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COMMENT

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PROHIBITING SEXUAL ORIENTATION DISCRIMINATION  
IN PUBLIC ACCOMMODATIONS:  
A COMMON LAW APPROACH

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PAUL VINCENT COURTNEY<sup>†</sup>

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<sup>†</sup> Executive Editor, Volume 163, *University of Pennsylvania Law Review*. J.D. Candidate, 2015, University of Pennsylvania Law School; A.B., 2011, Georgetown University.

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*“The common law like its English king never dies, it persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain.”*

—Bruce Wyman<sup>1</sup>

## INTRODUCTION

In May 2014, Collin Dewberry and his partner, Kelly Williams, went to breakfast at Big Earl’s Bait House and Country Store in Pittsburg, Texas.<sup>2</sup> On their way out of the restaurant, their waitress—the daughter of the restaurant’s owner, Earl Cheney—asked the men not to return.<sup>3</sup> “We don’t serve fags here,” she allegedly told them.<sup>4</sup> Mr. Cheney did not deny that the incident occurred but claimed that what his daughter actually said was “we just don’t *like* fags.”<sup>5</sup> He explained that the men had violated the restaurant’s policy because their legs were touching—their sexual orientation itself was not an issue, he claimed.<sup>6</sup> “She told them the rules are on the door and it

<sup>1</sup> Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 160 (1904).

<sup>2</sup> See Summer Dashe, *Couple Says They Were Asked Not to Come Back to East Texas Restaurant Because They Are Gay*, KLTV (July 26, 2014, 8:40 PM), <http://www.kltv.com/story/25624630/couple-says-they-were-asked-not-to-come-back-to-east-texas-restaurant-because-they-are-gay>, archived at <http://perma.cc/NB53-HDP8>; *Gay Couple Told Not to Return to East Texas Restaurant*, CBS DALLAS / FORT WORTH (May 29, 2014, 7:04 AM), <http://dfw.cbslocal.com/2014/05/29/gay-couple-told-not-to-return-to-east-texas-restaurant>, archived at <http://perma.cc/QKN4-U7DU>.

<sup>3</sup> See *Gay Couple Told Not to Return to East Texas Restaurant*, *supra* note 2.

<sup>4</sup> *Id.*

<sup>5</sup> See Dashe, *supra* note 2 (emphasis added) (“She’s a young lady, didn’t know what else to say, and they just kept on and she finally said we just don’t like fags.” (quoting Earl Cheney)).

<sup>6</sup> See *id.* (“Big Earl said it was their behavior, touching legs, that was against policy, not their sexual orientation.”); *Gay Couple Told Not to Return to East Texas Restaurant*, *supra* note 2 (“What I saw was one of them half way under the table with his legs stretched out into the other guy’s lap.

says ‘Welcome to Big Earl’s where men act like men, women act like ladies, no saggy pants and we reserve the right to refuse service to anyone.’”<sup>7</sup> Mr. Cheney claimed that “plenty of” gay people eat at Big Earl’s and that he has no problem serving gay customers who adhere to the establishment’s rules.<sup>8</sup> “You’re welcome to come and eat, but a man act [sic] like a man and a woman act [sic] like a woman,” he explained.<sup>9</sup> “[A] man’s supposed to stand up and be a leader. He’s not supposed to be a woman. He’s not supposed to come in here in a dress.”<sup>10</sup>

The experience of Messrs. Dewberry and Williams illustrates the nuanced way in which businesses discriminate against gay people in modern society. Today’s sexual orientation discrimination does not target gay people categorically but rather singles out “the subset of the group that fails to assimilate to mainstream norms.”<sup>11</sup> Mr. Cheney claims to have no issue with gay people—so long as they comport themselves according to heterosexual norms and present themselves as straight. Of course, saying that it is okay to *be* gay—but not to behave in any manner that could be perceived as gay—is essentially a demand that gay people remain closeted if they wish to avoid discrimination.<sup>12</sup> This regime of forced compliance with heterosexual norms harms human dignity and autonomy because it denies “individuals the freedom to elaborate their authentic selves.”<sup>13</sup> And it harms not only the immediate victims of discrimination—people such as Messrs. Dewberry and Williams—but also every person who, fearing discrimination, forces himself to comply with heterosexual norms and suppresses his true identity.<sup>14</sup> One of the greatest evils of modern-day sexual orientation discrimination is thus that so much of it goes unnoticed.

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And he kind of looked really possum eyed at me as they say it in East Texas, he kind of looked at me like ‘uh-oh.’” (quoting Earl Cheney)).

<sup>7</sup> *Gay Couple Told Not to Return to East Texas Restaurant*, *supra* note 2.

<sup>8</sup> See Dashe, *supra* note 2 (“The owner said plenty of gay couples eat at his restaurant without hassle and he has no problem with that as long as they follow his policy.”); *Gay Couple Told Not to Return to East Texas Restaurant*, *supra* note 2 (“Homosexuality [sic], Blacks, Hispanics—they all come in here—everybody comes in here to eat.” (quoting Earl Cheney)).

<sup>9</sup> Dashe, *supra* note 2.

<sup>10</sup> *Id.* (quoting Earl Cheney).

<sup>11</sup> KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 22 (2007).

<sup>12</sup> See *id.* at 20-26 (discussing “covering demands”).

<sup>13</sup> *Id.* at 93.

<sup>14</sup> Like Yoshino, I am not committed to any “rigid notion of what constitutes an authentic gay identity” but believe that gay people should have “the freedom to elaborate their authentic selves” without regard to stereotypes (either gay or straight). *Id.* It is certainly the case that some gay people will form authentic identities that incidentally comply with heterosexual norms.

Messrs. Dewberry and Williams were apparently left without legal recourse. To be sure, their story got media coverage,<sup>15</sup> and Internet users exacted revenge on Big Earl's Yelp page.<sup>16</sup> But Texas law appeared to provide them no remedy: Texas is one of only five states that has no statute prohibiting discrimination in so-called "public accommodations"<sup>17</sup>—broadly defined as those businesses offering "lodging, food, entertainment, or other services to the public."<sup>18</sup> Federal law was also unavailing, as the federal public accommodations statutes do not cover sexual orientation discrimination.<sup>19</sup>

Although forty-five states have enacted public accommodations statutes, the statutes of only twenty-one states<sup>20</sup> and the District of Columbia<sup>21</sup>

<sup>15</sup> See, e.g., sources cited *supra* note 2.

<sup>16</sup> See *Big Earl's Bait House and Country Store*, YELP, <http://www.yelp.com/biz/big-earls-bait-house-and-country-store-pittsburg> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/9NF9-K2BK> (displaying numerous "one-star" reviews); see also Khushbu Shah, *Yelpers Slam Texas Restaurant for Asking Gay Couple to Not Return*, EATER (May 29, 2014, 12:10 PM), <http://www.eater.com/2014/5/29/6216059/yelpers-slam-texas-restaurant-for-asking-gay-couple-to-not-return>, *archived at* <http://perma.cc/37AG-WQWY> ("After a gay couple alleged that they were asked not to return to a restaurant in Texas because they are gay, the restaurant's Yelp page has been pummeled with fake negative reviews.").

<sup>17</sup> See Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-Discrimination Public Accommodation Laws*, 2 WM. & MARY POL'Y REV. 288, 300 (2011). The other four states are Alabama, Georgia, Mississippi, and North Carolina. See *id.*

<sup>18</sup> BLACK'S LAW DICTIONARY 19 (10th ed. 2014). Title II of the Civil Rights Act of 1964, one of the federal public accommodations statutes, defines "places of public accommodation" as including hotels, restaurants, entertainment venues, and establishments located within hotels, restaurants, and entertainment venues. See 42 U.S.C. § 2000a(b) (2012). State statutes vary in the scope of businesses that are covered, with some statutes including retail establishments. See Bayless & Wang, *supra* note 17, at 300.

<sup>19</sup> Title II of the Civil Rights Act of 1964 prohibits discrimination only "on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(b). Title III of the Americans with Disabilities Act of 1990, the other federal public accommodations statute, prohibits discrimination only "on the basis of disability." *Id.* § 12182(a). Interestingly, in explaining the urgency of passing Title II, the chairman of the Senate Committee on Commerce noted that only thirty-two states had protected against racial discrimination in public accommodations—eleven more than protect against sexual orientation discrimination today. See *Civil Rights—Public Accommodations: Hearings on S. 1732 Before the S. Comm. on Commerce*, 88th Cong. 1 (1963) (opening statement of Sen. Warren G. Magnuson, Chairman, S. Comm. on Commerce) ("In the last few days, 2 States . . . have joined 30 other States and the District of Columbia in adopting laws against discrimination in public accommodations. This still leaves a substantial number of States and a substantial number of people without this affirmative protection."). Whether Title II should be amended to cover sexual orientation discrimination is a question beyond the scope of this Comment.

<sup>20</sup> These states are California, see CAL. CIV. CODE § 51 (West 2014); Colorado, see COLO. REV. STAT. § 24-34-601 (2013); Connecticut, see CONN. GEN. STAT. § 46a-81d (2013); Delaware, see DEL. CODE ANN. tit. 6, § 4503 (2014); Hawaii, see HAW. REV. STAT. § 489-3 (West 2014); Illinois, see 775 ILL. COMP. STAT. 5/1-102 (2012); Iowa, see IOWA CODE § 216.7 (2014); Maine, see ME. REV. STAT. tit. 5, § 4592 (2014); Maryland, see MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis 2014); Massachusetts, see MASS. GEN. LAWS ch. 272, § 98 (2014) (criminalizing such discrimination); Minnesota, see MINN. STAT. § 363A.11 (2013); Nevada, see NEV. REV. STAT. § 233.010 (2014); New

explicitly prohibit sexual orientation discrimination; the gay populations of twenty-nine states thus live without any affirmative statutory protection from discrimination in commerce. This Comment addresses the failure of these states to include gay people among those classes of persons protected by their public accommodations statutes. The presumption today is that businesses in twenty-nine states can discriminate against gay people with impunity—“that businesses, as property owners, have the right to exclude non-owners *unless that right is limited by statute*” and “to refuse to contract with anyone with whom they do not wish to deal *unless required to do so by express statutory command*.”<sup>22</sup>

Indeed, the right to exclude others has long been a fundamental notion of property.<sup>23</sup> Sir William Blackstone described “the right of property” as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total *exclusion* of the right of any other individual in the universe.”<sup>24</sup> Blackstone’s formulation has become embedded in our conception of “property rights in the abstract, centered around the *in rem* right to exclude,”<sup>25</sup> and the association between property and exclusion has come to pervade modern legal thought.<sup>26</sup> One scholar has gone so far as to argue that the exclusionary right “is the *sine qua non* of property.”<sup>27</sup>

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Hampshire, *see* N.H. REV. STAT. ANN. § 354-A:17 (2014); New Jersey, *see* N.J. STAT. ANN. § 10:5-4 (West 2014); New Mexico, *see* N.M. STAT. ANN. § 28-1-7(F) (2013); New York, *see* N.Y. EXEC. LAW § 296 (McKinney 2014); Oregon, *see* OR. REV. STAT. § 659A.403 (2013); Rhode Island, *see* R.I. GEN. LAWS § 11-24-2 (2013) (criminalizing such discrimination); Vermont, *see* VT. STAT. ANN. tit. 9, § 4502 (2014); Washington, *see* WASH. REV. CODE. § 49.60.215 (2013); and Wisconsin, *see* WIS. STAT. § 106.52 (2014).

<sup>21</sup> *See* D.C. CODE § 2-1402.31 (2014).

<sup>22</sup> Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1290 (1996) (emphasis added); *see also infra* notes 152-53 and accompanying text.

<sup>23</sup> *See, e.g.*, Shyamkrishna Balganes, *Demystifying The Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL’Y 593, 596 (2008) [hereinafter Balganes, *Demystifying*] (“The idea of exclusion, in one form or the other, tends to inform almost any understanding of property, whether private, public, or community.”); Shyamkrishna Balganes, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1892 (2012) (“A property right has long been thought to center around the idea of exclusion, and is often described as entailing the ‘right to exclude.’”); Francisco J. Morales, Comment, *The Property Matrix: An Analytical Tool to Answer the Question, “Is This Property?”*, 161 U. PA. L. REV. 1125, 1130 (2013) (“Some property theorists equate property with the right to exclude others from the thing owned.”).

<sup>24</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (emphasis added); *see also* Balganes, *Demystifying*, *supra* note 23, at 596 (noting Blackstone’s emphasis on exclusion).

<sup>25</sup> Balganes, *Demystifying*, *supra* note 23, at 596.

<sup>26</sup> *See id.* at 597; *see also id.* at 596 & n.3 (noting that “the Supreme Court too has characterized the element of exclusion as a critical component of the property ideal”).

<sup>27</sup> Thomas W. Merrill, Essay, *Property and The Right to Exclude*, 77 NEB. L. REV. 730, 752 (1998); *see also* Morales, *supra* note 23, at 1130 (noting Professor Merrill’s view that exclusion “is both a necessary and sufficient condition of property”).

But the right to exclude is subject to certain limitations. For public accommodations, the right to exclude historically has been counterbalanced by a common law duty to serve.<sup>28</sup> Over the course of the twentieth century, however, the common law duty to serve fell into disuse and was replaced by state and federal public accommodations statutes that prohibit businesses from denying service to statutorily defined protected classes.<sup>29</sup> Because public accommodations statutes have come to supplant the common law duty in our modern legal consciousness, many now believe—mistakenly, I argue—that these statutes are the sole source of law proscribing discrimination in commerce, and that if these statutes do not specifically enumerate a class or characteristic as among those protected, then businesses may discriminate against that class or characteristic with impunity.<sup>30</sup>

Recent scholarship has largely focused on proposals to expand state antidiscrimination statutes to encompass sexual orientation discrimination;<sup>31</sup> political advocacy groups' goals are similarly defined.<sup>32</sup> But this Comment rejects the notion that gay people's only hope for legal protection lies in *statutory* law. That certain states have not yet decided to extend statutory protection to gay people does not mean that those individuals are necessarily without legal recourse if a business should deny them service, or that enacting statutes is the only way to provide protection. As discussed above, a business's right to exclude historically has been counterbalanced by a common law duty to serve. Claims based upon the foundational principles of this common law duty may offer gay people immediate protection against discrimination in states whose legislatures have failed to provide such protection expressly. This Comment argues that even in states that have not proscribed sexual orientation discrimination affirmatively by statute, such discrimination is nonetheless illegal as a violation of businesses' common law duty to serve—and to not exclude arbitrarily—all customers.

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<sup>28</sup> See *infra* Part I.

<sup>29</sup> See *infra* Part II.

<sup>30</sup> See *infra* notes 152-53 and accompanying text.

<sup>31</sup> See generally, e.g., Kelly Catherine Chapman, Note, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783 (2012) (arguing for a religious exemption scheme that would promote the passage of laws protecting gay individuals in so-called "holdout states"); Justin Muehlmeier, Note, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781 (2013) (arguing for legislation that codifies sexual orientation as a protected class and defines the term "public accommodation" broadly).

<sup>32</sup> See, e.g., A.M. GILL, HUMAN RIGHTS CAMPAIGN FOUND., 2014 STATE EQUALITY INDEX: A REVIEW OF STATE LEGISLATION AFFECTING THE LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMUNITY AND A LOOK AHEAD IN 2015, at 14 (2015), available at <http://www.hrc.org/files/documents/HRC-SEI-2014-ReportRev4.pdf> (noting that advocates' "[e]fforts to pass comprehensive non-discrimination bills will move forward" in 2015).

Part I explores the background of the common law duty to serve, beginning with its roots in English common law and tracing its evolution—or perhaps more appropriately, regression—in the American courts in the nineteenth and early twentieth centuries. Part II offers a brief discussion of the rise of public accommodations statutes in the late nineteenth and mid-twentieth centuries, which provides a likely account for the duty’s lack of development over the past century. Part III explains modern-day sexual orientation discrimination, which is often directed not at all gay people but rather only at those gay persons who deviate from heterosexual norms. Part III hypothesizes that, today, this discrimination is perhaps most likely to occur in the market for commitment ceremony and wedding-related services. Noting that twenty-nine states lack statutory protection from sexual orientation discrimination in public accommodations (often because the legislature lacks the political will to extend protection to gay people), Part III highlights the acute need for a revived common law duty. Finally, Part IV discusses the role that the common law could play in such states. First, courts should follow the canon of statutory construction that requires them to read statutes in conformity with common law principles, unless and until the legislature has expressed an explicit intent to abrogate the common law. The argument for reading public accommodations statutes in light of the principles of the common law duty to serve is especially strong in those states whose statutes, in addition to enumerating protected classes in their text, guarantee a right of nondiscrimination that is generally applicable to all persons. Because such statutes essentially codify the common law duty, they should be construed as imposing a ban on all arbitrary discrimination coextensive with the duty, or at the very least should be read in light of their common law background to prohibit discrimination against groups similar in nature to those specifically enumerated as protected classes. More ambitiously, Part IV argues that where courts are unwilling to extend the protections that the legislature has granted by statute, a common law cause of action could be used to combat instances of sexual orientation discrimination and may have some advantages over statutory protections. Part IV concludes by addressing the challenges that politicized state judiciaries might pose to reviving a common law duty-to-serve claim for gay plaintiffs, especially in some southern states. A short conclusion follows.

## I. THE ORIGINS AND DEVELOPMENT OF THE COMMON LAW DUTY TO SERVE

The duty to serve and its correlative right of reasonable access are deeply embedded in the common law.<sup>33</sup> The common law has long imposed a duty upon businesses engaged in so-called “public callings”<sup>34</sup> to serve all members of the general public and not to refuse service to an individual unless there are “reasonable” grounds for doing so.<sup>35</sup> This Part first examines the two major competing theories—what I term the “economic theory” and the “conduct theory”—for the origin of the duty to serve at English common law. It then explores American courts’ deviation from the traditional common law duty to serve in the nineteenth and early twentieth centuries.

### A. *English Origins*

Two dominant historical narratives attempt to account for the duty’s origins at common law: one theory posits that the duty arose out of the virtual monopoly power that these public callings exercised in early England—what I refer to as “the economic theory”—while the other looks to whether the business represented itself as serving the public—what I refer to as “the conduct theory.”<sup>36</sup>

#### 1. The Economic Theory

The economic theory links the imposition of the duty to serve to the economic circumstances in which the business operates.<sup>37</sup> Under this view, the public possesses “an interest in the conduct of” those businesses that,

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<sup>33</sup> *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 373 (N.J. 1982).

<sup>34</sup> See Note, *The Antidiscrimination Principle in the Common Law*, 102 HARV. L. REV. 1993, 1993 (1989); see also *supra* note 18 and accompanying text (listing such businesses).

<sup>35</sup> See Note, *supra* note 34, at 1995-96.

<sup>36</sup> *Id.*

<sup>37</sup> Professor Wyman proposes this view in his treatise on public accommodations:

Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business may always refuse to sell if they please. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time, therefore, depends ultimately upon the industrial conditions which prevail at that period.

<sup>1</sup> BRUCE WYMAN, *THE SPECIAL LAW GOVERNING PUBLIC SERVICE CORPORATIONS AND ALL OTHERS ENGAGED IN PUBLIC EMPLOYMENT* § 1, at 2 (1911); see also Norman F. Arterburn, *The Origin and First Test of Public Callings*, 75 U. PA. L. REV. 411, 420 (1927) (“All trades in time of distress or economic paralysis were affected with a very high degree of public interest.”).

facing effectively no competition, function as virtual monopolies.<sup>38</sup> The law seems to have first imposed the duty to serve in the fourteenth century, after the outbreak of the Black Death.<sup>39</sup> The disease had so decimated the English population that there was a shortage of tradesmen of every sort, with most “in a position to exact any price they pleased.”<sup>40</sup> All businesses exercised effective monopoly power; in response, governments enacted comprehensive criminal statutes that imposed upon all laborers and tradesmen the duty “to practise his calling to whomever applied”<sup>41</sup> and “penalize[d] a refusal to serve in all trades.”<sup>42</sup> Although the extent of this criminal legislation—and perhaps the willingness of some desperate customers to capitulate to high prices—appears to have limited the filing of civil cases,<sup>43</sup> liability at common law for violating the duty to serve seems to have existed contemporaneously.<sup>44</sup> As time went on and trade increased, evolving economic conditions “warrant[ed] a change in those upon whom the duty to serve was placed,”<sup>45</sup> with the duty’s imposition shifting from all trades to only those that continued to exercise monopoly power.<sup>46</sup>

The logic underlying this theory is that when one business exercises virtually exclusive control over the provision of a good or service, consumers suffer. If such a business were to charge an excessive price, potential customers would be forced to either comply with its demand or forego access to that good or service. But where virtual monopolies refuse service outright, customers are completely denied access, as no alternate providers exist. Whereas shops that operate in close proximity must compete on price to attract and retain customers—and thus cannot afford to choose their customers selectively if they are to remain competitive—the “wayside inn” feels no such market pressure and has the tired traveler at its

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<sup>38</sup> 1 WYMAN, *supra* note 37, § 36, at 30; *see also* Wyman, *supra* note 1, at 161 (“[I]n the private calling the situation is that of virtual competition, while in the public calling the situation is that of virtual monopoly.”).

<sup>39</sup> *See* Arterburn, *supra* note 37, at 421 (discussing the economic circumstances “which, in the Fourteenth Century brought most, if not all, businesses” under a legal duty to serve).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 422.

<sup>43</sup> *See id.* at 422, 424 (hypothesizing that the extent to which the duty to serve was criminalized may account for the dearth of early civil cases).

<sup>44</sup> *See id.* at 424 (“There seems to have been a liability at common law without a statute, for we have also the court saying about this time that if a smith refuses to shoe my horse or if he pricks him, an action on the case lies against him.” (footnote omitted)).

<sup>45</sup> *Id.* at 425.

<sup>46</sup> *See id.* at 425-28 (offering the monopoly-power and changing-economic-circumstances theories to explain statements by several English courts that a carpenter would not be subject to the duty to serve).

mercy.<sup>47</sup> Proponents of the economic theory thus argue that the common law imposed this special duty on certain businesses because their virtual monopoly power prevented the forces of the competitive market from adequately protecting the consumers who dealt with them.<sup>48</sup> Under this view of the duty's origin, the public interest necessitates—and thus justifies—the common law's regulation of such businesses; because virtual monopolies “hav[e] devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created.”<sup>49</sup> Some proponents of the economic theory contend that this rationale justifies imposing a duty to serve on modern-day monopolies, with modern economic circumstances determining which businesses would be subject to the duty to serve.<sup>50</sup>

## 2. The Conduct Theory

The conduct theory, the other dominant view, traces the duty's origin to the emergence of the common law writ of action on the case and focuses on the business's conduct toward the public.<sup>51</sup> The argument here is that since “a person held himself out to serve the public generally, making that his business, and in doing so assumed to serve all members of the public who

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<sup>47</sup> Wyman, *supra* note 1, at 159.

<sup>48</sup> *See id.* (“The processes of competition may be trusted in the case of the shop, [but] they do not act with any certainty in the case of the inn.”); *see also id.* at 166 (“Wherever virtual monopoly is found the situation demands this law that all who apply shall be served . . . without discrimination; otherwise in crucial instances of oppression, inconvenience, extortion and injustice there will be no legal remedies for these industrial wrongs.”); *cf.* CHARLES M. HAAR & DANIEL WM. FESSLER, *THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLE AGAINST INEQUALITY* 209 (1986) (“In particular, competition in a free marketplace would guarantee the public reasonable prices and quantities . . . [T]hrough the doctrine of the duty to serve, the common law imposed an equal and adequate service requirement wherever the sovereign affirmatively condoned, or passively tolerated, the existence of a monopolistic supplier.”).

<sup>49</sup> 1 WYMAN, *supra* note 37, § 36, at 30.

<sup>50</sup> *See, e.g.,* Arterburn, *supra* note 37, at 427-28 (“[T]he law of public callings may be invoked in cases of the monopolistic trust problems of modern times. Those in the class have changed and will continue to change with altered economic conditions, but the reason still exists for the class . . . .”); Wyman, *supra* note 1, at 160 (“Barber, surgeon, smith, and tailor are no longer in common calling because the situation in the modern market does not call for it; but innkeeper, victualler, carrier, and ferryman are still in that classification, since even in modern trade the conditions require it.”).

<sup>51</sup> *See* Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 515 (1911) (“It would seem that the origin and basis of the liability of the person engaged in a common calling for failure to serve . . . is to be found in this early developed branch of the action on the case.”).

should apply, . . . he was liable in an action on the case for refusal to serve . . . [,] a breach of his *assumpsit*.<sup>52</sup> While an action for *assumpsit* would ordinarily require one to have assumed a specific undertaking, Professor Charles K. Burdick, a proponent of the conduct theory, argues that “[t]he fact that one was a common carrier . . . was of itself a general *assumpsit* to serve carefully.”<sup>53</sup> Under this view, a business became a public calling by virtue of holding itself out<sup>54</sup> to the public as being ready and willing to provide service upon request.<sup>55</sup> Professor Burdick attributes this rule to Chief Justice Holt’s dissenting opinion in *Lane v. Cotton*:

[W]herever any Subject takes upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects, he is *eo ipso* bound to serve the Subject in all the Things that are within the Reach and Comprehension of such an Office, under Pain of an Action against him . . . . If on the Road a Shoe fall off my Horse, and I come to a Smith to have one put on, and the Smith refuse to do it, an Action will lie against him, because he has made a Profession of a Trade which is for the Publick Good, and has thereby exposed and vested an interest of himself in all the King’s Subjects that will employ him in the Way of his Trade.<sup>56</sup>

Professor Burdick interprets this to mean “that originally anyone who held himself out to serve all who might apply was conceived of as assuming a public or common calling, and by force of this *assumpsit* was held to obligate himself to serve all who should apply and to serve with care.”<sup>57</sup> He elaborates that in early England, “the kinds of things which a person would be likely to

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<sup>52</sup> *Id.* at 515-16. The common law writ of *assumpsit* grew out of action on the case. *See id.* at 516 (“[T]he action of *assumpsit* as we understand it . . . was evolved at a later day from the earlier *action on the case* wherein the *assumpsit* and its breach were . . . the vital elements of the tort.”); *see also* 1 WYMAN, *supra* note 37, § 201, at 168 (“It has been seen that in the course of the development of our law the obligation resting upon one who had made a general assumption of public service preceded the obligation of one who had made a special promise in a particular case.” (footnote omitted)).

<sup>53</sup> Burdick, *supra* note 51, at 516.

<sup>54</sup> A person engaged in a common calling could “hold himself out” by posting signs outside his place of business, advertising in public venues, or soliciting the public “in any way that will give the community to understand that he wishes to do business with all comers.” 1 WYMAN, *supra* note 37, §§ 203-205, at 170-72.

<sup>55</sup> *See* Burdick, *supra* note 51, at 518 (“[A] person, by holding himself out to serve the public generally, assumed two obligations—to serve all who applied; and, if he entered upon the performance of his service, to do it in a ‘workmanlike manner.’”).

<sup>56</sup> *Id.* at 520-21 (quoting *Lane v. Cotton*, (1701) 88 Eng. Rep. 1458, 1464; 12 Mod. 472, 484); *see also* 1 WYMAN, *supra* note 37, § 202, at 169-70 (treating the same passage from *Lane v. Cotton* as expressing the “original rule”).

<sup>57</sup> Burdick, *supra* note 51, at 522.

hold himself out to do for all applicants would be few, perhaps not much more numerous than those of which we have a record in the early cases.”<sup>58</sup>

There is some disagreement among scholars, however, as to whether conduct that evinces a willingness to serve the public is sufficient to make a business a public calling subject to the duty to serve. Professor Bruce Wyman, perhaps the foremost proponent of the economic theory described in the preceding subsection, views conduct expressing a willingness to serve the public as necessary, but not sufficient, to trigger imposition of the duty.<sup>59</sup> For Professor Wyman, a business’s status as a public calling is independent of any conduct manifesting its intent to serve the public: “[I]n any case of public employment the evidence of profession to serve the public and the proof that the business is public in character must both be sufficient to carry conviction.”<sup>60</sup>

### B. *American Deviation and Development*

American legal commentators in the early nineteenth century largely embraced the conduct theory, “agree[ing] that the basis of the duty of innkeepers and common carriers to serve the public rests on the fact that they hold themselves out as ready to serve anyone who seeks their services.”<sup>61</sup> Most courts at the time agreed with this understanding of the duty’s basis.<sup>62</sup> Professor Joseph William Singer identifies *Markham v. Brown*,<sup>63</sup> a case decided by the New Hampshire Supreme Court, as the first American case to explain the duty’s rationale.<sup>64</sup> As Professor Singer notes,<sup>65</sup> the court makes clear from the beginning of its opinion that it understands the duty to serve’s justification to lie in the conduct theory:

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<sup>58</sup> *Id.* Professor Burdick lists as examples “the common innkeeper and victualler, the common carrier, the common ferryman, the common bargeman, hoyman or other common water carrier, the common farrier, the common tailor, and the common surgeon.” *Id.* (footnotes omitted).

<sup>59</sup> See 1 WYMAN, *supra* note 37, § 200, at 167-68 (“Even one who has acquired a virtual monopoly is not forced into service against his will; it is only when he has held himself out in some way as ready to serve that he is bound thereafter to deal with all indiscriminately.”).

<sup>60</sup> *Id.* at 168.

<sup>61</sup> Singer, *supra* note 22, at 1312. For a survey of the American treatise writers espousing this view in the antebellum period, see *id.* at 1312-15.

<sup>62</sup> See *id.* at 1315 (“Most of the cases decided in the United States in the antebellum period similarly base the duty to serve on the holding out theory.”). *But see id.* (“A few, however, base the duty on the fact that the business in question has been granted a license or franchise from the government.”); *id.* at 1318-21 (surveying the antebellum franchise cases and challenging the rationale behind the franchise theory).

<sup>63</sup> 8 N.H. 523 (1837).

<sup>64</sup> Singer, *supra* note 22, at 1316.

<sup>65</sup> See *id.* at 1317.

An innkeeper holds out his house as a public place to which travelers may resort, and of course surrenders some of the rights which he would otherwise have over it. *Holding it out as a place of accommodation* for travelers, he cannot prohibit persons who come under that character, in a proper manner, and at suitable times, from entering, so long as he has the means of accommodation for them.<sup>66</sup>

In *Markham*, an innkeeper allowed certain stagecoach drivers to solicit business from patrons in the common areas of his inn but at the same time excluded a driver employed by a rival stagecoach line.<sup>67</sup> The court held that, under these circumstances, the inn's duty to serve extended beyond travelers; because the owner opened the inn's premises to some stagecoach drivers, "[t]here seem[ed] to be no good reason why the landlord should have the power to discriminate . . . and to say that one shall be admitted and another excluded, so long as each has the same connection with his guests."<sup>68</sup> This rule "is expressly premised on a requirement of equal treatment and lack of discrimination"<sup>69</sup> and appears to protect *all* citizens, not merely those who belong to certain protected classes.<sup>70</sup> The court held, however, that certain individuals could reasonably be excluded—for example, those who could not pay for lodging or whose conduct would threaten the lawful and peaceable operation of the inn.<sup>71</sup> American courts have reaffirmed this principle, consistently holding that an inn or common carrier's right to exclude may be used only against those whose individual conduct could seriously interfere with the operation of the business.<sup>72</sup>

Although American courts followed the content of *Markham's* duty to serve, they did not adopt the *Markham* court's rationale for determining which businesses owed that duty. In the period before and after the Civil

<sup>66</sup> *Markham*, 8 N.H. at 528 (emphasis added).

<sup>67</sup> *See id.* at 524.

<sup>68</sup> *Id.* at 529-30.

<sup>69</sup> Singer, *supra* note 22, at 1332.

<sup>70</sup> *See id.* ("Before 1850, neither common law nor statutes said anything specifically about race in connection with public accommodations. At least formally, this would suggest all free persons had the same rights of access to common callings as was enjoyed by white men."); *see also* Note, *supra* note 34, at 2002 ("[T]he common law should be understood to guarantee blacks the same rights as whites. Although early constitutional interpretation and statutory law declared that the rights of blacks were limited, no common law cases state or suggest a similar premise." (footnote omitted)).

<sup>71</sup> *See Markham*, 8 N.H. at 531 (explaining that the defendant, by his misconduct, might forfeit his right to be served if removing him from the inn appeared to be necessary for the protection of the guests or the innkeeper).

<sup>72</sup> *See, e.g., Pearson v. Duane*, 71 U.S. (4 Wall.) 605, 615 (1866) ("Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.").

War, American courts began limiting the businesses on which the duty to serve would be imposed to the narrow class of innkeepers and common carriers.<sup>73</sup> This formalistic inquiry severely limited the duty's application,<sup>74</sup> and it led to a "majority American rule [that] for many years disregarded the right of reasonable access, granting to proprietors of amusement places an absolute right to eject or exclude arbitrarily any person consistent with state and federal civil rights laws."<sup>75</sup>

This formalistic imposition of the duty to serve upon innkeepers and common carriers "do[es] not reflect the common law as it has existed from time immemorial"<sup>76</sup> but appears rather to be an American innovation, informed largely by this country's attempt to limit the obligation of businesses to serve free blacks in the wake of the Civil War and emancipation.<sup>77</sup> Indeed, Justice Morris Pashman, writing for the New Jersey Supreme Court in *Uston v. Resorts International Hotel, Inc.*, noted that the racial circumstances surrounding the narrowing of the duty to serve

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<sup>73</sup> See, e.g., *McCrea v. Marsh*, 78 Mass. (1 Gray) 211, 213 (1858) (adopting the rule of *Wood v. Leadbitter*, (1845) 153 Eng. Rep. (Exch.) 351; 13 M. & W. 838, to hold that a theatre could exclude a black patron at will). Professor Singer argues that race relations were responsible for the narrowing of the American common law duty to serve:

The formal narrowing of public accommodations law began when *McCrea v. Marsh* adopted the rule that authorized places of entertainment to choose their customers at will. Adoption of th[e *Wood v. Leadbitter*] rule in the United States, whatever its justification in England, had a disparate racial impact and was undoubtedly intended to have such an impact. Only after the Civil War did the law in the United States clearly authorize *most businesses* to choose their customers at will. This occurred only after African-Americans were granted civil rights. Reversing the presumption of access and substituting a right to exclude served to limit these newfound civil rights. Only after the issue of public access became thoroughly enmeshed in the issue of racial segregation did the current common-law rule obtain its present form.

Singer, *supra* note 22, at 1344-45.

<sup>74</sup> See Note, *supra* note 34, at 1996 ("Historically, American courts determined whether the duty to serve bound an entity through a formalistic inquiry of whether a company fell within a category of entities traditionally viewed as 'public.' This class included innkeepers and common carriers such as railroads and public warehouses. All other entities, including restaurants, racetracks, and places of amusement, were deemed private." (footnote omitted)).

<sup>75</sup> *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 374 (N.J. 1982) (footnote omitted).

<sup>76</sup> Singer, *supra* note 22, at 1294. Proponents of both the economic theory and the conduct theory argue that the scope of businesses to which the duty applies is fluid. Professors Arterburn and Wyman believe that the class of businesses subject to the duty fluctuated depending upon economic circumstances. See *supra* note 37 and accompanying text; see also Singer, *supra* note 22, at 1329 (discussing Professor Wyman's belief "that the legal sources demonstrated that many actors other than innkeepers and common carriers were conceptualized and characterized as 'common callings' in the antebellum period"). Professor Burdick, on the other hand, believes that any business that held itself out to the public had assumed common carrier status. See *supra* notes 51, 53, 58 and accompanying text.

<sup>77</sup> Singer, *supra* note 22, at 1294-95.

“suggest that the current majority rule may have had less than dignified origins.”<sup>78</sup> In *Uston*, the New Jersey Supreme Court held that Resorts International Hotel could not exclude renowned card counter Kenneth Uston from its casino absent a New Jersey Casino Control Commission rule against card counting.<sup>79</sup> Recognizing the arbitrary nature—and the apparent sordid history—of the majority American rule,<sup>80</sup> the court held that

when property owners *open their premises to the general public* in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, innkeepers, owners of gasoline stations, or to private hospitals, *but to all property owners who open their premises to the public*. Property owners have no legitimate interest in unreasonably excluding particular members of the public *when they open their premises for public use*.<sup>81</sup>

The New Jersey rule appears to radically expand the scope of the duty to serve but in reality marks a return to the duty’s common law foundations. The court’s view of the duty to serve embraces the conduct theory, just as the *Markham* court did before the Civil War. Justice Pashman rejected “the current majority American rule [that] has for many years disregarded the right of reasonable access,”<sup>82</sup> noting that at the time the Fourteenth Amendment was passed the common law was thought to guarantee access to places of public accommodation,<sup>83</sup> and that the majority rule favoring strong owner exclusionary rights appears to have come into being only after the passage of the Reconstruction Era Amendments and Civil Rights Act of 1866.<sup>84</sup> New Jersey is the only state to have returned to the traditional duty

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<sup>78</sup> *Uston*, 445 A.2d at 374 n.4; see also Singer, *supra* note 22, at 1294 (discussing Justice Pashman’s observation in *Uston*).

<sup>79</sup> See *Uston*, 445 A.2d at 375. The court held that because the New Jersey Casino Control Commission had been granted exclusive authority by statute to set the rules of casino games, Resorts International Hotel could not reasonably exclude Uston for card counting, which the Commission had not proscribed. See *id.* at 371.

<sup>80</sup> See *supra* note 75 and accompanying text.

<sup>81</sup> *Uston*, 445 A.2d at 375 (emphasis added) (citations omitted).

<sup>82</sup> *Id.* at 374.

<sup>83</sup> See *id.* at 373-74 (“Underlying the congressional discussions and at the heart of the Fourteenth Amendment’s guarantee of equal protection, was the assumption that the State . . . by ‘the good old common law’ was obligated to guarantee all citizens access to places of public accommodation.” (quoting *Bell v. Maryland*, 378 U.S. 226, 296 (1964) (Goldberg, J., concurring))).

<sup>84</sup> See *id.* at 373; see also *id.* at 374 n.4 (“The denial of freedom of reasonable access in some States following passage of the Fourteenth Amendment, and the creation of a common law

to serve.<sup>85</sup> The states' vast expansion of the duty to serve by statute, discussed in the next Part, may explain why the American common law rule has seen such little development,<sup>86</sup> given that "the presumption . . . that businesses, as property owners, have the right to exclude non-owners unless that right is limited by statute" is apparently still "the law in every jurisdiction in the United States except the State of New Jersey."<sup>87</sup>

## II. THE RISE OF STATE PUBLIC ACCOMMODATIONS STATUTES

In the mid-nineteenth century, states began codifying the duty to serve through public accommodations statutes.<sup>88</sup> As Justice Kennedy explained in *Romer v. Evans*, these statutes were a direct response to the common law's failure to address racial discrimination adequately.<sup>89</sup> With the Supreme Court having held that Congress's first attempt at a federal public accommodations statute exceeded its Fourteenth Amendment power,<sup>90</sup> the states were forced to act.<sup>91</sup> While the common law duty "was a general one and did not specify protection for particular groups,"<sup>92</sup> these state statutes expressly included race as a protected class against which discrimination was prohibited and, in what marked a slight step back from the then-emerging majority American common law rule, usually covered some places of amusement in addition to inns and common carriers.<sup>93</sup> Progress in this endeavor, however, was very slow; a 1949 study found that only eighteen

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freedom to arbitrarily exclude following invalidation of segregation statutes, suggest that the current majority rule may have less than dignified origins.").

<sup>85</sup> See Singer, *supra* note 22, at 1290.

<sup>86</sup> See Note, *supra* note 34, at 1996 ("In many jurisdictions, the duty to serve doctrine has lain dormant . . . , at least with respect to inns and common carriers. The absence of recent cases largely results from the existence of regulatory statutes that responded to specific types of refusals to serve.").

<sup>87</sup> Singer, *supra* note 22, at 1290.

<sup>88</sup> See Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238 (1978) (discussing an 1865 Massachusetts statute that prohibited discrimination on the basis of race in places providing essential goods and services, and similar statutes enacted by other states in the ensuing decades).

<sup>89</sup> See 517 U.S. 620, 627-28 (1996) ("The common-law rules, however, proved insufficient in many instances . . . . In consequence, most States have chosen to counter discrimination by enacting detailed statutory schemes.").

<sup>90</sup> See *id.* at 628 (citing *Civil Rights Cases*, 109 U.S. 3, 25 (1883)).

<sup>91</sup> See *id.*

<sup>92</sup> *Id.* at 627; see also *supra* note 70 and accompanying text.

<sup>93</sup> See Lerman & Sanderson, *supra* note 88, at 240 ("These laws generally prohibited a short list of places from excluding blacks because of their race. The places most commonly covered were inns, taverns, hotels, public conveyances, restaurants, theaters, and barber shops.").

states had enacted public accommodations statutes as of that time.<sup>94</sup> The emergence of the African-American Civil Rights Movement in the 1950s and 1960s brought considerable change.<sup>95</sup> By the time that Congress finally prohibited public accommodations discrimination on the federal level through Title II of the Civil Rights Act of 1964,<sup>96</sup> only thirty-two states had enacted similar public accommodations laws prohibiting racial discrimination.<sup>97</sup> Title II prohibits discrimination only “on the ground of race, color, religion, or national origin,”<sup>98</sup> and the establishments covered are essentially limited to those businesses that state statutes covered at the time of its enactment—namely, those related to travel and amusement.<sup>99</sup>

Professors Thomas E. Merrill and Henry E. Smith argue that Title II’s “provision regarding entertainment venues in particular goes beyond the common-law definition” and that “[i]t appears that the expansive definition of public accommodation in the 1964 Act has had some gravitational effect on the common-law definition,” citing *Uston* as an example.<sup>100</sup> But history suggests that Title II’s definition was influenced by state statutes,<sup>101</sup> which themselves had sought, at least in part, to restore the antebellum common law rule’s scope of coverage.<sup>102</sup> And as Justice Pashman made clear in his opinion, *Uston*’s extension of the duty to serve to a casino was not influenced by Title II but rather, *like* Title II, was a rejection of the narrower American

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<sup>94</sup> *Id.* at 239-40 (citing THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849-1970, at 251 (Richard Bardolph ed., 1970)).

<sup>95</sup> *See id.* at 240 (discussing the impact of demonstrations and sit-ins on the passage of state public accommodation statutes); *see also* Muehlmeier, *supra* note 31, at 788 (“It was not until the peak of the civil rights struggle of the 1960s that legislation prohibiting race discrimination began to accelerate.”).

<sup>96</sup> Pub. L. No. 88-352, tit. II, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. §§ 2000a-2000a-6 (2012)).

<sup>97</sup> *See supra* note 19.

<sup>98</sup> 42 U.S.C. § 2000a(a) (2012).

<sup>99</sup> Title II covers lodging (“any inn, hotel, motel, or other establishment which provides lodging to transient guests”); dining establishments (“any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises”); “gasoline station[s],” places of amusement and entertainment (“any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment”); and any establishment that is either “physically located within the premises of any . . . covered” establishment or “within the premises of which is physically located any such covered establishment” and “which holds itself out as serving patrons of such covered establishment.” *Id.* § 2000a(b)(1)-(4). While Title II has been effective in prohibiting discrimination in these categories, it does not apply to many other businesses. *See* Lerman & Sanderson, *supra* note 88, at 222.

<sup>100</sup> *See* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 80 (2010).

<sup>101</sup> *See supra* note 93 and accompanying text.

<sup>102</sup> *See supra* notes 61-70 and accompanying text.

duty that emerged in the aftermath of the Civil War and was an embrace of the duty's broader foundational principles.<sup>103</sup>

State statutes have rapidly expanded in the years following Title II, both in the number of classifications protected and the scope of establishments covered.<sup>104</sup> At present, all but five states—Alabama, Georgia, Mississippi, North Carolina, and Texas—have enacted public accommodations statutes.<sup>105</sup> The states' vast expansion by statute of the duty to serve likely explains why the American common law rule has seen such little development,<sup>106</sup> with only New Jersey having revisited and revived the duty to serve.<sup>107</sup>

### III. THE PROBLEM OF SEXUAL ORIENTATION DISCRIMINATION

*"This is the essence of discrimination: formulating opinions about others not based on their individual merits but rather on their membership in a group with assumed characteristics."*

—Joe Miller, Andrew Beckett's attorney in the film *Philadelphia*,  
reading aloud in the University of Pennsylvania's law library<sup>108</sup>

#### A. *The Contours of Modern Sexual Orientation Discrimination*

Sexual orientation, as a classification, is somewhat amorphous. As one court has observed, gay people often lack "obvious, immutable, or distinguishing characteristics that define them as a discrete group," because gay "identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts."<sup>109</sup> Modern-day sexual orientation discrimination in public accommodations is thus more nuanced. It is not likely to be targeted at all gay people categorically but rather only toward those individuals whose behavior deviates from heterosexual stereotypes. Indeed, those individuals may very well be the only people who are identifiable as gay. Discrimination against gay people thus targets not status

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<sup>103</sup> See *supra* notes 81-84 and accompanying text.

<sup>104</sup> See, e.g., CAL. CIV. CODE § 51(b) (West 2014) (listing the set of classifications that the statute covers, including sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, and sexual orientation).

<sup>105</sup> See *supra* note 17 and accompanying text.

<sup>106</sup> See *supra* note 86 and accompanying text.

<sup>107</sup> See *supra* note 87 and accompanying text.

<sup>108</sup> PHILADELPHIA (TriStar Pictures 1993).

<sup>109</sup> Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 267 (6th Cir. 1995) (citations omitted), *vacated on other grounds*, 518 U.S. 1001 (1996).

(i.e., *being* gay) but rather behavior (i.e., *acting* gay). As Kenji Yoshino has described:

We are at a transitional moment in how Americans discriminate. In the old generation, discrimination targeted entire groups—no racial minorities, no women, no gays, no religious minorities, no people with disabilities allowed. In the new generation, discrimination directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms. This new form of discrimination targets minority cultures rather than minority persons. Outsiders are included, but only if we behave like insiders—that is, only if we cover.<sup>110</sup>

By “covering,” Yoshino means “ton[ing] down a disfavored identity to fit into the mainstream.”<sup>111</sup> Gay individuals cover by acting “straight.” Businesses that discriminate against those gay customers who deviate from the “mainstream” (i.e., heteronormativity) force gay people to cover if they wish to avoid discrimination. This harms gay individuals’ dignity and autonomy by threatening their “desire for authenticity, our common human wish to express ourselves without being impeded by unreasoning demands for conformity.”<sup>112</sup> Indeed, as the Supreme Court recognized in *Lawrence v. Texas*, sexual orientation “involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”<sup>113</sup> Because businesses that impose covering demands seek to regulate the ways in which people express their identities, modern antidiscrimination law must go beyond immutable statuses such as “skin color, chromosomes, or innate sexual orientation” and protect “the behavioral aspects of our personhood.”<sup>114</sup>

### B. *Sexual Orientation Discrimination in Practice*

The discrimination faced by Messrs. Dewberry and Williams, discussed in the Introduction, was exactly of the modern sort Yoshino describes. The owner of Big Earl’s claimed that the men were not welcome back at his restaurant not because of their sexual orientation but rather on account of conduct—intimate touching—that made their sexual orientation manifest.<sup>115</sup>

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<sup>110</sup> YOSHINO, *supra* note 11, 21-22.

<sup>111</sup> *Id.* at ix.

<sup>112</sup> *Id.* at xii.

<sup>113</sup> 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>114</sup> YOSHINO, *supra* note 11, at xi-xii.

<sup>115</sup> See *supra* note 7 and accompanying text.

The problem with this distinction is that the *only* people who are likely to be identifiable as gay in the first instance are those whose appearance<sup>116</sup> or behavior<sup>117</sup> deviates from heterosexual norms; discrimination directed at conduct associated with a gay identity thus increases pressure on those who are capable of passing as straight to do so. It is perverse to claim that one does not discriminate against gay customers when one discriminates against any behavior that one associates with being gay. And even assuming that businesses *could* learn the sexual orientation of some straight-appearing gay customers and would not discriminate against those individuals, the harm to the dignity and autonomy of non-conforming and forced-to-cover gay customers would be no less severe. A business's decision to exempt from discrimination those customers who, for all intents and purposes, appear to be straight only reinforces heterosexual privilege and should not excuse sexual orientation discrimination against others. And to the extent that those straight-appearing gay customers are themselves being coerced to comply with a business's covering demands, they too are victims of discrimination.

This conduct-focused discrimination occurs frequently in the market for wedding services. Indeed, with the rapid expansion of same-sex marriage across the states<sup>118</sup> and the Supreme Court poised to rule in favor of marriage equality this Term,<sup>119</sup> this market will arguably be one of the most

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<sup>116</sup> Muehlmeier, *supra* note 31, at 800 (noting that some LGBT individuals experience discrimination "based on their appearance").

<sup>117</sup> See *id.* (noting that "some LGBT individuals are extremely expressive of their orientations"). One Oklahoma restaurant owner, who refuses to serve gays, believes he "can spot a freak or a f\*\*\*\*t" and "do[es]n't like girly men." *Owner of Oklahoma Restaurant Gary's Chicanos Club Says He Refuses to Serve Gay People*, HUFFPOST GAY VOICES (Feb. 8, 2014, 8:59 AM), [http://www.huffingtonpost.com/2014/02/07/garys-chicanos-oklahoma-restaurant-serve-gays\\_n\\_4746095.html](http://www.huffingtonpost.com/2014/02/07/garys-chicanos-oklahoma-restaurant-serve-gays_n_4746095.html), archived at <http://perma.cc/89MG-EBUH>. For a discussion of "the broader cultural privileging of masculinity in men—and in many contexts, though not all, femininity in women—in the intimate domain," see Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1344 & n.161 (2009).

<sup>118</sup> As of this writing, thirty-seven states and the District of Columbia allow persons of the same sex to marry. See *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states> (last visited Mar. 21, 2015), archived at <http://perma.cc/X7LS-SX7S> (displaying a map of the jurisdictions that allow same-sex couples to marry).

<sup>119</sup> The Supreme Court appears prepared to rule this Term that the Fourteenth Amendment requires the states to license marriages between persons of the same sex. See Adam Liptak, *Justices to Decide Marriage Rights for Gay Couples*, N.Y. TIMES, Jan. 17, 2015, at A1 ("The Supreme Court's . . . last three major gay rights rulings suggest that the court will rule in favor of same-sex marriage."); Ben Smith & Chris Geidner, *Obama Welcomes Supreme Court Move to End "Patchwork" Marriage Laws*, BUZZFEED NEWS (Feb. 10, 2015, 6:24 PM), <http://www.buzzfeed.com/bensmith/obama-welcomes-supreme-court-move-to-end-patchwork-marriage>, archived at <http://perma.cc/B5L8-NLK6> ("My sense is that the Supreme Court is about to make a shift, one that I welcome, which is to recognize that—having hit a critical mass of states that have recognized same-sex marriage—it doesn't make sense for us to now have this patchwork system." (quoting

likely commercial contexts in which sexual orientation discrimination occurs. Indeed, in those states where public accommodations statutes do include sexual orientation as a protected class, claims of discrimination commonly implicate wedding services.<sup>120</sup> The certainty of the parties' sexual orientation when procuring services for a same-sex commitment ceremony or wedding (as opposed to fleeting and impersonal commercial exchanges where one's sexual orientation might escape notice) provides one account for why wedding services are a frequent site of sexual orientation discrimination.<sup>121</sup>

Modern attitudes toward homosexuality offer a more illuminating (and complete) explanation. The American public's support for legalizing same-sex marriage has consistently lagged behind its support for granting other rights and benefits to gay people.<sup>122</sup> This is because marriage touches on

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President Barack Obama)); *see also* Lucy McCalmont, *Ruth Bader Ginsburg: America More Accepting of Gay Marriage*, POLITICO (Feb. 12, 2015, 8:49 AM), <http://www.politico.com/story/2015/02/ruth-bader-ginsburg-gay-marriage-115142.html>, *archived at* <http://perma.cc/237Q-C567> (reporting Justice Ruth Bader Ginsburg's recent comments that it "would not take a large adjustment' for Americans to support same-sex marriage if the [C]ourt were to rule in favor of it"). Accordingly, we may soon be confronted with a landscape in which all twenty-nine states that do not prohibit sexual orientation discrimination in public accommodations must license same-sex marriages.

<sup>120</sup> *See* Chapman, *supra* note 31, at 1790 ("As gay-marriage laws gain traction, public accommodations statutes are uniquely positioned as a point of contention because marriage-related public accommodations contexts are those in which the conflict appears so commonly." (footnote omitted)).

<sup>121</sup> *See* Muehlmeier, *supra* note 31, at 809 (noting that "the typical LGBT experience with discrimination does not generally occur in simple consumer transactions like buying milk at the grocery store, but rather in transactions that involve cultural values and close personal interaction like wedding services, education, and housing"). I by no means intend to suggest that gay individuals do not experience discrimination in exchanges unrelated to marriage or that such discrimination is less serious of a problem.

<sup>122</sup> Although many Americans appear to disapprove of both homosexuality and gay sex, they seem to oppose discrimination against gays in almost every legal context other than marriage. In 2013, 64% of Americans surveyed by Gallup thought that gay sex between consenting adults should be legal, whereas only 54% supported same-sex marriage. *See Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited Mar. 21, 2015), *archived at* <http://perma.cc/2VBW-B533>. In a 2012 poll, support for other rights was higher, such as health insurance and other employee benefits for gay domestic partners and spouses (77%) and inheritance rights for gay domestic partners or spouses (78%). *Id.* Going back to 2008, although only 57% of Americans surveyed felt that "homosexuality should be considered an acceptable alternative lifestyle," 89% felt that "homosexuals should . . . have equal rights in terms of job opportunities." *Id.* Governor Mitt Romney, the Republican Party's eventual presidential nominee, demonstrated this dichotomous view of gay rights during a debate before the 2012 New Hampshire Republican primary:

I don't discriminate. And in the appointments that I made when I was governor of Massachusetts, a member of my Cabinet was gay. I appointed people to the bench, regardless of their sexual orientation, made it very clear that, in my view, we should not discriminate in hiring policies, in legal policies. At the same time, from the very

cultural and religious values<sup>123</sup> in a way that homosexuality, broadly defined, does not. Many Americans do not want to see gay people suffer harm and discrimination but view same-sex marriage as impinging upon their deeply held moral and religious beliefs. This dichotomous stance on gay rights is seen in those businesses that express a willingness to serve gay people but refuse to provide services for same-sex weddings.<sup>124</sup>

Although marriage is a traditionally heteronormative institution,<sup>125</sup> seeking to marry a person of the same sex may be viewed as “an act of flaunting”<sup>126</sup> one’s sexual orientation, and “[t]he contemporary resistance to gay marriage can be understood as a covering demand: *Fine, be gay, but don’t shove it in our faces.*”<sup>127</sup> The wedding-services market is one in which covering one’s gay identity is practically impossible, regardless of one’s appearance or behavior. A customer who might appear straight while dining in a restaurant, for example, will necessarily “out” herself as gay in seeking services for her wedding.<sup>128</sup> Businesses that have refused to provide services for same-sex weddings have advanced the same argument as Big Earl’s, claiming that they do not discriminate against gay individuals, just gay *conduct*: they claim to be perfectly willing to serve gay customers, just not gay customers *who are getting married*.<sup>129</sup>

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beginning in 1994, I said to the gay community, “I do not favor same-sex marriage.” I oppose same-sex marriage, and that has been my view. But if people are looking for someone who will discriminate against gays, or will in any way try and suggest that people that have different sexual orientation don’t have full rights in this country, they won’t find that in me.

CBS News, *Santorum, Romney Questioned over Gay Rights*, YOUTUBE (Jan. 8, 2012), <http://www.youtube.com/watch?v=U9pjtfvecLg>, archived at <http://perma.cc/9L6C-4PR8>.

<sup>123</sup> See Muehlmeier, *supra* note 31, at 794-95, 809-10 (discussing the prevalence of conflict in exchanges touching on cultural values, such as marriage-related services).

<sup>124</sup> See *infra* note 129 and accompanying text.

<sup>125</sup> YOSHINO, *supra* note 11, at 91.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 19.

<sup>128</sup> This would be especially unavoidable in the case of more personalized wedding services that require specific details about, or even physical presence at, the wedding, such as invitation printing or photography. See, e.g., *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013) (“It was apparently Willock’s e-mail request to have Elane Photography photograph Willock’s commitment ceremony to another woman that signaled Willock’s sexual orientation to Elane Photography, regardless of whether that assessment was real or merely perceived.”).

<sup>129</sup> See, e.g., Reply Brief of Petitioner at 1-2, *Elane Photography*, 309 P.3d 53 (No. 33,687) (arguing that a photography studio that “would have provided other services” to a lesbian woman “did not decline [to photograph her commitment ceremony] because she is homosexual” and that the studio “serves homosexuals” in other contexts); cf. Conor Friedersdorf, *Should Christian Bakers Be Allowed to Refuse Wedding Cakes to Gays?*, ATLANTIC (Feb. 25, 2014, 8:00 AM), <http://www.theatlantic.com/politics/archive/2014/02/should-christian-bakers-be-allowed-to-refuse-wedding-cakes-to-gays/284061>, archived at <http://perma.cc/N9JU-94K5> (quoting conservative

In *Elane Photography, LLC v. Willock*, petitioner Elane Photography, LLC, invoked this status–conduct distinction.<sup>130</sup> When Vanessa Willock contacted Elane Photography about her upcoming commitment ceremony to another woman,<sup>131</sup> the company’s co-owner, Elaine Huguenin, responded that she served only “traditional weddings” and “d[id] not photograph same-sex weddings.”<sup>132</sup> Willock brought a complaint against Elane Photography before the New Mexico Human Rights Commission (NMHRC), pursuant to the New Mexico Human Rights Act,<sup>133</sup> a statute that prohibits sexual orientation discrimination in public accommodations.<sup>134</sup> The NMHRC found that Elane Photography had discriminated on the basis of sexual orientation in refusing to photograph Willock’s commitment ceremony.<sup>135</sup> Elane Photography appealed the administrative decision to the New Mexico state district court, which granted summary judgment for Willock;<sup>136</sup> the New Mexico Court of Appeals later affirmed.<sup>137</sup> Taking the case to the New Mexico Supreme Court, Elane Photography argued that it refused to serve

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pundit Erick Erickson, who argued that a Christian business owner “should no more be allowed to deny service to a gay person than to a black person” when “serving a meal at a restaurant” or “baking a cake for a birthday party” but could reasonably refuse to serve a gay person’s “wedding, which millions of Christians view as a sacrament of the faith . . . ordained by God to reflect a holy relationship”).

<sup>130</sup> 309 P.3d at 61; *see also infra* note 138 and accompanying text.

<sup>131</sup> The court noted “the parties['] agree[ment] that the [commitment] ceremony was essentially a wedding.” 309 P.3d at 59 n.1. New Mexico prohibits sexual orientation discrimination through its public accommodations statute, the New Mexico Human Rights Act. *See* N.M. STAT. ANN. § 28-1-7(F) (2013) (declaring that “[i]t is an unlawful discriminatory practice” for “any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of . . . sexual orientation”). New Mexico defines the term “public accommodation” broadly, as “any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private.” *Id.* § 28-1-2(H). The commitment ceremony at issue in *Elane Photography* took place prior to New Mexico’s 2013 legalization of same-sex marriage. *See* Griego v. Oliver, 316 P.3d 865, 872 (N.M. 2013) (“[B]arring individuals from marrying and depriving them of the rights, protections, and responsibilities of civil marriage solely because of their sexual orientation violates the Equal Protection Clause under Article II, Section 18 of the New Mexico Constitution.”). Now that same-sex marriage is legal in New Mexico, the number of same-sex wedding ceremonies—and thus occasions for discrimination prohibited by the state’s statute—will almost surely increase.

<sup>132</sup> *Elane Photography*, 309 P.3d at 60.

<sup>133</sup> *See id.*; *see also* N.M. STAT. ANN. § 28-1-10 (2013) (outlining New Mexico’s administrative grievance procedure, including the requirement of identifying either the secretary’s regulation or the section of the Human Rights Act alleged to have been violated).

<sup>134</sup> *See supra* note 131.

<sup>135</sup> *See Elane Photography*, 309 P.3d at 60 (describing the procedural history of the case).

<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

only gay *commitment ceremonies*, not gay people, which meant that it did not discriminate on the basis of sexual orientation.<sup>138</sup> The court flatly rejected any distinction between discrimination on the basis of sexual orientation and discrimination on the basis of conduct “*closely correlated with sexual orientation*,”<sup>139</sup> finding that *both* constitute sexual orientation discrimination: “We agree [with the United States Supreme Court] that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation.”<sup>140</sup> The court found that Elane Photography’s willingness to serve gay people in contexts that “do not reflect the client’s sexual preferences . . . does not cure its refusal to provide other services that it offered to the general public.”<sup>141</sup>

As both the United States Supreme Court and the New Mexico Supreme Court have held, there is no legitimate distinction to be drawn between discrimination on the basis of a status and discrimination on the basis of conduct “inextricably tied” to that status.<sup>142</sup> The *Elane Photography* court thus demonstrated that states with public accommodations statutes that protect “sexual orientation” are analytically equipped to deal with the realities of modern-day sexual orientation discrimination. But there remain twenty-nine states whose laws ostensibly do not protect gay people from discrimination in public accommodations.

Many believe that because the statutes of only twenty-one states enumerate sexual orientation as a protected class, discrimination against gay people is thus legal in the remaining twenty-nine.<sup>143</sup> This view was widely espoused in news coverage and commentary surrounding Indiana’s recently enacted Religious Freedom Restoration Act, which in its initial form extended a judicial defense against discrimination claims not only to individuals and religious organizations but also to

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<sup>138</sup> See *id.* at 61; see also Reply Brief of Petitioner, *supra* note 129, at 1-2.

<sup>139</sup> *Elane Photography*, 309 P.3d at 61 (emphasis added).

<sup>140</sup> *Id.* at 62. The court cited the U.S. Supreme Court’s opinion in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S. Ct. 2971 (2010), in which the Supreme Court (in turn quoting its own decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993)) noted its refusal to distinguish between status and conduct. *Elane Photography*, 309 P.3d at 61-62.

<sup>141</sup> *Elane Photography*, 309 P.3d at 62.

<sup>142</sup> See *supra* note 140 and accompanying text.

<sup>143</sup> See, e.g., David S. Cohen & Leonore Carpenter, *Anti-Gay Bias Legal in Indiana Before New Law: Column*, USA TODAY (Mar. 31, 2015, 5:19 PM), <http://www.usatoday.com/story/opinion/2015/03/31/indiana-religious-freedom-restoration-act-discrimination-anti-gay-column/70723684>, archived at <http://perma.cc/AHF5-RB9D> (“The much-discussed case of the baker who doesn’t want to bake a cake for a gay couple’s wedding? In 29 states, . . . the baker is allowed to refuse service because the couple is gay . . .”).

[a] partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity that . . . exercises practices that are compelled or limited by a system of religious belief held by . . . the individuals . . . who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes.<sup>144</sup>

The list of entities entitled to the defense encompasses nearly all private businesses.<sup>145</sup> Members of the media widely characterized the bill as giving businesses license to discriminate against gay people.<sup>146</sup> Indeed, immunizing businesses' discrimination against gay people appears to have been the motivating purpose of the law.<sup>147</sup> Opposition from political and business leaders was intense,<sup>148</sup> with Indianapolis-based Angie's List canceling a

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<sup>144</sup> S. Enrolled Act 101, 119th Gen. Assem., 1st Reg. Sess. (Ind. 2015), available at <http://iga.in.gov/static-documents/9/2/b/a/92bab197/SBo101.05.ENRS.pdf>.

<sup>145</sup> See, e.g., Mark Joseph Stern, *Mike Pence Is Either Lying or Deluded About Indiana's "Religious Freedom" Law*, SLATE (Mar. 31, 2015, 1:26 PM), [http://www.slate.com/blogs/outward/2015/03/31/mike\\_pence\\_is\\_either\\_lying\\_or\\_deluded\\_about\\_indiana\\_s\\_religious\\_freedom.html](http://www.slate.com/blogs/outward/2015/03/31/mike_pence_is_either_lying_or_deluded_about_indiana_s_religious_freedom.html), archived at <http://perma.cc/H2XP-CK3H> (observing that "the bill explicitly permits for-profit businesses to exercise their religious beliefs, rather than limiting its effects to regular human beings").

<sup>146</sup> See, e.g., *id.* (noting that the Indiana law "has come under severe criticism for potentially granting businesses a license to discriminate against gays and lesbians based on their owner's religious prejudices").

<sup>147</sup> See Zack Ford, *The True Intent of Indiana's 'Religious Freedom' Bill, According to the People Who Helped Write It*, THINKPROGRESS (Mar. 31, 2015, 9:43 AM), <http://thinkprogress.org/lgbt/2015/03/31/3640801/conservatives-indiana-discrimination>, archived at <http://perma.cc/3KBB-BTUG> (highlighting public statements of proponents of the law that evinced an intent to protect businesses that discriminate against gay customers); see also *Indiana Governor Insists New Law Has Nothing to Do with Thing It Explicitly Intended to Do*, ONION (Mar. 30, 2015), <http://www.theonion.com/articles/indiana-governor-insists-new-law-has-nothing-to-do,38330>, archived at <http://perma.cc/5ZH5-4CMP> (mocking the notion that the Indiana law had any purpose other than protecting businesses that refused to serve gay customers).

<sup>148</sup> See Michael Babario & Erik Eckholm, *Indiana Law Denounced as Invitation to Discriminate Against Gays*, N.Y. TIMES (Mar. 27, 2015), <http://www.nytimes.com/2015/03/28/us/politics/indiana-law-denounced-as-invitation-to-discriminate-against-gays.html>, archived at <http://perma.cc/PE69-YQ4V> (noting that "influential national leaders, including Hillary Rodham Clinton and Tim Cook, the chief executive of Apple, had weighed in against the law, calling it a disappointing invitation to discriminate," and detailing outrage among other business leaders, actors, and athletes); see also Tim Cook, *Dangerous Laws*, WASH. POST, Mar. 31, 2015, at A1 ("Regardless of what the law might allow in Indiana or Arkansas, [Apple] will never tolerate discrimination."); Hillary Clinton, TWITTER (Mar. 26, 2015, 6:32 PM), <http://twitter.com/HillaryClinton/status/581267449523343360>, archived at <http://perma.cc/3E97-2B2V> ("Sad this new Indiana law can happen in America today. We shouldn't discriminate against p[er]p[er] b[e]c[ause] of who they love . . .").

planned \$40 million expansion of its headquarters<sup>149</sup> and Apple chief executive Tim Cook going so far as to call the law “dangerous.”<sup>150</sup> Because Indiana’s public accommodations statute does not explicitly include sexual orientation as a protected class,<sup>151</sup> however, some commentators—including gay rights advocates—argued that the law did not have the effect of legalizing discrimination because, in their view, it was already legal to discriminate against gay people in Indiana.<sup>152</sup>

These allegations echo arguments made last year in response to Arizona’s controversial SB 1062,<sup>153</sup> a 2014 bill that, had it been signed into law,<sup>154</sup> would have amended Arizona’s existing Religious Freedom

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<sup>149</sup> See Tim Evans, *Angie’s List Canceling Eastside Expansion over RFRA*, INDIANAPOLIS STAR (Apr. 2, 2015, 11:38 AM), <http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738>, archived at <http://perma.cc/F7GE-NJEW>.

<sup>150</sup> See Cook, *supra* note 148 (“There’s something very dangerous happening in states across the country. A wave of legislation, introduced in more than two dozen states, would allow people to discriminate against their neighbors. Some, such as the bill enacted in Indiana last week that drew a national outcry and one passed in Arkansas, say individuals can cite their personal religious beliefs to refuse service to a customer or resist a state nondiscrimination law.”).

<sup>151</sup> See IND. CODE § 22-9-1-2 (2014) (prohibiting discrimination in public accommodations on the basis of “race, religion, color, sex, disability, national origin, or ancestry”).

<sup>152</sup> See, e.g., Cohen & Carpenter, *supra* note 143 (“[T]he reality of the situation is that even before this law was passed, most gay and lesbian Hoosiers had almost no protection anyway . . . . The bottom line is that the businesses that are pulling their money out of Indiana were already doing business in a state that allowed anti-gay discrimination.”). Professors Cohen and Carpenter allege that the controversy over the Indiana act “has fed a basic misunderstanding about the underlying state of the law.” *Id.* The professors’ claim, however, depends upon the erroneous view that only statutes protect individuals from discrimination. For another example of the view that “[a]ny type of private discrimination is legal unless a state or federal law specifically forbids it,” see Garrett Epps, *Public Accommodations and Private Discrimination*, ATLANTIC (Apr. 14, 2015, 6:00 AM), <http://www.theatlantic.com/politics/archive/2015/04/public-accommodations-and-private-discrimination/390435>, archived at <http://perma.cc/K7LM-EL3M>.

<sup>153</sup> See, e.g., Ross Douthat, Op-Ed., *The Terms of Our Surrender*, N.Y. TIMES, Mar. 2, 2014, at SR12 (“Never mind that in Arizona it’s currently legal to discriminate based on sexual orientation . . . .”); Magnus Samuelsson, Comment to *Arizona and the Right to Discriminate*, HARV. POL. REV. (Feb. 25, 2014), <http://harvardpolitics.com/united-states/arizona-right-discriminate>, archived at <http://perma.cc/KA9B-X4NY> (“It is already legal to discriminate against members of the LGBT community in Arizona. And you don’t even need to have a ‘religious reason’ to do it. The Civil Rights Act of 1964 does not extend protections to LGBT persons, and Arizona does not have any state laws which explicitly offer protections against LGBT discrimination.”); Scott Shackford, *News Flash: It’s Already Legal to Deny Service to Gays in Arizona*, REASON.COM HIT & RUN BLOG (Feb. 21, 2014, 11:05 AM), <http://reason.com/blog/2014/02/21/news-flash-its-already-legal-to-deny-ser>, archived at <http://perma.cc/L35A-KCWX> (“Actually, Arizona’s laws already give businesses the right to discriminate against gays. Sexual orientation is not included in Arizona’s public accommodation laws. Discrimination against gays is actually legal in a lot of places in America still.”).

<sup>154</sup> Arizona Governor Jan Brewer vetoed the bill under pressure from gay rights groups, political leaders, and the business community. See Cindy Carmaco, *Arizona Gov. Jan Brewer Vetoes So-Called Anti-Gay Bill*, L.A. TIMES NATION NOW BLOG (Feb. 26, 2014, 5:04 PM),

Restoration Act<sup>155</sup> to cover a list of entities similar in scope to that covered by the Indiana law.<sup>156</sup> The public outcry over the Indiana bill became so intense, however, that the state amended the law to state explicitly that it neither “authorize[s] a provider to refuse to offer or provide services, facilities, use of public accommodations, goods, employment, or housing” on the basis of classes including “sexual orientation” nor “establish[es] a defense to a civil action or criminal prosecution for refusal” to serve gay people.<sup>157</sup> This amendment only limited the application of Indiana’s Religious Freedom Restoration Act; it did not provide any affirmative statutory protection for gay people, who appear to remain unprotected by Indiana’s public accommodations statute.<sup>158</sup> But does a state public accommodations statute’s failure to explicitly identify sexual orientation as a protected class mean that there is consequently a legal *right* to discriminate on the basis of sexual orientation in that state? Might courts, reading these public accommodations laws broadly, find sexual orientation discrimination illegal, despite the lack of an explicit statutory statement to that effect? As the next Part argues, courts can—and should—prohibit sexual orientation discrimination in public accommodations through a revival of the common law duty to serve.

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<http://www.latimes.com/nation/nationnow/la-na-nn-arizona-gay-brewer-20140226-story.html>, archived at <http://perma.cc/PYV9-HNYY>; see also Mitt Romney, TWITTER (Feb. 24, 2014, 1:41 PM), <http://twitter.com/MittRomney/status/438428674250256385>, archived at <http://perma.cc/A2HM-X7BD> (“@GovBrewer: veto of #SB1062 is right.”).

<sup>155</sup> ARIZ. REV. STAT. ANN. § 41-1493.01 (2014).

<sup>156</sup> See S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), available at <http://www.azleg.gov/legtext/51leg/2r/bills/sb1062p.pdf>. The law as presently enacted provides the defense to only “a religious assembly or institution.” ARIZ. REV. STAT. ANN. § 41-1493 (2014). SB 1062 also explicitly allowed a defense against lawsuits brought by private parties; such a defense had previously been allowed against only government-initiated suits.

<sup>157</sup> S. Enrolled Act 50, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015), available at <http://iga.in.gov/static-documents/1/b/d/f/1bdf457b/SB0050.05.ENRS.pdf>.

<sup>158</sup> See *supra* note 151 and accompanying text; see also David S. Cohen & Leonore Carpenter, *The “Fix” to Indiana’s Law Still Doesn’t Protect Hoosiers from Anti-Gay Discrimination*, SLATE (Apr. 2, 2015, 2:52 PM), [http://www.slate.com/blogs/outward/2015/04/02/indiana\\_religious\\_freedom\\_law\\_the\\_fix\\_still\\_doesn\\_t\\_protect\\_gay\\_hoosiers.html](http://www.slate.com/blogs/outward/2015/04/02/indiana_religious_freedom_law_the_fix_still_doesn_t_protect_gay_hoosiers.html), archived at <http://perma.cc/9VUJ3-6MJR> (lamenting the fix to the Indiana law as a “partial victory at best” because it did not amend Indiana’s antidiscrimination laws, which do not explicitly list sexual orientation as a protected class). Interestingly, Indiana’s public accommodations statute states that “[i]t is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, . . . and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity.” See IND. CODE § 22-9-1-2 (2014) (emphasis added). As I argue in Section IV.A, courts should read such a broad grant of a right of access against the background of the common law duty to serve; a court could thus construe Indiana’s statute to prohibit all arbitrary discrimination in public accommodations.

## IV. THE ROLE OF A REVIVED COMMON LAW DUTY TO SERVE

A revival of the principles underlying the common law duty to serve can help those who suffer sexual orientation discrimination in states whose public accommodations statutes do not explicitly provide protection. First, under the canon of statutory construction requiring conformity with the common law, courts can read state public accommodations statutes to provide more expansive protection in light of the common law duty to serve's foundational principles. Second, and more ambitiously, in those states that either lack public accommodations laws altogether or whose courts refuse to construe those laws more broadly, the common law can provide an independent cause of action sounding in tort.

A. *Common Law Conformity*

A fundamental premise of the American legal system is that legislatures have the ability to override the common law.<sup>159</sup> But courts retain the ability to constrain the legislature; even where a statutory codification exists, courts are obligated to apply the common law unless and until the legislature explicitly abrogates it. Justice Breyer recently discussed this canon of statutory construction in *Kirtsaeng v. John Wiley & Sons, Inc.*, a case that involved the first-sale doctrine of copyright law.<sup>160</sup> In holding that the relevant sections of the Copyright Act should be read to conform with preexisting common law principles, Justice Breyer noted that “[w]hen a statute covers an issue previously governed by the common law, [courts] must presume that ‘Congress intended to retain the substance of the common law.’”<sup>161</sup> Indeed, this canon has long dictated that “[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”<sup>162</sup> Guided by this interpretive canon, Justice Breyer read the relevant statutory provisions in light of the “impeccable historic pedigree” of the common law doctrine of first sale, which he traced back to the fifteenth century.<sup>163</sup> Judges should interpret state public accommodations statutes in the same manner. Unless a statute

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<sup>159</sup> See, e.g., N.Y. CONST. art. I, § 14 (adopting the common law of the colony of New York “subject to such alterations as the legislature shall make concerning the same”); see also JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 234 (2008) (recognizing that “[i]t is open to legislatures to override or supplement common law rules”).

<sup>160</sup> 133 S. Ct. 1351 (2013).

<sup>161</sup> *Id.* at 1363.

<sup>162</sup> *Id.* (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

<sup>163</sup> *Id.*

manifests the legislature's explicit intent to abrogate the common law duty to serve, judges should read these statutes in light of the duty's historical and foundational principles, as outlined above in Part I of this Comment, and provide citizens protection against all arbitrary discrimination in public accommodations.

The argument is particularly strong with respect to those public accommodations statutes that, in addition to enumerating protected classes in their text, guarantee a right of nondiscrimination that is generally applicable to all persons.<sup>164</sup> Because such statutes essentially codify the common law duty, an understanding of the common law doctrine's expansive scope can support arguments that such statutes should be read as broadly protecting all persons from arbitrary discrimination, regardless of whether they fall into a class enumerated within the statute.

The State of California provides an apt example. In its 1951 decision in *Stoumen v. Reilly*, the California Supreme Court held that, under the then-applicable version of its public accommodations statute, the Unruh Civil Rights Act,<sup>165</sup> bars and restaurants could not reasonably exclude gay patrons who were behaving properly.<sup>166</sup> In *Stoumen*, a bar owner brought an action for a writ of mandamus against the California Board of Equalization, which had indefinitely suspended his liquor license for serving "persons of known homosexual tendencies"—a practice the Board claimed made the bar "a disorderly house for purposes injurious to public morals" in violation of the Alcoholic Beverage Control Act.<sup>167</sup> The court disagreed, reading California's public accommodations statute as providing *all* members of the public a right to patronize businesses unless they were behaving illegally or immorally; a proprietor had "no right to exclude" and would be liable for doing so without good cause.<sup>168</sup> The statute did not identify gay people as a protected class,<sup>169</sup> nor did the court's opinion give gay people any special protection. The court instead relied on a duty to serve *all persons* and found

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<sup>164</sup> See, e.g., IND. CODE § 22-9-1-2 (2014) ("It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, . . . and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity.")

<sup>165</sup> CAL. CIV. CODE § 51-52 (1950).

<sup>166</sup> 234 P.2d 969, 971 (Cal. 1951).

<sup>167</sup> *Id.* at 970.

<sup>168</sup> *Id.* at 971.

<sup>169</sup> CAL. CIV. CODE § 51 (1950).

sexual orientation to be an arbitrary basis for exclusion that did not rise to the level of good cause.<sup>170</sup>

As the California Supreme Court later explained, the California Legislature, in enacting the predecessor statute to the Unruh Civil Rights Act, codified the common law duty.<sup>171</sup> The court's brief overview of early common law doctrine aligned with the conduct theory of the duty's origin.<sup>172</sup> A "fundamental" canon of statutory interpretation "is that all legislation is to be considered in the light of the common law."<sup>173</sup> Reading the statute against its common law background, the court explained that it was not limited to prohibiting discrimination based on statutorily protected classifications such as race but could also proscribe "all arbitrary discrimination by a business enterprise."<sup>174</sup> Although the court described *Stoumen* as "recogniz[ing] the right of homosexuals to obtain food and drink in a bar or restaurant," this right was based not on their status as gay persons but rather as members of the general public.<sup>175</sup> The court recognized that this case "clearly establish[ed] that the Civil Rights Act prohibited all arbitrary discrimination in public accommodations."<sup>176</sup>

The California Supreme Court provided this background in the course of interpreting the effect of the legislature's 1959 amendments to the Civil Rights Act, which came some eight years after *Stoumen*. Whereas the statute that the *Stoumen* court construed had read "All citizens . . . are entitled to . . . full and equal accommodations . . . of inns, restaurants, hotels, eating houses, places where ice cream and soft drinks of any kind are sold

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<sup>170</sup> *Stoumen*, 234 P.2d at 971. The California Supreme Court reaffirmed this principle in a similar case, *Tarbox v. Board of Supervisors of the County of Los Angeles*, in which it found that the owner of a movie theatre could not lawfully refuse admission to gay patrons. 329 P.2d 553, 556 (Cal. 1958).

<sup>171</sup> *In re Cox*, 474 P.2d 992, 996 (Cal. 1970).

<sup>172</sup> *See id.* ("These undertakings 'held themselves out' as providing a particular product or service to the community." (citing, among other sources, Arterburn, *supra* note 37, at 418-28)).

<sup>173</sup> Warren R. Maichel, Legislation, *The Role of the Common Law in Interpretation of Statutes in Missouri*, 1952 WASH. U. L.Q. 101, 101. According to one nineteenth century argument, courts in code states such as California should interpret common law codifications as though they were uncodified common law. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 83 (1982) ("Except . . . where the language is so clear and unequivocal as to leave no doubt of an intention to depart from, alter or abrogate the common-law rule concerning the subject matter, the courts should avowedly adopt and follow without deviation the uniform principle of interpreting all the definitions, statements of doctrine and rules contained in the code in complete conformity with the common-law definitions, doctrines and rules, and as to all the subordinate effects resulting from this interpretation." (quoting John Norton Pomeroy, *The True Method of Interpreting the Civil Code*, 4 W. Coast Rep. 109-10 (1884))).

<sup>174</sup> *In re Cox*, 474 P.2d at 995.

<sup>175</sup> *Id.* at 997.

<sup>176</sup> *Id.*

for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of a public accommodation or amusement,”<sup>177</sup> the legislature broadened its scope in its amendment: “All citizens . . . are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations . . . in all business establishments of every kind whatsoever.”<sup>178</sup> Although the 1959 amendments expanded the scope of the law to cover *all* businesses,<sup>179</sup> the court faced the question of whether the legislature’s addition of specific protected classifications limited the scope of protected persons to those within the enumerated classes. The court, compelled by its understanding of the common law duty at the statute’s core, found that the protected classes were “illustrative, rather than restrictive, indicia of the type of conduct condemned” and prohibited all arbitrary discrimination.<sup>180</sup>

The California Supreme Court slightly retrenched from this position in 1991, holding that the Unruh Act did not prohibit all arbitrary discrimination but rather prohibited only those distinctions based on the protected classes enumerated in the Act “or similar personal traits, beliefs, or characteristics that bear no relationship to the responsibilities of consumers of public accommodations.”<sup>181</sup> Although sexual orientation had not yet been added as a protected class,<sup>182</sup> there is no doubt that, under the standard articulated by the court, the statute would have continued to bar sexual orientation discrimination. The court’s retrenchment marks a shift from businesses having a duty to serve all customers to having a general right to exclude customers limited by a statutory duty to serve members of specifically enumerated protected classes. The court’s shift in thought is emblematic of the modern view that discrimination against gay people is legal unless and until it is explicitly proscribed by statute.<sup>183</sup> Of course, the California Supreme Court’s retrenchment with respect to its interpretation

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<sup>177</sup> CAL. CIV. CODE § 51 (1950).

<sup>178</sup> *Id.* § 51 (1960).

<sup>179</sup> *In re Cox*, 474 P.2d at 997 & n.8.

<sup>180</sup> *Id.* at 995; *see also* *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 121 (Cal. 1982) (“In reaching th[e] conclusion [that the Unruh Act bars all arbitrary discrimination], we relied, inter alia, upon the fact that the Unruh Act had emanated from the venerable common law doctrine which ‘attached [to various “public” or “common” callings] certain obligations including—at various stages of doctrinal development—the *duty to serve* all customers on reasonable terms without discrimination . . . .’” (quoting *In re Cox*, 474 P.2d at 996) (second alteration in original)).

<sup>181</sup> *Harris v. Capital Growth Investors XIV*, 805 P.2d 873, 889 (Cal. 1991).

<sup>182</sup> *Id.* at 878.

<sup>183</sup> *See supra* notes 152-53 and accompanying text.

of the Unruh Act did nothing to diminish the broad content of the common law duty, with which the statute was previously coextensive.

Although California has since included sexual orientation among the Unruh Act's protected classifications,<sup>184</sup> the logic and principles behind the California Supreme Court's twentieth century decisions interpreting the Act may be persuasive in arguing for a broader interpretation of public accommodations statutes in states that have not yet explicitly protected sexual orientation. Statutes that grant rights of reasonable access to all citizens broadly<sup>185</sup> arguably reflect a codification of the common law duty, which prohibits all businesses open to the public from arbitrarily discriminating against customers, including on the basis of sexual orientation.<sup>186</sup> Whereas statutes have broadened the scope of covered businesses beyond the inns and common carriers subject to the American rule (seemingly a legislative endorsement of the conduct theory), they have been understood simultaneously to limit the universe of persons to whom such protections apply to certain enumerated classes.<sup>187</sup> Although the California Supreme Court ultimately ruled that its civil rights statute was no longer fully coextensive with the common law duty to serve,<sup>188</sup> the court's holding that the Act's protected classifications could still be illustrative of the types of persons protected provides fodder for the argument that statutes that list protected classifications may be read to implicitly include sexual orientation. This latter argument may be more readily accepted given the modern understanding that public accommodations statutes bar not all arbitrary discrimination but rather discrimination on the basis of protected class membership.

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<sup>184</sup> CAL. CIV. CODE § 51(c) (West 2014).

<sup>185</sup> See, e.g., IND. CODE § 22-9-1-2 (2014) ("It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations, . . . and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin, or ancestry, since such segregation is an impediment to equal opportunity.").

<sup>186</sup> This argument does not appear to have been successful outside of California. For example, despite a broadly worded statutory right of "all persons" to "full and equal accommodations," the Michigan Supreme Court read a related section, which imposed criminal sanctions for denying service to certain protected classes, as "restricting the scope" of the right to those classes. *Riegler v. Holiday Skating Rink, Inc.*, 227 N.W.2d 759, 761 (Mich. 1975) (referencing MICH. COMP. LAWS ANN. § 750.146 (1968)). Unlike its California counterpart, the Michigan Supreme Court appears not to have considered the statute in the context of its common law roots. See generally *id.* (evaluating whether an ice skating rink can refuse to serve a male person because of the length of his hair, without considering the common law public accommodations doctrine).

<sup>187</sup> See *supra* notes 104-07 and accompanying text.

<sup>188</sup> See *supra* note 181 and accompanying text.

### B. *An Independent Cause of Action*

If courts are not inclined to broadly construe public accommodations statutes to cover all persons protected at common law, persons subjected to discrimination in public accommodations on the basis of their sexual orientation may be able to simply proceed under an independent common law cause of action sounding in tort.<sup>189</sup> In the context of racial discrimination, it has been suggested that a common law cause of action would serve a gap-filling role by covering an array of commercial enterprises that are excluded from Title II.<sup>190</sup> Of course, many state public accommodations statutes cover a broader array of businesses than does Title II. The common law duty can play an even greater gap-filling role in the sexual orientation discrimination context. Whereas all state public accommodations statutes proscribe racial discrimination, only twenty-one states and the District of Columbia prohibit sexual orientation

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<sup>189</sup> *The Antidiscrimination Principle in the Common Law* suggests that courts could evaluate a common law claim of a violation of the duty to serve under a burden-shifting framework similar to that used in the employment discrimination context. See Note, *supra* note 34, at 2008 & n.102 (describing the burden shifting in a Title VII disparate impact claim). *The Antidiscrimination Principle* refers to the burden-shifting framework of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), see Note, *supra* note 34, at 2008 n.102, which controlled *disparate impact* claims under Title VII of the Civil Rights Act of 1964 until Congress codified disparate impact in its 1991 amendments to the Act, see Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k)(1)(A) (2012)). Because disparate impact involves facially neutral policies that have disproportionate effects on certain groups, the comparison seems inapposite. The framework used in individual disparate treatment claims is more appropriate, as disparate treatment claims allege that adverse action was taken with discriminatory intent. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). But the frameworks are arguably similar.

The plaintiff would first make a prima facie case of discrimination, with the burden of production then shifting to the defendant to articulate a legitimate, nondiscriminatory reason for the decision to exclude the plaintiff. See *id.* at 802. The plaintiff could then, at the rebuttal stage, offer proof that the defendant's stated nondiscriminatory reason is merely pretextual. See *id.* at 804. Since the common law duty prohibits arbitrary exclusion, this framework would work well due to its rebuttable presumption that exclusion is unreasonable.

<sup>190</sup> See Note, *supra* note 34, at 2009 (“[T]he common law duty-to-serve cause of action could fill the resulting gaps in the federal antidiscrimination coverage. . . . For example, under recent trends in duty-to-serve analysis, this common law cause of action could cover a number of commercial establishments excluded from title II . . . .” (footnote omitted)). In the racial discrimination context, a claim under 42 U.S.C. § 1981 can also play this role. See *id.*; see also *Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (holding that § 1981 reaches private acts of racial discrimination). A § 1981 claim is not available to gay plaintiffs as it proscribes only racial discrimination. See 42 U.S.C. § 1981 (2012) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”); see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976) (noting that “the phrase ‘as is enjoyed by white citizens’ . . . emphasize[s] ‘the racial character of the rights being protected’” (citation omitted)).

discrimination.<sup>191</sup> A common law claim would thus do much more than merely expand the scope of businesses to which the duty to serve applies; it would bring gay people within the scope of antidiscrimination law in the twenty-nine states whose public accommodations statutes afford them no protection. Judges will have latitude in developing a new common law cause of action for refusal of service, but the elements should be roughly as follows: the plaintiff must show that the defendant (1) is a business that holds itself out as open to the public, (2) has denied service to the plaintiff for an arbitrary reason, and (3) by this arbitrary denial of service intentionally caused the plaintiff to suffer direct dignitary harm (with no requirement that the plaintiff's actual sexual orientation correspond with the defendant's perception). To illustrate how such a claim might work in practice, let us consider the following hypothetical:

Two men are seated at nearby tables in a restaurant in a rather conservative town. (The restaurant holds itself out as open to the public.) One man, Adam, is actually straight, but he appears and behaves in ways that are stereotypically associated with being gay. The other man, Ben, is actually gay—but is not “out.” Ben's experiences have led him to believe that it would be a bad thing if other people found out that he is gay, so he tries pretty hard to come off as straight when he is in public places. The waitress makes small talk with him—flirtatiously asking why he is eating alone and where his girlfriend is—before taking his order. She then looks over at Adam before turning away and walking off toward the kitchen. When she returns with Ben's order, Adam flags her down, explaining that no one has come to take his order yet. “That's right,” the waitress replies. “We don't serve disgusting fags like you here. This is a family restaurant.” Ben, being only a table away, hears this.

Although he is not gay, Adam could succeed on a common law refusal-of-service claim based on the sexual orientation discrimination he suffers. He would need to show that the restaurant (1) held itself out as a business open to the public, (2) denied him service for an arbitrary reason (here, his perceived sexual orientation), and (3) caused him to suffer direct dignitary harm. This Section proceeds to discuss each of these elements in turn, followed by a brief discussion on the available remedies.

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<sup>191</sup> See *supra* notes 20-21 and accompanying text.

### 1. The Defendant Is a Business that Holds Itself Out as Open to the Public

The question of which businesses are subject to the duty to serve is perhaps the greatest hurdle that a plaintiff bringing a common law cause of action will face, given the limited scope of businesses covered by the majority American rule.<sup>192</sup> *Uston v. Resorts International Hotel, Inc.*<sup>193</sup>—apparently the only deviation from the majority rule<sup>194</sup>—will be crucial persuasive authority for applying the duty to all businesses that hold themselves out as open to the public. Public accommodations statutes should also be surprisingly helpful, insofar as their broad application to virtually all businesses reflects modern society’s normative view that no business that holds itself out as open to the public should be allowed to discriminate arbitrarily. As Professor Singer notes, “the prevailing social assumption now is that businesses open to the public have no right to exclude customers on [a discriminatory] basis . . . and that the law backs up this assumption.”<sup>195</sup> The assumption that a duty to serve covers all businesses reflects an evolution of the modern American rule and yet simultaneously marks a return to the duty’s foundational principles. Some, including Professor Richard Epstein, are of the view that antidiscrimination law ought to apply only to monopoly businesses, with the marketplace otherwise serving as a corrective for discrimination.<sup>196</sup> Although the free market *might* provide all persons with access to resources, such an argument fails to address normative concerns that discrimination is inherently harmful to human dignity and autonomy.

In my hypothetical, Adam can easily show that the restaurant is a business that holds itself out as open to the public.

### 2. The Defendant Has Denied Service to the Plaintiff for an Arbitrary Reason

The question, of course, is whether sexual orientation discrimination is arbitrary or whether a customer’s sexual orientation can ever serve as a reasonable basis for denying service. At common law, the duty to serve requires a particularized reason for refusing to serve an individual customer;

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<sup>192</sup> See *supra* note 73 and accompanying text.

<sup>193</sup> 445 A.2d 370 (N.J. 1982).

<sup>194</sup> See *supra* note 107 and accompanying text.

<sup>195</sup> Singer, *supra* note 22, at 1293.

<sup>196</sup> See, e.g., RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 127 (1992) (“Someone could have made a fortune catering solely to blacks who were kept out of white hotels that adopted segregationist policies.”).

a dislike for a group to which the customer belongs is insufficient to justify exclusion.<sup>197</sup> In *Stoumen v. Reilly*, the California Supreme Court held that a proprietor could not exclude gay persons who were “acting properly and [we]re not committing illegal or immoral acts.”<sup>198</sup> In so holding, the court relied on common law cases that recognized the right of known prostitutes to receive equal service when not engaged in illegal acts.<sup>199</sup> Indeed, at oral argument in *Romer v. Evans*, Justice Kennedy recognized the possibility that where a state’s law says that “you cannot bar people from public accommodations for any arbitrary or unreasonable reason,” a court could “find that it was unreasonable or arbitrary to bar a person from public accommodations by reason of sexual orientation.”<sup>200</sup>

The common law thus seems to support the proposition that sexual orientation discrimination is arbitrary. Many individuals who refuse to provide services for same-sex weddings, however, genuinely believe as a matter of conscience that same-sex marriage is immoral. Might the common law legitimize the distinction between refusing service to gay individuals and refusing services related to same-sex marriages that certain business owners have attempted to raise?<sup>201</sup> Surely not; plaintiffs could cite opinions like that of the New Mexico Supreme Court in *Elane Photography*, in which the statute’s prohibition of sexual orientation discrimination was construed to extend to same-sex commitment ceremonies despite perceptions of that conduct as immoral.<sup>202</sup> The claim that same-sex marriages could not be reasonably excluded should have even stronger weight in states that have legalized same-sex marriage,<sup>203</sup> since such conduct is given the imprimatur of the state. Finally, although the common law cause of action would be brought by and against private parties, the public nature of businesses that open their doors to the community at large might lead plaintiffs—and courts—to look to the Supreme Court’s equal protection jurisprudence,

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<sup>197</sup> See Note, *supra* note 34, at 2006 & nn.87-89 (surveying common law cases that prohibited exclusion of “a youth, a ‘hippie,’ or a member of a particular militia company”).

<sup>198</sup> 234 P.2d 969, 971 (1951).

<sup>199</sup> *Id.*

<sup>200</sup> Oral Argument at 35:56, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039), available at [http://www.oyez.org/cases/1990-1999/1995/1995\\_94\\_1039](http://www.oyez.org/cases/1990-1999/1995/1995_94_1039).

<sup>201</sup> See *supra* notes 129, 138 and accompanying text.

<sup>202</sup> See *supra* notes 140-41 and accompanying text.

<sup>203</sup> The ceremony at issue in *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013), was not a marriage but rather a commitment ceremony; the refusal of service occurred prior to New Mexico’s legalization of same-sex marriage. See *supra* note 131 and accompanying text.

which has held that moral disapprobation of homosexuality can never satisfy the rational basis test, the lowest level of constitutional scrutiny.<sup>204</sup>

In my hypothetical, Adam is discriminated against on the basis of his perceived sexual orientation. If courts accept that sexual orientation discrimination is arbitrary, Adam can succeed in satisfying this element as well.

### 3. The Defendant Intentionally Caused the Plaintiff to Suffer Direct Dignitary Harm

A core element of any tort claim is the plaintiff's harm. A key advantage of a common law duty-to-serve claim over a statutory claim is the common law's focus on the discriminator's conduct—whether it is arbitrary or unreasonable—rather than on the plaintiff's membership in a statutorily enumerated protected class. The common law can thus avoid any potential correspondence requirement between the plaintiff's actual sexual orientation and that perceived by the defendant.<sup>205</sup> The focus on the basis of the defendant's decision to discriminate—and not on determining the plaintiff's actual sexual orientation—is important for two reasons.

First, the lack of a correspondence requirement ensures that the plaintiff's sexual orientation will not be a litigated issue. As discussed above, sexual orientation is an amorphous classification,<sup>206</sup> and outside of wedding-related discrimination (where one's sexual orientation could be inferred from one's intention to marry a person of the same sex), it is difficult to comprehend on what sort of evidentiary bases it could be determined. Having to prove one's sexual orientation would likely require one to share intensely personal and intimate details, perhaps touching on one's sexual history and practices. Some plaintiffs may wish not to identify as gay (or as having any particular sexual orientation) at all. Forcing plaintiffs to publicly

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<sup>204</sup> See generally *United States v. Windsor*, 133 S. Ct. 2675 (2013) (holding that section 3 of the Defense of Marriage Act is unconstitutional without stating a level of scrutiny but citing *Romer v. Evans*, 517 U.S. 620 (1996)); *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting that moral disapproval of homosexual relations is not sufficient to uphold the constitutionality of Texas's sodomy statute); *Romer v. Evans*, 517 U.S. 620 (1996) (declaring a Colorado constitutional amendment that precluded state or local government from banning discrimination against gays, bisexuals, and lesbians as unconstitutional under rational basis review). While the Equal Protection Clause of the Fourteenth Amendment binds only state actors, the Court's holding that moral disapprobation of homosexuality is an insufficient basis for discrimination can be instructive and persuasive in the public accommodations context.

<sup>205</sup> Cf. D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 100-13 (2013) (discussing cases imposing a requirement that plaintiffs bringing intentional discrimination claims under Title VII be an actual member of the protected class).

<sup>206</sup> See *supra* note 109 and accompanying text.

identify with, and establish, a gay (or other non-heterosexual) identity as an element of their discrimination claim could thus significantly deter plaintiffs from bringing claims. The common law claim neatly avoids this problem.

Second, and perhaps more important, the common law's lack of correspondence requirement would allow all people—whether gay or not—to assert a duty-to-serve claim, ensuring that discriminatory conduct is sufficiently deterred. Sexual orientation discrimination harms not only the dignity of the immediate victim of the discriminatory act but also the dignity and autonomy of those who, fearing such discrimination, feel forced to comply with heterosexual norms. Because the harm of sexual orientation discrimination in public accommodations is so far-reaching (and often goes unnoticed), underdeterrence is an obvious issue. But focusing on the basis of the discriminatory decision, rather than on the classification of the person who suffered the immediate harm, ensures greater deterrence by allowing all instances of intentional sexual orientation discrimination to give rise to liability.

In my hypothetical, there is no doubt that the waitress intended to discriminate on the basis of sexual orientation, but she happened to misperceive Adam as gay. To be sure, the waitress's discriminatory act harms Adam's dignity and autonomy—it is a direct attack on his chosen identity and self-expression—but it does not do so on the basis of his actual sexual orientation.<sup>207</sup> And, of course, Ben's dignity and autonomy are harmed too. Although he is not denied service—indeed, he receives excellent service—the waitress's anti-gay speech reinforces his fear of coming out and forces his continued compliance with heterosexual norms. The common law would allow Adam to bring a claim because it is concerned not with the plaintiff's actual sexual orientation but rather with whether the business's basis for exclusion is reasonable. And sexual orientation discrimination is certainly no more reasonable when it is misdirected at non-gay individuals. Allowing Adam to bring a claim vindicates not only his own injury but also the injury wrought upon gay individuals by the regime of forced heteronormativity that anti-gay discrimination perpetuates. It also ensures that businesses that intend to discriminate on the basis of sexual orientation do not escape liability when they misperceive a customer's sexual orientation by relying on stereotypes. Indeed, the elimination of sexual orientation stereotypes is a core goal of the common law duty.

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<sup>207</sup> Or at least not on the basis of Adam being gay. Arguably, though, discrimination against a straight person for failing to conform to heterosexual norms is itself a form of sexual orientation discrimination.

## 4. Remedies

A common law duty-to-serve claim must provide a plaintiff with relief that goes beyond merely vindicating his dignity. As with the elements of the claim itself, judges will have latitude in determining the appropriate relief. The harm caused by arbitrary denials of service—especially when based on one’s identity and chosen self-expression—is emotional in nature. In civil society, businesses open to the public play a large role in defining who is a part of the community. Given that the defendant’s conduct likely consists of abusive or insulting words, the harm of the refusal-of-service tort is akin to that of intentional infliction of emotional distress.<sup>208</sup> Interestingly, as Prosser notes, long before intentional infliction of emotional distress became an independent tort, courts imposed liability for intentional infliction of emotional distress on “common carriers, telegraph companies, and innkeepers.”<sup>209</sup> Indeed, the Second Restatement of Torts subjects “[a] common carrier or other public utility . . . to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility’s servants while otherwise acting within the scope of their employment.”<sup>210</sup> Compensatory damages can be awarded for noneconomic harm, including emotional distress.<sup>211</sup> And punitive damages are especially appropriate here, given the intentional and outrageous nature of the defendant’s discriminatory act and our societal goal of deterring discrimination in the marketplace.<sup>212</sup>

C. *The Challenge Posed by a Politicized Judiciary*

This Comment has argued that a revived common law duty-to-serve claim is needed because state statutes are inadequate to protect individuals from sexual orientation discrimination in commerce. My argument relies upon the hope that, although many state legislatures appear to lack the political will to statutorily protect their citizens from sexual orientation discrimination in public accommodations, state *judges* might be willing to entertain a common law claim based upon the duty to serve’s foundational

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<sup>208</sup> See John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 794 (2007).

<sup>209</sup> *Id.* at 796 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 57-58 (5th ed. 1984)). Professor Kircher’s hypothesis for why courts were willing to find liability is rooted in the economic theory, *see id.* at 796-97, but the conduct theory provides an equally plausible explanation.

<sup>210</sup> RESTATEMENT (SECOND) OF TORTS § 48 (1965).

<sup>211</sup> *See id.* § 905.

<sup>212</sup> *See id.* § 908.

principles. But due to the elected and politicized nature of the judiciary in many states, gay people may fare no better in the courts than they have with the legislature. Although the *Uston* court's decision to revive the duty to serve did not directly implicate sexual orientation (and so is not controversial in quite the same way), it is worth noting that New Jersey Supreme Court justices are appointed.<sup>213</sup> New Jersey justices initially serve seven-year terms and receive life tenure if reappointed,<sup>214</sup> insulating them from the political process more than elected judges who can run for reelection (or who might run for other elected office) and those appointed judges who are subject to popular retention votes.

The current situation in the Alabama state courts is illustrative. Roy Moore, Alabama's Chief Justice (and two-time failed Republican gubernatorial candidate<sup>215</sup>), has been fighting to limit the effect<sup>216</sup> of the United States District Court for the Southern District of Alabama's injunction in *Searcy v. Strange*,<sup>217</sup> the case that declared the state's ban on same-sex marriage unconstitutional.<sup>218</sup> Moore was elected Chief Justice in 2012 with nearly fifty-two percent of the vote,<sup>219</sup> despite having been removed from that same position in 2003 for his refusal to comply with a federal court order to remove a large statue of the Ten Commandments

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<sup>213</sup> See N.J. CONST. art. VI, § VI, para. 1 ("The Governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and associate justices of the Supreme Court . . .").

<sup>214</sup> See *id.* art. VI, § VI, para. 3 ("The Justices of the Supreme Court . . . shall hold their offices for initial terms of 7 years and upon reappointment shall hold their offices during good behavior . . .").

<sup>215</sup> See SEC'Y OF STATE, STATE OF ALA., ELECTION RESULTS ARCHIVE—GOVERNOR (1946–2010), available at <http://alabamavotes.gov/downloads/election/general/eagovernor1946-2010.xls> (showing that Moore won only 19.35% of the vote in the 2010 Republican gubernatorial primary and only 33.34% in the 2006 Republican gubernatorial primary); Eric Velasco, *The Gospel According to Roy*, POLITICO MAG. (Feb. 11, 2015), <http://www.politico.com/magazine/story/2015/02/roy-moore-alabama-gay-marriage-115128.html>, archived at <http://perma.cc/4YHH-RCHG> ("[Moore] made two failed bids for Alabama governor and toyed with running for president under the Constitution Party banner").

<sup>216</sup> See Alan Blinder, *Judge Defies Gay Marriage Law*, N.Y. TIMES, Feb. 9, 2015, at A1 ("In a dramatic show of defiance toward the federal judiciary, Chief Justice Roy S. Moore of the Alabama Supreme Court on Sunday night ordered the state's probate judges not to issue marriage licenses to gay couples on Monday, the day same-sex marriages were expected to begin here."); see also Velasco, *supra* note 215 (noting that "Moore is again waving his sword at the federal judiciary").

<sup>217</sup> No. 14-0208, 2015 WL 328728, at \*5 (S.D. Ala. Jan. 23, 2015).

<sup>218</sup> See *id.*

<sup>219</sup> See SEC'Y OF STATE, STATE OF ALA., ELECTION RESULTS ARCHIVE—STATE SUPREME COURT (1970–2012), available at <http://alabamavotes.gov/downloads/election/general/easupremecourt1970-2012.xls>.

(which Moore himself had commissioned) from the courthouse.<sup>220</sup> Some believe that Moore is positioning himself to run for governor yet again.<sup>221</sup> Recall that Alabama is one of the five states that has *no* public accommodations statute,<sup>222</sup> meaning that *only* a common law claim could offer relief. Given its highly politicized nature, it seems unlikely that gay citizens would fare any better with the Alabama judiciary than they have with its legislature.

But I do not believe that the situation is nearly this bleak. To be sure, there are other judges like Roy Moore sitting on the Alabama courts and on state courts across this country—but there are other judges like Morris Pashman too. Although accounts of incrementalism might make the common law seem conservative, the common law actually has the potential to be quite progressive.<sup>223</sup> The beauty of the common law is that it takes only one enlightened judge to bring about change.

#### CONCLUSION

The common law has long imposed upon businesses a duty to serve all customers. This duty has been largely forgotten, eclipsed by the public accommodations statutes that arose beginning in the late nineteenth century. These statutes came to cover virtually all businesses, extending beyond the scope of the majority American rule in what marked a return to the duty's origins at English common law. However, many of these statutes are not equipped to combat sexual orientation discrimination, which may become an even greater problem as same-sex marriage becomes legal in states that lack affirmative statutory protections for gay people. While the current legal milieu—with its statutory and regulatory obsession—has led many to focus on finding ways to protect gay people *by statute*, in many cases there will not be the political will to enact meaningful protections. Until such will exists, the common law duty to serve can play an essential gap-filling function that will provide gay people with the immediate protection that their human dignity and autonomy require.

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<sup>220</sup> See Richard Fausset, *For Alabama Chief Justice, Soldiering in Name of God Is Nothing New*, N.Y. TIMES, Feb. 10, 2015, at A12; Velasco, *supra* note 215.

<sup>221</sup> Velasco, *supra* note 215 (“[S]ome observers say he is positioning for yet another run for governor in 2018.”).

<sup>222</sup> See *supra* note 17 and accompanying text.

<sup>223</sup> See Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1268 (2015) (“Yet extant accounts of common law incrementalism tend to . . . contribute[] to the characterization of the common law as an institution that is traditional, conservative, and archaic in multiple respects, which is indeed far from being true in practice.”).