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INCONVENIENCE OR INDIGNITY? RELIGIOUS EXEMPTIONS TO PUBLIC ACCOMMODATIONS LAWS

Marvin Lim & Louise Melling†*

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public¹

—Senate Commerce Committee Report
on the Civil Rights Act of 1964

To be sure, gays and lesbians also suffer serious economic injustices But far from being rooted directly in the economic structure, these injustices derive instead from the status order, as the institutionalization of heterosexist cultural norms produces a class of devalued persons who suffer economic liabilities as a byproduct. The remedy for the injustice, consequently, is recognition, not redistribution.²

—Nancy Fraser, The Tanner Lectures

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¹ S. REP. NO. 88-872, at 2370 (1964).

² Nancy Fraser, Professor, New Sch. For Soc. Research, Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation, Tanner Lectures on Human Values, Delivered at Stanford University 14 (April 30–May 2, 1996), *in* THE TANNER LECTURES ON HUMAN VALUES, *available at* http://tannerlectures.utah.edu/_documents/a-to-z/f/Fraser98.pdf.

INTRODUCTION

States are increasingly recognizing the right of LGBT individuals to live free from discrimination. Across the country, more and more state laws are prohibiting discrimination in public accommodations based on sexual orientation or gender identity. Confronted with these laws, some businesses have refused to comply, invoking the owners' religious objections. As a result, inns,³ cake shops,⁴ and florists⁵ are closing their doors to customers because of these customers' sexual orientation.⁶

Invariably, these refusals to provide service come at the expense of the dignity of LGBT individuals. This harm is clear from the words of those refused service because of their sexual orientation. For example, "[i]t is hurtful to see that we are less welcome than the family dog," stated a lesbian couple refused a room at a Vermont inn.⁷ Another gay couple emphasized the "shock and hurt" they experienced after being turned away by a florist in Washington State.⁸ "I was devastated . . . I was crying," explained a lesbian in New Jersey as she described the aftermath of being sent out of a bridal shop.⁹ "I can't tell you

³ *E.g.*, Anne-Marie Dorning, *ACLU: Wildflower Inn Sued Over Refusal to Host Gay Wedding*, ABC NEWS (July 20, 2011), <http://abcnews.go.com/US/vermont-inn-sued-refusal-host-gay-couples-wedding/story?id=14110076>; see also *Baker and Linsley v. Wildflower Inn*, ACLU (Aug. 23, 2012), <https://www.aclu.org/lgbt-rights/baker-and-linsley-v-wildflower-inn>; *Cervelli v. Aloha Bed & Breakfast*, LAMBDA LEGAL, <http://www.lambdalegal.org/in-court/cases/cervelli-v-aloha-bed-and-breakfast> (last visited Feb. 17, 2014).

⁴ *E.g.*, Katie McDonough, *Oregon Baker Denies Lesbian Couple a Wedding Cake*, SALON (Feb. 4, 2013), http://www.salon.com/2013/02/04/oregon_baker_denies_lesbian_couple_a_wedding_cake.

⁵ *E.g.*, Manuel Valdes, *Florist Sued for Refusing Service to Gay Couple*, ASSOC. PRESS (Apr. 18, 2013), <http://bigstory.ap.org/article/florist-sued-refusing-service-gay-couple>; see also *Ingersoll v. Arlene's Flowers*, ACLU (Oct. 11, 2013), <https://www.aclu.org/lgbt-rights/ingersoll-v-arlenes-flowers>.

⁶ See also Fraser, *supra* note 2, at 14 (discussing the "serious economic injustices" suffered by gays and lesbians).

⁷ Dorning, *supra* note 3.

⁸ Valdes, *supra* note 5.

⁹ Ronnie Polaneczky, *Store Dresses Down Bride for Being a Lesbian*,

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how much it hurt to be essentially told, ‘we don’t do business with your kind of people,’” said a woman who, along with her long-term girlfriend, was denied accommodations at a hotel in Hawaii.¹⁰ “We don’t want anyone else to experience that and [be] made to feel like they have no place in society,” she continued.¹¹ “It still stings to this day.”¹²

As suggested in these statements and in the Senate Commerce Committee Report on the Civil Rights Act of 1964 quoted earlier, discrimination harms a person’s dignity. Yet this harm has been given little voice in the debates over religious exemptions to laws prohibiting discrimination in public accommodations. Proponents of exemptions have typically framed religious objectors’ compliance with LGBT antidiscrimination laws as pitting one person’s religious conscience against another person’s mere inconvenience and mild sense of offense.

This Article does not question the harm a person experiences when required to comply with a law that conflicts with his or her religious beliefs—that harm, whether or not it is legally cognizable, is real. Rather, this Article aims to shed light on what has been less articulated and appreciated: the dignitary harm that results when businesses turn away LGBT individuals based on the owners’ religious beliefs. Part I discusses how some proponents of religious exemptions, understating or overlooking the deeper harm at stake, frame the debate as one of religious conscience versus customer inconvenience. Part II shows how the U.S. Supreme Court has long recognized the dignitary harm inflicted by discrimination and the critical role antidiscrimination laws play in preventing that harm. Part III illustrates that, in the transnational debate, the courts of other countries have repeatedly recognized the dignitary harm of discrimination against LGBT people, even in the face of competing religious liberty claims.

PHILLY.COM (Aug. 18, 2011), http://articles.philly.com/2011-08-18/news/29900898_1_bridal-shop-dresses-gay-marriage.

¹⁰ *Lambda Legal Files Lawsuit on Behalf of Lesbian Couple Rejected by Hawaii Bed & Breakfast*, LAMBDA LEGAL (Dec. 19, 2011), http://www.lambdalegal.org/news/hi_20111219_lambda-legal-files.

¹¹ *Id.*

¹² *Id.*

Finally, Part IV argues that, as American courts and legislatures now consider the scope of protections for LGBT people in antidiscrimination laws, they must give weight to the harm to dignity as they have in other contexts. Accordingly, they should reject calls for religious exemptions to public accommodations laws that protect LGBT people.

I. REFUSAL OF SERVICE: A MERE INCONVENIENCE?

Proponents of religious exemptions have argued that refusals by businesses to serve LGBT people cause little harm if the individual can obtain the services elsewhere. Accordingly, they frame the issue of compliance with laws prohibiting sexual orientation-based discrimination as pitting customers' inconvenience against a much deeper harm to business owners: a burden to their religious beliefs. Among the most prominent and representative of these proponents are Professors Doug Laycock and Thomas Berg. In the book, *Same-Sex Marriage and Religious Liberty*, Laycock characterizes the harm generated by not allowing for religious exemptions as "forcing the merchant to violate a deeply held moral obligation."¹³ Similarly, Berg emphasizes that the harm to religious merchants would cut to the core of their being, since religious beliefs "affect virtually all of the defining decisions of personhood."¹⁴

The harm to those turned away from businesses is far less, according to Laycock and Berg. They characterize this harm as "the insult of being refused service and the inconvenience of going elsewhere."¹⁵ It should be unsurprising, then, that they would deny religious exemptions "only in cases of concrete, tangible hardship," where the customer will struggle to secure similar services elsewhere.¹⁶ But in "the large majority of cases,"

¹³ Douglas Laycock, *Afterword to SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS* 189, 197 (Douglas Laycock et al. eds., 2008).

¹⁴ Thomas C. Berg, *What Same-Sex-Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 215 (2010).

¹⁵ Laycock, *supra* note 13, at 197.

¹⁶ Berg, *supra* note 14, at 229; *see also* Laycock, *supra* note 13, at 198.

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Berg argues,¹⁷ there will be no such hardship, considering particularly that “the large majority of gay couples” live in urban areas where presumptively there are more vendors.¹⁸ Laycock even goes so far as to say that he “would have no objection to a requirement that merchants that refuse to serve same-sex couples announce that fact on their website or, for businesses with only a local service area, on a sign outside their premises.”¹⁹ Such signals, Laycock argues, would avoid “unfair surprise,” which presumably exacerbates any inconvenience that an LGBT person experiences.²⁰

Laycock and Berg do concede imperfections with their approach, including the idea of harm beyond the potential transaction costs. Laycock argues:

From the gay rights perspective, discrimination gets a certain legitimacy, and in the worst case, the stream of commerce might be sprinkled with public notices of discriminatory intent. In more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago. All of this is true, and in some parts of the country it would be very real²¹

In the end, though, Laycock finds these concerns to be insufficiently alarming, arguing that “in most cities, such problems would be minimal.”²² Berg reaches the same conclusion:

Denials of service do affect gay couples by causing them disturbance, hurt, and offense. While acknowledging that harm, one must also acknowledge, I think, that the harm to the objector from legal sanctions is greater and more concrete.

¹⁷ Berg, *supra* note 14, at 229.

¹⁸ *Id.* at 233.

¹⁹ Laycock, *supra* note 13, at 198.

²⁰ *Id.*

²¹ *Id.* at 200.

²² *Id.*

In most cases, the offended couple can go to the next entry in the phone book or the Google result. The individual or organization held liable for discrimination, by contrast, must either violate the tenets of her (its) faith or else exit the social service, profession, or livelihood in which she (it) has invested time, effort, and money. One simply has not given the religious dissenter's interest significant weight if one finds that offense or disturbance from messages of disapproval [is] sufficient to override it.²³

As Laycock and Berg have jointly stated, denying religious exemptions

threatens serious harm to a religious minority while conferring no real benefits to same-sex couples. Same-sex couples will rarely if ever actually want such personalized services from providers who fundamentally disapprove of their relationship, and they will nearly always be able to readily obtain these services from others who are happy to serve them.²⁴

The approach advocated by Laycock, Berg, and others who adhere to similar arguments has faced no shortage of critique. Much of this critique, however, focuses on the inaccuracy of their economic arguments, most often disputing the contention that LGBT people turned away will usually have no trouble

²³ Berg, *supra* note 14, at 229.

²⁴ Letter from Douglas Laycock, Professor of Law, Univ. of Va. Sch. of Law, et al. to Tom Cross, Ill. State Rep. (Mar. 12, 2013), *available at* <http://mirrorofjustice.blogs.com/files/illinois-republicans-2013.pdf>; *see also* Douglas Laycock et al., Op-Ed., *Gay Marriage Bill Should Be Passed After More Religious Liberty Protections Are Included*, HAW. REP. (Oct. 28, 2013), <http://www.hawaiireporter.com/gay-marriage-bill-should-be-passed-after-more-religious-liberty-protections-are-included/123>; Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. (forthcoming 2014) (manuscript at 35), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304427 (arguing that denying religious exemptions confers no real benefit to LGBT people, because services by objecting providers are “entirely unwanted” and generally can be replaced by other service providers).

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finding alternate service providers.²⁵ This Article takes a different tack: even in the absence of economic transaction costs, discrimination against LGBT people motivated by sincere religious objection should not be permitted, because of the significant harm to dignity that it inflicts.

II. AT THE U.S. SUPREME COURT: THE LONGSTANDING RECOGNITION OF THE DIGNITARY HARM OF DISCRIMINATION

Dignity can be defined in various ways. But one conceptualization of dignity clearly recognized within American constitutional law—and the conception of dignity that is most relevant to the current debate over protecting LGBT people from discrimination—is the dignity of public respect and recognition. As Professor Neomi Rao states, this conception of dignity “requires more than . . . equal benefits in order to recognize belonging.”²⁶ Instead, “[i]nherent in this conception of dignity is

²⁵ See, e.g., Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 199–200 (2012) (arguing that it is hard to show, one way or the other, whether LGBT people actually have sufficient access to alternate service providers, as this would require difficult judgments about whether alternative providers are qualitatively comparable to the original provider, whether they are sufficiently close, and other such questions); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Family Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL’Y 274, 290 (2010) (criticizing Laycock and Berg’s argument insofar that it fails to address the imbalance between customer and merchant and fails to address the extra cost of “locating providers willing to serve [same-sex couples]”). One author who discusses the dignitary implications for Laycock’s approach is Shannon Gilreath, who argues that reducing the harm experienced by LGBT people to inconvenience is made possible by looking at the individual harm alone. See Shannon Gilreath, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 219 (2010) (book review) (arguing that a focus on “‘dignitary rights’ . . . rhetoricizes the harm inherent in the proposed system as an individual harm” of embarrassment, insult, or inconvenience, which “can then easily be balanced against the individual rights of religious objectors”).

²⁶ Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 262 (2011). See also generally Reva Siegel,

the idea that public respect and recognition are necessary to lead a full private life. An individual's private choices gain meaning and validation in part through their recognition by the social and political community."²⁷

The U.S. Supreme Court has long recognized this particular conception of dignity in its antidiscrimination jurisprudence. Beginning with *Brown v. Board of Education*, the Court has consistently understood the harm to dignity that discrimination causes, and recognized it to be distinct from the more "tangible" harm of being unable to access a particular benefit or entitlement.²⁸

Most relevant to the current debate over discrimination against LGBT people, the Court has, in the context of race, repeatedly recognized the dignitary harm of being turned away from public accommodations. The most prominent instance is in *Heart of Atlanta Motel v. United States*, where the Court upheld the constitutionality of the Civil Rights Act's prohibition of discrimination in public accommodations, known as Title II.²⁹ Writing the majority opinion, Justice Clark affirmed that "the fundamental object of Title II was to vindicate 'the deprivation of personal dignity.'"³⁰ Here Clark quoted from the Senate

Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart, 117 YALE L.J. 1694, 1736-45 (2008) (discussing various concepts of dignity); Reva Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1307 (2011) (discussing dignity as it informs the contemporary Supreme Court's approach to race cases).

²⁷ Rao, *supra* note 26, at 262.

²⁸ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."); see also *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that a state's discriminatory selection of jurors violates a defendant's Equal Protection rights, without regard to whether the absence of such discrimination would have changed the outcome of the jury's decision).

²⁹ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964).

³⁰ *Id.* at 250 (citing S. REP. NO. 88-872, at 2370 (1964)).

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Commerce Committee's report on the bill, which states:

The primary purpose . . . is to solve this problem, the deprivation of personal dignity that surely accompanies denials of equal access to public establishments. *Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color.* It is equally the inability to explain to a child that, regardless of education, civility, courtesy, and morality, he will be denied the right to enjoy equal treatment even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.³¹

The Civil Rights Act's legislative history makes clear that, while Title II is concerned with remedying the "adverse economic effect of discrimination," the "*fundamental* purpose . . . is directed at meeting a problem of human dignity"³² This is shown as well in the report's citation of Roy Wilkins, then-executive secretary of the NAACP: "The truth is that the affronts and denials that this section, if enacted, would correct are intensely human and personal. Very often they harm the physical body, but always they strike at the root of the human spirit, at the very core of human dignity."³³

Though perhaps most prominent, *Heart of Atlanta* is only one instance in which the Court has given recognition and weight to harm to dignity. Indeed, the Court has recognized this harm across many different contexts where discrimination occurs. In *Roberts v. Jaycees*, the Court held that discrimination—in that case, turning women away from a private organization—"deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and

³¹ S. REP. NO. 88-872, at 2370 (1964) (emphasis added).

³² *Id.* at 2371 (emphasis added).

³³ *Id.* at 2369.

cultural life.”³⁴ In doing so, the Court found that the state’s public accommodations law served a compelling interest, one outweighing the First Amendment right to freedom of association in this particular case.³⁵ In *JEB v. Alabama ex rel. T.B.*, when striking down gender-based preemptory challenges in jury selection, the Court stated that such discrimination can be an “assertion of . . . inferiority”³⁶ that “denigrates the dignity of the excluded” and “reinvokes a history of exclusion.”³⁷ In *Curtis v. Loether*, a case arising out of a Fair Housing Act racial discrimination claim, the Court stated that “[a]n action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress [U]nder the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort.”³⁸ And in the employment context, the Court explained in *Price Waterhouse v. Hopkins* that “[w]hile the main concern of [Title VII] was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one’s race or sex.”³⁹ The Court continued,

³⁴ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (rejecting the all-male club Jaycees’ freedom of association claim because the organization lacked sufficient intimacy in size and selectivity, and because the state had a compelling interest in eradicating gender discrimination).

³⁵ *Id.* at 625–26.

³⁶ *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 142 (1994) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

³⁷ *Id.*; see also Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 56 (2009) (discussing both the “public” dignity concerns touched on by the Court’s “branding” argument, and the “private” dignity concerns touched on by the Court’s “subordination” argument).

³⁸ *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) (quoting CHARLES O. GREGORY & HARRY KALVEN, JR., *CASES AND MATERIALS ON TORTS* 961 (2d ed. 1969)) (internal quotation marks omitted).

³⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, 42 U.S.C. § 1981a (1991), *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

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“whatever the final outcome of a decisional process, the inclusion of race or sex as a consideration within it harms both society and the individual.”⁴⁰

The Supreme Court has also recognized the dignity at stake in sexual orientation discrimination. In *United States v. Windsor*, the Court emphasized how a state’s decision to give LGBT people the right to marry “conferred upon them a dignity and status of immense import.”⁴¹ Consequently, the Defense of Marriage Act effectuated not just a denial of the economic benefits tied to marriage but also a “differentiation [that] demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify.”⁴² Harkening to the language of Title II’s legislative history,⁴³ the Court also recognized the problem that discrimination presents for children. According to the Court, DOMA “humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”⁴⁴

In short, American jurisprudence amply recognizes the harm to dignity resulting from discrimination. It takes more seriously than do Laycock and Berg the harm of being turned away. The harm goes to a person’s core, to her dignity. The question then remains: how does this harm to dignity factor into the issue of today—namely, whether the law should accord exemptions to

⁴⁰ *Price Waterhouse*, 490 U.S. at 265. It is worth noting that the Court has also recognized that such harm occurs beyond race- or gender-based discrimination. *See, e.g.*, *Commissioner v. Schleier*, 515 U.S. 323 (1995). In *Schleier*, the Court recognized that age discrimination may cause economic loss and a separate “psychological or ‘personal’ injury”—and that remedying one does not necessarily remedy the other. *Id.* at 330 (explaining that with respect to the remedy for loss of wages and the remedy for “personal” injury, “neither is linked to the other”).

⁴¹ *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

⁴² *Id.* at 2694 (citation omitted).

⁴³ *See* S. REP. NO. 88-872, at 2370 (1964).

⁴⁴ *Windsor*, 133 S. Ct. at 2694.

businesses that object, on religious grounds, to complying with laws that prohibit discrimination against LGBT people in public accommodations? Put differently, how does this harm to dignity weigh against the harm to business owners, who today object to serving LGBT people on religious grounds?

III. DIGNITY IN THE TRANSNATIONAL CONTEXT

Courts and legislative bodies throughout the United States are grappling with these very questions today. As they do, it is critical to remember, as this Symposium Issue shows, that debates about the intersection of religious freedom and equal treatment are not taking place in just one country. Instead, such debates are happening across multiple continents. Only recently has this issue begun to percolate in the American courts in the context of LGBT rights. However, the courts of other countries have already confronted claims for religious exemptions with respect to LGBT antidiscrimination laws—and they have repeatedly rejected such claims. In the process, they have also repeatedly recognized the central thesis of this Article: that preventing the dignitary harm of discrimination is a paramount interest.

The European Court of Human Rights,⁴⁵ and courts in the United Kingdom,⁴⁶ Israel,⁴⁷ and South Africa have all rejected the

⁴⁵ See *Eweida et al. v. United Kingdom*, 57 Eur. Ct. H.R. 213, 239 (2013) (upholding British court decision denying a British civil servant's religious discrimination claim, arising out of the government's requiring that she register same-sex civil partnerships, in spite of her religious objections to doing so); *id.* at 215 (upholding British court decision denying religious discrimination claim by a psychosexual therapist, who was dismissed by his employer after he refused to provide sex therapy to LGBT individuals).

⁴⁶ See *Bull v. Hall & Preddy*, [2013] UKSC 73 (S.C.) (upholding a discrimination claim against the owners of a bed-and-breakfast who refused to serve a gay couple, on the grounds of their religious beliefs).

⁴⁷ CS 5901/09 *Tal Ya'akovovich and Yael Biran v. Yad Hashmona Guest House* (2012) (Isr.) (Jerusalem Magistrate Court ruling that the owners of a reception hall violated Israeli antidiscrimination law by cancelling a reservation to host a wedding reception after discovering that the reception was for a lesbian couple).

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notion that violation of antidiscrimination laws could be sanctioned in the name of religion.⁴⁸ In addition, the French Constitutional Court rebuffed a claim that its national marriage equality law was constitutionally defective because it did not have a religious exemptions provision.⁴⁹ It is beyond the scope of this Article to engage in a comprehensive analysis of all of these countries and their jurisprudence. Instead, we briefly highlight one country whose courts have already repeatedly faced this issue: Canada.

Perhaps more frequently than the courts of any other country, Canadian courts have recognized the dignitary harm of discrimination against LGBT people, even in the face of competing religious liberty claims. In one such case, a challenge to a refusal by the Knights of Columbus to rent out a hall for a same-sex marriage reception,⁵⁰ the British Columbia Human Rights Tribunal awarded damages to compensate the plaintiffs “for injury to dignity, feelings and self-respect.”⁵¹

Other Canadian decisions have spoken at greater length on the dignitary harm of discrimination against LGBT people. Deciding *In the Matter of Marriage Commissioners Appointed Under the Marriage Act*,⁵² the Saskatchewan Court of Appeal held that an amendment to Saskatchewan’s Marriage Act, which would have allowed individual marriage commissioners to refuse to perform same-sex marriages, violated the Canadian Constitution.⁵³ In so holding, the court emphasized the harm of being turned away, a harm not mitigated simply by finding another commissioner to perform the marriage:

⁴⁸ See *Strydom v. Nederduitse*, 2009 (4) SA 510 (CC) at para. 6 (S. Afr.) (finding by South African court that Christian church violated antidiscrimination law when it fired a music teacher for being gay).

⁴⁹ See *Franck M. et al, Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-353 QPC*, Oct. 18, 2013 (Fr.).

⁵⁰ *Smith & Chymyshyn v. Knights of Columbus et al.*, 2005 BCHRT 544 (Can.).

⁵¹ *Id.* at para. 151.

⁵² *Marriage Commissioners Appointed Under the Marriage Act*, 2011 SKCA 3 (Can.).

⁵³ *Id.* at paras. 2–3.

[T]his submission overlooks, or inappropriately discounts, the importance of the impact on gay or lesbian couples of being told by a marriage commissioner that he or she will not solemnize a same-sex union. As can be easily understood, such effects can be expected to be very significant and genuinely offensive. It is easy to imagine the personal hurt involved in a situation where an individual is told by a governmental officer “I won’t help you because you are black (or Asian or [Native Canadian]) but someone else will.” [B]eing told “I won’t help you because you are gay/lesbian but someone else will” is no different.⁵⁴

The court also emphasized that the dignitary harm will hardly be isolated—and gives credence in the process to the “legitimation of discrimination” that proponents of accommodation in the U.S. often deemphasize.⁵⁵

[I]mportant . . . is the affront to dignity, and the perpetuation of social and political prejudice and negative stereo-typing that such refusals would cause. Furthermore, even if the risk of actual refusal were minimal, knowing that legislation would legitimize such discrimination is itself an affront to the dignity and worth of homosexual individuals. History has established and jurisprudence has confirmed the extreme vulnerability of this group to discrimination and even hatred.⁵⁶

⁵⁴ *Id.* at para. 41.

⁵⁵ *See supra* notes 21-22 and accompanying text.

⁵⁶ *Marriage Commissioners*, 2011 SKCA 3, para. 107. In another case, the Ontario Superior Court affirmed the claim of a student who wanted to bring a same-sex date to his prom at his Catholic high school. *Hall v. Durham Catholic Dist. Sch. Bd.* [2002] O.J. No. 1803 (Can.). The court emphasized “the impact of stigmatization on gay men in terms of denial of self, personal rejection discrimination and exposure to violence.” *Id.* at para. 53. Being barred from bringing a same-sex date to a culturally significant event like a prom, the court argued, is a “harm that cannot be properly compensated in

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To the Saskatchewan Court of Appeal, it thus hardly matters that this regime may inflict no economic transaction costs on LGBT individuals; what matters is that their dignity will be harmed regardless. The reasoning of these courts follows that of U.S. courts when the latter addresses the harm of discrimination in the context of both race and gender. However, the question remains: will the U.S. debates concerning LGBT discrimination follow this lead?

IV. GIVING DIGNITY ITS DUE IN THE CURRENT DEBATES OVER LAWS PROHIBITING LGBT DISCRIMINATION IN PUBLIC ACCOMMODATIONS

We are now at a critical moment in the United States in the debate over the propriety of religious exemptions to laws ending discrimination against people based on sexual orientation and gender identity. The question of exemptions arises whenever legislatures consider enacting protections against discrimination;⁵⁷ where these protections already exist, but businesses claim a right of religious exemption;⁵⁸ and, as in Arizona this year, where

damages.” *Id.* at para. 51.

⁵⁷ Nearly thirty states have no laws prohibiting sexual orientation and/or gender identity discrimination in public accommodations. See *Non-Discrimination Laws: State by State Information – Map*, ACLU, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Feb. 21, 2014). Another example of legislative contention over religious exemptions is the ongoing debate over the Employment Non-Discrimination Act. See Ian S. Thompson & Dena Sher, *Why ENDA’s Religious Exemption Must Be Narrowed*, ACLU (Apr. 30, 2013, 10:21 AM), <http://www.aclu.org/blog/lgbt-rights-religion-belief-womens-rights/why-endas-religious-exemption-must-be-narrowed>.

⁵⁸ See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, State of Colo., Office of Admin. Cts., CR 2013-0008, at 12–13 (Dec. 6, 2013), available at https://www.aclu.org/sites/default/files/assets/initial_decision_case_no_cr_2013-0008.pdf; *Cervelli v. Aloha Bed & Breakfast*, No. 11-1-3103-12-ECN (Haw. 1st Cir. Apr. 11, 2013); *Complaint of Civil Rights Violation, Wathen v. Beall Mansion Bed & Breakfast*, No. 2011-SP-2486 (Ill. Hum. Rts. Comm’n 2011); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 58 (N.M. 2013); *Settlement Agreement at 2, Baker v. Wildflower Inn*, No. 183-7-11 (Vt. Sup. Ct. 2012); *Complaint at 3, Ingersoll v. Arlene’s Flowers*, No. 12-3-

legislatures call for religious freedom protections that would make it much easier for objectors to secure exemptions.⁵⁹ The acknowledgement of dignity is thus critical because, at its core, the question in these contestations is whether there is a governmental interest in prohibiting the discrimination of sufficient strength to override any harm to the business owner.

In other contexts, we have already rejected the notion of exemptions to antidiscrimination measures predicated on religious beliefs. The Civil Rights Act of 1964, which prohibits discrimination based on race, among other predicates, has no exception for those who object to racial integration in public accommodations based on religious grounds.⁶⁰ And the courts have also rejected claims for exemptions to integration of the races based on religious grounds.⁶¹ The question then becomes, is there any basis to reason differently here?

00871-5 (Wash. Sup. Ct. 2013); *see also* Michael Hill, *Complaint: NY Wedding Site Banned Same-Sex Couple*, ASSOC. PRESS (Oct. 22, 2012), <http://bigstory.ap.org/article/complaint-ny-wedding-site-banned-same-sex-couple>; Alyssa Newcomb, *Bakery Denies Same-Sex Couple Wedding Cake*, ABC NEWS (Feb. 2, 2013, 7:51 PM), <http://abcnews.go.com/blogs/business/2013/02/bakery-denies-same-sex-couple-wedding-cake>.

⁵⁹ *See* Miranda Leitsinger, *Religious Liberty or Anti-Gay Discrimination? Debate Heats Up*, NBCNEWS (Feb. 27, 2014), <http://www.nbcnews.com/storyline/arizona-bill-controversy/religious-liberty-or-anti-gay-discrimination-debate-heats-n40666> (discussing bills in Arizona, Kansas, and other states).

⁶⁰ *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

⁶¹ *See, e.g.*, *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966) (dismissing a defense that “religious beliefs [compelled restaurant owner] to oppose any integration of the races whatever”), *aff’d in relevant part and rev’d in part on other grounds* 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968); *see also* Brief Amici Curiae of Julian Bond et al. in Support of the Government, *Sebelius v. Hobby Lobby Stores; Conestoga Wood Specialties Corp. v. Sebelius*, Nos. 13-354, 356 (U.S. Jan. 28, 2014) (recounting history of calls for religious exemptions in the context of civil rights, including women’s rights); Louise Melling, *Will We Sanction Discrimination? Can “Heterosexuals Only” Be Among the Signs of Today?*, 60 UCLA L. REV. DISC. 248, 251–52 (2013) (discussing *Piggie Park* and other cases concerning religious exemptions to laws prohibiting discrimination).

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There is no question that a business owner experiences an affront when she is required to comply with the law in spite of her sincere religious objection to doing so. The harm described by business owners arises from their role as an agent in facilitating what, to them, is a moral wrong. The issue for the merchant is participation; it is irrelevant to them whether these individuals will likely find another service provider. To those seeking services, harm arises from the denial of agency, whether or not they could easily obtain the same services elsewhere. This is because a person refused help in this manner is essentially “told that [he or she] is unacceptable as a member of the public,” eliciting “humiliation, frustration, and embarrassment,” as the Senate Commerce Committee stated in discussing Title II.⁶² This harm is unlike that of a business turning away a customer merely for lack of appropriate attire, as this harm is set against a history of discrimination.⁶³

This brand of harm can only be addressed, as philosopher Nancy Fraser has stated, by public “recognition, not redistribution.”⁶⁴ Antidiscrimination laws provide a form of this recognition: by declaring a group to have a right to access goods and services, for example, the political community takes an affirmative step to accord respect and recognition to that group. Exemptions to these laws undermine that communal respect and recognition. And they legitimize discrimination, even if only in small pockets of society, and thus undermine the traditionally stigmatized group’s belief that the community will ever give them a fair shake.⁶⁵

⁶² See S. REP. NO. 88-872, at 2370 (1964).

⁶³ See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“The avowed purpose and practical effect of the [Defense of Marriage Act] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”); *Romer v. Evans*, 517 U.S. 620, 632 (1996) (holding that a state constitutional amendment removing all LGBT-specific public antidiscrimination protections “seems inexplicable by anything but animus”).

⁶⁴ Fraser, *supra* note 2.

⁶⁵ See R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 840 (2004) (noting that “racial stigma deprives individuals of the confidence that they are being dealt with in

This harm would only be exacerbated, not mitigated, by Laycock's suggestion that merchants could post notice that they will not serve LGBT people or couples, so as to avoid "inconveniencing" LGBT clients. Such a sign would only reinforce LGBT people's feeling of exclusion—regardless of whether other proprietors were more welcoming. To be fair, Laycock does recognize that public notices of discriminatory intent are problematic: he observes that "[i]n more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black families driving across the South half a century ago."⁶⁶ But he argues that this is the "worst case" scenario, and that "in most cities, such problems would be minimal."⁶⁷ Even accepting the assertion that "Heterosexuals Only" signs would not crop up across many segments of the country, the question remains: why should this be acceptable anywhere, even where motivated by religious belief?

It is also no response to say, as Laycock and Berg do, that we can sanction or tolerate the exemptions because those turned away by religious merchants should not want to be served by them anyway.⁶⁸ This essentially amounts to: "If they don't want you, why would you want them?" Like the argument emphasizing the availability of welcoming proprietors, it is another way of saying, what is the harm? Ironically, this argument sounds in dignity—that individuals turned away because of who they are deserve better. And it is an argument that, at its core, fails to consider that grudging respect and recognition, even if not ideal, is still better than no recognition—or rejection.⁶⁹ One need only consider

good faith, leaving them (quite understandably) somewhat mistrustful of even those individuals who expressly claim and perhaps even believe that they are [nondiscriminatory]").

⁶⁶ Laycock, *supra* note 13, at 200.

⁶⁷ *Id.*

⁶⁸ *See supra* note 24 and accompanying text.

⁶⁹ This is particularly true when one considers the negative psychological effects of discrimination. *See, e.g.,* Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AMER. J. OF PUB. HEALTH 1869, 1869 (2001) (finding that the social stigma of homosexuality and the higher-than-average rate of discrimination against LGBT individuals has important

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the protests at Woolworth's,⁷⁰ early efforts at school integration in Arkansas,⁷¹ protests at all-male clubs,⁷² or employment discrimination lawsuits⁷³ to appreciate the value of inclusion, even if forced. Moreover, this argument fails to appreciate that legally enforced recognition can in fact be the spark that changes minds and institutions in the long run. As then-Solicitor General Thurgood Marshall stated in 1966, "There is very little truth to the old refrain that one cannot legislate equality. Laws not only provide concrete benefits, they can even change the hearts of men—some men anyhow—for good or evil."⁷⁴

Finally, it is no response to propose that at least small businesses should be allowed to refuse service on religious grounds. Laycock and Berg have made this argument on the basis that "very small businesses . . . are essentially personal extensions of the individual owner."⁷⁵ But the dignitary harm is no less significant merely because the business that refuses the customer happens to be small. Notably, federal law banning discrimination in public accommodations has no such broad exemption.⁷⁶ The question thus presents itself once more: where

mental health consequences).

⁷⁰ See Michael J. Klarman, *Brown, Racial Chance, and the Civil Rights Movement*, 80 VA. L. REV. 7, 46 (1994).

⁷¹ See *id.* at 47–48.

⁷² See *supra* notes 34–35 and accompanying text.

⁷³ See *supra* notes 39–40 and accompanying text.

⁷⁴ Thurgood Marshall, Solicitor General, Address at the 1966 White House Conference on Civil Rights (June 1, 1966).

⁷⁵ See Letter from Douglas Laycock, Professor of Law, Univ. of Va. Sch. of Law, et al. to Tom Cross, Ill. State Rep. (Mar. 12, 2013), available at <http://mirrorofjustice.blogs.com/files/illinois-republicans-2013.pdf> (proposing that "individuals and very small businesses" be accommodated). Laycock et al.'s letter references proposed legislative language authored by Robin Fretwell Wilson, which would protect individuals, sole proprietors, and businesses with five or fewer employees. See Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J. L. & SOC. POL'Y 318, 367–68 (2010), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1057&context=njls>.

⁷⁶ See 42 U.S.C. § 2000a(b), (e) (2006) (providing Title II exemptions only to inns "contain[ing] not more than five rooms for rent or hire and which

federal law banning discrimination based on race has no such exemption, why should laws prohibiting discrimination based on sexual orientation or gender identity have one?

In short, the question remains: once you acknowledge the harm to dignity that LGBT people experience when they are turned away, why should our laws and court decisions permit exemptions in this context when we have rejected them in other contexts? Why sanction “Heterosexuals Only” signs when we reject the notion of a restaurant posting, “Christians Only” or “Citizens Only”? Why permit this, even in the limited number of instances when the refusal is premised on religious grounds? We see no compelling reason for a difference.

CONCLUSION

Going forward, American courts and legislatures should reaffirm the dignitary harm of discrimination. Accordingly, they should greet any calls for exemptions motivated by religious beliefs with great skepticism. In doing so, they will align themselves with longstanding American tradition and with the courts of many other countries. This tradition recognizes that, while the right to religious freedom is fundamental, religion cannot be used to discriminate, and thus to harm the dignity of people who deserve basic respect and recognition in our society.

Emphasizing precisely this point about respect, we conclude with the words of Justice Bosson in his concurrence in the case of *Elane Photography*, a case in which the New Mexico Supreme Court rejected a photography studio’s call for an exemption to that state’s antidiscrimination law, predicated on religious and speech grounds.⁷⁷ Justice Bosson states:

In the smaller, more focused world of the marketplace, of commerce, of public accommodation, the [company owners] have to

[are] actually occupied by the proprietor of such establishment as his residence” and to any “private club or other establishment not in fact open to the public”).

⁷⁷ *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013), cert. denied, No. 13-585, 2014 WL 1343625 (U.S. Apr. 7, 2014).

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channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the [company owners], with the utmost respect: it is the price of citizenship.⁷⁸

⁷⁸ *Id.* at 79 (Bosson, J., concurring).