“Them”: Bridging Divides Between Distant Neighbors After Masterpiece Cakeshop*

By ANTON SORKIN

“They shut the road through the woods
Seventy years ago.
Weather and rain have undone it again,
And now you would never know
There was once a road through the woods
Before they planted the trees.”

“And when they saw it, they all grumbled,
‘He has gone in to be the guest of a man who is a sinner.’”

I. Introduction

WE BEGIN WITH A BLEAK FOUNDATION, almost irreparably so. Since the 1992 Republican Convention in Houston, Texas conservative Christians and LGBT rights groups alike began to separate themselves into respective political alliances, content on a lifestyle of division rooted in a festering suspicion of the other. Jean Bethke

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4. See BULL & GALLAGHER, supra note 3, at 93 (“[T]he debate was framed as gays versus morality,” with “[g]ay activists all too easily . . . characteriz[ing] conservative Christians as antigay bigots and nothing else.”). As Andrew Jackson said in his farewell address: “Mutual suspicions and reproaches may in time create mutual hostility, and artful and designing men will always be found who are ready to foment these fatal divisions and to inflame the natural jealousies of different sections of the country.” Andrew Jackson, Fare-
Elshtain’s remarks during this decade on American society echoes the storm our culture was weathering then and now: “Are we not busy building barriers between ourselves, bustling away, proclaiming that we cannot speak to one another, cannot understand one another, and must not have anything to do with one another?”

In *The Peloponnesian War*, Thucydides illuminated the current crisis when he wrote about the utility of history being made the subject of our own self-regard, as “people [make] their recollection fit in with their sufferings.” In other words, when people filter their everyday existence with reminders of past wrongs, they largely disqualify opportunities for future reconciliation. On one side, the *faith camp*—largely representative of the Christian/social conservatives on the right—seek opportunity at will to carve out religious exemptions from laws of general applicability in an effort to live out their faith in public and private. On the other side, the *equality camp*—largely representative of the LGBT-interest groups and advocates on the left—likewise, seek their own space in private and public, deeply protective that their newfound liberty not be reversed by “religious dogma.” Both sides see themselves as victims and refuse to acknowledge responsibility for extending across the aisle to find room for peaceful coexistence. This renewed level of anti-intellectual engagement with the other side seems to be a product of an almost clerical spirit of zealotry—content on “frozen ideas” and burning tunnel vision advocacy without any semblance of a desire to refine one’s values through the process of cognitive renewal. The two communities are built apart with an im-

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5. JEAN BETHKE ELSHTAIN, AUGUSTINE AND THE LIMITS OF POLITICS 107 (1995) [hereinafter ELSHTAIN, LIMITS OF POLITICS]. In discussing Charles Taylor and diversity, Elshtain further helps set the political dynamics inherent in our natures through the lens of hope. On one hand, our differences are not so radical as to consign us to becoming strangers forever. On the other, our commonalties are not so “transparent and irresistible that we are slated for a world of strong unity bordering on homogeneity.” Jean Bethke Elshtain, *Augustine and Diversity, in A Catholic Modernity?*, 95, 95 (James L. Heft ed., 1999) [hereinafter Elshtain, A Catholic Modernity?].


7. See NELSON TEBBE, RELIGIOUS FREEDOM IN AN Egalitarian Age 1–5 (2017) (“Political progressives have decried the campaign by religious actors to win a ‘right to discriminate,’ while conservatives have warned that the contemporary conflict could mean . . . ‘the end of religious freedom’ itself.”).

8. “For the life of thought, even though it may be regarded as the highest form of human activity, is also a medium through which other values are refined, reasserted, and realized in the human condition.” RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 28 (1963).
pregnable wall of separation, a slow drift toward what T.S. Eliot called the “formation of a new Christian culture” or “the acceptance of a pagan one,” and no middle ground in sight.9 Thomas Berg summarized this well when he wrote: “The conflict between LGBT people and religious traditionalists is a prime locus of fear-based polarization; the two groups remain today, as a 1990s book called them, ‘perfect enemies.’”10

A large part of these issues deal with the role of symbolic victories in establishing what Steven D. Smith called the “constitutive” significance of a religious nation,11 and what James Davidson Hunter referred to as “struggles to monopolize the symbols of legitimacy.”12 This is a pseudo-Christian nation ideal driven by “[b]iblical imagery [as] the basic framework for imaginative thought”13 and judicial restraint in shaping the public character.14 As Smith explained: “A community is a community because people think of it as one, or imagine it as one. And public symbols are the matter around and by which such imaginings occur.”15 Hence, this ideal explains the reason for why fights over “public symbols”16 such as bakery products and rubber goods engender “culture wars.”17

14. Smith, Reconstituting of America, supra note 11, at 21–25; see also JOHN FEA, WAS AMERICA FOUNDED AS A CHRISTIAN NATION? A HISTORICAL INTRODUCTION 21 (2011) (“Between 1789 and 1865 Americans—North and South, Union and Confederate—understood themselves to be citizens of a Christian nation . . . . Despite the religious skepticism of many of the founders, evangelical Protestantism . . . defined the culture.”).
15. Smith, Reconstituting of America, supra note 11, at 5; STEVEN D. SMITH, PAGANS & CHRISTIANS IN THE CITY 174 (2018) [hereinafter Smith, Pagans & Christians]. “Communities are not physical objects; they are conjured up and consolidated, rather, in people’s imaginations—in their minds and souls. People constitute a community because, often for complex and elusive reasons, they think themselves, or imagine themselves, as a community.” Id. at 265.
16. Smith, Reconstituting of America, supra note 11, at 5.
17. See generally Smith, Pagans & Christians, supra note 15, at 270–82. As Smith wrote: “The optics, as modern pundits say, [are] crucial.” Id. at 174. The Supreme Court will soon decide the fate of a forty-foot-high concrete Latin cross, designated as a memorial to the local World War I dead, which sits on public land in Maryland. Garrett Epps, Why Is This Cross-Shaped Memorial Constitutional, ATLANTIC (Feb. 19, 2019), https://www.theatlantic.com
These fights return us to the very birth of the Christian influence in society when Bishop Ambrose threatened to excommunicate the Emperor Valentinian II if he restored the Altar of Victor to the Senate House. Smith argued that these were fights where Christians “effectively undid the pagan sacralization of the world” and instituted a “desanctification of nature”; fights that Smith argued raged into modernity as the “badges and incidents” of classical paganism survived—“either in their own forms or as incorporated into the official Christian faith and culture.” Hence, when T.S. Eliot made his famous remarks that the modern world is a struggle between Christianity and modern “paganism,” he spoke to an imminent return of the pagan idea through a renewed form of secularism that rages against “Christian institutions, Christian ethics, and the Christian view of man.”

Interestingly, Smith noted that, like the present modern campaigns, both “pagans” and Christians in their time of persecuting the other offered terms of mutual accommodation that seemed fair to them, but could never be accepted by the other. Terms that, at best, kept the powerful faction in a state of pragmatic accommodation to--
ward the other, or, at worse, drove them to practice their faith in secret or in silence. Where the Christian institutions sought to instill the Christian Nation ideals throughout the 1940s and 1950s, Smith argued that, in more recent years, the progressive camp strategy has been “to capture what had previously been a more neutral framework or arrangement for governance and turn it to the cause of secularism or immanent religion.” And so, the culture wars rage and the Constitution becomes a partisan weapon used to advance the respective ideals of the “orthodox” and “progressive” constituencies. Religious freedom itself becomes a microcosm for these disputes—each side (i.e., transcendent and immanent religiosities) vying for their respective positions to define the community at large. Sensing that to give an inch to the other side is to give an inch too much, both camps find it easier to reject the possibility for moderation instead of admitting the deficiencies in themselves.

Worse still, both sides are fraught with the consequences of myopic vision: not only a failure to see the long-term effects of the current cycle of intransigence, but also a problem of seeing the other as anything more than a villain. To borrow from Richard Hofstadter’s discussion on the mind of fundamentalists, both sides in the “culture wars” have adopted a Manichean mindset: “look[ing] upon the world as an arena for conflict between absolute good and absolute evil, and accordingly scorn[ing] compromises . . . and [tolerating] no ambiguities.” This leads to a “growing and increasingly acrimonious polariza-

23. See id. at 138, 142.
24. Id. at 267. “[A]s in the ancient city, citizens with commitments to strong versions of Christianity or other truth-oriented faiths are today a foreign and divisive element in the city of ‘modern paganism.’” Id. at 363.
25. Id. at 267.
26. Id. at 303.
27. Frank S. Ravitch, remarking on the responses to Obergefell and RFRA, summarizes this perfectly: “[W]hen one observes these attacks it becomes clear that many of those attacking have a complete inability, or perhaps lack of desire, to find common ground or put themselves in the shoes of those with whom they disagree.” Frank S. Ravitch, Freedom’s Edge: Religious Freedom, Sexual Freedom, and the Future of America 9 (2016).
29. Hofstadter, supra note 8, at 135; Laycock, Campaign Against Religious Liberty, supra note 28, at 242–43.
its vicious vortex—including Justices of the Supreme Court.” 30 As Rowan Williams explained: “Aggression not dealt with in the inner ecology of social beings seeks outlets—if not against a stranger, then by making strangers of fellow-citizens.” 31 And aggression is one thing this country has in surplus.

While the causes of this aggression are multifaceted, the explanation certainly has something to do with what social psychologist Jonathan Haidt noted as a hate-based view of people perceived to be a threat to something one holds dear. 32 Since “[i]dentity is defined in relationship to whatever or whomever one serves,” 33 if the other side is a threat to one’s own existence, then to join in their cause is to be complicit with one’s own extinction. Where one side is publically expressing their identities and the morals of their respective communities, the other is making no efforts to reconsider that the historical animus they feel may be a relic of bygone era.

Having already made my effort to speak to the legal community and, in particular, to judges who decide cases involving antidiscrimination laws, 34 I now seek to speak primarily from (and to) the community of faith in putting forth the first offering of compromise—an offer to adjust our minds and avoid, in the immortal words of Abraham Lincoln, great destruction: “As a nation of freemen, we must live through all time, or die by suicide.” 35 At times, I will also speak to the equality community—having spent the last two years seeking to understand their plight and their eventual victory in the marriage debate. 36

33. Marianne Mey Thompson, Colossians and Philemon 96 (2005).
36. I retained two New York Times papers to commemorate my law school days that spanned the pivotal last three years of this debate. One from December 2012 (after my first semester) with the front-page story about the Supreme Court “entering the national debate over same-sex marriage” by agreeing to hear Hollingsworth v. Perry, 50 U.S. 693 (2013),
Whether anyone can help mend the separation remains to be seen, but that is where we turn to first: discussing this great divide between the faith and equality camps in more detail.

As a general matter, this Article will introduce a number of themes that weave throughout the psychological furniture I recommend the faith community embraces in order to bridge the divides. Already in Section I, we’ve seen the separation and the forming of factions that create these perfect enemies (i.e., Christian and gay neighbors). In Section II, we delve further into these respective camps to better understand their stated objections and the ideological obstacles that impede the ultimate goal of finding a shared space through peacebuilding. In Section III, we delve a little deeper into the question of “pollution” and the corresponding lessons from history when Christians were forced to live in a pagan countryside where the imprimatur of unclear rituals touched the idyllic purity of the Christian life. We look to connect this with the modern chapter using authors like Steven D. Smith, whose recent publications made the profound observation that we are living in “a modern reenactment of late antiquity’s struggle between Christianity and paganism.”

Importantly, this Article will push most against the psychological thought process of those who invoke their freedom of religion and the corresponding concerns of moral complicity. In that vein, the remainder of the Article will be divided into three sections, each forming one psychological layer for reform.

Section IV builds on the individual’s understanding of moral complicity and to what extent one’s own conscience can be reformed. This section looks at the faith claims being made by those at the center of the antidiscrimination disputes.

Section V considers the optics behind the legal battles grounded on the moral claims in the previous section and the consequential refrain that religious liberty has become an instrument for discrimination.

Section VI ties this all together and offers a solution founded on a renewed understanding of complicity based on two factors: (1) avoid-

ing a full-bodied compromise of those elements that make the faith distinct, and (2) building a richer theology of participation and peacebuilding based on mutual benefits. This solution embodies a renewed approach for engaging in double-vision in order to be aware of the optics generated—a renewed form of adapting to the culture by forming new discriminations through a mechanism of “tropism,” where legal and cultural changes navigate the undercurrents of Christianity in culture.

While this only forms the starting point to a reformed psychology of interest and community, the next logical step is to carry this vision into the legal world by embracing a culture of mediation instead of incessant legal challenges—mediation whereby the terms remain elastic and the mindset between distant communities remain open to change and the non-essential involvement of judges. While the brunt of my approach is geared toward the faith community, I will intermittently ask that the equality camp do their part in extending tolerance and opportunity for peacebuilding. To treat others as you would like to be treated on matters of dignity and personal autonomy.

With that lengthy introduction, let us begin to delve a little deeper into these two camps. As I introduce these themes one-by-one, I encourage readers to return to this roadmap if things get confusing.

II. The Great Divide

The struggle between the faith and equality camps on the subject of discrimination has been coming for a while now. In 2003, David E. Bernstein expressed his concerns that courts through the 1970s and early 1990s had abandoned civil liberties in favor of antidiscrimination principles with “stunning blitheness.”38 In 2004, after Massachusetts began allowing same-sex marriage, Mary Ann Glendon wrote an op-ed for the Wall Street Journal where she announced the looming “new era of intolerance and discrimination,” whereby “[e]very person and every religion that disagrees will be labeled as bigoted and openly discriminated against.”39 Richard Samuelson picked up on this trend in 2016 when he noted that personal identity in the context of the gay-rights movement “has resulted in a legal battle in which the radioactive charge of ‘discrimination’ . . . is wielded as a weapon to isolate,

38. DAVID E. BERNSTEIN, YOU CAN’T SAY THAT! 11 (2003). Today, Steven D. Smith notes how equality is being used as “a kind of cultural and political bulldozer.” Smith, The Torturous Course, supra note 30, at 1561.
impugn, and penalize dissenting views held by Americans of faith and informing the conduct of their religious lives.” That same year, an amicus brief filed in the Washington Supreme Court considering the case of State v. Arlene's Flowers, Inc., signed by nearly thirty of today's leading First Amendment scholars, warned that we are entering a time when national unity seems desperately in need, and when "a course of uncompromising intransigence operates to aggravate rather than calm cultural conflicts.” As evidence of this, a Pew Forum survey from 2016 discussing Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission indicated that over eighty percent of respondents “expressed none or not much sympathy for the people they disagreed with”—leaving Professor Douglas Laycock to conclude: “These are not Americans committed to liberty and justice for all; these are two sides looking to crush each other.”

LGBT rights groups and academics have attributed these recent trends to the exploitation of religious liberty as a cover for bigotry—dismissing notions of a “Christian America,” they see the call for religious accommodations as measures for imposing one’s beliefs on others. Notably, the Civil Rights Department under President Obama characterized proponents of robust religious liberty protections as extremists promoting bigotry cloaked in the mantle of “religious freedom.” Recently, a contentious debate has ensued over the Southern Poverty Law Center’s characterization of another prominent religious liberty non-profit as a “hate group,” determined to criminal-

ize the LGBT community abroad and return them back to the closet. In short, the more space the faith community seeks to exercise their religion, the more these efforts are cast off as by-products of a concentrated effort to discriminate.

And so, the central question in this Article regarding discriminations in many ways boils down to two basic questions posed by the equality side and the faith side. A question based on the very future identity of America and the level of toleration that both camps will allot to the other.

A. Questioning Discrimination: Equality Side

The first question, framed well by Louise Melling of the American Civil Liberties Union (“ACLU”) regarding the needs of the LGBT community, is “[w]hy grant accommodations for religious objectors in today’s anti-discrimination laws when similar calls were rejected in the context of civil rights?” After all, “[i]f an individual has a free exercise right to be exempt from laws on the basis of his religious objections, then he might have a constitutional right to escape the effect of any law.”

The faith community does after all have a history of marginalizing members of the LGBT community. Going back to the Middle Ages, Alfonso the Wise (1252–84) traced the foundational prohibition on homosexual acts from the story of Sodom and Gomorrah, prescribing death to those who committed the “crime against nature” (with minimal exceptions). William Eskridge wrote that through most of American history, the public discourse on the “crime against nature” was dominated by moral and religious tropes—translated into scien-


48. Melling, supra note 45, at 183.


50. John Boswell, Christianity, Social Tolerance, and Homosexuality 289 (1980). Similar to the sodomy laws in the nineteenth century and despite its implementation, Boswell wrote that the Wise mandate offer an “eloquent testimony to the shift in attitude on the part of the rising power structures of western Europe during the period.” Id.; see also William N. Eskridge Jr., Dishonorable Passions 20 (2008) (“A widely accepted legal rule of evidence reinforces the notion that sodomy laws were understood, in the nineteenth century, primarily as instruments to regulate sexual assault.”).
tific and medical terminology in an effort to “modernize.” There was no shortage of professing Christians who opposed the behavior of gay and lesbian citizens using the language of deviance. Notorious among them at the turn of the century was Anthony Comstock, who described sexual non-conformists (e.g., “fairies,” cross-dressers, male prostitutes) as inverts, unfit to live among the rest of mankind, and ought to carry the branding of lepers on their foreheads crying “Unclean! Unclean!” as they go about. Attempts to Christianize the United States continued to crop up as committees in the 1930s like the Legion of Decency and the National Organization for Decent Literature formed to regulate and enforce the moral conduct of United States citizens.

The expansion of selective sodomy restrictions into the twentieth century and the vocabulary of degeneration as a social disease forced many homosexuals to hide their authentic selves. As Eskridge wrote: “In the half-generation after the [second world] war, American political leaders [e.g., future Chief Justice Earl Warren] engaged in an ambitious campaign of demonizing and purging homosexuals from public life.” After the watershed moment of the 1960s when the public became “liberated,” gay men and women became increasingly “open and celebratory about their sexuality,” thus carving out “battle

51. Eskridge, supra note 50, at 10.
52. Id. at 46.
54. See Eskridge, supra note 50, at 46–72; see also Walter Frank, Law and the Gay Rights Story 7–12, 22–23 (2014). By the early 1960s, the social meaning of sodomy became synonymous with homosexuality, including oral sex as part of the “crime against nature,” which was criminally enforced “at levels never before imagined.” Eskridge, supra note 50, at 75. Modern day manifestations involve a process of covering whereby individuals may be comfortable being gay and saying so, but nonetheless modulate their identity to permit others to ignore their orientation. Kenji Yoshino, Covering, 111 Yale L.J. 769, 772 (2002). Relevant to Yoshino’s discussion of covering is the relation he makes to not only the LGBT community, but also religious minorities and questions on the “True Self.” See Kenji Yoshino, Covering 167–96 (rept. ed. 2007). Yoshino wrote: “[D]espite our frequent political differences, religionists and gays share a special bond” in relation to pressures for assimilation—noting later that “[t]he goal is not to eliminate assimilation altogether, but to reduce it to the necessary minimum.” Id. at 168, 186; see also Thomas C. Berg, What Same-Sex-Marriage and Religious-Liberty Claims Have in Common, 5 Nw. J. L. & Soc. Pol’y 206, 218 (2010) (discussing how intolerance of same-sex couples and traditionalist religious believers force them to “keep their identities in the closet”). This same idea was applied to early Christians by Boin when he wrote that while some passed as non-Christians, others covered, i.e., “made choices to appear less threatening to their friends ‘in the know.’” Douglas Boin, Coming Out Christian in the Roman World 47 (2015).
55. Eskridge, supra note 50, at 88; see also Frank, supra note 54, at 5 (“For the first two and half decades after the end of World War II, gay men and women were pariahs.”).
lines . . . between gay rights activists and the religious right,” from the perspective of the religious right.56

Leaders such as Phyllis Schlafly “built an empire of right-wing fanatics who would work to . . . push their pro-family and virulent antilesbian and antigay agenda.”57 Anita Bryant infamously called a crusade against homosexuals in school under the banner of saving the children from recruitment by means of money, drugs, or alcohol.58 When the AIDS crisis struck in the 1980s, many in the Christian community celebrated with Pat Buchanan who saw it as a sign that “[n]ature is exacting retribution.”59 Returning to the outskirts of society during the Middle Ages and the Comstock language of uncleanness, Lilian Faderman wrote in harrowing detail the state of the AIDS crisis in 1983:

AIDS was the leprosy of the times; and gay men, whether infected or not, were the lepers. The largest festive gathering of gays and lesbians in big American cities had been the pride parades; but the parades these days were led by contingents of gay men with AIDS, some already so weak they had to be pushed in their wheelchairs. Instead of their usual carnival-like hilarity, the parades became funereal.60

These are not things of the past. It was only a few years ago that the LGBT community gained a right to marriage equality across all fifty states—a decision still dividing the public along religious and political lines.61

While these issues are deeply layered and complicated given their contexts, they help illustrate the idea discussed later in this Article concerning “optical disenchantment” and why the members of the LGBT community remain steadfastly opposed to many religious liberty efforts. With the branding of “uncleanness” comes the corresponding scarlet lettering of “bigotry,”62 vilification in the press, and

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56. FRANK, supra note 54, at 51.
58. See id. at 321–35; FRANK, supra note 54, at 51–53; see also ANITA BRYANT, THE ANITA BRYANT STORY 113–20, 138 (1977) (“Join us in accepting the challenge and acting together to protect America’s children.”).
59. FADERMAN, supra note 57, at 416.
60. Id. at 423.
high economical costs driven by the force of state coercion. On the other side, I still hear Christians today laboring under the premise that the LGBT community is an effluence on society—a “contamination” of the good wellspring of family values they promote. Both sides remain cynical of the other—unable to see that the common good requires a compromise in common.

To understand this further, we move to the faith side to see what animates their resolve.

B. Questioning Discrimination: Faith Side

Nathan A. Berkeley framed the second corresponding question regarding the discrimination debate as “why should the majority be permitted to ‘use the power of the State’ via public accommodation laws, nondiscrimination laws, or other applications of due process or equal protection principles, to enforce the moral view that same-sex sexual conduct must be accepted?” After all, Christians often just want to be “left-alone” to practice their religion in peace—e.g., asking the law to grant them exemptions to refuse certain requests from gay customers that they consider promotional material for a lifestyle of sin. As one notable conservative scholar argued: “Some citizens may conclude that they cannot in good conscience participate in a same-sex ceremony, from priests and pastors to bakers and florists. The government should not force them to choose between their religious beliefs and their livelihood.”

These legal battles represent two opposing sides: neither able to find common ground nor appreciate the full gravity of the consequences of intransigence, and neither willing to toil together toward

FOR COMMON GROUND 17 (William S. Eskridge, Jr. & Robin Fretwell Wilson eds., 2019). As Marsha Freeman so frankly put:

Religious beliefs are certainly not new, now are private beliefs that run counter to our laws. What is new and disturbing is that today’s political climate has allowed these private beliefs to not only surface publicly but to take precedence in many cases. Bigotry and intolerance are not only openly sanctioned, they are promoted and applauded.

Freeman, supra note 32, at 891.


65. See generally Steven J. Heyman, A Struggle for Recognition: The Controversy over Religious Liberty, Civil Rights, and Same-Sex Marriage, 14 FIRST AMEND. L. REV. 1 (2015) (outlining the conflict between religious liberty and civil rights in connection with same-sex marriage); see generally RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE
a mutually beneficial outcome. Both opposing sides ignore the words of John Donne: “[E]very man is a piece of the continent, a part of the main,” 66 and neither seem aware of the overlapping interests the two share. 67 In the words of Frank S. Ravitch: “We sit on freedom’s edge, and if a balance is not struck . . . we will fall off the edge in one extreme direction or the other and lose a piece of what is means to be an American in the process.” 68

III. The “Pollution” 69 by Pagan Rite

Considering these issues, we return to Steven D. Smith’s observations that the culture wars today “present a contest between transcendent and immanent conceptions of reality, and of the community,” in what he described to be “a modern reenactment of late antiquity’s struggle between Christianity and paganism” 70—a fitting template for

United States and Europe (Timothy Samuel Shah, Thomas F. Fatt & Jack Friedman eds., 2016); see generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello, Jr. & Robin Flomwell, Wilson eds., 2008). Douglas Laycock believes a mutual compromise has not been reached because both parties are looking to crush the other in pursuing an all-or-nothing victory. Laycock, Wedding-Vendor Cases, supra note 44, at 58; Steven D. Smith, Die and Let Live? The Asymmetry of Accommodation, in Religious Freedom and Gay Rights: Emerging Conflicts in the United States and Europe 181, 182 (Timothy Samuel Shah, Thomas F. Fatt & Jack Friedman eds., 2016); see also Doug Mainwaring, Same-Sex Marriage: We’re Playing Chess, Not Checkers, Pub. Discourse (Mar. 20, 2013), http://www.thepublicdiscourse.com/2013/03/9622/ [https://perma.cc/F58S-4T5H] (“[N]ational discussion of same-sex marriage treats the issue like a game of checkers, where opponents can quickly gain each other’s pieces without much forethought about the consequences.”).

67. See Laycock, Wedding-Vendor Cases, supra note 44, at 61–66. Frank S. Ravitch explains that the problem is based on perceptions and “framing of issues rather than on an inherent tension between religious freedom and sexual freedom.” Ravitch, supra note 27, at 9.
68. Ravitch, supra note 27, at 21; see also Eskridge, supra note 50, at 35 (“A great challenge for any society is to find the proper balance between distinctive individualism and the needs of the community.”).
69. Peter Brown, Authority and the Sacred 17 (Canto ed. 1997) [hereinafter Brown, Authority and the Sacred].
70. Smith, Culture Wars, supra note 37. Elsewhere, Smith describes the retrieval of paganism—or, “the easygoing cosmopolitan toleration that thinkers like Hume and Gibbon perceived”—as a secondary and less distinctive influence on the American approach to religion and religious pluralism. Steven D. Smith, The Rise and Decline of American Religious Freedom 46 (2014) [hereinafter Smith, Rise and Decline]. John Boswell likewise compares the connection between old and new forms of deviance: “Deviance in sexual matters in cultures organized by sexually created relationships is much like heresy in theologically dominated societies or political dissent in politically organized communities. Gay people seem dangerous in kingship societies as heretics once did in Catholic Europe or as socialists more recently in Western democracies.” Boswell, supra note 50, at 33. Consider
this Article’s running theme concerning moral complicity and paganism.

In the early church, Christians maintained a strict separation from pagan rituals in order to avoid what they deemed to be “pollution by pagan rites.” This idea of “pollution” has to do with a desecrated form of living within religion that disrupts the harmony believers seek to attain with the unseen world and the supreme good therein. Smith explained that “the religious person strives for sanctity, or *purity*, which is necessary to sustain that harmony . . . [he or she] seeks to avoid impurity, or corruption, or pollution, that would negate or undermine the association with the sacred.”

With many peasants and landowners living within the bounds of a predominantly pagan countryside, these concerns in the early church began to surface around questions of moral complicity in relation to eating certain foods, wearing certain robes, or washing in certain baths connected with pagan rituals or locations. Historian W.H.C. Frend described the attitude as one where “[a]voidance of sin rather than active furtherance of collective good still dominated the thinking of the Christian leadership on the eve of and even during the Great Persecution.” It was around this time that ideas began to emerge reconciling Christian purity with involvement in a pagan culture.

These ideas were addressed at the Synod of Elvira (early fourth century) where, for example, Canon 3 stated that Christian officials tasked with priestly services would receive communion after performing penance so long as they *personally abstained* from sacrificing to the explanations for prejudice toward each. Compare id. at 286 (“Most of the charges of sexual deviation leveled against heretics were formulaic, either the consequences of fear and prejudice or conscious fabrication for propaganda purposes.”), with ESKRIDGE, supra note 50, at 78 (“As Americans became fearful of sexual chain reactions that would destroy the nation’s moral fiber and expose them to external as well as internal enemies, the resulting philosophy of containment made homosexuals the universal scapegoat.”).

71. BROWN, AUTHORITY AND THE SACRED, supra note 69. Among Celsus’ attacks on Christians was their seeming intent on “subverting established institutions . . . [and] failing conspicuously to demonstrate any sense of civic obligation towards the society in which they lived. This was compounded by apparent contempt for pagan philosophy, dismissed by Paul as ‘the wisdom of this world.’” W.H.C. Frend, *Early Christianity and Society: A Jewish Legacy in the Pre-Constantinian Era*, 76 HARV. THEOLOGICAL REV. 53, 54 (1983) (citing Origen, *Contra Celsum* 1.9 and 6.11; 3.55; cf. 1.27, 3.52) [hereinafter Frend, *Early Christianity*].

72. See id.

73. SMITH, PAGANS & CHRISTIANS, supra note 15, at 40–41.

74. Id.; BROWN, AUTHORITY AND THE SACRED, supra note 69, at 17.


76. BROWN, AUTHORITY AND THE SACRED, supra note 69, at 18.
idols. Similarly, Canon 41 instructed landowners who feared the violence of their slaves that they may allow for idols to be kept on their estates so long as they themselves abstained from participation (e.g., “kept themselves pure”). At the same time, things are made complicated with Canon 59, which appears to announce that Christians who “go up to the idol of the capitol . . . to watch” are held guilty of the same crime that pagans are held responsible for in their actual sacrificing.

These tensions regarding moral complicity and “pollution” have become mainstreamed in American society. In discussing the Synod, historian Charles Freeman made note of the achieved social cohesion of the church and its promulgated values, particularly in respect to an opposition to abortion and stressing sexual continence—the very things we see today engendering the culture wars and creating a need to debate religious liberty and discrimination. Smith again, in a series of lectures at Princeton, discussed these promulgated values as a point of estrangement between: (1) Christian sexual restraint and Pagan sexual liberation in Ancient Rome, and (2) the seemingly incomprehensible display of non-compliance from Christians in refusing to worship the emperor and pagan deities. As Smith wrote: “[T]he Christian stance might seem . . . almost incomprehensible. After all, virtually nothing was being asked of them; or so it seemed.”

77. Samuel Laeuchli, Power and Sexuality: The Emergence of Canon Law at the Synod of Elvira 126 (1972). Canon 55 also states that “[p]riests who simply wear the wreath and who neither sacrifice nor offer any of their income to idols shall receive communion after two years.” Id. at 132. Scott Bradbury provides further background to this attitude and to its restrictions:

Sacrificial ceremonies were a routine part of the duties of Roman magistrates. For Christian officials, this meant pollution, consorting with foul and detestable daemons. The Council of Elvira (ca. 305) had imposed harsh penalties on Christians who had sacrificed as part of their official duties. Any baptised Christian, for example, who had entered a temple to worship an idol was never again to be admitted to communion. The harsh restrictions imposed at Elvira naturally had to be softened as more Christians became officials. Nonetheless, Christian officials must have had moments of unpleasantness, whether they themselves were called upon to sacrifice or merely to attend sacrificial ceremonies.


78. Brown, Authority and the Sacred, supra note 69, at 18; Laeuchli, supra note 77, at 69, 73, 131.

79. Laeuchli, supra note 77, at 69, 73, 133.


82. See id. at 14–15.

83. Id. at 15. Elsewhere, Smith explained:
It should come as no surprise then that the Synod of Elvira—in its wrestling with issues of moral complicity and purity—served as the “first stirrings of a great revolution in the boundaries of the church, in which it was transformed from a puritanical minority into an immense sexual sanatorium for all the world’s sinners.” As the regulation of sexual impulses became the central preoccupation of the Synod, so too we return to this struggle today regarding moral complicity and sexual ethics. And while endorsing the semblance of “living together,” both sides are only too content to watch the other’s influence diminished.

Let us now turn to discussing the legal challenges regarding the question of moral complicity and outlining the first offering of compromise, while remaining mindful that the community of faith must retain its distinction.

IV. Between Conscience and Complicity

A tripartite layer of cases involving the same issues the Supreme Court decided in *Masterpiece Cakeshop* has emerged—three layers, each based on claims of moral complicity, but each further attenuated to the point where the fear of “pollution” becomes increasingly remote such that questions concerning the reputational cost of litigation on religious liberty and its claimants need to be asked. To better help understand these issues, let us look at examples of each layer and then concern ourselves with finding some solutions for creating a shared space. I will call the three layers of complicity the following: service complicity, venue complicity, and anticipatory complicity.

A. Service Complicity

The first of these layers involves a direct transaction of goods or services for the purpose of use in a same-sex wedding. A number of legal cases has moved through the stream of litigation, with each appeal creating legal precedent with wider political and social ramifications. To understand the moral complicity concerns, it will help to
look at the language used by those appealing for an accommodation with the effort to fairly characterize their underlying reasons for refusing to serve members of the LGBT community.

First, Jack Phillips of Masterpiece Cakeshop, in his petition for writ of certiorari, wrote that “[h]is decisions on whether to design a specific custom cake have never focused on who the customer is, but on what the custom cake will express or celebrate.”86 When a gay couple asked him to make a cake for their same-sex wedding, he refused, deeming it “sacrilegious to express through his art an idea about marriage that conflicts with his religious beliefs.”87 Through his artistic investment in creating the cake, and only the cake since he agreed to make “other items,” he believed he was vicariously celebrating and therefore endorsing the intended final celebration.88 His brief described it in this way: “The cake, which serves as the iconic centerpiece of the marriage celebration, announces through Phillips’s voice that a marriage has occurred and should be celebrated.”89 Alongside cakes for same-sex weddings, Phillips is also morally constrained from making cakes that “celebrate Halloween; express anti-family themes (such as a cake glorifying divorce); contain hateful, vulgar, or profane messages (such as a cake disparaging gays and lesbians); or promote atheism, racism, or indecency.”90

Similarly, Barronelle Stutzman, who ran a flower shop in the State of Washington, declined a service request from a gay couple that ordered a flower arrangement intended for their wedding.91 Like Phillips, Stutzman in her petition to the United States Supreme Court, explained that in her creation of a floral arrangement is an underlying celebration of the “couple’s particular union, which requires not only that she invest herself creatively and emotionally in their wedding ceremony, but also that she dedicate herself artistically to memorializing and formalizing it in three-dimensional form.”92 Noted in summary is Stutzman’s inability to “separate her artistic creativity from her soul.”93 In designing a floral arrangement, Stutzman believes that she

87. Id. at 9.
88. See id. at 10.
89. Id. at 1–2.
90. Id. at 9.
92. Id. at 4.
93. Id.
is “creating expression that celebrates a view of marriage” that is readily traced back to her and could stand in contradiction to her faith.94

Finally, there is the Huguenin Family who ran a small photography business in New Mexico.95 As part of their creative process, the Huguenins believe the photographs they take and edit convey a message that they themselves endorse and therefore refused to “create images that tell stories or convey messages contrary to their religious beliefs.”96 This is why, holding to a traditional understanding of marriage, they refused to photograph a same-sex ceremony, as well as nude maternity pictures, polygamous weddings, and images depicting violence.97 In essence, the story that the Huguenins tell in their photography, regardless of whether it was gratuitous or if it was commissioned, is the story they wish to tell. As they wrote in their petition to the United States Supreme Court: “Ms. Huguenin, and not her customer, is the speaker communicating through her photographs and books.”98

In most (if not all) of these examples, the business owners are willing to provide the LGBT-customers with raw goods devoid of expressive significance.99 However, once the business owners commingle their services with an underlying event compromising their religious convictions, moral complicity or “pollution” becomes an issue and refusal soon follows.

B. Venue Complicity

The next set of examples move us away from service complicity and into venue complicity, similar to the struggles faced by the early church regarding fears of “pollution”100 in allowing the worship of idols on their property.

94. Id.
96. Id. at 6.
97. Id. at 6–7.
98. Id. at 5.
100. Infra Section III.
The first involves the Gifford Family who ran Liberty Ridge Farm (the “Farm”) in Schaghticoke, New York. The Farm is located on the Giffords private property where they themselves reside and on occasion invite groups under contract to enter and use a portion of their home and backyard for wedding ceremonies and receptions. While the public is welcome to participate in activities (e.g., corn maze, pumpkin patch) on other parts of the property, only those under contract can use the private residence to throw events. According to their complaint with the New York State Court, very few wedding inquiries are conducted on property. Similar to the previous group of business owners, the Giffords “have employed openly gay employees” and thrown birthday parties for same-sex couples. Where they draw the line is hosting the same-sex wedding, but not the reception: “Ms. Gifford was very clear to distinguish between her inability to agree to the marriage ceremony on religious grounds and her willingness to host the couple’s reception.” The Giffords explained that in hosting the marriage ceremony, they become “intimately involved in promoting, facilitating and perpetuating the marriage ceremony” so that “[t]heir physical presence . . . is often-times viewed as endorsing the conduct of the wedding itself.”

The second example is the Walder Family, who ran the Timber-Creek Bed & Breakfast in Illinois, where they also hosted religious and civil weddings. James and Elizabeth Walder’s religious beliefs reject sex outside of marriage and maintain that homosexuality is “wrong and unnatural.” When a gay couple emailed Mr. Walder inquiring whether they would host same-sex civil union ceremonies or weddings, they were told that the business would “never host” events of

102. Id.
103. Id. The court explained why this private residence is covered by the state’s public accommodation laws this way: “The fact that the wedding ceremonies occur on private property and pursuant to a written contract does not . . . remove Liberty Ridge’s facilities from the reach of the Human Rights Law; the critical factor is that the facilities are made available to the public at large.” Id. at 427.
105. Id. at para. 33.
106. Id. at para. 19.
109. Id. at 4.
that nature. Their beliefs were clearly rooted in a reading of scripture, which to them was predominant over “Illinois law, United States law, and Global law.” Mr. Walder explained his position in a follow up email with verses from Romans 1:26–27 concerning “how the Creator of the Universe looks at gay lifestyle.” It was this latter email that caused the “hurt, humiliation and anger” that triggered legal action on the part of the gay couple—having previously decided “to just drop the matter and let it go.” More importantly, it was the follow up email that augmented the emotional damages awarded to the gay couple. As the Administrative Law Judge noted:

[W]hile I take Walder at his word that the “great commission” of his religion requires that he inform Complainants . . . about the teachings of the Bible, this obligation necessarily has a cost to him if his unsolicited message generates an emotional distress on the person receiving his message.

In a statement to the press after losing their case, the Walders reiterated their opposition to same-sex marriage and vowed to continue breaking the law:

To be absolutely clear, we cannot host a same-sex wedding even though fines and penalties have been imposed by the Illinois Human Rights Commission. Our policy will not be changing. We are not looking for a fight, but when immoral laws are purposely passed (or deemed constitutional) that blatantly conflict with God’s Word and when the heavy hand of government tries to force us as Christians to embrace sinful behavior, we have a moral obligation to resist and stand for Biblical truth. “It is better to obey God than men.” — Acts 5:29.

In a final, more recent appeal, the owner of a bed and breakfast in Hawaii refused to rent out a room to a same-sex couple because of their sexual orientation. The proprietor admitted in their motion for summary judgment that “allowing a lesbian couple to share a

110. Id. at 5.
111. Id. at 6.
112. Id.
114. See id. at 17.
115. Id. at 17–18. With a dozen attorneys expending around 1000 hours at a rate between $170 to $475 per hour, the Walders were lucky to walk away with only $50,000 in attorneys’ fees. Id. at 19.
room with only one bed in her home violates [her] sincerely held religious beliefs." According to the Hawaii Civil Rights Commission’s (“HCC”) investigation into the matter, the plaintiff and sole proprietor of the bed and breakfast explained her beliefs this way: “Young stated that she is Catholic; that she believes that homosexuality is wrong; that she believes that sexual relations between same-sex couples (regardless of whether they are legally married) are immoral; and that she therefore refused to provide [the couple] with a room.”

The court of appeals elaborated on the plaintiff’s beliefs in discussing a theoretical application of strict scrutiny review, noting that the fear in renting out the room is based on a fear of facilitating wrongful conduct. In the end, the court found that the state’s interest in prohibiting sexual orientation discrimination in public accommodations as against public policy was sufficient because such discrimination results in “stigmatizing injury” to the gay persons “sense of self-worth and personal integrity.”

These three cases illustrate a second form of moral complicity where opposition to same-sex marriage is devoid of artistic expression and governed instead by a hard stance regarding participation—a categorical refusal to engage in anything that may have a remote semblance of complicity (or complicity by proxy). We move next into the final category of complicity—where Christian business owners take preemptive measures to avoid being placed in a situation where the danger of complicity may arise.

C. Anticipatory Complicity

The final category for complicity comes in the form of preemptive or pre-enforcement challenges to state public accommodation laws in anticipation of business expansion or participation into areas

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119. Cervelli, 415 P.3d at 924.
120. Id. at 935.
121. Id.; see also HAW. REV. STAT. ANN. § 368-1 (2012) (“The legislature finds and declares that the practice of discrimination because of . . . sexual orientation . . . in employment, housing, public accommodations, or access to services receiving state financial assistance is against public policy.”). Hawaii Supreme Court denied review of this case. Audrey McAvoy, Hawaii Supreme Court Sides with Lesbian Couple in B&B Case, AP (June 11, 2018), https://apnews.com/08f6f481e2345d894c0e9768c77ed7 [https://perma.cc/AXA8-LB2D].
where the above-mentioned concerns may surface. The parties in these cases sought preliminary injunctions preventing enforcement of state laws against them in their future business endeavors.

A recent example involves Telescope Media, a company that seeks to only create films that are consistent with their religious beliefs—that marriage is between one man and one woman.122 Telescope Media similarly reasoned: “[While] the Larsens will create films for anyone[, t]hey cannot create films promoting every message . . . [a] decision [that] turns on what a film promotes, never who requests it.”123 The Larsens believed that “every talent comes from God and must be used consistent with His teachings . . . includ[ing] . . . film-making.”124 As part of their collaborative process with customers, they strive to create films that “express a message that is pleasing to both [them and the clients].”125 In making final decisions concerning the direction of the film and its final content, the Larsens speak through their products and wish to speak only messages that align with their religious views.126

The lawsuit emerged when the Larsens decided to start creating wedding films, but feared that the redefinition of marriage and the Minnesota Human Rights Act (“MHRA”) would compel them to film same-sex weddings or face a monetary penalty.127 They sought to enter this new medium for filmmaking and to publish an explanation on their website that says they “cannot make films promoting any con-

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123. Telescope Media Opening Brief, supra note 122, at 2.
124. Id. at 5.
125. Id. at 6.
126. Id. at 7. For example, they reject films that “promote sexual immorality, support the destruction of unborn children, promote racism or racial division, incite violence, degrade women, or promote any conception of marriage other than a lifelong institution between one man and one woman.”
127. The district court framed it as such: “The [Larsens] claim that if they operate a wedding video service, they will be forced to choose between violating the MHRA—and facing the associated civil and/or criminal consequences—or offering wedding video services to same-sex couples in violation of their religious beliefs.” Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1100 (D. Minn. 2017). The law in question makes it illegal to “refuse to do business with, refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s . . . sexual orientation.” Minn. Stat. § 363A.17(3) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and First Spec. Sess.), unconstitutional as applied by Telescope Media Grp. v. Lucero, 936 F.3d 740 (8th Cir. 2019).
ception of marriage that contradicts its religious beliefs." The district court read this to be akin to posting a “White Applicants Only” sign that may be prohibited without implicating the First Amendment. In the end, the court dismissed all claims filed by the Larsens.

In a similar case, the plaintiff challenged Colorado’s Public Accommodation statute, which made it illegal for a public accommodation to not only directly or indirectly discriminate against anyone on the basis of sexual orientation, but also directly or indirectly communicate an intent to refuse a service or express an unwelcoming air toward anyone on the basis of a protected class, which includes on the basis of sexual orientation. The plaintiff ran a Christian graphics, web design, and social media company, and sought to expand her business without compromising her religious belief in opposition to same-sex marriage. As such, the plaintiff intended to “decline any request to design, create, or promote content that: contradicts biblical truth; demeans or disparages others; promotes sexual immorality; supports the destruction of unborn children; incites violence; or promotes any conception of marriage other than marriage between one man and one woman.” While her company did not, at the time, provide a platform for weddings, it intended to move into that area in the near future, which triggered her concern that if she refused to serve a same-sex couple she would be held in breach of the state’s public accommodation statute. Seeking a way to prevent this event before it took place, the owners asked the state not to enforce the statutory provisions against them. But the court refused by denying plaintiff’s preliminary injunction and finding no grounds to suspend

129. Lindsey, 271 F. Supp. 3d at 1112.
130. Id. at 1128 (“The MHRA does not violate the Larsens’ First Amendment speech, association, or free-exercise rights. Nor does the MHRA implicate the unconstitutional conditions doctrine. The Larsens’ Fourteenth Amendment claims also fail because the Larsens have not alleged that they are treated differently than similarly-situated individuals, they have not alleged the infringement of a fundamental right, the MHRA is not unconstitutionally vague, and their First Amendment-related claims are not separately cognizable under the rubric of substantive due process.”). This case was appealed to the Eighth Circuit, where the court (as of today) is still in deliberation.
132. Id. at *2–3.
133. Id. at *2.
134. Id.
135. Id. at *1.
the enforcement of the state public accommodation law at that stage of litigation.136

The final case out of Phoenix, Arizona involves a design company engaged in hand-painting, hand-lettering, and calligraphy skills.137 The company sought a pre-enforcement ruling from Arizona’s public accommodation law to protect it from the forced design of same-sex wedding invitations and allow it to post their intent online to refuse such services.138 The company justified its refusal to promote any non-traditional marriage on the foundation that any “artwork condoning or promoting anything dishonorable to God would violate their religious beliefs.”139 While the company does not consider the sexual orientation of their clients, it does “assess the message that they will send through the custom artwork and whether that message is one they can convey without violating their artistic and religious beliefs.”140 In accepting designs for a wedding, the plaintiffs understand their work to be inextricably connected with a message conveying “celebratory, affirming, and promotional messages” about the marriage and the ceremony.141 As Christians, the owners (Joanna Duka and Breanna Koski) explained they “can only celebrate and participate in a marriage that is in line with what God says marriage is.”142 The superior court refused to strike down the enforcement of the law based on the plaintiff’s compelled speech and free exercise arguments, noting that the plaintiff is not barred from expressing her views on marriage since the “plain language of the ordinance prohibits only the conduct of refusing to sell and the conduct of publishing that refusal to sell.”143 The court further noted that it was absurd to think creating or printing a wedding invitation for a same-sex couple amounts to an endorsement of same-sex marriage and that the plaintiff even failed to show an incidental burden on their faith.144

136. Id. at *7; see also 303 Creative LLC v. Elenis, 385 F. Supp. 3d 1147 (D. Colo. 2019) (reconsidering in light of Masterpiece Cakeshop yielded the same outcome).
138. Id. at 432.
140. Id. at 8.
141. Id.
142. Id.
144. Id. at 12–14.
These cases illustrate the moral complicity tension from three separate vantage points. Each individual believes that in offering their services or places of business to same-sex couples they are somehow entangled in the celebratory act for which those services are required. As a consequence of these decisions, these business models have been compared to racist institutions that invidiously discriminated against African-American customers for no reason other than the color of their skin. As a consequence of these decisions, religious liberty has been viewed by equality groups as an instrument for bigots to impose their religion on society. Wrong or right, being aware of such optics is instrumental to building bridges—a topic we discuss next as we delve deeper into the *Masterpiece Cakeshop* decision.

V. Optical Disenchantment

*Masterpiece Cakeshop* began in 2012 when Charlie Craig and Dave Mullins entered the bakery of Jack Phillips in Lakewood, Colorado with the intention of buying a cake for their wedding reception. It ended in 2018 at the United States Supreme Court where Justice Kennedy (writing for the majority in what would become among his final decisions) announced that the Colorado Civil Rights Commission


(“Commission”), which ruled against Jack Phillips at the administrative level, failed to provide him with the type of religious neutral due process required under state law. Justice Kennedy avoided the freedom of speech issue and chose to instead carve out a narrow exception, which failed to shield Jack Phillips from renewed legal challenges from the LGBT community.

The Court’s holding complicated case law by its lack of precedential clarity and its deference to “further elaboration . . . all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.” If any clarity was reached, it was done so by Justice Kagan’s concurrence, which succinctly summarized the holding of the majority: “Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only . . . if the State’s decisions are not infected by religious hostility or bias.” But for this narrow reading, it remains doubtful that the two

147. Id.


150. Masterpiece Cakeshop, 138 S. Ct. at 1732.

liberal members of the Court would have joined in the majority in order to give the decision its decisive seven to two margin.  

The case, for all practical purposes, is a Pyrrhic victory for Jack Phillips since it will do little for similarly situated claimants and probably a lot more to fuel anti-religious liberty sentiment from opposing camps. A shadow has been cast over religious claims, as one source aptly describes, that creates the appearance of “establish[ing] discrimination as a theological imperative . . . rendering gay activists’ suspicious of religious arguments in public policy all the more well-founded and driving the wedge between the groups still deeper.” A shadow that became prominent after the United States Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, decided that the Religious Freedom Restoration Act of 1993 (“RFRA”) protects three closely held corporations from being forced to provide health-insurance coverage by the United States Department of Health and Human Services (“HHS”) for methods of contraception that violate the sincerely held religious beliefs of the companies’ owners. The shadow of disenchantment cast over religious liberty in the wake of *Hobby Lobby* serves to illustrate a growing distrust in the sincerely held beliefs of common Americans in bringing claims based on religious convictions. No longer are the enemies of social conservatism willing to read a good faith motive into religious liberty measures if those same measures seek to undermine the liberties of gay citizens. The *Hobby Lobby* decision was emblematic: It was a perfect storm combining major ideological premises that came together to embody the “culture war” ideals of both sides.

152. See [Thomas Berg](#) offers an insightful review of the parallelism between *Masterpiece Cakeshop* and *Romer v. Evans*, 517 U.S. 620 (1996), worth considering for understanding the underlying motivation of Justice Kennedy. See Berg, supra note 10. For the present purposes, this commentary is helpful for bridging divides:

> The Court perhaps hoped that after its admonition for tolerance and respect, objectors like Phillips might win in a limited set of circumstances, or at least that decisionmakers would consider their predicament seriously—as Court in *Romer* perhaps hoped in 1996 that an admonition to social conservatives might have prompted greater consideration for the lives and interests of same-sex couples. 

153. See [Bull & Gallagher](#), supra note 3, at 300.


On one side, *Hobby Lobby* came at a time of building animosity towards religious liberty and what Steven D. Smith described as an “opposition to religious accommodation” for its “distinctive claim that the state is subject to a higher or transcendent power.” On the other side, *Hobby Lobby* triggered tangential fears involving the interference of religion in commerce and the implications this may have on the gay communities’ experiences in the commercial marketplace. Religion was seen as dangerous and needed to be “zoned out of the marketplace and market relations.” Paul Hortwitz described this latter strand:

Hobby Lobby sits withal in the eye of a hurricane: a perfect storm of foregrounded legal and social contestation over religious accommodation, LGBTQ rights, and a “re-enchanted” and repoliticized marketplace. Its judgment may channel and constrain the nature of the response to it, but it will hardly be able to quell the broader contestation over these issues. Appeals to the “culture wars” as an explanation of our national debates are often exaggerated and sometimes challenged outright. But they are sometimes dead right. If any controversy can be described as a part of the culture wars, the Hobby Lobby moment surely qualifies.

At the same time, the contraception mandate itself that triggered the legal action in favor of accommodation was, in the words of Douglas Laycock, an unprecedented attempt to not only require one of the largest religions to violate a core religious teaching, but in doing so take an unprecedented step of refusing an accommodation for a conscientious objector.

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156. No better example illustrates this growing distrust than the corresponding near unanimity of the passage of the Religious Freedom Restoration Act in 1993 versus the hostile response the State of Indiana received when it tried to pass essentially the same law in 2015. See Smith, Pagans & Christians, supra note 15, at 315–18; see also Smith, *The Torturous Course*, supra note 30, at 1563 (“As more sober commentators pointed out, the Indiana law was virtually identical to a federal statute adopted twenty-two years earlier with nearly unanimous approval in Congress.”); Paul Horwitz, *The Hobby Lobby Moment*, 128 Harv. L. Rev. 154, 154 (2014) (“American religious liberty is in a state of flux and uncertainty. The controversy surrounding *Burwell v. Hobby Lobby Stores, Inc.* is both a cause and a symptom of this condition. It suggests a state of deep contestation around one of the key markers of the church-state settlement: the accommodation of religion.”). As Steven D. Smith rightly noted, the Indiana “conflict was between righteousness and evil—or at least between what . . . critics experienced as righteousness and what they took to be evil.” Smith, *The Torturous Course*, supra note 30, at 1563.


158. See Horwitz, supra note 156, at 172–89.

159. Id. at 177.

160. Id. at 185.

As a result, claims based on conceptions of transcendence have become, Smith argued, “incongruous in the city now reconceived in secular and immanently religious terms.”162 What religious claimants hold as their right under the First Amendment, opponents have defined as an ongoing pattern to convert the Religious Clause into a sword used to harm others.163 As Marci Hamilton exclaimed: “Rights for the vulnerable are under attack by some religious actors who have sought to turn religious liberty into a weapon of exclusion, control, and harm”—a rooted fear embodied in what Justice Kagan recently referred to as a weaponization of the First Amendment.165 Perhaps no one is more vitriolic about the use of religious freedom as a weapon than Shannon Gilreath, who characterized the post-Obergefell efforts to carve out exemptions as a “campaign for the continued second-class citizenship of gay Americans.”166

This cost to religious liberty has not gone unnoticed. “Open hostility to religious liberty is breaking out all around us.” 167 As Kent

163. See, e.g., Horwitz, supra note 156, at 172 (“[R]eligious accommodation has become virtually synonymous with, or code for, discrimination.”); Leslie C. Griffin, A Word of Warning from a Woman: Arbitrary, Categorical, and Hidden Religious Exemptions Threaten LGBT Rights, 7 Ala. C.R. & C.L. L. Rev. 97, 97 (2015) (“Religious exemptions have already undermined women’s rights. Now exemptions threaten gays and lesbians.”); Freeman, supra note 32, at 889 (“Anti-gay marriage opponents, having lost the overall battle, have evolved into anti-LGBT forces, citing many of the same concerns and couching them in terms of safety and religious freedom.”); Jeff Nelson, Tipped Scales: A Look at the Ever-Growing Imbalance of Power Protecting Religiously Motivated Conduct, Why That’s Bad, and How to Stop It, 66 Clev. St. L. Rev. 751, 753–54 (2018) (“RFRAs undeniably have skewed too much protection in favor of the individual believer, allowing him in some circumstances to actively discriminate against others on the basis of a religious belief.”); see also Goodrich & Busick, supra note 145, at 354–55 (explaining the common narrative to be one where religious liberty statutes, e.g., RERA, and favorable decisions, e.g., Hobby Lobby, have “emboldened the Christian majority to wield ‘religious liberty’ as a sword to take away other people’s rights, rather than a shield to protect religious minorities”).
167. See Laycock, Campaign Against Religious Liberty, supra note 28, at 232.
Greenawalt pointed out, *Hobby Lobby* and its corresponding implications on women’s rights and nondiscrimination ordinances has made efforts to enact new state laws like RFRA much harder.\(^{168}\) It seems every time religious liberty wins at the Supreme Court, it loses more ground in the court of public opinion. It becomes morphed into a “special interest demand,” what Douglas Laycock has described as “the first time in nearly 300 years [where] important forces in American society are questioning the free exercise of religion *in principle*—suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized.”\(^{169}\) As one scholar explained, when the public remains unmoved, the symbolic and enforcement value of the law “may contribute to realizing the necessary cultural change.”\(^{170}\) As such, this change carries with it the corresponding opportunity for advocates to cast the prevailing viewpoint as the future wave of progress and the losing party as the backwards swell raging against change. No longer can attorneys litigate social causes in insulated courtrooms without triggering a wider debate with corresponding reputation and monetary costs.

By way of illustration, in July 2018, the Attorney General Jeff Sessions announced the creation of a “Religious Liberty Task Force” in order to implement Justice Department guidance on accommodating religious beliefs.\(^{171}\) In his remarks, Sessions mentioned how “nuns were being forced to buy contraceptives” (a reference to a post-*Hobby Lobby* related decision dealing with the Little Sisters of the Poor) and offered a word of praise to Jack Phillips for his courage.\(^{172}\) He described a “dangerous movement, undetected by many,” that is undermining religious freedom and called for the current administration to “arrest these trends and to confront them.”\(^{173}\) His mission was stated


\(^{172}\) Id.

\(^{173}\) Id.
clearly: This administration is “actively seeking, carefully, thoughtfully and lawfully, to accommodate people of faith.”

The news was not well-received by LGBT advocates on Twitter. Tim Teeman writing in the Daily Beast compared the decision to a declaration of holy war on “LGBT people, LGBT equality, and LGBT rights.” The Human Rights Campaign described it as a continuation of the Trump-Pence Administration’s efforts to use taxpayer-funds to “license discrimination against LGBTQ people in the public square.” Louise Melling of the ACLU accused Sessions of turning religious freedom on its head by perpetuating a “right to discriminate or harm others.” The president of the Gay and Lesbian Alliance Against Defamation (“GLAAD”) said the measure exposed the administration’s anti-LGBT agenda by “weaving protections for those seeking anti-LGBTQ religious exemptions into the government.” A predictable response when the underlying goals of one side is to inundate the culture with correct conduct, while the other is busy seeking carve-outs from “society-wide norms” for every perceived offense to conscience.

Douglas Laycock explained this phenomenon well: “Masterpiece Cakeshop and similar cases have been polarizing legally because they are polarizing morally and politically.” Frank S. Ravitch has detailed the multifaceted backlash after Hobby Lobby and its detrimental effects on religious liberty in general—advocating wisely that proponents of Hobby Lobby might need to voluntarily jettison the for-profit exemption privileges in order to preserve the future sustainability of religious

174. Id.
175. See generally Mary Papenfuss, Twitter Rains Hell on Jeff Sessions’ New Religious Liberty Task Force, HUFFPOST (July 30, 2018), https://www.huffingtonpost.com/entry/twitter-sessions-religious-liberty-task-force_us_5b5f92bace4b0b15a829b1c7 [https://perma.cc/Y22S-33U6].
180. Laycock, Wedding Vendor Cases, supra note 44, at 58.
freedom. Legal historian Philip Hamburger discussed in greater detail this “more is less” phenomenon, arguing:

[W]hen twentieth-century Americans redefined the free exercise of religion to include a right of exemption from general laws, they had to qualify this otherwise too expansive right. They thereby ended up qualifying not merely the right of exemption, but also the basic freedom from discriminatory constraints. The need to balance the expansion of free exercise with compelling government interests rendered the right of free exercise generally subject to governmental conditions.

This “more is less” idea becomes relevant in the *Masterpiece Cakeshop* decision given that the Court, in borrowing from its precedent in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, would allow the government to penalize religion so long as its interest was compelling. And, since most courts today refuse to make a distinction between conduct and identity-based discrimination, all lower courts would need to do if they wish to escape evidence showing religious hostility is to cite to *Lukumi* and *Masterpiece Cakeshop* for the proposition that antidiscrimination laws are simply there to uphold the compelling interest of the state in protecting from social harms inherent when “the rights and dignity of gay persons . . . [are denied] when they seek goods or services.” Or, even more basic, to do what the Washington Supreme Court did in conflating the rejection of the gay customers in *Arlene’s Flowers* with 1960s racists and hold that antidiscrimination law “serve a broader societal purpose: eradicating barriers

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182. Hamburger, supra note 49, at 875 (“It should be no surprise that the qualified character of the periphery affected the previously unqualified core.”).
184. Compare *Lukumi*, 508 U.S. at 546–47 (“Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.”), with *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018) (“While the issues here are difficult to resolve, it must be concluded that the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed.”). As Philip Hamburger rightly pointed out in examining the decision in *Lukumi*: “It is disturbing . . . that the Court believed laws penalizing religion and thus prohibiting its free exercise could ever be justified by government interests.” Hamburger, supra note 49, at 880. He goes on to ask: “If (as the Court said in *Lukumi*) ‘[t]he ordinances had as their object the suppression of religion,’ and if they therefore were ‘not neutral,’ why was any balancing or other consideration of government interests necessary?” Id. at 881.
185. See generally Sorkin, supra note 34 (discussing this non-distinction approach as a form of legal fiction).
to the equal treatment of all citizens in the commercial marketplace. Were we to carve out a patchwork of exceptions for ostensibly justified discrimination, that purpose would be fatally undermined.”

This social harm justification introduced in *Lukumi* renders *Masterpiece Cakeshop* a tentative precedent for similarly situated claimants, while offering plenty of fuel to those who would use its favorable treatment of Jack Philips as evidence of the dangers of religious liberty in allowing discrimination.

If this be so—and if the private realm is, as Smith says, being choked out by the expanding walls of the public space marked by authorized markets hostile to transcendent claims for accommodation—the faith community must begin considering the cost of intransigence on religious liberty and find more shrewd methods for social and legal engagement. Riding the wave of political momentum, the faith community has a chance to set an example by extending themselves to members of the LGBT community through meaningful compromise. Without offering the exact terms, the rest of this Article will discuss the foundational mindset that must first be adopted before any compromise can be achieved. The first offering of compromise, in short, is based on a renewed approach to litigating socially progressive cases, while taking active steps for engaging in dialogue with the LGBT community.

187. See *State v. Arlene’s Flowers, Inc.*, 441 P.3d 1203, 1235 (Wash. 2019) (en banc) (“This case is no more about access to flowers than civil rights cases in the 1960s were about access to sandwiches.”).

188. See *Lukumi*, 508 U.S. at 535 (“[A] social harm may have been a legitimate concern of government for reasons quite apart from discrimination.”).

189. See *Smith, Pagans & Christians*, supra note 15, at 334–42. “As government has expanded the scope of its ambitions and activities, and as legal requirements and regulations accordingly proliferate, the occasions of conflict between law and religion multiply.” *Smith, The Torturous Course*, supra note 30, at 1557.

VI. Between Patience and Pluralism

Before diving deeper into remedial measures concerning moral complicity and the mindset for creating a shared space between the faith and equality community, it is important to establish a few concepts that should help dispel some of the confusion surrounding this approach to compromise. In his *Common Objects of Love*, Oliver O’Donovan discussed three concepts that will serve as a rudder through the waves of my suggestions below in order to avoid an impermissible cultural assimilation that offends the convictions of the faith community: alertness, patience, and worship.

First, alertness is connected with the threat of losing one’s identity. Quoting Revelations 16:15 regarding the blessed one who stays awake “that he may not go about naked and be seen exposed,” O’Donovan explained that the Church is constantly in danger of being stripped of its true representation, especially “when it is seeking appropriate cultural entrees for the commendation of the gospel.” From the standpoint of compromise, retaining a “true representation” remains pivotal in negotiating a shared space.

Second, O’Donovan noted patience in connection with the necessary conflict that comes with discipline, which must be sustained and not evaded: “[B]y refusing to escape it or to adjust the terms on which it arises, the church proves and displays the strength of its own common object of love.” Russell Moore explained that a “Christianity that is without friction in the culture is a Christianity that dies,” noting: “Our call is to an engaged alienation, a Christianity that preserves the distinctiveness of our gospel while not retreating from our callings as neighbors, and friends, and citizens.” From the standpoint of compromise, continuing to engage the other side in thoughtful, patient, and rigorous debate remains pivotal in negotiating a shared space.

Finally, while Moore and O’Donovan describe the consequences of compromise and the need for steadfast adherence to biblical realities—“a call for the endurance of the saints, those who keep the com-

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191. OLIVER O’DONOVAN, COMMON OBJECTS OF LOVE 70 (Eerdmans 2002) [hereinafter O’DONOVAN, COMMON OBJECTS].
192. “Behold, I am coming like a thief! Blessed is the one who stays awake, keeping his garments on, that he may not go about naked and be seen exposed!” Revelation 16:15 (ESV).
194. Id.
mandments of God and their faith in Jesus”—the discussion below adds a further component of existing in a state of moral tension for the sake of adaptation. It is important to be sitting at the proverbial table of sinners in a state of worship (our last concept)\(^{196}\) as the true posture of the represented, “allowing the one [which is Christ] representative image to rule all other images;” while, at the same time, the represented still bearing His image and tasked with being a true reflection of His grace.\(^{197}\) From the standpoint of compromise, retaining the practice of worship helps believers realign their efforts toward peace as an offering unto God. Just as how Christ spoke to the women at the well, foretelling of a time when worship as geography would be replaced by worship of “spirit and truth,”\(^{198}\) so, too, in our changing political climate, the faith community must learn to adapt their strictures of worship to better serve the needs of those outside their respective communities instead of forming geographical boundaries for the exclusive and proper forms of conduct.

These three concepts ground the faith on a foundation for permissive compromise while remaining distinct in avoiding that “great absorption” desired for the Christians by the Romans through the incremental worship of gods, the burning of incenses, the pouring of wine, and even “revil[ing] the name of Christ.”\(^{199}\) This is where the ruminations of Douglas Boin serve some purpose in drawing a distinction in my traditional pragmatism and what is often the full-scale compromise of the Church with modernity.

Boin delineated three levels of social engagement in the context of the pre-Constantine Christian experience with pagan rituals.\(^{200}\) The first, illustrated by figures like Blandina, involves those who embraced martyrdom as a wholesale refusal to participate in Roman festivities—“hung up on a cross in her local arena, she was set out as food for the beasts.”\(^{201}\) The second, illustrated by those like Prisca, the wife of the

\(^{196}\) Worship, here, connotes the ideal of a two-fold process of sitting before the “throne of heaven” in celebration and praise of the judgments of God, while also becoming transformed into a “visible sign of the Kingdom of God” in their respective communities. See O’DONOVAN, COMMON OBJECTS, supra note 191, at 71–72. The term will most commonly be used in the context of loyalty, purity, and obedience to the ultimate divine presence in its transforming work to sustain a community of resistance. Id. at 71.

\(^{197}\) Id. at 71.


\(^{200}\) Boin, supra note 54.

\(^{201}\) Id. at 29; N.R. NEEDHAM, 2000 YEARS OF CHRIST’S POWER: VOLUME ONE 80–82 (rev. ed. 2016) (1907).
emperor Diocletian, honored the emperor with sacrifices, or what Boin flippantly reduced to “dutifully [going] through the motions.”

And, finally, there was a seeming middle ground of people like Basilides and Martial, who participated in the empire-wide festivals and broke bread with local members at banquets in honor of patron deities. If we borrow from Boin’s description, we see Martial as someone able to extend a celebratory nod to the Roman festivities, take part in the civic duties, and participate in local Roman social clubs that allowed him to sit across the aisles with members of varying economic ranks and share meals in an effort to strengthen the ties to one another and their community.

Certainly, this Martial middle ground, explored further, could fluctuate along the spectrum of compromise, but the ability to overcome the sacrificial nuances without “sacrificing the essentials of his faith” makes Martial an apt personification of what Joel Harrison referred to as the creation of a “community of communities.” He wrote:

> For Christians, seeking solidarity, fraternity, and charity can mean recognising analogous (albeit incomplete on a Christian account) expressions. In this way, we build what others have called a ‘community of communities’, in which our different groups contribute to, shape, and negotiate shared goods—worship, health, charitable care, education, employment, creative endeavours, and community festival, for example.

I certainly do not endorse the spectrum of license that Boin endorsed in his book—seemingly unaware of the dividing line whereby the unique Christian identity becomes nothing more than a product of cultural assimilation. As Lewis’ infernal figure counseled his servant in The Screwtape Letters: “Some ages are lukewarm and complacent, and then it is our business to soothe them yet faster asleep.” The soothing sentiments of compromise are all too readily administered to

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202. Boin, supra note 54, at 33. Boin strangely contends that Prisca and Diocletian’s daughter, Valeria, were not compelled to do anything because they could have opted for martyrdom if they wanted to. Id. at 34.

203. Id. at 30.

204. Id. at 30–31.

205. Id. at 30.


207. C.S. Lewis, The Screwtape Letters 32, 84 (1942); see also Smith, Pagans & Christians, supra note 15, at 105 (2018) (“[Boin] elevates the Christians who, then and now, would be regarded by more rigorous Christians as lax or lapsed or ‘lukewarm.’”).
the community of faith by their leaders in an attempt to escape social stigmatization. Thus, Steven D. Smith was right to criticize Boin’s approach when he wrote that the model offered requires a high degree of selective hearing “in which the historical record must be clipped and contorted to fit the conciliating story line.”

At the same time, Boin does provide an opportunity to begin to consider the nuances of separating the idea of a compromise based on requisite contextual understanding (e.g., “offerings of wine and incense” was the equivalent of worshipping a false god or the test for religious allegiance) and challenging the very significance of the act in question. To say this another way, my challenge is not to compromise in the areas of public accommodation complicity because it is like the “offerings of wine and incense,” but to compromise because it is not like those things, but more akin to the use of old pagan pots and the growing of crops on lands that were used in the past for pagan rituals (discussed in more detail below).

I ruminate over these areas of compromise for many reasons, but primarily (and for the sake of this Article) to overcome the reverberating disenchantment now dominating popular culture of religion and religious liberty after Hobby Lobby and Masterpiece Cakeshop. The faith community must begin asking itself difficult questions concerning the needful hills of battle (primary) and the grey meadows (secondary) where conscience and complicity are able to adapt and bend to the changes of a secular world. These three concepts—alertness, patience, and worship—serve to ground the faith community in its foundations while retaining a needful elasticity to maneuver within the world, mindful of its mission to be a witness and mindful of the corresponding optical disenchantment that needs to be repaired. This invokes the idea of “legal tropism,” or the practice of allowing legal change to navigate the undercurrents of Christianity in culture: (1) by bending to the light of legal change; (2) through adaptation and crea-

208. See 1 Corinthians 1:23, 15:19 (ESV) (describing escape from what the Apostle Paul called foolishness in the eyes of Gentiles or the pitiable state of their existence if Christ has not been raised).


210. Wilken, supra note 199, at 25–30. To make “offerings of wine and incense” became a standard for supplications, a religious act, or a “common form of worship.” Id. at 26. The Emperor Trajan made it clear himself that a so-called Christian can “make[ ] it clear that he is not by offering prayers to our gods.” Id. at 28 (quoting Ep. 10.97). Steven D. Smith explained this well: “[A]ny pagan offer to accept Jesus as one god among many was not really an invitation of inclusion; it was instead a proposal that the Christians renounce their faith and become polytheistic pagans instead.” Smith, Pagans & Christians, supra note 15, at 152.
tion of multifaceted approaches to the culture, and at the same time;
(3) remaining distinct and faithful to core convictions. But before
the “bending” can take place, a proper reworking of the understand-
ing of moral complicity must happen. We turn there next, considering
first the very basis from which the legal cases above are brought.

A. Non-Participation and Instrumentality (LEVEL ONE)

The consideration of moral complicity deals with the role of par-
ticipation and the non-essential contribution of the public accommo-
dation services mentioned in Section IV and the wider actions
committed by the principal agents (e.g., Jack Phillips). The cited ex-
amples, on the surface, involve a fear of participatory complicity
where the Christian business owners sense their involvement in the
wedding—whether by production or presence—connotes a form of
approval constituted as joint action. On a complicity scale ranging
from principals and co-conspirators on the Left to actions meriting no
causal relationship on the Right, the parties above seem to sense
themselves as secondary agents closer to the Left and part of the
causal chain that contributes, even if indirectly, to the approval of
not only the civil marriage, but also to the act of approving the redefi-
nition of marriage. This corresponds to the term “complicit” itself,
rooted in the etymology of a contributory action that is “wrapped up”
in another’s perceived wrongdoing—not only enveloping oneself in
some wrong, but also magnifying the conduct of guilty agents.

When Jack Phillips, for example, refused to cater a same-sex wed-
ding, among his concerns was that the bakery product would magnify
the solemnity of the event, thereby adding credence to the underlying
conduct. For the family in Hawaii who refused to offer a room in
the bed and breakfast, the term complicity simpliciter applies—
loosely related to the type of complicit behavior that “gives access” to

211. This concept—introduced to me first by Professor John Witte, Jr.—could very well
be an essential public policy objective in order for Christians to retain doctrinal distinction
while keeping the walls of their respective communities responsive to changing trends.

212. “Contributory acts contribute (or might have contributed) in a causal way to that
wrong’s being done by someone else.” Chiara Lepora & Robert E. Goodin, On Complic-
ity and Compromise 34 (2013). There seems to be almost a level of conspiratorial complic-
ity in collaborating to do the wrong and engaging in the planning therein. See id. at 37–41.

213. See id. at 8, 33; Isaiah 5:20 (ESV).

214. Lepora & Goodin, supra note 212, at 41.

215. See generally Masterpiece Cakeshop, Ltd. v. Colo.Colorado Civil Rights Comm’n,

the principal conduct. In both instances, the fear of approval was also supplemented by a fear of “inducing,” “encouraging,” “incentivizing,” or simply making it easier to complete the conduct—even if they have only a vague awareness of the details of the principal’s plans. The physical proximity concerns from the Giffords align well with the idea of contiguity—defined literally as “the condition of touching or being in contact.” While the conduct may be entirely the works of others, “close proximity, without actual contact” is sufficient to trigger the imputation of association or “commonality of interests.”

While one can write entire books on the semantics of complicity and the proper designation therein (and people certainly have), our focus here is to dissect the good faith mindset of these business owners devoid of any actual malice or invidious discrimination. But, at the same time, we are mindful to remember the consequences of preaching an inelastic Christianity whose members struggle to adapt to a changing environment and, in the process, serve witness to a static faith. The Second Vatican is right to warn believers that through neglected education, false doctrines, or defects in “religious, moral or social life, they . . . conceal rather than reveal the authentic face of God and religion.”

With that, we delve a bit more into the theological and faith-based objections made by those adhering to their understanding of complicity—offering opportunity to develop our conscience to better serve as bridges for cultural divides.

1. The Theological Approach (re: Complicity)

This issue of physical proximity (contiguity) as it relates to the question of moral complicity is nothing new. Throughout history, Christians have had to wrestle with their geographical context and the question of participation with pagan rituals touching on everyday tasks.

217. Lepora & Goodin, supra note 212, at 42.
218. Id.
220. Lepora & Goodin, supra note 212, at 50. “It is not that the person who remains contiguous has done any wrong herself, nor has she done anything to contribute causally to the wrongdoing of the other.” Id. at 50–51.
221. Id. at 50.
Sometime after the Synod of Elvira seemingly decided that non-participation was the requisite feature for Christians to remain unpol-luted by pagan rites, Augustine received a letter from a landowner in Africa named Publicola concerning “the issues of pollution and avoid-ance,” such as “taking shares of crops blessed by pagan rituals, eating fruit found beside pagan altars (that may have been offered to the gods of the altar), washing in baths where pagan statues stood and where the smell of incense lay heavy in the air.”223 According to Peter Brown, Augustine took these questions as “fussy and misplaced,” yet very clearly revealing “the horizons of the possible with which average well-to-do Christians viewed the world.”224 While some linked association with moral complicity, others saw that only “modern, secretive magic . . . should be condemned,” having failed to attain what Brown noted as “the favour of God” though a history of practice.225 These fears of intermixing with the outside “pollution” as evidence of tainted living became an issue even before Augustine with Jesus Christ, who was subject to a prevailing set of critiques from religious leaders of his day concerning his association with societies’ outsiders.

When Christ sat at the home of Levi226 amidst other “disreputa-ble” characters, the Scribes and Pharisees questioned why he would eat with “sinners and tax collectors.”227 They saw his association as a breach of ritual purity that comes when a “teacher of the Law” reclines at the table of those “who maintained the traditions less strictly”—a fundamental failure to retain the distinction between “the righteous” and “the sinners.”228 As D.A. Carson explained: “Though eating with them entailed dangers of ceremonial defilement, Jesus and his disciples did so.”229

When he extended himself to touch the leper,230 Jesus would be deemed ceremonially unclean by those same religious leaders, who

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223. Brown, Authority and the Sacred, supra note 69, at 17; see also St. Augustine, The Letters of St. Augustine 46 (J.G. Cunningham trans., 1862).
224. Brown, Authority and the Sacred, supra note 69, at 17.
225. Id. at 18.
228. Lane, supra note 226, at 104. Citing to the Mishnah, Lane further provides anecdotal support for the proscription: “He that undertake to be trustworthy (i.e., a Pharisee) may not be the guest of one of the people of the land.” Id. at 104 n.42.
saw only the possibility of a transfer of defilement to Jesus instead of a transfer of cleansing to the leper.\textsuperscript{231} In his act of compassion, Jesus extended himself to a person traditionally separated from the general public and "restore[d] him to human community."\textsuperscript{232} As William L. Lane explained: "[Jesus] did not hesitate to act in violation of [the cultic and ritual system’s] regulations when the situation demanded: ‘the ceremonial law gives place to the law of love when the two come into collision.’"\textsuperscript{233}

When Jesus allowed a woman of poor repute in the city to draw near and wipe his feet with her hair and anoint them with ointment, the Pharisees grumbled, saying: "If this man were a prophet, he would have known who and what sort of woman this is who is touching him, for she is a sinner."\textsuperscript{234} To them, the issue, wrote Darrell Bock, was one of defilement, brought on by her "ongoing contact with Jesus" and his tolerance of her action.\textsuperscript{235} Was he complicit in her lifestyle choices by allowing her to make this gesture of humility and adoration? By no means! But in the eyes of the religious leaders of the day, Jesus, in extending himself to the tax collectors, lepers, and sinners became associated with their defilement—having become "unclean" through his complicity. Not to be lost is the fact that this episode took place while Jesus sat in the home of Pharisees—a group who, throughout the New Testament, sought to antagonize and challenge him.\textsuperscript{236} Rod-

\textsuperscript{231} Carson, supra note 229, at 198.

\textsuperscript{232} Luke Timothy Johnson, The Gospel of Luke 95–96 (Daniel J. Harrington ed., 1991); see Lane, supra note 226, at 85. The correlation to AIDS was not lost on some commentators, which adds layers to the treatment of the LGBT community as a corollary to the treatment of lepers by the religious community. Darrell L. Bock, Luke (Volume 1: 1:1–9:50) 473 (Moises Silva ed., 1994); see also Faderman, supra note 57, at 425 ("AIDS was the leprosy of the times; and, gay men, whether infected or not, were the lepers."). Christian right leader, Jerry Falwell, called AIDS "the wrath of God on homosexuals" and suggested that those infected should be quarantined. Frances Fitzgerald, The Evangelicals 327 (2017). Another leader of the Christian Right, Pat Robertson, suggested manslaughter charges for anyone who knowingly infected another person. Id. at 366. Another Far Right leader, Pat Buchanan, gloated that AIDS was a sign that "[n]ature is exacting retribution," and that these homosexuals were no longer just a "moral menace," but not a "public health menace." Faderman, supra note 57, at 416. The President of the Southern Baptist Convention announced that "God created AIDS to reveal His displeasure with homosexuality." Eskridge, supra note 50, at 207.

\textsuperscript{233} Lane, supra note 226, at 87.

\textsuperscript{234} Luke 7:36–40 (ESV).

\textsuperscript{235} Bock, supra note 232, at 697.

ney Stark aptly summarized the significance of these instances: “Jesus asserted a revolutionary conception of moral equality, not only in words but in deeds. Over and over again he ignored major status boundaries and associated with stigmatized people . . . thereby giving divine sanction to spiritual inclusiveness.”

Putting this together, we return to Augustine in considering the above-cited cases dealing with the three forms of complicity (e.g., service, venue, and anticipatory). In Epistle 47, on the question of hiring “barbarians” who had guaranteed their fidelity by swearing to false gods, Augustine pointed out that if the defilement is transferred to the Christian who makes a concord with the barbarians, there would be “no place on earth in which we could live,” since throughout the provinces, “the security of peace rests on the oaths of barbarians.”

On the question of taking anything offered to idols “from the threshing-floor or winepress,” Augustine noted that if it is in one’s power to prevent the offering, they are held accountable. However, once the act had been completed, the use of those items was permitted. More instructive is the question of whether a Christian can use fruits and vegetables that he knows to have been brought from idol temples. Augustine again wrote that, since “we have no scruples about inhaling the air into which we know that the smoke from all the altars and incense of idolaters ascend,” the issue is really one about participation or “devoting anything to the honour of the false gods, or appearing to do this by so acting as to encourage in such worship those who do not know our minds, although in our hearts we despise their idols.” Augustine compared the act of appropriating or overthrowing these “temples, idols, groves, etc.” for the benefit of the community to the manner which “men themselves . . . are turned from impiety and sacrilege to the true religion.” Taking the lessons from Deuteronomy 7:25–26, Augustine remarked that the abomination may be linked to “either the appropriation of such spoils to their own pri-

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238. ST. AUGUSTINE, supra note 223, at 47.2.
239. Id. at 47.3.
240. Id.
241. Id. at 46.xviii.
242. Id. at 47.3.
243. Id.
vate use . . . [or the taking of] anything of that kind into their own houses with the intention of giving it honour.”

Concerning the question of eating meat offered to idols, Augustine returned to the example of using air that receives the smoke of idol sacrifices or the light of the sun used by “wicked men . . . [for] worship.” He later added that, regarding the man on the brink of starvation who finds meat placed in an idol’s temple, it is better to reject that food if he is certain the food was offered to idols, otherwise it may be taken “without any conscientious scruples.”

While gleaning from these responses, it is difficult to construct a definitive approach to the cases above in their various forms of complicity. However, what is of use is the theological perplexity that Augustine engaged in to properly discern between acts of moral complicity (e.g., participating in or encouraging the act; willful disobedience based on certainty) versus acts free from the stain of participation (e.g., the use of items without giving them honor; concord with barbarians for security without personally taking the oath)—mindful of the corresponding absurdity that a certain theological position brings. A mind bent on creating a shared space with outsiders should be one always willing to bend itself to the needs of others instead of creating a form of rigid decision-making that only pushes people away—a mind able to adapt and evolve while retaining its distinctiveness.

This type of approach seen in Augustine—always reforming and adapting—was described by Oliver O’Donovan as a development more complex than a simple change of mind:

There is, as it were, a slow accretion of new layers to his thought. At points of new departure he will reorganize the way he approaches a question, while still carrying forward the observations and conclusions that he has made at earlier stages. We do not find constant innovation; it is something more like regeneration, as the familiar keeps coming back to make new and unfamiliar effects.

Perhaps this keen ability to retain an open-minded regeneration is the key to achieving the same spirit of reconciliation that allowed

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244. Id.
245. Id. at 47.4.
246. Id. at 47.6.
247. Oliver O’Donovan et al., From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 105 (Oliver O’Donovan & Joan Lockwood O’Donovan, eds. 1999) [hereinafter O’Donovan, From Irenaeus].
Augustine, in the words of Martha Nussbaum, to “move[s] society towards equal concern for the deprived, the poor, and the different.”

Regarding the cases above dealing with the three forms of complicity, it seems plain that the requisite participatory and causal elements are not actually there, but rather the perception or fears of complicity controls their decisions—something Paul the Apostle described as the manifestation of a “weak” conscience. Considering this “weakness,” Douglas Moo posited that the reference in Romans 14 (verses 17 and 21) regarding abstaining from drinking wine is in reference to the fear of the “weak” that the “wine had been contaminated by association with pagan religious practices.” The same can be said regarding eating vegetables only (verse 2)—the “weak in faith” again believing these dietary rigors were more pleasing to God than the liberties of the “strong” who can eat everything.

Borrowing from Karl Barth, the demand that the “strong” (or those who sail on the “open sea”) treat the convictions of the “weak” with respect involves understanding that, first, Jack Phillips (who refused to cater a same-sex wedding) comes from the same longing as the man with a “strong conscience”—namely, to be loyal to God. And, in this process, those who can overcome the “narrow canal” of rigorists have an opportunity to persuade those like Jack Phillips to “break through . . . to the place where—to the pure all things are pure.” The recent assertion that Jack Phillips made illustrates the unworking edges of complicity created by his rigid understanding of

249. Simply put, the “weak” versus “strong” comparison refers to those Christians, in the former camp tethered to the concern of maintaining Old Testament laws of purity; and, in the latter, those Christians who are able to accept the truth that their faith in Christ implies liberation from certain OT/Jewish ritual requirements. Douglas Moo, The Epistle to the Romans 836–37 (1996). Thomas R. Schreiner explained that the “weak” were primarily Jewish Christians and the “strong” were the Gentile believers. Thomas R. Schreiner, Romans 707 n.8 (1998).
250. Moo, supra note 249, at 856, 861.
251. See Schreiner, supra note 249, at 714.
252. See id. at 717 (“[A]ccepting the ‘weak’ involves respecting them and holding them in honor even if there are disagreements over what is permissible.”).
253. See Karl Barth, The Epistle to the Romans 506, 511, 517–18 (Edwyn C. Hoskyns trans., 1968); see also Schreiner, supra note 249, at 714 (“[Apostle] Paul can tolerate diverse practices, which do not violate any biblical or moral norm, as long as they are motivated by the glory of God.”). While Jack Phillips’ inability may come from a place of a “weak faith”; he nevertheless should remain steadfast in abstaining until he fully comes to understand the implications of faith in Christ.
254. Barth, supra note 253, at 511, 518; see also Moo, supra note 249, at 853 (“What Paul wants the ‘strong’ to realize [in Romans 14] is that people differ in their ability to
participation—perhaps, here, there could be opportunity for persuasion.255

After winning at the Supreme Court, Jack Phillips was immediately targeted by members of the LGBT community—this time to make a two-color cake (pink interior, blue exterior) signifying the seventh anniversary of the customer’s gender transition.256 Phillips refused, citing to his religious beliefs that God created two immutable genders and that designing a cake ostensibly celebrating gender transitioning meant he, too, celebrated the process.257 This leaves Phillips in a rather precarious situation. In order for Phillips to reject a request, all a customer would need to tell him is that the product will end up being used in the course of celebrating anything that Phillips rejects. His services become coextensive with the underlying purpose of the product and the broader assumption of those who see from the cake that Phillips was somehow lending his support or participating in their cause.

Phillips approaches the absurdity of those—who precluded themselves from the use of the sun because some men worship that luminary. Phillips cannot make a cake if that cake is being used toward a sinful activity because, in his mind, his artistic expression vicariously joins him to the activity therein. Simply stated, to Jack Phillips, his conviction is disturbed by the act of association, and if possible, it is here that instead of making him a test-subject for religious liberty, the Christian legal community can help him break into the open sea where “to the pure all things are pure.”258

internalize truth . . . particularly when it runs so counter to a long and strong held tradition basic to their own identity.

255. “The ‘Pauline’ Christian does not complain of those who hold opinions differing from his own, nor does he abuse them; rather he stands behind them sympathetically asking them questions.” Barth, supra note 253, at 506.


258. See Barth, supra note 253.
2. The Faith-Based Disclaimer Approach

Theology is but one branch of this developing saga, so we will put theology aside and offer an easier route that should alleviate concerns of complicity: faith-based disclaimers. This solution has been offered from the very first case involving Elane Photography, LLC v. Willock\(^{259}\) in New Mexico, to the most recent one in Brush \\& Nib Studio, LC v. City of Phoenix\(^{260}\) that dealt with a pre-enforcement challenge in Arizona. A solution involves using similar language in an online disclaimer with two components: (1) an affirmation of faith (“opposition to same-sex marriage”) with a disavowal of participation (“act of selling goods and services does not constitute an endorsement”), with (2) a stated intent to comply with public accommodation laws (“notwithstanding that belief, [the law] requires them to provide goods and services to everyone regardless of sexual orientation”).

As Andrew Koppelman explained, announcements of this sort “would probably suffice to persuade [some] gay customers . . . to look elsewhere, with no formal change in the antidiscrimination law.”\(^{261}\) It also serves the purpose of signaling to outsiders that acquiescence to the problematic request does not equate with supporting the underlying (eventual) conduct for which the product is being used. In the words of Augustine, they will now “know our minds.”

3. A Lesson on Peacemaking

Combining what we’ve already discussed regarding distinctiveness (through alerliness, patience, worship) and developing a strong conscience towards moral complicity, this Article will briefly discuss the idea of peacemaking and avoiding the false dichotomy separating a love for God with a love for neighbor. As Sabine MacCormack wrote:

Adam, Aaron, and Solomon had all experienced a sense of obligation, a socialis necessitudo, as Augustine expressed it, in relation to those who were close to them, whether this was a wife, a lover, or

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\(^{261}\) Andrew Koppelman, A Free Speech Response to the Gay Rights/Religious Liberty Conflict, 110 NW. U. L. Rev. 1125, 1138 (2016) (“A business that posts such a disclaimer might never need to violate its conscience by facilitating same-sex marriages.”). Although, even a disclaimer may run afoul to broadly written antidiscrimination laws that include prohibitions on discrimination regardless if it was done “directly or indirectly.” See, e.g., Elane Photography, LLC v. Willock, 309 P.3d 53, 60 (N.M. 2013); State v. Arlene’s Flowers, Inc., 825, 389 P.3d 543, 553 (Wash. 2017); 303 Creative LLC v. Elenis, No. 16-CV-02372-MSK-CBS, 2017 WL 4331065, at *1 (D. Colo. Sept. 1, 2017).
the society at large; and it was this sense of obligation, motived by love, that led them to err.262

Returning to Augustine and his ideas on the conditions of society and the role of the church in pursuing peace, he wrote in the City of God that humanity should not merely seek to remain united by our shared “natural likeness,” but also called to share in the common membership in this earthly society through a “bond of peace.”263 In Book XIX, he emphasized the sweetness and desirability of attaining peace and the necessity therein to the city’s survival.264 Even those who engage in war desire peace, so long as the conditions of surrender are favorable—as Augustine explained: “[E]ven they who intentionally interrupt the peace in which they are living have no hatred of peace, but only wish it change into a peace that suits them better.”265 Augustine described a situation where the peace some seek to attain is a peace of personal advancement even at the cost of war. Those who they oppose are seen as the mere impediment to a peace where they who prevail can impose on the other “the laws of their own peace.”266

In the political arena, the culture wars have been beset by what Jonathan Rauch aptly described as a competition based on “all-or-nothingism” and driven by a commitment to the “foreclosure of compromise.”267 Both sides are determined to advance their respective interests with the prospect of settlement conditioned on advancing “the laws of their own peace” on the other.268 Writing during the same-sex

263. See ELSHTAIN, A Catholic Modernity?, supra note 5, at 99.
264. AUGUSTINE, THE CITY OF GOD, Ch. 11, Book XIX; Phillip Cary, United Inwardly by Love: Augustine’s Social Ontology, in AUGUSTINE AND POLITICS 21–25 (John Doody et al. eds., 2005). “Whoever gives even moderate attention to human affairs and to our common nature, will recognize that if there is no man who does not wish to be joyful, neither is there any one who does not wish to have peace.” AUGUSTINE, THE CITY OF GOD, Ch. 12, Book XIX.
265. See AUGUSTINE, supra note 264, at Ch. 12.
266. Id.
267. Jonathan Rauch, Gay Rights, Religious Liberty, and Nondiscrimination: Can a Train Wreck Be Avoided?, 2017 U. ILL. L. REV. 1195, 1206 (2017); see also Ravitch, supra note 27, at 139–40 (noting that the “all-or-nothing” approach is destructive of compromise and may lead to an actual all-or-nothing outcome for one side).
268. Considering the rancor by which opposing sides have advanced their interests without allowing for impurity to seep into the ideological orthodoxy, there is an interesting correlation that emerges with the Romans, who retained their “high standard of moral conduct” by the threat of Carthage. See Michael Hanby, Democracy and Its Demons, in AUGUSTINE AND POLITICS 117, 118 (John Doody et al. eds., 2005) (“Rome owes both its peace and its virtue to its enemies.”). It bears questioning whether both sides refuse to come to the table of common compromise because the ideological purity within its own ranks may
marriage debates, Doug Mainwaring helpfully noted how the “national discussion of same-sex marriage treats the issue like a game of checkers, where opponents can quickly gain each other’s pieces without much forethought about the consequences.” It seems clear that neither side is mindful of the consequences that optical disenchantment plays on religious liberty and sexual orientation protection, especially in light of the fact that “a course of uncompromising intransigence operates to aggravate rather than calm cultural conflicts.” Both sides are losing, and neither is willing to work together towards a common interest.

Responsible advocates must pursue a peace that finds the virtue of mutual compromise more desirable than the imposition of foreign values on conquering foes. From the standpoint of the faith community, the desire for uninterrupted dictates of conscience must balance the need to create the following process: (1) adaptation for the sake of witness-opportunity; peacemaking by avoiding zero-sum paradigms and promoting equal protection for sexual orientation identity; and (3) the creation of a man, described by Confucius and used by Matteo Ricci, that only “appears paradoxical in comparison to other[s], but [fully] a companion of Heaven.” But it begins with a renewed understanding of complicity and a refusal to play the legal games of respective special interest advocates.

From the standpoint of the LGBT community, the desire to protect the individual dignity of expression that comes with sexual liberation must find a shared space to allow for the individual dignity of expression associated with a conviction rooted in religion—a renewed energy toward the understanding, noted by William Eskridge, that they themselves are now part “family members and actors interacting

become “polluted” and whether they fail to see the advantage of peace as the process by which their moral conduct would be drastically improved.

269. Mainwaring, supra note 65.
271. See, e.g., Isaiah 43:10; Ephesians 5:16–17; Colossians 4:5.
272. See Rauch, supra note 267, at 1203 (stating that the “zero-tolerance model militates against the balancing of interests in the courts and in the legislative process”); Berkeley, supra note 62, at 3 (“It is imperative first to determine whether the opposing claims are predicated on genuine violations of either side’s civil rights.”). Elshtain noted an important historical lesson: “If one brings the city of God into too tight a relationship to the city of man, then the latter begins to make claims that take on the character of the ultimate.” Elshtain, Limits of Politics, supra note 5, at 98.
with communities.”274 In short, the LGBT community should stop forcing people of faith to embrace individual identities while retaining room for themselves to reject their religious beliefs.275 As Jane Calderwood Norton wrote: “[I]f we value personal autonomy then we must value autonomy in relation to religious matters too.”276 This also begins with a refusal to treat every slight as an opportunity to bring legal charges and, most importantly, forgiving the faith community for wrongs committed in the past.

Jonathan Rauch pointed out how “a zero-tolerance model militates against the balancing of interests in the courts and in the legislative process, because allowing even a narrow ‘license to discriminate’ is seen as eviscerating the whole principle of nondiscrimination.”277 A stark reality is offered by Augustine in the workings of the two respective communities: The early city presses heavenly into service as the heavenly also commandeers the citizens of the earth.278 Both sides in coexistence and yet devoid of dual citizenship—left to the devices of their own making—must foster the requisite elasticity of character to build a peace based on creating a shared space for one another.279 Augustine continued:

We find a citizen of Jerusalem, a citizen of the kingdom of God, entrusted with secular administration. He may wear the purple, or be an officer of the state, or a magistrate, or a proconsul, or a general. He discharges civic duties, but he keeps his heart raised above them if he is a Christian, a believer, a Godfearing person, one who sets little store by the circumstances in which he finds himself and

274. Eskridge, supra note 50, at 383.
275. In considering the need to file a lawsuit to enforce transactions, one scholar asks why the gay couples “insist on suing people whose services they neither need nor want?” See Smith, Pagans & Christians, supra note 15, at 6–8; see also Douglas Laycock & Thomas C. Berg, Protecting Same-Sex Marriage and Religious Liberty, 99 Va. L. Rev. Online 1, 8 (2013) (arguing that “demanding a commitment to counsel same-sex couples does not obtain counseling for those couples, but it does threaten to drive from the helping professions all those who adhere to older religious understandings of marriage”) [hereinafter Laycock & Berg, Protecting Same-Sex Marriage].
277. Rauch, supra note 267, at 1203 (stating that “zero-tolerance disallows comparing costs with benefits, weighing relative harms, and taking into account the particular structure of local markets”).
278. Augustine, Expositions of the Psalms 16 (Maria Boulding trans., New City Press ed., 2001) [hereinafter St. Augustine, Expositions]. Borrowing from the imagery of the olive press, Peter Brown wrote: “The religious life of all members of the Christian Church is quite inconceivable for Augustine without this constant pressure—this constant pressure—inside the saeculum.” Peter Brown, Saint Augustine, in Trends in Medieval Political Thought 1, 11 (Beryl Smalley ed., 1965).
279. See Robert C. Crouse, Two Kingdoms & Two Cities: Mapping Theological Traditions of Church, Culture, and Civil Order 162–63 (2017).
puts his hope in those he has not attained yet . . . We should not despair of the citizens of the heavenly kingdom, therefore, when we see them transacting the business of Babylon or dealing with earthly matters in this earthly political arena.\textsuperscript{280}

In short, both sides should redeem our civic engagement by working together toward “constructing shared meanings and shared futures, in action . . . that transcends the immediate and the local.”\textsuperscript{281} As Rowan Williams powerfully explained, with the breakdown of a form of “talking and understanding” comes a society increasingly incapable of “intelligent speech, common imagination, increasingly enslaved to idolatrous objectification, fetishes and slogans.”\textsuperscript{282} And we are there.

Since my focus is primarily to speak to the religious community, I repeat that while a \textit{permissive compromise} on matters of complicity should be pursued, the ideals of alertness, patience, and worship must also be retained. Opportunity for criticism should be sought in avenues of genuine moral degeneration—as Robert Markus said: “The Gospel can never be at home in the world . . . [i]t is in essential and permanent tension with the world.”\textsuperscript{283} A Christian should consider secular values through an eschatological lens—a more “exacting standard” in subjecting the “good” through “more deeply penetrating questioning.”\textsuperscript{284} But at the same time, Markus added that this inevitable tension should be \textit{fruitful}.\textsuperscript{285} I take counsel from his writing on the approach that the faith community should take toward social institutions and add that the same suspicion should be extended “to prevent [religious] institutions from becoming rigid and fixed.”\textsuperscript{286}

To help the faith community work out this \textit{first level} of requisite balancing involving a renewed theology on (1) participation, (2) peacemaking, and (3) distinction, I add a second filter to forming the right psychology toward legal tropism in forming new discriminations. The \textit{second level} involves the proper limits of conscience as \textit{insiders} of the faith community and the consequential optics that a weak conscience begets from the perspective of \textit{outsiders}. Only then can the faith community begin to adapt in such a way as to remain viable and

\textsuperscript{280} ST. AUGUSTINE, EXPOSITIONS, \textit{supra} note 278, at 51.6.
\textsuperscript{281} Williams, \textit{supra} note 31, at 56.
\textsuperscript{282} \textit{Id}.
\textsuperscript{284} \textit{Id} at 168.
\textsuperscript{285} \textit{Id} at 169.
\textsuperscript{286} \textit{Id}.
distinct while providing the “impulse for innovation, improvement and advance.”

We discuss this second level idea of double-vision next.

B. Double-Vision and Participatory Moral Action (LEVEL TWO)

This second layer requires developing what I call political double-vision rooted in the Greek legend of Sisyphus, cursed by the gods to a life of futility. The term is used as an instrument to create a public policy approach, whereby the faith community is able to, not only understand their own respective theological positions (as “insiders”), but also become mindful of how their decisions are being perceived by the outside world (as “outsiders”).

Albert Camus described the legend in these poetic terms:

As for this myth, one sees merely the whole effort of a body straining to raise the huge stone, to roll it, and push it up a slope a hundred times over; one sees the face screwed up, the cheek tight against the stone, the shoulder bracing the clay-covered mass, the foot wedging it, the fresh start with arms outstretched, the wholly human security of two earth-clotted hands. At the very end of his long effort measured by skyless space and time without depth, the purpose is achieved. Then Sisyphus watches the stone rush down in a few moments toward that lower world whence he will have to push it up again toward the summit. He goes back down to the plain.

Where many find the tedium of the curse unbearable, Camus performed an interesting mental trick, imagining the pause preceding the return of Sisyphus to the bottom of the mountain in which he discovered a self-conscious purpose over the absurdity of his condition. Camus wrote: “That hour like a breathing-space which returns as surely as his suffering, that is the hour of consciousness . . . . The lucidity that was to constitute his torture at the same time crowns his victory.”

The remarkable observation here is not the descent into the existentialism that pervades Camus in his embrace of the absurd, but the observational double-vision that emerges in respect to the imagina-

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287. Id. at 170.
288. Albert Camus, The Myth of Sisyphus and Other Essays 120–21 (Justin O’Brien trans., 1955); see also Homer, The Odyssey 136 (W.H.D. Rouse trans., 1937) (describing his “tedious task” of heaving the stone up the hill to discover at the top of the crest that the weight is too much to bear).
289. Camus, supra note 288, at 121.
290. I am indebted for this insight to Stephen West who coordinates the podcast: Philosophize This!
tion of perspective. This idea of embracing a double-vision from the standpoint of The Insider (Sisyphus) and The Observer (Camus) is useful. In considering the three forms of complicity (service, venue, and anticipatory) and the corresponding disenchantment these lawsuits have had on religious liberty, the faith community needs to embrace a holistic approach based not only on the distinctiveness from The Insider position, but also from a position of The Observer, in order to minimize the optical backlash from poorly considered decision-making. To borrow from Tomáš Halík in his discussion of the existential experience of faith, Christians need to embrace a “sensitivity to the signs of the times in the cultural and political climate of today’s world.” And not only to embrace signs of the time, but to embrace an elasticity of the faith that commits to the central tenets of one’s religion while deeply considering the peripheral doctrines in respect to optical disenchantment and its ill-effects on religious liberty. Christians need to carefully respond to the moment and not make the same mistakes that the religious community made in the aftermath of the sexual revolution where their fear and disgust began to metastasize and spread into the wider culture by the process of creating exclusionary communities through separation rhetoric aimed at removing “deviants” from society.

Instead, Christians must learn from history the perils of myopic ambition brought on by a failure to embrace the role of Christianity-in-culture from the lens of double-vision. They must also develop the ability to adapt by replacing an “infantile fixation on the forms of the past in favor of the faith of the sons—with everything that Jesus says about the freedom of those who are not slaves, but sons, friends, and partners.” Christians must replace the narrow confines of earlier puritanical traditions with the bridge of reconciliation for those

291. An apt analogy comes from the role that the urban press played during the preaching of Dwight L. Moody on restraining the manifestation of enthusiasm. Richard Hofstadter explained: “It was not merely that pietism had grown more restrained, but that the city revivals took place under the critical eye of the urban press and nothing could be allowed to happen that would lose the sympathetic interest of the public.” Hofstadter, supra note 8, at 112.

292. Tomáš Halík, Patience with God 22 (Gerald Turner transl., 2009).

293. See Frank, supra note 54, at 10 (stating that heterosexual domesticity was the norm and any deviants were put in isolation to reinforce those norms). Even the ACLU—who changed its tune in the 60s—referred to homosexuals as “heretics” and “deviants,” and supported sodomy laws and the notion that gays were a security threat throughout the 50s. See, e.g., Michael J. Klarman, From the Closet to the Altar 6 (2014); Frank, supra note 54, at 11, 17; Faderman, supra note 57, at 83, 563.

294. Halík, supra note 292, at 51.
outside the camp—they must gain the ability to mix faith and optics as the measure for public policy. But, as Halík wrote, not by “giving up our own tradition, but simply not being fixated with it and instead exposing ourselves to the adventure of discovering it in a wider context” and “by engaging in dialogue with others.”

In failing to do so, the faith community will not only continue to galvanize opposition against itself, which may have otherwise remained dormant, but also find that its behavior undermines the very value systems that it hopes for others to embrace.

1. Optics and Its Discontents

Let me offer two illustrations to show the usefulness of optics as an instrument to discern the shifting disenchantment imputed on religion and religious liberty. The first comes from the Death of Hypatia in the midst of a transitional period between the Ancient Roman Empire and a new Christian politics where Christianity, no longer facing the harrowing mornings of the persecuted, walked the new dawn of the persecutor’s standards—legitimizing violence and war. It was a new “church of power” where “Christian and imperial tendencies towards intolerance and official interference with religion were conspicuously on display.”

Even among Christians, Hypatia was a widely respected figure, an accomplished scientist and philosopher, and the envy of Bishop Cyril of Alexandria for the adulation she received from the city and the surrounding regions in seeking to manage tension and advance knowledge. She not only practiced and taught a philosophy for the coexistence between “traditional intellectual life and Christianity,” but

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295. Id.
296. Id. at 52.
297. As many scholars have pointed out, those like John Briggs and Anita Bryant helped stir the consciousness of gay issues to the point of galvanizing and mobilizing counter-efforts that would otherwise not likely have begun. Frank, supra note 54, at 55; Klarman, supra note 293, at 26; see also Tina Fetner, How the Religious Right Shaped Lesbian and Gay Activism (2008); Bull & Gallagher, supra note 3.
298. John Howard Yoder, The Original Revolution 120–21 (2003). Steven D. Smith, borrowing from Edward Gibbons, wrote: “Upon achieving ascendency under the emperor Constantine, the new religion pushed aside pagan tolerance—the mild spirit of antiquity—and substituted for it ‘the intolerant zeal of the Christians.’” Smith, Rise and Decline, supra note 70, at 15.
299. Stark, supra note 237, at 202–03.
300. Smith, Rise and Decline, supra note 70, at 31.
also held to the conviction that “the authority of the bishops should not extend to areas meant for the imperial and municipal administration.”\footnote{302. Watts, supra note 301, at 107, 113–14; Dzielska, supra note 301, at 87–88.} She seemed to be a model citizen for societal cooperation and church-state demarcation; however, in the end, she found herself accused of sorcery and black magic by Cyril and his militia for her studies in Platonism, mathematics, and astronomy.\footnote{303. Dzielska, supra note 301, at 90–91; Watts, supra note 301, at 114; see also G.L. Prestige, Fathers and Heretics 152 (1940) (Hypatia was also accused of impeding the reconciliation of Cyril and Orestes).} For her troubles, a group of Cyril’s loyalists turned their attention to “the pagan woman,” found her on her customary ride in the city, dragged her out of her carriage, took her to a former temple of the emperor’s cult, stripped her and stoned her using broken roof tiles.\footnote{304. Russell, Cyril of Alexandria, supra note 301, at 9; Dzielska, supra note 301, at 93. Accounts of her death vary, with John of Nikiu writing that after she was killed, “she was torn to pieces by the Alexandrians . . . and parts of it scattered all over the city.” The Martyrdom of the Pagan Philosopher Hypatia, Suda On Line 644.5–6 [https://perma.cc/3CEN-VBL2]. Edward Gibbons described her death this way: Hypatia was torn from her chariot, stripped naked, dragged to the church, and inhumanly butchered by the hands of Peter the reader, and a troop of savage and merciless fanatics; her flesh was scraped from her bones with sharp oyster shells, and her quivering limbs were delivered to the flames. Empire 1562 (J.B. Bury ed., 1995).} Dzielska poignantly remarked on the death of Hypatia:

\[\text{[T]he conflict between Orestes and Cyril was concluded in a manner and for a reason known and used for ages: murder for a political purpose . . . . They killed a person who was the mainstay of the opposition . . . who through her authority and political connections provided support for the representative of the state authority in Alexandria contending against Cyril.}\footnote{305. Dzielska, supra note 301, at 94.}

For his effort, Cyril received the honors of being called the man who “destroyed the last remains of idolatry in the city.”\footnote{306. Russell, Cyril of Alexandria, supra note 301, at 9. While scholars remain skeptical as to Cyril’s direct involvement in planning the event, he is generally held responsible for the precipitation that led to her death. Watts, supra note 301, at 117; W.H.C. Frend, The Rise of the Monophysite Movement 16 (1972) [hereinafter Frend, Monophysite Movement]. After all, Cyril did campaign to foment a prejudice against a woman through the exploitation of fear among the uneducated class of loyalists in a political contest for power. Dzielska, supra note 301, at 96–97. And as G.L. Prestige remarked: “People who incite the passions of the rabble cannot escape all blame for what the rabble does when it is roused.” Prestige, supra note 303, at 153.} Importantly, Cyril’s role in the death of Hypatia would be felt profoundly two centuries later when enlightenment figures began to resurrect the death of Hypatia as the embodiment of the dangers of religion. Voltaire characterized her death as the product of religious
fanaticism aimed at enslaving the spirit and rational thought. A half-century later, Edwards Gibbon likewise indicted Cyril in the murder of Hypatia from “jealous eyes,” scolding the duplicitous behavior of the church in withholding punishment for the crime because “superstition [Christianity] . . . would more gently expiate the blood of a virgin, than the banishment of a saint.” Mirroring the language of Socrates, Gibbons wrote how the murder of Hypatia has “imprinted an indelible stain on the character of religion of Cyril of Alexandria.” Feminist publications wrote about her name and legend—painting the incident as “the end of time when women were still appreciated for the brain under their hair.” Feminist poet Ursule Molinaro perhaps encapsulated these sentiments best when she wrote that the murder of Hypatia by “a new brand of Christians, politicians of faith, who lawed independent thought” and offered women a “new role model of depleurized [sic] submission.” Bertrand Russell, in borrowing from Gibbons, described Cyril as a man of “fanatical zeal” and Hypatia as “a distinguished lady, who in an age of bigotry” suffered a gruesome death by “a troop of savage and merciless fanatics.” In being instrumental in the death of Hypatia, Cyril became instrumental in what Edward J. Watts alluded to as the possible “pagan-Christian philosophical consensus” now replaced with a Christian persecution. In the death of Hypatia, we see the hope of cooperation replaced with a “new, intense suspicion of Christian-led institutions.” And Christian-led institutions have been replaced by a bewildered group of fanatical fringe voices who seek power even at the cost of discrediting their religion for generations to come.

The second illustration is a well-known one to modern scholars of law and religion, and it goes to the heart of the issue regarding the roots of disenchantment. It stems from an interracial dating policy at a fundamentalist Christian university that sued the Internal Revenue

308. Id. at 4, 19. Cyril did in fact receive minor sanctions from Rome, but escaped more serious penalties by bribing one of the emperor’s officials. See id. at 95–96; Watts, supra note 301, at 117.
309. Dzielska, supra note 301, at 19.
310. See id. at 12–16 (“Formerly free, intellectually independent, and creative, [women] were suppressed into silence.”).
312. Bertrand Russell, A History of Western Philosophy 368 (1945) [hereinafter Russell, Western Philosophy].
313. Watts, supra note 301, at 119.
314. Id.
Service ("IRS") after the agency revoked its tax exempt status for practicing racial discrimination. In the 1970s, the infamous Bob Jones University prohibited African-American students from engaging in interracial dating and marriage—justifying the restriction on a sincerely held religious belief that the Bible prohibits such behavior. The Supreme Court did not buy that argument. Chief Justice Burger, writing for the majority, was clear: "Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy." Given Bob Jones University’s history of entirely excluding black students until 1971, hardly anyone is still questioning the underlying motive of the school in targeting black students on the basis of identity. The fact that Bob Jones has since apologized for what it called "racially hurtful" policies is indicative of a failure already acknowledged by most.

Thanks in part to the example set by Bob Jones University, advocates for antidiscrimination laws simply refuse to accept the argument that moral complicity—and, by extension, religious liberty—is anything more than a cover for bigotry. Something that the dissenters


316. WITTE & NICHOLS, supra note 155, at 241; Bob Jones, 461 U.S. at 602 n.28. The disciplinary policy went even further in threatening to expel students who joined or affiliated with organizations promoting interracial marriage, and even threatening to expel "[s]tudents who espouse, promote, or encourage others to violate the University’s dating rules and regulations." Bob Jones, 461 U.S. at 581.

317. Id. at 595.

318. Id. at 580.


320. See Joshua J. Craddock, Article, The Case for Complicity-Based Religious Accommodations, 12 TENN. J.L. & POL’Y 233, 272 n.112 (2018) ("[I]t is commonly asserted that protections for religious freedom shelter bigotry."); Gilreath & Ward, supra note 45, at 246 ("[T]he argument that anti-gay discrimination is somehow qualitatively different from antiblack discrimination is . . . a convenient smoke screen enabling bigots to mask their true animus."); Ira C. Lupu, Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights, 7 ALA. C.R. & C.L. L. REV. 1, 17 (2015) ("At a moment of great social change and cultural agitation on issues of same sex intimacy, including ferment within many religious communities, we may be entering a period of increased skepticism about whether any particular employer . . . is acting out of sincere religious conviction, or reflexive, homophobic bigotry."); cf. Steve Sanders, RFRA’s and Reasonableness, 91 INDIANAPOLIS L.J. 243, 259–61 (2016) ("[I]t may be impossible for anyone but the claimant and her lawyer to know for sure whether an asserted religious belief is truly sincere."); Chai R. Feldblum, Moral Conflict and
in the Supreme Court’s same-sex marriage decision were worried would happen, warning “that those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools.”

The outcome in *Bob Jones* requires very little effort to superimpose onto the present context. Just like an organization loses its “charitable” badge of recognition when its activities are “contrary to a fundamental public policy,” so too does the First Amendment no longer protect a public accommodation when its activities are “contrary to a fundamental public policy.” Given the sweeping societal change in favor of LGBT equality and how lower courts have treated the refusal to serve members of the LGBT community as status based discrimina-

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*Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119–20 (2006) (“If individual business owners, service providers and employers could easily exempt themselves from such laws by making credible claims that their belief liberty is burdened by the law, LGBT people would remain constantly vulnerable to surprise discrimination.”). In discussing the history of Christianity engaged in discrimination on the basis of race and sexuality, William N. Eskridge offers an important reminder: “Because the Bible is a treasure trove of quotable but vague admonitions, the prejudiced reader can find support for many biases and stereotypes.” William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 713 (2011) [hereinafter Eskridge, *Noah’s Curse*].

321. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642–43 (2015). Chief Justice Roberts echoed these concerns: “It is one thing for the majority to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share the majority’s ‘better informed understanding’ as bigoted.” *Id.* at 2626 (Roberts, J., dissenting). Professor Laurence Tribe disagrees; however, his analogous correlation between historical racial discrimination and our present baker’s dilemma is instructive: “[A]s a matter of constitutional culture, everything [Justice Alito] says could equally have been said by those whose ‘old beliefs’ told them to exclude African Americans from their lunch counters or to refuse to bake cakes for the weddings of interracial couples.” Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 32 (2015). More severe language that indirectly involves these issues came from California Councilman Al Muratsuchi in discussing a bill that purports to ban goods or services that advocate “sexual orientation change efforts,” asserted that given the progress of science, faith communities need to “evolve with the times.” David French, *Yes, California Is on the Verge of Banning Some Christian Books, Here’s How*, Nat’l Rev. (Apr. 23, 2018), https://www.nationalreview.com/corner/california-bill-threatens-christian-books-and-booksellers/ [https://perma.cc/M73A-PMZA].

tion, importing the language from *Bob Jones* needs little modification: “[T]here can no longer be any doubt that [sexual orientation] discrimination in [public accommodations] violates deeply and widely accepted views of elementary justice.” Advocate have done just that, demanding that requests to discriminate rooted in religion to “be rejected today, just as they were fifty years ago.”

While I have argued elsewhere that the courts are wrong to automatically make the conflation between status- and conduct-based discrimination in public accommodation cases, Professor John Inazu was right when he wrote that even an opportunity to explain such a distinction may do little to assuage members of the LGBT community since “the stigma of exclusion on an individual level can be hurtful and demeaning, regardless of the reason for exclusion.” The negative response to *Masterpiece Cakeshop* and the disenchantment this creates with religious liberty is, therefore, understandable.

Given the importance of religious liberty as a fundamental right central to the American Experiment, the faith community must

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323. *Bob Jones*, 461 U.S. at 592. This line of reasoning was considered by Professor Suzanne E. Eckes regarding the consequences of *Bob Jones* and *Obergefell* to religious schools:

To effectively prevent discrimination on the basis of sexual orientation, the IRS could decide to revoke a private school’s tax-exempt status if the school engages in discrimination. Similar to the decision in *Bob Jones*, such revocation should not violate the Free Exercise Clause because the government has a fundamental interest in eradicating discrimination based on sexual orientation, and that interest should outweigh and override schools’ interests in practicing their religious beliefs to the exclusion of the employment of LGBT persons.


324. Melling, *supra* note 45, at 185; see also Velte, *supra* note 45, at 54 (stating that a failure to enforce state antidiscrimination laws will “turn America into a theocratic state, or a collection of theocratic mini-states, governed by the very narrowest of religious points of views.”).

325. See Sorkin, *supra* note 34.

326. John D. Inazu, *A Confident Pluralism*, 88 S. Cal. L. Rev. 587, 603 (2015); see also Feldblum, *supra* note 320, at 119 (“If I am denied a job, an apartment, a room at a hotel, a table at a restaurant or a procedure by a doctor because I am a lesbian, that is a deep, intense and tangible hurt. That hurt is not alleviated because I might be able to go down the street and get a job, an apartment, a hotel room, a restaurant table or a medical procedure from someone else. The assault to my dignity and my sense of safety in the world occurs when the initial denial happens.”).

327. See Witte & Nichols, *supra* note 155, at 1–6. A relevant recent decision shows the potential reach of RFRA to allow sex-discrimination based on sincerely held religious beliefs. See Hersh, *supra* note 145, at 278–80. In the case, the Eastern District Court of Michigan held that RFRA prevented the Equal Employment Opportunity Commission (“EEOC”) from enforcing Title VII against the funeral home when the home’s owner fired a transgender employee for dressing in accordance to her gender identity, believing that allowing such conduct would directly involve himself “in supporting the idea that sex is a change-
take better efforts to protect this sacred privilege through sound public policy measures and collective action toward peacebuilding. We discuss this next, including how both sides can help mend the divide.

4. Building on Moral Complicity and Double-Vision Toward Gestures of Repair

Getting back to our discussion on moral complicity or moral action, Christopher Kutz provided us a helpful starting point for reconciliation based on the confluence of mindful individual acts in the context of a wider social milieu—an engagement in individual “participatory intention” as part of a collective action.328 His communal harm from individual acts idea engaged the question regarding how moral agents should respond from the vantage point of both prospective and retrospective vision.329 From our earlier discussion concerning the historical oppression of gay communities and the related harm of stigmatization (looking back) and optical disenchantment (looking ahead), Kutz teaches us that moral action in response to concerns over moral complicity must account for the role those actions have on the broader community and must not be merely based on individualistic conceptions of normative mandates. Kutz explained: “[T]he moral responses agents warrant manifest the complexity and specific character of their moral and social relations to others, as refracted through the perspective of the particular respondent.”330

While outsiders may sense the response from members of the LGBT community is exaggerated when a single business refuses to entertain a particular request, they must also recognize that the relationship between the faith and equality communities is rife with a complicated history marked by bigotry that has similarities with the present conditions.331 As Kutz noted: “[R]esponses to . . . actions flow principally from [an] assumption about the sentiments expressed by


329. Id. at 11.
330. Id. at 49.
331. The idea of the “positional dependence of accountability” goes to “the way that individuals’ various perspectives on and relations to harms inflect the responses they give and are warranted in giving to those harms.” Id. at 64–65.
... conduct, not the consequences produced by it.”

Peter Strawson elaborated further by discussing two categories of responses to a corresponding harm that helps us realign the way we approach another. The first is based on an awareness that the harm-causing agent was behaving in accordance with the attitudes and intentions that we would demand from him, thus “invit[ing] us to see the agent as other than a fully responsible agent.” The second requires the adoption of an objective attitude toward the agent deemed psychologically abnormal in what Strawson described “as an object of social policy” or as an object of “treatment” to be “managed or handled or cured or trained.”

Too often, the faith and equality communities confuse the proper conduct of our responses by treating the other as part of the second group of agents needing “treatment” instead of the first inviting understanding. If the LGBT community can seek to discover the underlying attitudes motivating those like Jack Phillips, then we may soon find their reactions transformed for the better—if for no other reason than to engage in a collaborative process of offering gestures of repair in not filing lawsuits or seeking out problematic bakeries.

If the Christian community would only seek to understand better the dignity attached to the identities of the LGBT community instead of merely seeing their conduct as a deviant form of sexual license, they too can find a means toward a shared existence without the fear of “pollution” and the need to file preemptive challenges that signal a standing rejection of any future reconciliation.

Of course, this is entirely hinged on the assumption that the relationship is worth preserving and that the state abstains from unilaterally trying to rectify perceived wrongs—in the process making individual restraint by gay couples meaningless. In some of the

332. Id. at 28. “According to Strawson, our practices of accountability are made up of natural patterns of emotional reaction, or ‘reactive attitudes,’ to the welcome and unwelcome attitudes of others manifested in their conduct towards us.” Id. at 27.


334. Id. at 77–78.

335. Id. at 79.

336. See Kutz, supra note 328, at 28.

337. See id. at 59 (“[I]f the accountability system has a point chiefly in terms of the goods it promotes, then we must act with a reflective conception of those goods, specifically a conception of the relations worth wanting. Perhaps we can display power in forgiveness.”).

338. See id. at 63 (“[L]egal responses can only be seen as warranted by a particular set of social and moral relations, and the distorting effect that individual wrongs or harms have on these relations.”).
cases mentioned above, the gay couples, mindful that the conduct of the business owners is not rooted in animus, are nevertheless forced to involve themselves in a lawsuit, brought by the state, in an act of “righteous indignation” based on “the mere fact that another has acted wrongfully.”339 We see this in the case involving Barronelle Stutzman, where the gay couple only joined in the suit after the State of Washington decided to intervene.340 The danger this creates is put well by Kutz when he wrote: “When legal institutions assume the partialist position of the victim and the posture of resentment, the rights and liberties of defendants are severally compromised.”341 This only replaces the sense of marginalization of one group with another, driving the new group deeper into incorrigible entrenchment and creating an increasing distance between already estranged communities.

And, finally, the same goes for the faith community. Mindful of the historical underpinnings, the faith community can respond accordingly as a form of “collective responsibility”342—having now the advantage of understanding the moral complicity as insiders and the optical disenchantment as outsiders. The faith community now strives for accountability, not in ignorance or wanton invitation for exploitation, but in spite of it. (And certainly not in empty gestures of contribution to score political points in the court of public opinion.) When Kutz invited Nietzsche’s suspicions concerning the exploitation of blame, he noted the need to avoid paralyzing ourselves from the good that institutions of accountability provide and the gains from a collective endeavor.343 Kutz’s capable repurposing of Nietzsche’s words makes the point well: The behavior envisioned is a mark of those “strong, full natures in whom there is an excess of the power to form, to mold, to recuperate and to forget.”344 While accountability may not suffice to mend the relationship, it should still be pursued through

339. See id. at 32–33 (“[A] moral response is defined by the moral relationship between the respondent and the agent, and how the response changes as the relationship changes.”).
340. Brief of Appellants at 13–14, State v. Arlene’s Flowers, 2015 WL 11110491 (Wash. Oct. 16, 2015) (noting the Attorney General allegedly learned about the underlying facts through a media report). According to Stuzman, she told one of the men that she felt terrible that she couldn’t share this day with him and that he understood—then, he got the names of other flower shops in the area, gave Stutzman a hug, and left. Id. at 43. But see State v. Arlene’s Flowers, Inc. at 9, 2015 WL 720213 (Wash. Super. Ct. 2015) (noting that he was “upset because he had thought Stutzman would ‘do [his] flowers’”).
341. Kutz, supra note 328, at 64.
342. Id. at 28.
343. Id. at 58–59.
344. See id. at 58 (“Far better would be to note the wrongs we commit and those committed against us—note them, learn from them, and move on.”).
gestures of repair held together by our shared intention for reconciliation and our shared recognition of the importance we attach to another’s interests within the community.345

For the time being, the gestures themselves serve to supplement my primary aim here, which is to cultivate a willingness from both communities toward meaningful reconciliation through permissive compromise tethered to the authentic expression of faith and LGBT identity—not rooted in guilt and contrition-wielding rhetoric but in acknowledging the importance of the other and their corresponding sense of pain in society. For both sides should bend toward the light of legal developments in an act of legal tropism—not waiting to see the outcome of the next election but acting today as the keeper of the other’s individual liberties. What a moment it will be if the Christian community begins to advocate for laws that protect against sexual orientation discrimination in employment, while the LGBT community willingly concedes to exempt religious convictions from those same laws!

Having the unique position of being a Christian and a lawyer, I continue this discussion speaking to the respective faith community by looking deeper into this practice of making new discriminations by reference to Matteo Ricci’s voyages to China.346 Here we build on everything discussed above in a final push to bolster our understanding of permissive compromise.

C. The Accommodation Strategy (LEVEL THREE)

To summarize what we’ve discussed so far: This Article advocates for the faith community to renew their understanding of the role of moral complicity by wrestling with the theological scales of participation and the value of aligning themselves with outsiders—to cast aside fear of “pollution”347 by association, and to embrace the LGBT community in an act of peacebuilding; to create a shared space by offering the first fruits of a permissive compromise in the political arena by grafting carefully guided paths based on the double-vision as insiders (keen on remaining unique) and outsiders (mindful of the damage

345. Id. at 142–43. To appropriate a line from Kutz into a commentary on culture: “While differential degrees of responsibility might be assigned for instrumental reasons—little can be done about the weather.” Id. at 51. “Responses are warranted to what we do and who we are, not because of some deep metaphysics of causal responsibility, but because of what our actions and gestures of repair indicate about the view we take of our relations with others.” Id. at 139.
347. See supra Section II.
done to religion and religious liberty by legal strategies rooted in categorICAL non-service); to extend themselves beyond their walls of self-interest and challenge the established psychology of peace based, no longer on imposing favorable terms, but on mutual benefits. While this only forms the starting point to a reformed psychology of interest and community, the next logical step is to carry this vision into the legal world by embracing a culture of mediation instead of incessant legal challenges.

The final step for this Article is to discuss the outlines of this compromise and the need to remain grounded as a faith community in light of alertness, patience, and worship. And so, we arrive at Charles Taylor and his lecture at the University of Dayton, where he offered indispensable remarks in the lessons from the life of the Italian priest, Matteo Ricci, in his missionary work with China from 1582-1610. In seeing a man immersed in a civilization “built largely in ignorance of the Judeo-Christian revelation,” Taylor invites us to the process of adaptation rooted in the “difficult task of making new discriminations: what in the culture represents a valid human difference, and what is incompatible with Christian faith.”

1. Toward New Discriminations

The idea of forming “new discriminations” borrows from the above discussed cases on moral complicity and considers a better path to engage in dialogue with LGBT members instead of refusing products and services.

Matteo Ricci was a Catholic missionary sent to China in 1582 in what was deemed to be a mission with perils unending and essentially zero precedent for success. He became the subject of the “first significant encounter between European and Chinese civilization,” serving as a bridge in opening cultural dialogue between the East and the West in his keen ability to “accommodate and learn from [the] mystifying oriental culture” that saw itself superior to everyone else. His

348. Taylor, supra note 346.
349. Id. at 16.
351. Ambrose Mong, Accommodation and Acceptance 7–8 (2015). Mong explained that the process of inculturation was a historical practice used during the patristic period. As such, “by adapting Christianity to Chinese culture, Ricci was simply following in the footsteps of Justin, Athenagoras, and Clement of Alexandria.” Id. at 8. See also Frend, Early Christianity, supra note 71, at 63. Harking back to the early church, W.H.C. Frend wrote: “Absorption and adaptation were to mark the progress of the church both in east and west
life is less important for this Article. What is important is the psychology of his approach and, in particular, the way he was able to bend to his circumstances as that prototypical image of adaption for Charles Taylor—that “great attempt” to advance a universal faith in a culture profoundly at odds from his own; that ability to come to the table of the modern culture in an effort to synthesize its established rooting without vitiating the essentials of the Christian tradition. He did not merely wait for the other to sit at our table, but had the courage to sit down at theirs.

What Taylor sees in the Ricci Project adds further layers to our above discussion on the central versus periphery doctrinal convictions as a means to embrace the shared spaces of cultural differences. Instead of a rigid and dangerous arranged matrimony of the faith to the culture, the faith community must “struggle to make a discernment,” to follow in the example of Ricci and “see what in modern culture reflects its furthering of the gospel, and what its refusal of the transcendent.” This requires an ability to use the governing institutions to better serve others, instead of using them as instruments for building a culture in our own image. For his part, Ricci made remarkable use of the Chinese language and his mnemonics system in the effort to provoke discussions of the Christian faith—appropriating the language of the culture and its use of images to advance his Christian so long as it remained predominantly urban. In the last quarter of the second century, however, an observer would have noted signs that Christianity in the countryside might not follow the same pattern.” In the third century, the Church became respected and respectable . . . . Social and political ideals moved further away from gospel preaching with the new status achieved by the church . . . . The church filled a gap in public welfare which the empire no longer had the will nor the resources to sustain. The aim remained, however, to provide individual salvation for its members and not the reform of the body politics.

Id. at 66. Instead of engaging in the culture wars and attempting to Christianize the body politics through legislative and legal measures, the faith community should spend their energy promoting, e.g., awareness of persecution across the world, engaging in prison reform, and providing educational opportunity in lower-income neighborhoods. A type of “practical idealism” where an elastic faith grounded in tradition is able to spread across communities as a neutral voice for reconciliation. Id. at 71.

353. Taylor, supra note 346, at 84–85. Ricci always kept in mind who he was and why he was in China—needling to adapt his accommodation tactics “only for the purpose of confronting and overcoming obstacle of his evangelical mission.” Yu Liu, Seeing God Differently: Chinese Piety and European Modernity, 45 HIST. RELIGIONS 29, 30, 31 n.6 (2005) [hereinafter Liu, Seeing God].
354. Halik, supra note 292, at 55.
355. Taylor, supra note 346, at 17, 36.
goal of conversion. He was able to “use his scientific knowledge to communicate with a civilization eager to learn from the wise man from the West.” In short, he was able to use modern tools to open the way for ancient truths.

In one example of linguistic shrewdness, Ricci, while teaching his mnemonics system, suggested using the image of the Chinese ideograph for ten for every tenth image placed in the memory palace; which, when written in Chinese, appears as a cross (†). In other instances, Ricci modified the stories of the Gospel in order to connect its fundamental teaching with the only heuristic devices he had available. In another, Ricci appropriated the title for his book (“paradoxical man”) from the Taoist classic, the Zhuangzi. In another, Ricci delved into the fields of science and innovation with the intended effect of teaching on the frailty of human endeavor apart from some understanding of God’s grace. In another, Ricci allowed the practice of ancestor worship in order to facilitate communication and conversion.

When it comes to optical disenchantment, Ricci learned from an outsider’s perspective that his early attempts of appropriating the appearance of a Buddhist Monk proved counter-productive because “Buddhist monks had a very low social standing, and any association with them in the public perception made it more difficult for him to gain Christianity the kind of respect that he need for his evangelical

356. See Spence, supra note 273, at 3, 23 (“Ricci hoped that once the Chinese learned to value his mnemonic powers they would be drawn to ask him about the religion that made such wonders possible.”). This is similar to what Halik said of St. Thérèse de Lisieux, who “[t]hrough her solidarity with unbelievers” was able to “conquer[ ] new territory (along with its inhabitants) for a church that has previously been too closed.” Halik, supra note 292, at 34.

357. Møng, supra note 351, at 10.

358. See Spence, supra note 273, at 23.

359. See id. at 60–64.

360. See id. at 127. In the same vein, Ricci would appropriate Chinese classical teachings to get the audience to conceptualize ideas of divinity and push them toward Christian ideals while avoiding any emphasis to the sharp differences between Chinese and European conceptions of religion and philosophy. See Liu, Seeing God, supra note 353, at 33–38. Yu Liu wrote: “To conduct his evangelical work through accommodation rather than open confrontation, Ricci announced to the world that the Chinese deity had affinity with the Christian God, but it was a tactic rather than a conviction.” Id. at 38.

361. See Spence, supra note 273, at 149.

362. See Paul S. Chung, Mission and Inculturation in the Thought of Matteo Ricci, in Asian Contextual Theology for the Third Millennium 303, 322–23 (Paul S. Chung et al. eds., 2007) (recommending that those who converted to Christianity replace the custom with “alms for the poor and for the salvation of souls”).
work [e.g. as an insider].” He made the necessary adjustments by refashioning himself as a Confucian scholar and working toward developing a system for adapting his insider mission to the mold of the world outside. At the same time—harking back to the three concepts introduced by O’Donovan—Ricci knew that he could not simply blend in; he also needed to stand out. What he needed to do, described by Yu Liu, was to “differ from the Confucian scholar—while appearing in solidarity with them . . . to make as an admirer of Confucius and as a defender of Chinese philosophical and religious orthodoxy.”

Such tactics would almost certainly repel those who would allow no space for the reformation of the Christian faith into our modern culture. But, as secular and religious society drifts further and further apart, the example of Ricci as a “venerable bridge between two civilizations” can help us mend the divide to the point where we can at least hear one another. From Ricci, we see the confluence of the concept of optical disenchantment as well as the application for legal tropism.

The good news is that this capacity to bridge divides between the LGBT and faith communities is a less daunting task than what Ricci was required to do in minimizing his discussion of the mysteries and revelations of the faith to escape accusations of superstition. While

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364. See id. at 467 (“Even when [Ricci] dressed himself in 1583 as a Buddhist monk, he already desire and willingness to adapt, but when he refashioned 1595 as a Confucian scholar-official, he revealed in addition acquired sense of how accommodation could be best utilized evangelical purposes.”).
365. See id. at 469. Some of the things he did to stay distinct was: (1) rejecting Buddhism and Daoism so that Christianity would not become confused with those ceremonies and dogmas, and (2) imitating Confucians in his reappraisal of history and tradition while “carefully manipulating the canonical works of early Confucian masters against the exegetes of later commentators.” Id. at 470; see also Chung, supra note 362, at 309, 316–18 (stating that he “[1] utilized the Catholic doctrines as a complement to Confucianism . . . . [2] interpreted the Catholic doctrines to transcend and transform the Confucian ones . . . . , and [3] made some revisions of the Catholic doctrines and sought for concordance with the Confucian ones”).
367. Paul S. Chung described the questions raised by the missionary work of Ricci in terms of “how to effectively communicate between two cultural traditions with different backgrounds.” Chung, supra note 362, at 305.
368. Liu, Intricacies of Accommodation, supra note 363, at 480.
both communities have fundamental differences in respect to marriage and sexual ethics, much remains in common in the realization of the others’ humanity and participation in society. Christians need to educate themselves on the history of LGBT treatment in this country in order to fully embrace the intransigence of the other side when they sense their recently acquired badge of acceptance is being revoked through the language of condemnation. Ricci himself developed his mission-model having witnessed the intolerance of the Portuguese colonizers in India when the inquisition burned seventeen at the stake after parading them through the streets in “tunics impregnated with sulphur.”

2. Making the Ricci Strategy Work Today

Adding to the ideas of making new discriminations looms the how question. One of Ricci’s keys to success was to convince the Chinese that he maintained a sincere “desire for a complementary relationship between Christianity and Confucianism.” It is no wonder that his first written work in Chinese covered the subject of friendship, where Ricci spoke about its capacity to bridge the economical divides and find a spiritual purpose in communion with another. When it comes to embracing the humanity and identity of the LGBT community, the faith community should follow in the example of Ricci by first learning their culture and extending in friendship those formerly outcast members of society with a sincere desire for complementary relationships between the communities. As Martha

369. Tomáš Halík is helpful in his book Patience with God in discussing the process to bridge the divides between the inside (church) and outside communities. Halík, supra note 292. Discussing Zacchaeus in Luke 19, Halík explained: “The only person capable of addressing Zacchaeus, however, is someone for whom those people hidden in the branches of a fig tree are not strangers or aliens—someone who doesn’t disdain them, who has concern for them, someone who can respond to what happens in their hearts and minds.” Id. at 4.

370. See Mong, supra note 351, at 11–13 (“[Ricci embrace[d] modo soave—the gentle method—when dealing with his hosts’ culture.”). Ricci took after the model of Alessandro Valignano, who was “convinced that the missionaries should learn the language of the country which they were to work, study its way of life, adapt to the local customs, and respect the local traditions unless they proved repugnant to Christian morality.” Fontana, supra note 350, at 27–28 (emphasis added). “Generally known as cultural accommodation, this missionary policy was considered avant-garde at that time and was rejected by Rome during the Chinese Rites controversy.” Mong, supra note 351, at 13.

371. Liu, Intricacies of Accommodation, supra note 363, at 479.

372. Mong, supra note 351, at 17.

373. Martha Nussbaum wrote: “It is possible to view another human being as a slimy slug or a piece of revolting trash only if one has never made a serious good-faith attempt to see the world through that person’s eyes or to experience that person’s feelings.” Martha
Nussbaum noted: “To see the inequality, one must first see the person.”

Regarding serving the LGBT community in light of legal changes on anti-discrimination laws, the ideals of legal tropism allows the faith community to take on their own accommodation project with the changing whims and accomplishments of modernity. The Russian painter, Mikhail Gorshunov, has a remarkable painting of his imagined Tower of Babel that serves as a fitting illustration of the ideals of legal tropism—the capacity to bend to the light of legal change, while retaining the distinctive flowering rooted in the soil of foundation. In it, you can see a tower firmly rooted in the ground as it extends itself towards the outer fields of a pagan countryside—allowing for pragmatism and conservation, for foundationalism and progress.

![Mikhail Gorshunov, Tower of Babel](image)

C. Nussbaum, From Disgust to Humanity xvii (Geoffrey Stone ed., 2010) [hereinafter Nussbaum, From Disgust].

374. Id. at 49.

375. Taylor, supra note 346, at 85.

376. Mikhail Gorshunov, Tower of Babel. I own this painting and the artist has given me permission to use the image.
The summation of legal tropism as an ideal is explained well in the advice of Tomáš Halík: There is a need for “eyes that look progressively ahead, feet that stand firmly on the soil of tradition, hands that intervene actively in the world’s affair, and attentive, hearing ears that silently and contemplatively listen to the beating of God’s heart.”\textsuperscript{377} Or, to borrow one court’s description of the common law, the ideals of legal tropism must be “a living, growing body, cautiously flexible enough to meet new conditions but firmly tied to the precepts of the past.”\textsuperscript{378} This is a task requiring a dynamic course of action rooted in the soil of the Christian identity and the common humanity of LGBT-members. An ability, plainly put, to adapt to cultural phenomena instead of forming public policy using reactionary measures.

Speaking on German codes that criminalize the denial of the Holocaust, Oliver O’Donovan offered this important insight: “[F]uture deliberation must be built on an unambiguous judgment on . . . past roles.”\textsuperscript{379} A discussion must be driven by a corresponding desire to meet the other individuals halfway. Jonathan Rauch was right when he said that only when the faith and equality communities learn to detach themselves from the zero-tolerance paradigm of their own making can they meaningfully begin a dialogue that acknowledges the particular needs of opposing sentiments.\textsuperscript{380} The gay and the religious communities alike should learn to embrace what Martha Nussbaum called the “politics of humanity,” thereby “imagining how the world looks through that person’s eyes,” and extend to others the deserving level of respect as an “equal fellow citizen, trying to achieve a variety of purposes in American society.”\textsuperscript{381} As Nussbaum wisely added, this process does not require that you necessarily approve of or respect their conduct—it requires only that you see them as another “human being of equal dignity and equal entitlement pursuing a wide range of human purposes.”\textsuperscript{382}

To allow individual distinctiveness and differences to remain present while calling for mutual fellowship in understanding one another should be the goal. As Elshtain wrote, we should strive for understanding “through principle[s] of charitable interpretation that helps us to see, to hear, and to understand others.”\textsuperscript{383} In other words, we should

\begin{itemize}
\item \textsuperscript{377} Halík, \textit{supra} note 292, at 79.
\item \textsuperscript{379} O’Donovan, \textit{Common Objects}, \textit{supra} note 191, at 35.
\item \textsuperscript{380} See Rauch, \textit{supra} note 267, at 1206.
\item \textsuperscript{381} Nussbaum, \textit{From Disgust}, \textit{supra} note 373, at xvii–xviii, 48–49.
\item \textsuperscript{382} \textit{Id.} at 51.
\item \textsuperscript{383} Elshtain, \textit{A Catholic Modernity?}, \textit{supra} note 5, at 99.
\end{itemize}
strive to mediate between distant neighbors by extending oneself through gestures of repair—acts of contrition rooted in a true personal conviction for the well-being of the other. We should no longer seek selfish ambition, but seek mutual profit. This begins with a reformed psychology and newly formed discriminations on matters of moral complicity and peacebuilding. It ends with a renewed legal approach in engaging cultural differences.

VII. Conclusion

While Christians must remain vigilant in their pursuit of holiness, they must also remain vigilant of the underlying purpose of being witness to the world and avoid the creation of exclusionary communities in the effort to avoid the stain of “pollution” from pagan rites. As Taylor wrote, the danger we must avoid is the danger of not being “sufficiently bewildered” in thinking that “we have it all figured out from the start and know what to affirm and what to deny.” Ricci’s shrewd accommodation strategy helped him break into an otherwise hostile environment while remaining distinct in constant remembrance that—in this life—he remains a foreigner. Pope Gregory I, likewise, in his letter to Augustine, harked on the necessity for contextualizing the Gospel and recommending using heathen temples for spreading the Gospel to England. The faith community should

384. One should reconsider the analogy of “pollution” as made worse, not through participation, but through stigmatization, as Andrew Koppelman explained: “As with racism, the stigmatization of gays is so deeply rooted in American culture that it is probably necessary to construct this kind of counter-taboo in order to respond to it. In each case, the aim is to induce citizens to regard the relevant prejudice as itself ritually unclean.” Koppelman, supra note 261, at 1164–65.

385. TAYLOR, supra note 346, at 17, 36.

386. As Liu mentioned, what makes it remarkable is that Ricci’s “particular accommodation as a proselytizing strategy was utterly unworkable its own terms but actually worked in the very unusual social and political circumstances of the late Ming Dynasty.” Liu, Intricacies of Accommodation, supra note 363, at 479.

387. See id. at 470.

388. See CHUNG, supra note 362, at 318; see also Flora Spiegel, The Tabernacula of Gregory the Great and the Conversion of Anglo-Saxon England, 36 ANGLO-SAXON ENGLAND 1–13 (2007); George Demacopoulos, Gregory the Great and the Pagan Shrines of Kent, 1 J. LATE ANTIQUITY 353 (2008). Robert Markus adds this keen insight to the psychological adapting of Gregory I when he received new reports from English missionaries: As he considered their reports, which no doubt enabled him to appreciate the tenacity of popular paganism against which the Christian court could achieve little, and that only slowly, he came to see the situation more clear. His second thoughts are contained in the famous letter which he despatched [sic] post-haste after abbot Mellitus, already in Gaul, on his way back. It shows a wholly new approach, effectively countermanding the orders he had given only a few weeks
learn to do likewise in their unique context by remaining bewildered and convinced to take a stance of patience in the face of plurality.389 And so too the LGBT community should strive to welcome a discussion toward a common recognition of joint interests with the community of faith in order to find a common place for living together. We should embrace the words of Walt Whitman in striving to expand our shared experiences and “accept[ing] nothing which all cannot have their counterpart of on the same terms.”390 In the words of John F. Kennedy: “[I]f we cannot end now our differences, at least we can help make the world safe for diversity.”391

before. Deep-root assumptions suddenly give way under the pressure of a new situation. His pastoral imagination and realism could discard the settled habits of years. We can observe here an important ingredient of the theology of the Christian Empire suddenly yielding to the pressures of the moment.

389. O'DONOVAN, COMMON OBJECTS, supra note 191, at 69.