tolerate others in a liberal society? Why is tolerance not good enough for our situation?

WHAT IS TOLERATION?

Toleration is a concept political philosophers have wrestled with at least since John Locke's *Letter on Toleration*, which originally discussed the concept in the contexts of a society whose members had different religious and spiritual beliefs. Many philosophers have believed that toleration is necessary when two groups or two ideologies inherently clash, with one or both groups disapproving of the other's practices and beliefs, whether they are on moral, political, or religious grounds and where there is no easy resolution to their disagreements. Toleration emphasizes recognizing each citizen as an equal, despite the inherent disagreements they may have between one another. There is, however, this frustration of the idea:

"toleration…is required only for the intolerable. That is its basic problem."[27] Williams continues by writing that "toleration appeared impossible because it seemingly required someone to think that a certain belief or practice was thoroughly wrong or bad, and at the same time that there was some intrinsic good to be found in its being allowed to flourish. This does not involve a contradiction if the other good is found not in that belief's continuing but in the other believer's autonomy."[28] Toleration is required in situations where there is "some belief or practice or way of life that one group thinks (however fanatically or unreasonable) wrong, mistaken, or undesirable."[29] It is not a matter of simply agreeing to disagree in these situations, as I will explain in more detail below.

The definition of toleration that I will use throughout this paper is that of Andrew Jason Cohen. He characterizes the concept as having eight essential features. He states that an "act of toleration is (1) an agent's (2) intentional and (3) principled (4) refraining from interfering with (5) an opposed (6) other (or their behavior, etc.) (7) in situations of diversity, where (8) the agent believes [s/he has] the power to interfere."[30] While Cohen expands on each of these points in discussing how each is important in toleration, I will focus on his analyses of parts 2, 3, 4, and 8. These pieces of the definition are the important points of contention in our hypotheticals because both the inn owner and the clerk must be intentional and principled about their noninterference in the couples' decisions despite having the power to intervene in each case. For example, imagine that you are a parent of a child who has begun

[27] Bernard Williams, "Toleration: An Impossible Virtue?," in David Heyd, *Toleration: An Elusive Virtue*, 18-27, at 18.
[28] Willaims, 25.
[29] Williams, 19.
[30] Andrew Jason Cohen, "What Toleration Is," *Ethics* 115(1): 68-95 (2004), 78.

smoking. The parent chooses not to interfere intentionally in the child's habit because they want to respect the principle of autonomy for their child as they move towards adulthood.[31] This example makes clear Cohen's definition: the parent is practicing toleration because they choose not to interfere on some principle (i.e. the desire for the child to become autonomous) even though they could interfere in the behavior. The inn owner and clerk are not practicing toleration because to tolerate the couples would be to not turn them away.[32] For an act to be considered toleration of a certain behavior or other characteristic, it must be intentional. While this seems obvious, Cohen reminds us that toleration must be a voluntary leaving others alone and that "inaction is not enough; it must be chosen [inaction]."[33] A parent does not tolerate their child's smoking if they are not aware of the habit. They would need to know about the habit and then intentionally choose not to interfere in it. Toleration must also be principled, in addition to intentional. Cohen explains his use of principled noninterference by stating that it must be due to a good reason. If the parent does not interfere because they did not care, they are not rightly tolerating because they are not practicing noninterference based on some value or principle.[34] Noninterference requires that "the behavior in question not (negatively) be interfered with – there must be no action aimed at preventing the behavior in question."[35] Cohen elaborates by giving the example of George, Jack, and Jim. George has a negative emotional response to Jack and Jim's homosexual activity but he recognizes that his response is

[31] Cohen, 80.
[32] Whether or not the inn owner or clerk have the power to turn the couples away is a matter for the law to decide.
[33] Cohen, 79-80.
[34] Cohen, 80.
[35] Cohen, 85.

not a sufficient reason to interfere in their activities legally or physically and allows their activity to continue.[36] Despite George's negative response, he practices toleration by choosing not to interfere with Jack and Jim's homosexual activity. The last point is self-explanatory: one must believe s/he has the ability to "suppress, disrupt, or censure the offending speech or behavior, but refrains from doing so."[37] For the inn owner or county clerk to practice toleration of the gay couple, s/he must have an intentional and principled practice of noninterference in the couple's business by still issuing the marriage license and allowing them to rent the room. Although both have the ability to interfere in the couples' affairs, they must refrain from interfering to practice toleration.

While I have given a detailed definition of toleration and elaborated on the important components for the purposes of this paper, it will be helpful to consider what toleration is not. Toleration is not simple indifference to or endurance of something one does not like. One must recognize something and dislike it to tolerate it. Imagine someone throwing a ball against your bedroom door. You find it annoying but take no action.[38] You recognize that you find the behavior annoying but you choose to tolerate it by not taking action against it. While this makes toleration seem like simple endurance of a behavior, there is more to it. The difference between tolerating a behavior and enduring a behavior is that one endures what he thinks he must endure while someone tolerates what one believes they should endure.[39] Cohen gives the example of a neighbor who plays loud music that annoys you. You have the

[36] Cohen, 87.
[37] Cohen, 93-4.
[38] Cohen, 71.
[39] Cohen, 72-3.

option to call the police to get him to quiet down or walk next door to ask her to turn the music down. You endure the behavior if you think it is not worth the effort to make them stop though you have the ability to interfere. However, you tolerate the behavior if you value not interfering with the playing of the music. Another example of how toleration is not simple indifference or endurance to beliefs or behaviors is the example of my older sister deciding whether or not to get an abortion. I could try to convince my sister not to have an abortion despite her decision to go ahead with one.[40] I tolerate her actions when I step aside and allow her to make that decision. I may not agree with her choice but I choose to not interfere though I may believe I have a right to step in and stop her.[41] My principled noninterference in her actions is what makes the action toleration. If I just resigned myself to the situation and her decision, I would be practicing endurance. In using a system of toleration, then there must be something, whether it is a behavior, practice, or attitude, which goes against another individual's or group's beliefs.

Toleration has its limits. For instance, toleration cannot solve the issues of simple hatred. If it becomes a matter in which one group just hates another, such as in cases of "sheer racism" or "clan vendetta," toleration isn't what is needed to resolve the conflict; the groups need to lose their hatred or prejudice for one another.[42] Toleration is not as simple as just losing a feeling of hatred; it is much more complex than that.

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[40] Cohen, 74.
[41] One might argue that I would not have a legal right to interfere so I simply resigned myself to enduring her decision.
[42] Williams, 19.

WHY SHOULD WE TOLERATE OTHERS?

Now that toleration has been defined, why should we tolerate others? In a modern liberal society, multiculturalism is apparent; one could argue that for some societies it is considered a priority and/or something to promote among citizens. When the state does not impose certain religious or cultural requirements on its people, diversity is bound to emerge. The United States, for instance, does not allow any groups to impose their beliefs on others, though they are allowed to promote those beliefs without imposing them on others, and each of them can advocate for others to follow their beliefs. Bernard Williams discusses the United States Constitution's First Amendment and how it prohibits state-supported religion and allows the free exercise of one's religion without impediment by the state. The United States tolerates all religions, despite the "deep convictions" each religious believer may have that are in conflict with the deep convictions of others.[43]

George Carey makes a convincing argument as to why we should promote a tolerant society. He states that it is "an aspiring model of community today" in that "such a body will recognize the rights of others and will be eager to learn, share in dialogue and debate and be willing to embrace new insights and new learning"; such a society will also be "resistant to narrow-mindedness."[44] Toleration promotes a respect for individuals in a society, despite citizens' deep-rooted beliefs about a certain group or individual's characteristics and/or practices that go against their own. Toleration can be thought of as any attitude on the part of one individual or a group

[43] Williams, 22.
[44] George Carey, "Tolerating Religion," in Susan Mendus, *The Politics of Toleration in Modern Life*, 45-63, at 59.

towards another; it does not require that one group be more populous than another in their beliefs.

Toleration also "emphasizes the moral good involved in putting up with beliefs one finds offensive."[45] Many may question if there is such a thing as moral good in behaviors we do not like or agree with. Why would it be a moral good to put up with beliefs that murder or rape are permissible? Should we tolerate murderers and rapists? If a liberal society is to practice toleration, who is to decide what is permissible to tolerate and what is not?

John Stuart Mill's Harm Principle can help us differentiate between what we should and should not tolerate. Mill's Harm Principle was first introduced in his book *On Liberty*. In it, Mill states "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[46] While the harm principle is a limit on state coercion, I apply it here to help us discern whether it is permissible for individuals to discriminate against certain actions. We should not tolerate those, like murderers, who intentionally harm others. The couples in both hypotheticals, for instance, are not harming the inn owner or the county clerk; they simply are asking for a certain service from both that does not intentionally harm either in a physical or mental way. Still, the inn owner and the clerk both claim that there is something about the couple that goes against their being. But neither couple intentionally wishes to inflict harm on the agents and so toleration would not be out of place, at least according to the harm principle. Though, the harm

[45] Williams, 19.
[46] John Stuart Mill, *On Liberty* (London: Penguin, 1974), 22.

principle does not say members of a society must embrace or accept what does not cause harm, that does not necessarily mean we should not tolerate such behaviors.

Joel Feinberg expands on Mill's definition of harm. He believes harm to be a setback to interests. He states "[n]ot everything we dislike or resent, and wish to avoid, is harmful to us. Eating a poorly cooked dish may be unpleasant, but if the food is unspoiled, the experience is not likely to be harmful."[47] He also gives the example of receiving a rude comment or watching a bad play to illustrate that we may suffer momentarily from these incidents, but they are not enough, unless they are continuously endured, to constitute a real harm or setback to our interests.[48] Feinberg proceeds to separate harmful actions from actions we may dislike, those that may hurt us or offend us but not amount to harm. He characterizes hurts as physical (i.e. pangs, aches, bruises, sores) and mental (disappointment, depression, despair, grief) pains.[49] Alongside those conditions, he discusses offenses, like disgust, irritation, frustration, and embarrassment.[50] All of those traits are undesirable but they do not harm us or set back our interests. One could argue that the couple in the situations presented in chapter one offended the clerk and inn owner in some way so they should not be tolerated. Feinberg addresses this argument. He states, "Unless common hurts and offenses are of a sufficient magnitude to violate other interests, for example the interests in health and peace, they are not harms, and the use of the criminal law to

[47] Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (New York: Oxford University Press, 1984), 45.
[48] Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, 45-46.
[49] Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, 46.
[50] Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, 46.

prevent them cannot be justified by the harm principle."[51] Though the offending principle, like the harm principle, does not say that members of a society must embrace or accept what offends them, that does not preclude such acts from a practice of toleration. The couples offend the owner and clerk but do not harm them. Toleration is not ruled out on these grounds but it is unclear if we should tolerate offensive behavior or to what extent we should.

Even if someone could argue that the couples in both scenarios have committed harm against the clerk and the inn owner that sets back some interest, Feinberg has a response to this as well. He states, "It is the person of normal vulnerability whose interests are to be protected by coercive power; the person who, figuratively speaking, can be blown over by a sneeze cannot demand that other people's vigorous but normally harmless activities be suspended by government power."[52] The couple and their activities are harmless. They should not be forced to leave a certain establishment or have a service deferred until another period of time because of someone's belief system. People should not be expected to adjust their lives to accommodate the supersensitive (i.e., the person blown over by the sneeze). While their religious beliefs do not make them supersensitive, the clerk and inn owner's action on their beliefs with total denial of services to the couples makes them supersensitive as Feinberg describes them. Feinberg believes the state should have the power to regulate offensive acts, stating "it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the

[51] Like Mill, Feinberg is applying his principle to the state. I am applying his theory to individuals. Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, 49-50.
[52] Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, 50.

actor, and that it is probably a necessary means to an that end."[53] Feinberg later clarifies that the offense that is to be regulated through the principle is that of "wrongful offense," meaning the offense must "be taken by the offended person to wrong him whether in fact it does or not" but that there also must be a wrong present, not just the feeling of wrong.[54] One could argue that the couple's orientation is inherently wrong or their demanding the service of the inn owner or clerk is a offense to their beliefs. If both subscribe to religious doctrines that deplore homosexuality and claim it to be a sin, they are naturally offended by the conduct of the couple and they are not being supersensitive as Feinberg describes. To condone the conduct by allowing them a certain service under their watch would go against the belief systems they hold dear. So how would we solve the issue presented in the hypothetical cases?

A liberal society cannot force people to tolerate one another; it goes against the very concept of toleration. In a modern liberal society, it is natural for conflicting values and ideas to be present: "As they negotiate their way through life, people aim at different values and pursue different goods. These pursuits pose a problem of social order, which consists in the possibility (likelihood, inevitably) that the activities inspired by various people's aims will come into conflict with one another."[55] Jeremy Waldron describes a hypothetical situation with three different actors: an entrepreneurial pornographer (P), a devout Muslim (M), and a secular humanist (H). P enjoys his pornography, and "relishes [in] the shock that his pornographic wares

[53] Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (New York: Oxford University Press, 1984), 1.
[54] Feinberg, *The Moral Limits of Criminal Law; Offense to Others*, 2.
[55] Jeremy Waldron, "Toleration and Reasonableness" in Dario Castiglione and Catriona McKinnon, *Culture of Toleration in Diverse Societies: Reasonable Toleration*, 13-36, at 14.

occasion in unwilling passers-by."[56] M detests pornography, and is constantly distracted by P's use of it. M is trying to bring up his children as pious Muslims but P's blatant showing of his wares prevents this, causing stress to M. P does not care however and even encourages children to enjoy the lurid world.[57] H has no children and has no interest in anyone else's children, pursues his own aims and hobbies despite what P does, and is not distracted at all by P's actions.[58] H is very similar to M in terms of conduct and ideals.[59] There is still a friction, however. P's way of life makes M's way of life impossible and for M to live the way he would like, P could not continue his current way of life. Who should have more of a right?

This is a difficult case to solve. Neither way of life is illegal. Neither of the individuals should have to move away from one another. Can both just tolerate one another to keep their respective ways of life functioning? If not, which party should have to give in to the other and how will we decide that?[60] If we look to the harm principle, neither the Muslim nor pornographer is harming the other. However, once we look to the offending principle, it seems that our dilemma requires the Muslim to prevail since the pornographer is offending him. However, if it could be proven that the Muslim's lifestyle somehow offends the pornographer equally, then we would have a dilemma that a system of toleration would not be able to resolve. Neither can live his life to his full capacity as long as the other's lifestyle is allowed to thrive. This example, and the one of mere offense discussed above, seems to push us to the

[56] For the purposes of the argument, the pornographer is not doing anything illegal by putting the pornography in the windows of his home and is within his rights to do so. Castiglione and McKinnon, 19.
[57] Adapted from Waldron's example. Waldron, 19.
[58] Waldron, 19.
[59] Waldron, 19.
[60] Waldron, 20.

limits of toleration; they are scenarios in which a system of toleration is not enough to solve a multicultural society's issues.

Moving Beyond Toleration

"Although intolerance is a negative concept it does not follow that toleration is a wholly positive one."[61] Recall Williams's words: toleration is only for the intolerable. Some scholars have argued against the idea of toleration because they believe it puts society on the "wrong track."[62] They argue that toleration is "useful when applied to beliefs but it is inadequate when applied to persons or to practices" because other scholars "assume that beliefs are the foundation of practices or that practices can be completely analyzed in terms of the individual persons participating in them."[63] In other words, toleration is useful when working with conflicting ideologies or beliefs but does not work well when it comes to the practices of people, like in our hypothetical cases. It does not tell us who should have to concede in the situations. Also, as noted above, Mill and Feinberg's theories do not exactly guide us toward how to tolerate actions that do not harm us or offend us. Because of these issues, it seems best to move beyond toleration and find another idea or concept that will help promote multiculturalism in societies, especially in terms of the two hypotheticals presented in Chapter One.

One way of moving beyond toleration, as some argue, is by adopting a system of recognizing others and respecting their autonomy as individuals. Many, like

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[61] Garrett Fitzgerald, "Toleration or Solidarity?" in Susan Mendus in *The Politics of Toleration in Modern Life*, 13-25, at 13.
[62] Wibren Van Der Berg, "Belief, Persons, and Practices: Beyond Tolerance" *Ethical Theory and Moral Practice* 1(2): 227-254 (1998), 228.
[63] Van Der Berg, 249-250.

Williams, believe this to be the underlying notion of toleration, stating "under the philosophy of liberal pluralism, toleration does emerge as a principled doctrine, and it does require of its citizens a belief in a value: perhaps not so much in the value of toleration itself as in a certain more fundamental value, that of autonomy."[64] Recognition of autonomy seems to be a great alternative to toleration at first. Toleration appeared to be too idealistic whereas recognition of autonomy seems more realistic for citizens of a society to abide by. However, this system of recognition of autonomy appears to be the same as toleration itself, especially when we reconsider Cohen's definition of toleration and how it highlights the idea of principled noninterference.

However, there is an issue with simply recognizing others' autonomies, especially when it comes to the hypotheticals we have worked with in this chapter. This recognition of autonomy does not avoid the problems that come up when trying to rely on a framework of toleration. In terms of the pornographer and devout Muslim discussed above, we already came to the conclusion that neither can flourish equally so long as the other's way of life is instituted. There seems to be dissymmetry in this instance. If the Muslim respects the pornographer's autonomy, the pornographer will still continue to post explicit pictures in his windows. While this may get the pornographer to respect the Muslim and cause him to take measures to prevent the Muslim from being offended by the pornographer's porn, it is not a guarantee. The devout Muslim still has the frustration he had in the beginning of our issue. In addition, the inn owner and clerk can respect the couples' autonomy in that they have

[64] Williams, 23.

gotten married and choose to act on their sexual orientation, but then what of the clerk and inn owner's respective autonomies to deny the couple a service based on their belief systems? One could argue that if the inn owner were to respect the couple's autonomy to rent the room, the couple would give consideration to respecting the autonomy of the inn owner by looking for another place to stay. While this could occur, it is not for certain that this mutual respect of autonomy would occur; it still does not solve the issue of who should prevail and who should concede in the hypothetical cases. Another issue with respecting individuals' autonomy is that, "if freedom as such is valuable and should be protected [for the sake of each discovering their own good life], it means that there is no need any more for an interstitial principle of tolerance."[65] Basically, if we as a society are to value every person's autonomy, the ability for people to make their own choices and decisions while developing their own beliefs, there is no point to encourage or use tolerance because we would defeat the purpose of autonomy itself – we encourage others to buy into an idea they may not subscribe to. Respect for autonomy seems to not be the answer to our dilemma.

Wibren Van Der Berg puts us on the path to an answer. "If we look at [the conflicts we have worked with] from the perspective of those who are discriminated against, they are not about tolerance, but about a struggle for recognition as equals. Women or gays and lesbians, respectively, want to be recognized as persons with equal rights. Tolerance is not enough, because it still has the connotation that those

[65] Van Der Berg, 237.

who are tolerated are not completely equal."[66] We should move beyond a system of toleration to a system of equal respect and recognition for the decisions that are crucial to our sense of self. Van Der Berg's assertion brings us to the two components that will help us work within a multicultural society: John Rawls's idea of an overlapping consensus and Martha Nussbaum's politics of humanity.

First, I focus on Rawls and his paper *The Idea of an Overlapping Consensus*. Rawls points out that one of the most important aims of a political society is "presenting a political conception of justice that can not only provide a shared public basis for the justification of political and social institutions but also helps ensure stability from one generation to the next."[67] While this system is to be defined by members of a society to help set its aims and limits, Rawls reminds us there must be an overlapping consensus that supports this conception of justice. He defines an overlapping consensus as "a consensus in which [the political conception of justice] is affirmed by the opposing religious, philosophical, and moral doctrines likely to thrive over generations in a more or less just constitutional democracy, where the criterion of justice is that political conception itself."[68] Through the overlapping consensus, a society can maintain stability and social unity despite the deeply held differences its citizens may have between one another. Mendus also identifies the importance for a political system to be agreed upon by consensus of its citizens. She states "there are differences between people which give rise to hostility and…a just political order will be one which, while acknowledging these differences, takes no side in disputes

[66] Van Der Berg, 245.
[67] John Rawls, "The Idea of an Overlapping Consensus" *Oxford Journal of Legal Studies* 7(1): 1-25 (1987), 1.
[68] Rawls, "The Idea of an Overlapping Consensus," 1.

between them."[69] The political conception of justice that is identified helps the community as a whole to solve disputes where differences may arise.

I now expand on Rawls's idea of a political conception of justice and its features. One feature of a political conception of justice is that it is "not to be understood as a general and comprehensive moral conception that applies to the political order, as if this order was only another subject, another kind of case, falling under that conception."[70] A comprehensive doctrine makes decisions based on some principle or idea and applies that principle to each situation or decision the doctrine is faced with. To clarify, Rawls gives the example of utilitarianism. A utilitarian applies the theory of utility to all kinds of subjects from conduct to personal relationships to punishment and makes decisions based on what produces the greatest social utility. A political conception of justice cannot be a comprehensive doctrine because the idea of the overlapping consensus is that we need to accommodate different comprehensive doctrines and not favor one over the other. Christianity, Islam, and hedonism are all examples of comprehensive doctrines, as well. All three, like utilitarianism, apply certain theories or practices to different subjects and decisions. The overlapping consensus finds what those with comprehensive doctrines share so that they can get along with one another despite their differences. A political conception of justice would try to find what utilitarians and their opponents share or what Christians and non-Christians share in beliefs.

Rawls points out early in his paper that a political conception of justice "must allow for a diversity of general and comprehensive doctrines, and for the plurality of

[69] Susan Mendus, "My Brother's Keeper: The Politics of Intolerance," in Susan Mendus, *The Politics of Toleration in Modern Life*, 1-12, at 8.
[70] Rawls, "The Idea of an Overlapping Consensus," 3.

conflicting, and indeed incommensurable, conceptions of the meaning, value, and purpose of human life affirmed by the citizens of democratic societies."[71] He also stresses the importance of coming together to create the political conception of justice through an overlapping consensus. With the consensus, "questions of political justice can be discussed on the same basis by all citizens, whatever their social position, or more particular aims and interests, or their religious, philosophical, or moral views."[72] This brings Rawls to another feature of a political conception of justice, that "it is not formulated in terms of a general and comprehensive religious, philosophical, or moral doctrine but rather in terms of certain fundamental intuitive ideas viewed as latent in the public political culture of a democratic society."[73] In other words, the political conception comes from agreed upon practices from within the society's shared ideas and principles. For instance, in the United States, when the Founding Fathers wrote the Declaration of Independence, they wrote about how all men were created equal. Equality is something that has been a defining characteristic of American history ever since.

Returning to developing a political conception of justice, there is one last feature that must be explained. The last feature is that "just as a political conception of justice needs certain principles of justice for the basic structure to specify its content, it also needs certain guidelines of enquiry and publicly recognized rules of assessing evidence to govern its application. Otherwise, there is no agreed way for determining whether those principles are satisfied, and for settling what they require

[71] Rawls, "The Idea of an Overlapping Consensus," 4.
[72] Rawls, "The Idea of an Overlapping Consensus," 6.
[73] Rawls, "The Idea of an Overlapping Consensus," 6.

of particular institutions, or in particular situations."[74] For Rawls, the political conception of justice must be clearly defined for all to know. There must be a system in place to judge if the political conception of justice is being followed.

Rawls describes his idea of justice as fairness as an example of a political conception of justice. I will briefly summarize the theory below.[75] Within his theory, Rawls discusses the original position, which "corresponds to the state of nature in the traditional theory of the social contract."[76] When a group of people in the original position decide to come together to form a government, they must all come to an agreement about the principles of justice, but they must do so behind a "veil of ignorance," meaning they are unaware of their place in society, their class or social status, their strength, or even their own conception of what the good life entails.[77] From this position, no one can ensure that they are advantaged or disadvantaged in the choice of principles of justice. Thus, everything that is decided on from the original position must be fair for all since no one will know their place until after everything is agreed upon. He later discusses the two principles of justice that he believes would be "agreed to in the original position."[78] The first principle is that "each person is to have an equal right to the most extensive scheme of basic liberties compatible with a similar scheme of liberties for others."[79] For Rawls, there are certain liberties and rights that a government could not remove from a citizen no

[74] Rawls, "The Idea of an Overlapping Consensus," 8.
[75] For a full explanation of Rawls's concept of "justice as fairness," see *A Theory of Justice*. I use Rawls's idea of justice as fairness here to give an example of what a political conception of justice would be since everyone would have to come together to decide on certain values and ideas.
[76] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999), 11.
[77] Rawls, *A Theory of Justice*, 11.
[78] Rawls, *A Theory of Justice*, 52.
[79] Rawls, *A Theory of Justice*, 53.

matter the circumstance, such as the right to vote and to hold public office. The second principle that would be derived is that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to the positions and offices open to all."[80] For the second principle, while distribution of wealth does not need to be equal, it must be to everyone's advantage, including the guarantee that all elected offices and positions will be open for all to run for and gain the advantages of.

Rawls also takes a great deal of time in his argument to explain what an overlapping consensus and a political conception of justice do not look like. For instance, an overlapping consensus is "not merely a consensus on accepting certain authorities, or on complying with certain institutional arrangements, founded on a convergence of self- or group-interests."[81] The overlapping consensus is similar to toleration: an active pursuit of a common good, not mere indifference. Rawls does also point out that "in affirming a political conception of justice we may eventually have to assert at least certain aspects of our own comprehensive (by no means necessarily fully comprehensive) religious or philosophical doctrine…[but] we do not state more of our comprehensive view than we think would advance the quest for consensus."[82] To this extent, Rawls expresses how we can include the idea of free exercise of religion to express our views within the political conception of justice, but it can go no further than that; we cannot pick an official religion or an official philosophical way to go about our daily lives. Accepting this part of the conception allows for an acceptance of equal liberty for all within the system we are creating.

[80] Rawls, *A Theory of Justice*, 53.
[81] Rawls, "The Idea of an Overlapping Consensus," 11.
[82] Rawls, "The Idea of an Overlapping Consensus," 14.

Whichever virtues of political cooperation that we include in our conception of justice, they will become "very great" virtues.[83] For instance, if a society were to value toleration, we would be more susceptible within our political system to meet others halfway on issues. These values will be important, as whichever ones are included in the political conception will take precedent over other competing values. If we valued toleration in relation to our example about the Muslim and pornographer, we would encourage them to meet one another halfway and to somehow resolve their conflict so that both parties can gain positive results in some form or another and avoid discord in society.

Rawls's political conception of justice, however, is inadequate for our two hypothetical cases. The conception of justice through overlapping consensus needs to identify values. The only thing Rawls has done for us is give the framework of how such a conception should look and be agreed upon. There must be some value within the conception that we can use to resolve the situations presented above. In terms of the hypothetical scenarios, the political conception of justice would show us if we valued the couples' decisions to obtain a marriage license or remain at the bed and breakfast more so than the clerk or inn owner's religious belief guided actions. With the components of Rawls's political conception of justice in mind, we can incorporate Nussbaum's politics of humanity approach and discuss how that approach can become a part of a political conception of justice. Nussbaum articulates this approach in her book *From Disgust to Humanity*. She argues that many people are against equal rights for gays and lesbians because they characterize homosexuals as

[83] Rawls, "The Idea of an Overlapping Consensus," 17.

disgusting, constantly thinking of their sex practices and how they are portrayed as exchanging "saliva, feces, semen and/or blood" between one another.[84] She discusses how people like Lord Devlin have been proponents of legal intervention where something disgusts people. Leon Kass, head of former President Bush's President's Council on Bioethics, has concluded "disgust is a sufficient reason to ban a practice that causes no harm to nonconsenting parties."[85] Nussbaum is quick to point out that those who move to stop recognition or creation of equal rights for gays and lesbians come from large segments of the Christian population and discusses how they use disgust as a tool to sway voters one way or another. For Nussbaum, the politics of humanity approach would resolve these issues and prevent disgust to pervade the thoughts of everyday people. According to the politics of humanity approach, when people "don't think well of someone's intimate personal choices, they should give them space to make them, so long as they do not violate other people's rights. Such a politics of equal respect/equal liberty has long been the norm in the area of religion, where we are used to the idea that we should live on terms of respect with people whose choices we think bad, or even sinful, and to the related idea that such deeply meaningful personal choices require the protection, for all, of a sphere of personal freedom."[86] She defines this approach as requiring "a political attitude that combines respect with curiosity and imaginative attunement."[87] This differs from mere toleration or recognition of autonomy in that her approach gives deference to intimate and meaningful choices people make that are fundamental to their identity. The

[84] Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010), 1.
[85] Nussbaum, xiv.
[86] Nussbaum, xv.
[87] Nussbaum, xviii.

definition deserves some elaboration. While the definition includes respect, it is not the normal definition that we usually have in mind. We must have respect for others, seeing one another "as a center of perception, emotion, and reason, rather than an inert object."[88] Political respect must have a bigger component to it, an imagination and abstract thought to put us in the place of another. We must use sympathy and imagination in thinking of others in our political conception of justice.[89] Basically, we must give deference to the right of people to make decisions that are more crucial to their identity, whether as an individual or a couple.

This conception of equality seems to be one that we can incorporate into a political conception of justice with an overlapping consensus: that I should allow others to make decisions and lifestyle choices that I may not necessarily agree with but that are crucial to their sense of being and importance is something all moral, philosophical, and religious backgrounds could agree to so long as those decisions do not harm or offend me. The politics of humanity approach also satisfies the key features of Rawls's conception of justice. First, the conception must be a moral one for a specific kind of subject. For the politics of humanity approach, I would argue that this method is to be used for interactions, both public and private, between people, especially if there is a disagreement on some characteristic between the people interacting. The politics of humanity approach is not a comprehensive doctrine that can apply to everything, like the principle of utility can. Finally, Rawls states that our conception must have a system of measurement to judge those who take part in this conception of justice. The politics of humanity approach seems to lack this as of

[88] Nussbaum, xix.
[89] Nussbaum, xxiii.

now, so we must go further into discussion of the method and how it is to be evaluated.

How should we measure how the system of justice is working? It seems it needs to go beyond just assessing a situation and saying whether or not people are getting along. Let us return to the example of our hypotheticals. How will we know our political conception works for them? Will it ever work for them? The politics of humanity approach seems to solve the issue that toleration could not. In this political system, the clerk and the inn owner can disapprove of the couples' lifestyle and but choose not to interrupt the pursuits of the couples.[90] Nussbaum gives the example of colonial Rhode Island and Pennsylvania and how people of those colonies had lived together peacefully despite having a wide variety of religious beliefs.[91] Rhode Island, in fact, had "Baptists, Quakers, Roman Catholics, Jews, and (officially at least) Muslims" who all co-existed on the basis of "a fair-minded agreement to respect their property rights."[92] It appears that the way to ensure that we are following the politics of humanity approach is to assess if both parties involved in a dispute are really respecting the other's liberty in that they are imagining themselves in the other's situation. The politics of humanity also involves the principle of noninterference, as did tolerance. Unlike tolerance that simply implies that there is some moral good in tolerating the intolerable, the politics of humanity gives a special kind of respect to other human beings. As every human deserves to find his or her own meaning in life that does not harm others, the politics of humanity demands that we "ought to respect

[90] In the next chapter, I will discuss the legal recourses for both the inn owner and clerk and how they could not be forced to serve the couple. For instance, the inn owner is a private business owner and cannot provide business to the couple if he so wished absent a law that would compel him to do so.
[91] Nussbaum, 37.
[92] Nussbaum, 37.

the practitioners as their equals; respecting them as their equals, they should conclude that it is wrong to deny them the chance to search for meaning in their own way."[93]

Simply put, the means to judge the political conception of justice requires respect and imagining yourself in the position of the other. The imagination component of the conception is vital to the approach. Nussbaum even states "equality and equal respect cannot come into being, or long survive, without the ability to imagine the situation of a person in a different social group and to assess it from that person's point of view."[94] Respect for others cannot stand alone without imagination; people cannot see others as persons without the imagination of abstract thought. If citizens give this respect and imagination to others, they have satisfied the political conception of justice. If they are not giving this deference, they are not following the political conception of justice. The element of imagination is important because it can help us judge what are and are not crucial decisions to others. For instance, the couple can imagine from the clerk's viewpoint what it is like to be a Christian and if her decision to not issue the license is crucial to her faith. Conversely, the clerk could imagine herself as the couple in the situation and imagine what it would be like to not be issued the marriage license and see the detrimental effect it would have on the couple.

"The politics of humanity doesn't connote approval of the choices other people make, or even respect for the actions they perform. It just requires seeing them as human beings of equal dignity and equal entitlement pursuing a wide range of human purposes. In some cases those purposes may involve real harm to others. In

[93] Nussbaum, 40.
[94] Nussbaum, 47.

such cases, [which is not present in our cases] we may legitimately restrict people's ability to pursue them. But the person who practices the politics of humanity never retreats to a position from which the equal humanity of others can't be seen."[95]

Since all main features of a political conception of justice have been satisfied, we can now apply this conception to the hypothetical situations. The clerk should not stop the couple from getting a marriage license while the inn owner could legitimately deny the couple a stay at his inn. Despite the clerk citing religious reasons for not issuing the couple a marriage license despite it being legal in the state of New York, she should still issue the license because "respect[ing] another person as an equal is to see that person in a certain way…endowing the[m] with life and purpose, rather than with dirt and dross, with human dignity rather than with foulness."[96] Because the law has deemed the couple to be equal and allowed to enter in a marriage contract, the clerk should recognize this and issue the license despite her religious convictions. The couple does not harm anyone or setting back anyone's interests. While the clerk could still practice her faith in other aspects of her life, the couple's decision to get married is much more crucial to their identity as a couple; the clerk can still practice her religion in other ways that would define her as a Christian. Without the marriage license, the couple could not have their commitment and love be recognized by the state. When it comes to the couple in the bed and breakfast situation, either side might prevail over the other depending on the circumstances. If the couple could cite a reason as to why that particular inn was meaningful to them, such as their parents meeting there or it having been the place where they met, then

[95] Nussbaum, 51.
[96] Nussbaum, 50.

their interests would outweigh those of the inn owner. If they could not, however, the inn owner's interests would outweigh the couple's.

CHAPTER THREE

In the previous chapter, I addressed the normative arguments for toleration in a liberal society, deeming them inadequate; I argued for moving from that method to Nussbaum's politics of humanity approach. In this chapter, I will address the legal remedies that the actors in my hypotheticals can seek to redress their situations. I will show that the county clerk cannot deny the lesbian couple a marriage license, despite her religious beliefs. I will also show that, if an anti-discrimination public statute did exist that protected gay and lesbian access to public accommodations, that the inn owner could be legally held to allow the couple to stay at his establishment. Finally, I will argue that the U.S. Supreme Court should adopt a balancing test that incorporates Nussbaum's approach for resolving conflicts of interests, such as those in our hypothetical situations.

STATE ACTION

Before moving to the specific cases, it is important to note whether or not there is state action present in these circumstances. If such action is present, then the enforcement of the First and Fourteenth Amendments would come into play, though these Amendments only limit the state; private individuals are not bound by these Amendments. The clerk is a state actor whereas the inn owner is not. A state actor is a person or entity that is acting on behalf of a governmental body, which subjects them to regulation under the Bill of Rights and Fourteenth Amendment. While it is clear why the clerk is a state actor, it may be unclear why the inn owner is not. As the U.S. Supreme Court has repeatedly stated, "only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be

attributed its true significance."[97] How entangled the state becomes with private conduct determines if state action is present in a given situation, and therefore whether that conduct is subject to the First or Fourteenth Amendments. I will explore three court decisions to help us think about how the inn owner is not a state actor: *Shelley v. Kraemer*, *Burton v. Wilmington Parking Authority*, and *Moose Lodge No. 107 v. Irvis*.

In the 1947 case of *Shelley v. Kraemer*, the Court had to decide if judicial enforcement of a racially restrictive agreement that prevent blacks from owning property in a certain subdivision in Missouri amounted to state action. If so, the enforcement of the agreements would be unconstitutional under the Fourteenth Amendment. The agreement was drawn up by the residents of the subdivision and agreed to only by the white residents; it was not sponsored by any state or local government. The Shelleys were a black couple who moved into the subdivision and the Kraemers, residents of the subdivision, went to court to enforce the agreement. In a 6 to 0 decision, the Court held that "in granting judicial enforcement of the restrictive agreements…the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."[98] The Court made clear that the agreements standing alone were not a violation of the Fourteenth Amendment but when a state actor, like a court or judicial official, stepped in to enforce the agreement, it became a violation.[99]

In 1961, the Court had to decide if the Eagle Coffee Shoppe had violated the Equal Protection Clause of the Fourteenth Amendment in its refusal to serve William

[97] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), 722.
[98] *Shelley v. Kraemer* 334 U.S. 1 (1972), 20.
[99] 334 U.S. 1, 13, 17.

Burton, an African-American, in *Burton v. Wilmington Parking Authority*. The Coffee Shoppe was a restaurant that leased space within a garage operated by the Wilmington Parking Authority, which was a corporation created in part by the City of Wilmington to "provide adequate parking facilities for the convenience of the public" to relieve a parking crisis effecting the city at that time.[100] The Authority benefitted from the city's aid and received tax-exempt status.[101] After entering into a private lease with the Eagle Coffee Shoppe, the Authority eventually furnished heating and gas service for the restaurant as well as incurring all the costs it would take to maintain and repair the facility.[102] In a 6 to 3 decision, the Court held that "when a State leases public property in the manner and for the purpose shown to have been the case [in this situation], the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."[103] Because the Coffee Shoppe was receiving benefit of the City's funding via the Parking Authority, the Court decided that the Coffee Shoppe was a state actor, making its discrimination against Burton unconstitutional under the Fourteenth Amendment. Unless the inn owner is leasing and benefiting from the state or one of its contractors, he is not considered a state actor.

Finally, in *Moose Lodge No. 107 v. Irvis*, the Court had to decide if the discriminatory practices of Moose Lodge No. 107 constituted a violation of the Fourteenth Amendment since the Pennsylvania liquor board issued the Lodge a liquor

[100] 365 U.S. 715, 717.
[101] 365 U.S. 715, 718.
[102] 365 U.S. 715, 720.
[103] 365 U.S. 715, 726.

license, which Irvis argued made the club's discrimination state action.[104] The Moose Lodge was "a private club…having well-defined requirements for membership" while owning the building in which it operated and received no public funding.[105] The Court reasoned that discrimination by a private entity would never violate the Equal Protection Clause simply because that entity received any type of benefit from the state or was subjected to a state regulation in any degree; "such a holding would utterly emasculate the distinction between private as distinguished from state conduct."[106] As the Court notes, "the State must have 'significantly involved itself with invidious discriminations' in order for the discriminatory action to fall within the ambit of constitutional prohibition."[107] The regulatory practices of the Pennsylvania Liquor Control Board did not "sufficiently implicate the State in the discriminatory policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."[108] So, even if the state regulated the bed and breakfast, the inn owner's actions would not be considered state action. There would need to be a sufficient amount of involvement on the state's part in regards to the inn to begin the discussion as to whether or not the inn owner is a state actor, and this seems not to be the case.

The Case of the County Clerk

In our hypothetical, the county clerk is an elected official of the county in which she resides. She has been elected to carry out various functions, which includes

[104] *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), 165.
[105] 407 U.S. 163, 171.
[106] 407 U.S. 163, 173.
[107] 407 U.S. 163, 173.
[108] 407 U.S. 163, 177.

the issuance of marriage licenses to those legally allowed to wed. After New York State's passage of the Marriage Equality Act, licenses could be issued to same-sex couples.[109] This particular clerk, being a "self-described Bible-believing Christian," however, claimed that she could not issue the license to a lesbian couple because it went against her deeply held religious beliefs and refused to issue the license.[110] There are certain tensions that arise that must be addressed. Can the clerk go against her duties because she cites a burden on her religious liberty or does the state's interest in allowing same-sex partners to wed override her religious rights under the Free Exercise Clause of the First Amendment? To help answer this question, I turn to two relevant cases that involve a religious rights violation of an individual employed by the federal government: *Goldman v. Weinberger* (1986) and *Employment Division v. Smith* (1990).

In *Goldman*, the Supreme Court had to decide whether a Jewish Air Force officer had a right to wear a yarmulke, a traditional head covering of Orthodox Jews that acknowledges the wearer's belief in God above him, despite a military uniform code that said he was not allowed to wear one.[111] S. Simcha Goldman had previously not been prevented from wearing his yarmulke on the military base where he was stationed until his testimony at a court-martial hearing enraged an officer. The officer pointed out to Goldman's commanding officer that the wearing of the yarmulke was a violation of Air Force Regulation 35-10, which forbade headgear indoors by Air

[109] New York Code A8354-2011, 24 June 2011.
[110] Thomas Kaplan, "Rights Collide as Town Clerk Sidesteps Role in Gay Marriages," *New York Times*, September 27, 2011, 1.
[111] *Goldman v. Weinberger*, 475 U.S. 503 (1986).

Force personnel.[112] In its holding, the Court noted that in previous decisions, it has "held that military regulation must be examined to determine whether 'legitimate military ends are sought to be achieved' and whether it is 'designed to accommodate the individual right [in question] to an appropriate degree.'"[113] After restating that the military is a special kind of community that needs to promote discipline and camaraderie, the Court stated it must give deference to military authorities in deciding matters that pertain to military regulation; ultimately, the Court held that "the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations."[114]

While *Goldman* deals with military regulations and policy, it is the more closely related Supreme Court decision to the hypothetical involving the County Clerk. Both are employed by a government entity, one that automatically makes both a state actor. While some may argue that *Goldman* does not involve state action in any way, the Clerk is still the epitome of a state actor. *Goldman* does involve state action in that the military would not allow Goldman to wear his yarmulke. In our present case, the state, by requiring the clerk to issue the marriage license, would not be restricting the clerk from exercising her religion. A First Amendment claim would arise if requiring the clerk to issue the license would be to prevent the clerk from exercising her religion. The clerk is elected by her constituents to serve as the official record keeper and license provider of the district that she oversees. However, as the clerk has made clear, issuing the license to the lesbian couple goes against her

[112] 475 U.S. 503, 505.
[113] 475 U.S. 503, 506.
[114] 475 U.S. 503, 509-10.

religious beliefs and she refuses to issue the license as a result. A state actor employs her just as the officer ordering Goldman to take off her yarmulke is employed by the military. Can the state justify the burden on the clerk's religious beliefs by enforcing a section of the New York Penal Code? Is the Code an infringement on the free exercise of her religion? To help answer these questions, I turn to the 1990 case of *Employment Division v. Smith*.

In *Smith*, Alfred Smith was fired from his job at a private drug rehabilitation organization because he was ingesting peyote for sacramental purposes at a ceremony of the Native American Church.[115] Peyote is a hallucinogen derived from a plant that is a Schedule I drug under the Federal Controlled Substances Act; the use of the drug is punishable as a Class B felony.[116] Smith applied to the Employment Division of Oregon for unemployment compensation but was deemed "ineligible for benefits because [he] had been discharged for work-related 'misconduct.'"[117] As the court recognized in another Free Exercise case, *Sherbert v. Verner*, "the free exercise of religion, means first and foremost, the right to believe and profess whatever religious doctrine one desires," and the First Amendment excludes all regulation by the government of religious beliefs.[118] The Court extended this notion in *Smith*, noting that "the 'exercise of religion' often involves not only belief and profession but [also] the performance of (or abstention from) physical acts: assembling with others for a worship service" or "participating in sacramental use of bread and wine" are

[115] *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), 874.
[116] 494 U.S. 872, 874.
[117] 494 U.S. 872, 874.
[118] *Sherbert v. Verner*, 374 U.S. 398 (1963), 402.

examples.[119] But the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[120] Justice Scalia, the author of the *Smith* majority opinion, rejects the idea of requiring a "compelling government interest" to infringe upon someone's free exercise rights under the First Amendment because it would produce "a private right to ignore generally applicable laws."[121] Under *Smith*, as long as laws do not target religious individuals to expand or limit their conduct specifically, laws that may infringe on religious exercise are not automatically unconstitutional. One could argue that *Smith* also involves a law that restricts someone from doing something, whereas the clerk in our case is being required to do something and that limits *Smith*'s applicability to the case of the clerk. However, under New York Penal Code, the specifics of which I will discuss below, she can be fired by her refusal to act: while the First Amendment cannot force someone to act against their religious convictions, it does not mean that one has the right to engage in a religious act that is illegal.

Like *Goldman*, *Smith* deals with the Free Exercise Clause of the U.S. Constitution's First Amendment. By drawing on the two cases above, we could foresee how the Court would decide a claim of burden on free exercise. The Marriage Equality Act, however, is not a code of conduct for members of society to follow. Rather, it is a law that grants a right to all citizens to enter into a marriage with one

[119] 494 U.S. 872, 877.
[120] This new holding overshadowed the test established in *Sherbert* that "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest," 494 U.S. 872, 879.
[121] 494 U.S. 872, 885-6.

another regardless of sex or sexual orientation. The law that the Clerk would be breaking by not issuing the marriage license would be Section 195.000 of the New York Penal Code.[122] The code states "[a] public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another of a benefit…he knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office. Official misconduct is a class A misdemeanor." In the terms of *Smith*, the law is of general applicability to all citizens. It does not target specific clerks who follow a certain religious practice and force them to follow such a law by granting marriage licenses to couples who are not in heterosexual relationships.

Some might object that *Smith* and *Goldman* would not be the precedents that guide the hypothetical involving the county clerk since both cases do not involve refusing to perform an action required for one's profession, rather than a law that restricts someone from doing something. To further justify my argument, I turn to *Sherbert v. Verner* and examine the test the court identified in that case to see how it would apply to our case currently. Some may object to upholding the New York Penal Code Law and ruling against the clerk by relying on Scalia's "general applicability" test. The test from *Sherbert* is much more stringent and more protective of religious liberty. *Sherbert* is not binding precedent.[123] But still, it was a test the Court used to measure the burden on claims that the government was infringing upon religion and one that I believe is a solid test to determine if a substantial infringement

[122] Official Misconduct, New York Penal Code Article 195 (2010), § 195.00.
[123] Since *Smith*, the Court's guiding precedent in Free Exercise cases that have come before them is the test Justice Scalia uses in *Smith*, which abandons the test mentioned in *Sherbert*.

has occurred. It is a test of higher scrutiny than we find in *Smith*. Even under *Sherbert*, however, the New York law would still be upheld.

In *Sherbet*, which was decided in 1963, the Court had to decide if Adell Sherbert had a right to unemployment compensation through the South Carolina Unemployment Compensation Act.[124] Sherbert was a Seventh-day Adventist and she would not work on Saturday, the Sabbath Day of her faith. As a result, she was discharged from employment originally in South Carolina. The Act would not allow any citizen of South Carolina who refused employment to collect unemployment benefits, which Sherbert argued infringed on her right of free exercise of religion because she would not work on Saturdays. She brought suit against the Employment Commission of South Carolina, and the case eventually reached the Supreme Court for review. The Court sided with Sherbert in a 7 to 2 vote. Justice Brennan authored the majority opinion that outlined a test for claims of government infringement on religious liberty. The Court must determine first if the government's action "imposes any burden on the free exercise of [an individual's] religion."[125] As Justice Brennan points out, the South Carolina Supreme Court decision saying that Sherbert's religion is not impeded upon "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[126] Once a burden to religion has been established, there are two additional parts of the *Sherbert* test that a law must withstand to remain constitutionally valid: the law must further a "compelling state interest" and demonstrate that "no alternative forms of regulation

[124] 374 U.S. 398, 399-400.
[125] 374 U.S. 398, 403.
[126] 374 U.S. 398, 404.

would combat such abuses without infringing First Amendment rights."[127] In *Sherbert*, the Court found no compelling state interest in the way the Act burdened religion and struck down the law.

To determine if the Clerk's religious liberty is being intruded upon according to the *Sherbert* test, we first consider if a law imposes a burden on an individual's free exercise of their religion. The first part of the test has already been satisfied: the Clerk has said the Marriage Equality Act goes against her deeply held religious beliefs and refuses to issue the license, this violating Section 195.000 of the New York Penal Code. Under Nussbaum's approach, we must defer to the clerk's interpretation of her religion since the clerk is citing this burden as something that hinders her religion, something that is meaningful to her. According to the next part of the *Sherbert* test, the law must be narrowly tailored to satisfy a compelling state interest. I would argue that the state has a compelling interest in ensuring that its citizens have clerks that perform all of their duties at a given time, and do not merely pick and choose from the duties that they will follow when their religion dictates it. As Justice Scalia wrote in *Smith*, to allow people to pick and choose the laws they will follow based upon their religious beliefs would make "the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[128] The law is narrowly tailored to achieve the compelling government interest by making sure clerks follow all the duties assigned to their offices. Thus, the Clerk would be compelled to still produce a marriage

[127] 374 U.S. 398, 406-7.
[128] 494 U.S. 872, 879.

license for the couple she originally denied upon my analysis and utilization of Supreme Court precedent.

Some may argue, however, that if there were many clerks to issue licenses, that forcing this particular clerk to issue the license would not pass the *Sherbert* test since there would be others to complete the duties of issuing the licenses to gay and lesbian couples and the state's compelling interest would still be satisfied. I would argue, however, that saying that gays and lesbians are to be handled only by certain clerks still infringes on their equality as citizens. They should be able to receive a license from any clerk, even those with religious convictions; to allow anything different would be the equivalent of returning to the "separate but equal" doctrine of *Plessy v. Ferguson*.[129] One might respond that *Plessy* is different because the educational systems were inherently unequal because part of the education system is interacting with different types of people, but here everyone is still receiving the same marriage license. But a political right, such as marriage, demands equal respect from all persons, despite their deeply held personal convictions. There should not just be one clerk designated to issue same-sex marriage licenses while all other clerks at a certain office can issue opposite-sex licenses. As Nussbaum writes, "Even when we believe others are going astray, the faculty of conscience in them deserves respect from our laws and institutions. Because human beings are of equal worth, conscience is deserving of equal respect."[130]

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[129] *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[130] Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010), 38

THE CASE OF THE INN OWNER

In my other hypothetical, the inn owner denies admission to a newly wed gay couple, not allowing them to stay at his bed and breakfast. Unlike the county clerk, the inn owner is not a state actor and is not required to admit people of a sexual orientation that he morally disapproves of into his establishment. After the couple has already booked their stay online, the owner can issue a refund and not allow the couple to stay at his inn. As in the other hypothetical, a tension arises that must be addressed. While one could argue that there are other inns at which the couple could stay for their honeymoon, there is still some harm done to the couple, a dignitary harm that I touched on in the previous chapter. The harm "is the denial of the equality rights of others."[131] This harm has generally been remedied in history by legislative bodies, whether on the federal, state, or local level, by public accommodations statutes. Unlike the Southern racists who were opposed to Title II of the Civil Rights of Act of 1964, religious individuals have a constitutional provision – the First Amendment – to appeal to that would allow them an exemption to such public accommodation statutes when it comes to allowing gay and lesbian people in their establishments. Once again, one could turn to the precedents of *Sherbert* and *Smith* to help guide us through the outcome of this case. For the purposes of my argument, I will assume in this section that there is an anti-discrimination public accommodations statute that bars discrimination on the basis of sexual orientation in the municipality that the inn owner's establishment resides in. Since this is the case, I can discuss the tensions between such statutes and claims of religious liberty. Before turning to the

[131] Carl F. Stychin, "Faith in the Future: Sexuality, Religion and the Public Sphere" *Oxford Journal of Legal Studies* 729-755 (Winter 2009), 733.

precedents of *Sherbert* and *Smith*, however, it is important to examine case law that does address conflicts of deeply held beliefs and sexual orientation that courts have addressed. I will examine the following four cases and show how they are both similar and different from the situation that we are faced with here: *Hubert v. Williams*, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Boy Scouts of America v. Dale,* and *North Coast Women's Care Medical Group v. San Diego County Superior Court*.

I first turn to the Appellate Department of the Superior Court of Los Angeles County's 1982 case of *Hubert v. Williams*.[132] In that case, William Hubert, a quadriplegic, and his necessary 24-hour attendant, Cindy Kelly, were evicted from an apartment Hubert leased. James Williams, the landlord, evicted Hubert and Kelly because Kelly was a lesbian and Hubert "associated with persons of a homosexual orientation."[133] Hubert filed suit against Williams under the Unruh Civil Rights Act, which provided that "all persons within the jurisdiction of [California] are free and equal, and no matter their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[134] The Appellate Court held that "under the Unruh Act, landlords may not refuse to rent an apartment to a homosexual solely because of that person's sexual preference."[135] Drawing from the California Supreme Court's *Marina Point v. Wolfson*'s discussion that the Unruh Act prohibited all forms of arbitrary discrimination by business establishments, the

[132] *Hubert v. Williams*, 133 Cal.App.3d Supp. 1 (1982).
[133] 133 Cal.App.3d Supp. 1, 3.
[134] 133 Cal.App.3d Supp. 1, 3.
[135] 133 Cal.App.3d Supp. 1, 3.

Appellate Court remarked that "the members of a particular class may not be discriminated against because of their status as members of that class" though an exclusion could be granted if based upon "the individual conduct of the person so excluded."[136] Essentially, while landlords could not discriminate because of some trait that defines a class of people that would be deemed arbitrary by courts, they could take action of exclusion based on the person's actions within their establishments. The Court did not address whether or not the sexual practices of gay men or lesbians were to fall under this umbrella. The Court also found "no compelling societal interest which could justify an exclusion based upon class status as homosexual."[137]

Hubert did not address religious concerns against sexual orientation claims but the case did make a note that religious beliefs seemed to be the basis for Williams's objection to Hubert staying in his apartment building. However, as the Court noted at the end of the case, they could find no compelling interest for the arbitrary discrimination in the public accommodation. Had Williams been more explicit about the basis of his discrimination, the Court would have recognized that it was not arbitrary and that it was based on religious conviction. The Court failed to consider the possibility of a religious objection to the Act. The importance of the holding of *Hubert*, however, is that the Court recognizes the importance of public accommodations statutes and that the interest in having access to accommodations overrides other interests in the public sphere. However, the next two cases I discuss,

[136] 133 Cal.App.3d Supp. 1, 3-4.
[137] 133 Cal.App.3d Supp. 1, 5.

find constitutional rights that the U.S. Supreme Court deems more important than the interests protected by public accommodation statutes.

The first case where the U.S. Supreme Court dealt with a public accommodations law in relation to sexual orientation was in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*. In 1993, the South Boston Allied War Veterans Council was given the authority by the city to organize the St. Patrick's Day Parade. The Council refused to admit the Irish-American Gay, Lesbian, and Bisexual Group of Boston (GLIB), a group that desired to express "pride in their Irish heritage as openly gay, lesbian, and bisexual individuals, to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals."[138] GLIB filed suit against the Council, arguing that they had violated the state's public accommodations law, which prohibits "any distinction, discrimination or restriction on account of…sexual orientation…relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."[139] After the Court affirmed that the parade was a public accommodation that would fall under the purview of the state law, it reviewed the lower courts decisions that were in favor of GLIB's admission to the parade. The Supreme Court voted 9 to 0 to reverse the lower courts' decisions. While the Court was prepared to tackle all of the issues in the case, including that the exclusion from the parade violated the Equal Protection Clause of the Fourteenth Amendment, the GLIB only wanted their claim for inclusion in the parade based on the Massachusetts public

[138] *Hurley v Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), 561.
[139] 515 U.S. 557, 561.

accommodations law.[140] Parades, as the Court discussed, are a means of expression and speech, which is protected under the First Amendment to the U.S. Constitution. While the public accommodations law is good law created by the state to protect a group that is the target of discrimination, the parade organizers have the right of autonomy to choose the content of their message.[141] The State Court erred, according to the Supreme Court, in making the sponsors' speech (i.e. the message conveyed by the parade) the public accommodation and not the actual parade itself. Justice Souter wrote in the majority opinion that "rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."[142] While the Court recognizes the importance of public accommodation statutes that protect against discrimination, that law cannot trump a First Amendment right to expression in this case coupled with a right of association.

This type of logic carried over to the case of *Boy Scouts of America v. Dale*, where a New Jersey public accommodations law was at issue.[143] The case focused around James Dale, a former Eagle Scout and assistant scoutmaster of the Boy Scouts of America. When the organization found out that Dale was a homosexual and a gay rights activist, they revoked his membership, asserting that "homosexual conduct is inconsistent with the values it seeks to instill."[144] Dale filed a complaint against the Boy Scouts in the New Jersey Superior Court, alleging that the Boy Scouts violated

[140] 515 U.S. 557, 566.
[141] 515 U.S. 557, 573.
[142] 515 U.S. 557, 574.
[143] *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).
[144] 530 U.S. 640, 644.

New Jersey's public accommodations statute by revoking Dale's membership solely on the basis of his sexual orientation.[145] The New Jersey law banned this type of discrimination in places of public accommodation. Eventually, the New Jersey Supreme Court held that the "Boy Scouts was a place of public accommodation subject to the public accommodations law, that the organization was not exempt from the law under any of its express exceptions, and that the Boy Scouts violated the law by revoking Dale's membership based on his avowed homosexuality."[146] The New Jersey Supreme Court also held that the state had a "compelling interest in eliminating 'the destructive consequences of discrimination from our society,' and that its public accommodations law abridges no more speech than is necessary to accomplish its purpose."[147] The U.S. Supreme Court overturned the New Jersey Supreme Court's decision in a vote of 5 to 4, with the majority opinion being written by then-Chief Justice Rehnquist. Like in *Hurley*, the Court agreed that the Boy Scouts of America is an expressive association and that "the forced inclusion of Dale would significantly affect its expression."[148] The Court then looked to the compelling interest the state had in ending discrimination and if the public accommodations law was narrowly tailored enough to accomplish that goal. The Court found that the interest was not strong enough, holding that the "state interests in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association…we hold that the First Amendment prohibits

[145] 530 U.S. 640, 645.
[146] 530 U.S. 640, 646.
[147] 530 U.S. 640, 647.
[148] 530 U.S. 640, 656.

the State from imposing such a requirement through the application of its public accommodations law."[149]

After review of *Hurley* and *Dale*, it would appear that there is more susceptibility for public accommodations statutes to be overturned by First Amendment claims. However, these claims do not come from religious exercise but from speech and associational claims. These hybrid claims of First Amendment right assertions seem to trump the interests served by public accommodations statutes. For certain public accommodations, like the Boy Scouts of America and the War Veterans Council's parade, claims of association and speech can trump anti-discrimination statutes.[150] However, our inn owner cannot claim a right of association or of free speech because his establishment does not wish to convey a certain message or expression of beliefs. When the couple booked their stay on the inn's website, the webpage did not reflect a certain religious doctrine guiding its business practices. The inn owner was also not selective as to who does and who does not stay at his establishment. Based on this reasoning, it seems that the public accommodations statute would still be upheld. This still holds under the final case for our review and application: *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*.[151]

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[149] While the U.S. Supreme Court may appear to always favor a First Amendment claim of expressive association over the compelling interests of eliminating discrimination against certain groups, the Court has ruled in favor of anti-discrimination legislation when it competes with such First Amendment interests, such as in *Roberts v. U.S. Jaycees* (468 U.S. 609 [1984]). After finding that allowing women into the Jaycees would not alter the organization's expressive message, the Court found that a law banning sex discrimination could be applied to an all-male organization without impeding on their rights of association or expression. 530 U.S. 640, 659.

[150] The Supreme Court deemed both the BSA and the War Veterans Council's public accommodations.

[151] *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court,* 44 Cal.4th 1145 (2008).

In the 2008 *North Coast* case, the California Supreme Court dealt with Guadalupe Benitez's suit against the North Coast Women's Care Medical Group. As a lesbian, Benitez wanted to get pregnant, seeking out North Coast for treatment for her infertility.[152] Two physicians at North Coast were the only ones able to perform the procedure necessary for Benitez to become fertile but both said their "religious beliefs would preclude [them] from performing the procedure" because she was an unmarried woman.[153] Eventually, Benitez was able to conceive but brought suit against the two doctors for sexual orientation discrimination under the Unruh Civil Rights Act. After the Court declared that North Coast was a public accommodation, the State Supreme Court looked towards the U.S. Supreme Court's decision in *Smith*, reasoning that "the First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs."[154] The State Supreme Court, under federal precedent, came to this decision under the precedent in *Smith* since the law was of general applicability and did not target religious beliefs or behaviors specifically within the language of the law.

With the holding in *North Coast*, one could argue that the inn owner would not win a case bringing suit against a public accommodations statute, like the Unruh Civil Rights Act. This was the precedent found under the holding in *Smith*. If we return to the stricter standard of the *Sherbert* test, we would find the same result in favor of the gay couple. The first part of the test is satisfied when, for religious

[152] 44 Cal.4th 1145, 1150.
[153] 44 Cal.4th 1145, 1150-1.
[154] 44 Cal.4th 1145, 1156.

reasons, the inn owner disobeys a public accommodations statute that bans discrimination on the basis of sexual orientation. The statute impinges on the religious exercise of the inn owner, since he does not wish to extend stay to the couple based on their sexual orientation. For the public accommodations statute to survive constitutional muster, however, it must pass strict scrutiny by being narrowly tailored to a compelling government interest. The interest of government in passing such statutes is to prevent discrimination against a targeted class in publically available goods, privileges, and services on proscribed grounds.[155] The model public accommodations statute that I present in the next chapter is narrowly tailored to achieve these goals, including in it a religious exemption that is based on a balancing test of how entangled the religion is in the questionable public accommodation. Under these provisions, I argue that public accommodations statutes in general could pass both the *Smith* and *Sherbert* tests and compel the inn owner to accept the couple into his establishment, despite his disapproval and opposition to their sexual orientation.

A Better Distinction Under Nussbaum

As noted above, the Supreme Court has made a distinction in cases involving public accommodations. On one hand, there are cases involving the rights of minorities being at odds with claims of free association and expression. On the other hand, there are cases that involve a claim of religious exercise against a public accommodations statute. In the former cases, the rights of free association and expression prevail over the rights of minorities. In the latter cases, the rights of

[155] 515 U.S. 557, 572.

minorities, under laws like a public accommodations statute, prevail over claims of free exercise of religion. In the previous chapter, I discussed Nussbaum's framework in her politics of humanity approach. Recall that she argues that we should allow others to make decisions that are crucial to them and give them meaning in their life. Based on the distinctions the U.S. Supreme Court has made between the two types of cases above, the Court seems to express an idea that the free exercise of religion is less important than free expression and association. According to Nussbaum's approach, however, the current distinction made by the Court is not a good distinction. The distinction should not be of one right being more important than another, but a balancing of how important the decisions being made by each party are to their identity. For instance, if someone is making a decision, such as participating in a Communion or Confirmation ritual, that is crucial to his or her identity of being a Christian, that decision should not be impinged upon by others who cite reasons that are unimportant to their identity. In the couple-clerk example, marriage is a crucial, further step in identifying the couple as committed to each other before the state

Recall *Dale*. Dale had been a boy scout for ten years of his life prior to becoming an Eagle Scout and leaving for college.[156] It could be argued that he derived a deep sense of meaning and identity from being involved in the scouts and wanted to continue his involvement with them. Under Nussbaum's framework, Dale should be allowed to remain a scoutmaster. The Boy Scouts of America is an exemplary organization because of the values it promotes through its Scout Oath and

[156] 530 U.S. 640, 644.

Scout Law, neither of which denounce or abhor homosexuality outright.[157] The Boy Scouts of America organization could still pride itself and retain its identity as an association even with Dale serving as a scoutmaster; Dale could not retain meaning like he could with the Boy Scouts in another organization elsewhere. This organization has specific meaning to him. Nussbaum's politics of humanity approach is what should guide the distinction as to whether or not the rights of a minority are upheld instead of the Court's current precedent. Under her approach, people's intimate choices can be balanced against others' beliefs and desires. With this test, courts can balance the importance of the decisions and claims at stake with each party involved in the dispute. This ensures that the stronger claim of importance and meaning prevails in these situations. *Dale* is an example of a decision that would allow a claim of a choice crucial to identity to prevail over a claim of free speech.

[157] 530 U.S. 640, 649.

CHAPTER FOUR: CONCLUSION

After delving into the issues surrounding the hypothetical situations discussed in the foregoing chapters, both normatively and legally, I conclude that a system of toleration is not what could resolve the issues that we find in these hypotheticals. The competing values of religious liberty against the civil rights of the gay and lesbian couples create a friction that toleration cannot solve in practice. There must be a system that addresses these competing values and helps us decide who should prevail in such contentious situations. Nussbaum's politics of humanity approach is such a system.

In the hypothetical case involving the County Clerk, the couple's right to procure a marriage contract for the purposes of getting married cannot be trumped by the religious convictions of the clerk. Under the politics of humanity approach, the couple's desire to get married is more of a personal choice that provides meaning to their lives than the clerk denying them a marriage license. She could still practice her religion in meaningful ways in other parts of her life, such as attending church or taking part in communion. Legally, even under the current precedents of *Sherbert, Goldman,* and *Smith,* the infringement on the clerk's religion does not override the state's law mandating that the clerk perform her job.

I argue, under Nussbaum's approach, that Congress should amend Title II of the Civil Rights Act to include sexual orientation, making it a violation of federal law to discriminate on the basis of sexual orientation in public accommodations. While over twenty states currently have public accommodations laws that protect a right of access to such establishments to individuals regardless of sexual orientation, the

protection should be afforded on a federal level. Below is the model public accommodations law I have composed after comparing the twenty-one state laws and the District of Columbia's law while taking into account Nussbaum's normative approach:

(1) 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 accommodations, as defined below, without discrimination or segregation regardless of race, age, marital status, creed, color, sex, handicap, sexual orientation or national origin of such persons.

(2) Any owner, operator, or employee of a place of a public accommodation or an agent of such an owner or operator shall not withhold from, or deny to a person any of the accommodations, advantages, facilities, and privileges of places of public accommodation based on the characteristics listed in part (1).

(3) "Place of public accommodations" shall be defined as any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public. Establishments under this law include:

    a. any inn, hotel, motel or other establishment which provides lodging to transient guests;

    b. any restaurant, cafeteria, or place to eat or drink;

    c. any publicly funded educational institution;

d. any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor;

e. any establishment created with the purpose to serve the health, appearance, or physical condition of a person;

f. any business offering wholesale or retail sales to the public.

(4) "Place of public accommodations" shall not include:

a. any church, synagogue, mosque, or other place that is principally used for religious purposes or practices;

b. any organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society;

c. any private club or educational institution not open to the public (i.e. that limits access to those who meet admission or membership requirements).

(5) This law does not require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of that entity when the individual poses a direct threat to the health or safety of others.

(6) If there is a dispute between an accommodation's owner (or their designee) and a potential proprietor of that accommodation that does not follow under section (5), a judge or magistrate should decide amongst the

parties as to which should prevail. The decider should base his or her decision on the how the identity of the establishment or the potential proprietor would be affected by the admittance or denial of the accommodation. This should be based on the establishment or individual's guiding principles.

There are some important features of the public accommodations law above that I would like to explain, indicating how they follow Nussbaum's approach. Sections (1) and (2) prevent accommodations and their employees from engaging in discrimination on the basis of important, defining characteristics of people. This prevents the arbitrary discrimination of a certain group or class of people, whether their traits are chosen or immutable. Section (3) defines what constitutes a public accommodation.[158] Section (4) defines what a public accommodations is not, which includes some religious institutions and organizations that are guided by religious practices. Generally, a religious institution, like a church, is used solely for religious practice and purposes. Very few, if any, claims under Nussbaum's approach would permit an individual's decision to override a principled decision of the church, such as expulsion of gays and lesbians from a mass service. Some may believe that Section (4) exempts the Boy Scouts or the clerk from abiding by this statute. However, since the Boy Scouts and bed and breakfast in our hypothetical case are not guided by a certain religious doctrine outright, they would not qualify for the exemption. This model law only allows for organizations or associations explicitly guided by a religious faith or belief to be exempt. Section (5) touches upon our discussion of

[158] Based on the definition provided in Nan D. Hunter, *The Rights of Lesbians and Gay Men, Third Edition: The Basic ACLU Guide to a Gay Person's Rights* (New York: NYU Press, 2004), 101.

Mill's Harm Principle. If an individual poses a direct threat of harm to the health and safety of others enjoying that accommodation, the accommodation is not required to permit them. And Section (6) applies Nussbaum's approach to difficult situations in which claims, like those of free speech and religion, may arise and frustrate some access to establishments that are public accommodations.

Using this model law to guide our discussion of the case involving the inn owner, the couple's right to stay at the inn is clear. Absent a public accommodations law that precluded discrimination on the basis of sexual orientation, the couple could not claim a right to stay at the inn under current court precedent. However, if a public accommodation statute did exist on a federal level, like mine above, and protected people from discrimination based on sexual orientation, the couple could stay at the inn based on the precedent of the cases discussed in chapter three. More importantly, however, is that Nussbaum's approach is what should guide our decisions not only normatively but legally as well. Under the politics of humanity approach, people's claims of expression, free exercise of religion, and free association are weighed not on a terms of hierarchy of importance according to a court. Rather, such claims are weighted by how integral the choice being made provides meaning to that person or that group's life or sense of identity.

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