THE PRICE OF CITIZENSHIP? HOW A CAKE BAKER AND WEDDING PHOTOGRAPHER PAID THE PRICE

RAYGAN PIERCE CHAIN*

I. INTRODUCTION

In *Elane Photography, LLC v. Willock*, Justice Bosson, in his special concurring opinion, indicated that tolerance and compromise in the beliefs held by Americans is an important "glue" to our nation.[1] Justice Bosson went on to say 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. [I]t is the price of citizenship."[2]

As professors of Business Law, one of the first concepts we attempt to teach our students is what laws are and how they work. We attempt to demonstrate the premise that laws reflect the values and beliefs of the society in which they live. And, as such, as values and beliefs of that society change and grow, so, too, do the laws that govern them as citizens. Our country has seen this changing and growing throughout its history, especially on the subject of equality for its citizens, from slavery to the Civil Rights Movement to gender equality, and, more recently, sexual orientation and transgender issues.

The second concept professors impart to their students is the idea that the law is not black or white, but rather gray. Most applications of the law, and the cases that follow that application, put the rights of both parties at issue, leaving the judge and jury to sort through a gray area of whose right is stronger. As noted above, our values and beliefs in this country, over time, have taken a turn to reflect an equality for all, whether it be due to race, national origin, gender, or disability. Equality for all seems like an easy phrase to use. However, what happens when the idea of equality clashes with an individual's fundamental rights? How does the law reconcile itself when one party's right to equality imposes on another's right to freedom of speech or freedom of religion? Our changing values and beliefs hurl our justice system into a balancing act within this gray area.

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*J.D., Assistant Professor, Southwestern Oklahoma State University.

[1] 309 P.3d 53, 80 (N.M. 2013).

[2] *Id.*

Most recently, our courts have been asked to decide cases of discrimination based on sexual orientation. The defendants in these cases, business owners of public accommodations, have stood fast on their belief that the rights enumerated in the First Amendment, those of Freedom of Speech and Freedom of Religion, protect their right to refuse service to anyone for any reason. Thus far, only state and federal district courts have taken on this question; the Supreme Court has yet to address this issue. The issue? Do the rights of Freedom of Speech and Freedom of Religion allow a business owner to refuse service to a potential customer or client because of the actual or perceived sexual orientation of that customer or client? Put another way, does the right to be free from discrimination of any kind override the business owner's rights to Free Speech or Freedom of Religion? Does one right trump another? The focus of this paper is the change in our values and beliefs associated with the notion that all people, regardless of his or her sexual orientation, have the right to be free from discrimination, and how our courts are reconciling this notion with our fundamental First Amendment Rights.

This paper is divided into three parts. First, the historical approach to antidiscrimination will briefly be examined. Second, the facts and situations of recent cases of discrimination due to sexual orientation will be discussed. Finally, it will analyze the arguments of Freedom of Speech and Freedom of Religion in the context of the antidiscrimination laws.

II. HISTORICAL APPROACH TO ANTIDISCRIMINATION AND CHANGING VALUES/BELIEFS

A. *Discrimination, Sexual Orientation and Public Accommodations*

Merriam-Webster Dictionary defines discrimination as "the practice of unfairly treating a person or group of people differently from other people or groups of people."[3] In the context of this paper, discrimination will be viewed on the basis of sexual orientation. "Sexual orientation" is defined by Merriam-Webster Dictionary as "a person's sexual preference or identity as bisexual, heterosexual, or homosexual."[4]

Many State statutes also define sexual orientation. The State of Hawaii defines "sexual orientation" in its Human Rights Statute, HRS Chapter 489-2 as:

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[3] *Discrimination*, MERRIAM-WEBSTER DICTIONARY ONLINE, http://www.merriam-webster.com/dictionary/discrimination.

[4] *Sexual Orientation*, MERRIAM-WEBSTER DICTIONARY ONLINE, http://www.merriam-webster.com/dictionary/sexual%20orientation.

> "Sexual orientation" means having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences.

The State of Washington defines "sexual orientation" as follows:

> "Sexual orientation" means heterosexuality, homosexuality, bisexuality, and gender expression or identity.[5]

Therefore, sexual orientation discrimination would be a practice of unfairly treating a person differently because of his or her preference for heterosexuality, homosexuality, bisexuality, or perhaps even gender expression or identity. The cases discussed herein relate to a person's preference for homosexuality or bisexuality, i.e. having a preference for another person of the same gender.

Another important aspect of the cases to be discussed pertains to where the instances of discrimination take place. In all but one of the cases, the discrimination takes place in a "public accommodation." Public accommodation is defined in both the Washington and Hawaii statutes. Hawaii defines "Place of public accommodation" as:

> [A] business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.[6]

The State of Washington defines "public accommodation" as:

> Any place of public resort, accommodation, assemblage, or amusement" includes, but is not limited to, any place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or for public conveyance or

[5] WASH. REV. CODE §49.60.040(26) (2016).
[6] HAW. REV. STAT. § 489-2 (2016).

> transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles, or where food or beverages of any kind are sold for consumption on the premises, or where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes, or public halls, public elevators, and public washrooms of buildings and structures occupied by two or more tenants, or by the owner and one or more tenants, or any public library or educational institution, or schools of special instruction, or nursery schools, or day care centers or children's camps…[7]

It is interesting to note, however, that the State of Washington makes exceptions to public accommodations for certain entities such as fraternal organizations and religious institutions.[8]

Colorado and New Mexico have similar antidiscrimination laws defining both sexual orientation and public accommodations therein.[9]

B. *Fundamental Rights*

It is important to the issues discussed in this paper to understand what is meant by "fundamental rights." The Supreme Court has identified certain Rights throughout the Constitutional Amendments that are considered to be "fundamental." Fundamental Rights have been defined by the Court over the years as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[10] The United States Supreme Court in *Obergefell v. Hodges* reiterated "[un]der the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights."[11] The *Obergefell* Court also recapped the history and evolution of marriage as a fundamental right and holding the same-sex marriage is also protected under the Constitution.[12] The Supreme Court has also recognized family, the right to vote, interstate travel, and privacy as fundamental

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[7] WASH. REV. CODE § 49.60.040(2).
[8] *Id.*
[9] COLO. REV. STAT. §24-34-601(2) (2016); Human Rights Act, N. M. STAT. ANN. §§281-1 to -13 (2016).
[10] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).
[11] 135 S.Ct. 2584, 2597 (2015).
[12] *Id.*

rights.[13] A fundamental right is protected by the Constitution and not subject to the vote of people.[14]

C. *Heart of Atlanta Motel, Inc. v. United States*[15]

One of the most important pieces of legislation in our nation's history regarding antidiscrimination is the Civil Rights Act of 1964. Title II of the Civil Rights Act sought to prevent discrimination on the basis of race, color, religion or national origin in public accommodations (public accommodations are defined therein).[16]

After the enactment of the Civil Rights Act of 1964, a motel owner challenged the law on the basis of the Fifth Amendment.[17] The Heart of Atlanta Motel was a business offering rooms for rent to those passing thought Atlanta.[18] The owner was opposed to renting the rooms to any but those of the Caucasian race as was his right, he argued, to refuse service to anyone for any reason.[19] Forcing the owner to rent rooms to African-Americans, he argued, resulted in a taking of liberty and property without due process of law and without just compensation.[20] Basically, the owner of the motel argued that he had the right to discriminate against African-Americans and refuse to rent.

The Supreme Court in *Heart of Atlanta* provided confirmation that Congress has the ability, through the Commerce Clause, to remove obstructions to interstate commerce caused by racial discrimination.[21] Although sexual orientation is not a protected class under the Civil Rights Act of 1964, the reasoning used by the Court to prevent racial discrimination could be likewise applied to prevent sexual orientation discrimination.

D. *Loving v. Virginia*[22]

Prior to *Loving v. Virginia*, many States had laws prohibiting the marriage of persons of different "races". Until *Loving*, marriage laws and licensing were thought to be one of the rights reserved to the States under the

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[13] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Griswold v. State of Connecticut, 381 U.S. 479 (1965); McDonald v. City of Chicago, 561 U.S. 742 (2010).
[14] *Obergefell* at 29.
[15] 379 U.S. 241 (1964).
[16] Civil Rights Act of 1964, Title II, §201(a), 42 U.S.C. §2000a (2016).
[17] *Heart of Atlanta* at 243.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 244.
[21] *Id.* at 261.
[22] 388 U.S. 1 (1967).

Tenth Amendment.[23] As such, the Commonwealth of Virginia banned interracial marriages (hereafter miscegenation laws).[24] Richard and Mildred Loving, an interracial couple, were arrested and charged with violation of this law.[25] A trial judge sentenced the couple, and noted in his opinion:

> Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with this arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[26]

It is easy to see from this quote that the trial judge used an argument based on his religious beliefs in making his judgment. The Virginia argued before the Supreme Court that it equally applied the miscegenation laws to all.[27] The Court did not believe this argument to satisfy the Equal Protection Clause of the Fourteenth Amendment.[28] Although this particular case centered on racial discrimination, its lesson is important: "…the Equal Protection Clause requires consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination."[29]

Finally, the Court noted in *Loving* that the freedom to marry is a vital personal right essential to the pursuit of happiness.[30] In quoting *Skinner v. State of Oklahoma,*[31] the *Loving* Court recognized that marriage is a fundamental right and as such, cannot be infringed on by the State.[32]

The *Loving* case demonstrates a change in the values and beliefs of our society regarding marriage and interracial relationship. Miscegenation laws were common is many states, and at the time of *Loving*, sixteen states had similar laws.[33]

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[23] U.S. CONST. amend. X, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
[24] *Loving*, 388 U.S. at 3.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 8.
[28] *Id.* at 10.
[29] *Id.*
[30] *Id.* at 12.
[31] 316 U.S. 535 (1942).
[32] *Loving*, 388 U.S. at 12.
[33] *Id.* at 6.

E. *Changing Values and Beliefs in Sexual Orientation: Obergefell v. Hodges*[34]

Although sexual orientation is not a protected class under federal law, as of 2012, twenty-one states and the District of Columbia have antidiscrimination legislation which pertains to sexual orientation in public accommodations.[35] The inclusion of sexual orientation within the antidiscrimination statutes indicate perhaps the beliefs and values are changing.

In *Obergefell v. Hodges*, Justice Kennedy opened his opinion with the following: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[36] The question presented to the Court in *Obergefell* was whether the Fourteenth Amendment required a State to not only issue a same-sex marriage license, but also whether a State was required to recognize a same-sex marriage license not issued by another State.[37] Throughout *Obergefell*, Justice Kennedy discussed the history of marriage, and examined our society's view of homosexual behavior.[38] He noted that gays and lesbians argued for their dignity, even though it was in conflict with "both law and widespread social conventions."[39] He further noted that, historically, intimacy by same-sex couples was a crime in most states.[40] In fact, many states had laws making same-sex intimate behaviors a crime until 2003 when the Supreme Court took up the case of *Texas v. Johnson*, wherein it overturned its own precedent on the matter.

Justice Kennedy made clear that the States have contributed to a "fundamental character" of the marriage right by placing it at the center of legal and social order, including taxation, property rights, health insurance and child custody, among others.[41] The Opinion concluded that by prohibiting same-sex marriage, gays and lesbians were demeaned, determined unequal, and stigmatized.[42] In essence, in regards to marriage, same-sex couples were discriminated against because of their sexual preference.[43] The Court determined that this should no longer be the case.

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[34] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[35] Douglas Nejamie, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 CAL. L. REV. 1169, 1189-90 (2012).
[36] 135 S. Ct. at 2593.
[37] *Id.*
[38] *Id.* at 2954.
[39] *Id.* at 2596.
[40] *Id.*
[41] *Id.* at 2590.
[42] *Id.*
[43] *Id.*

With the *Obergefell* opinion, the Court reflected a change in the values and beliefs of our country regarding prejudice, stereotype and discrimination of same-sex couples. While *Obergefell* was not decided until 2015, in the past ten years, several State Courts have addressed the issue of sexual orientation discrimination under relevant State statutes.

III. RECENT CASES

As stated above, sexual orientation is not a protected class under federal law. The Civil Rights Act has not been amended to include sexual orientation. However, many states have enacted or amended legislation to include sexual orientation as a protected class. If a statewide nondiscrimination law has not been enacted, many municipalities have advanced their own laws. The factual backgrounds of the cases will be set out below. An analysis of the courts' decisions in these cases will be discussed under the "IV. Analysis" section below.

A. *New Mexico Wedding Photographer (2006)*

One of the first cases to catch national attention occurred in New Mexico, 2006. The State of New Mexico has a statewide prohibition on sexual orientation discrimination under the New Mexico Human Rights Act ("NMHRA"), NMSA 1978, §§28-1-1 to -13 (1969, as amended through 2007). Under the NMHRA, public accommodations are prevented from discriminating based on a person's sexual orientation.[44] Public accommodations are defined therein.[45]

In *Elane Photography, LLC v. Willock*, Elane Photography offered wedding photography services to the public. Vanessa Willock was refused those services by Elane Photography after Elaine Huguenin, one of the owners of the business, discovered Willock was in a same-sex relationship.[46] Willock requested photographs to commemorate the commitment ceremony between herself and her partner.[47] Huguenin stated that same-sex marriage was considered a violation of her personal religious beliefs and she would only photograph "traditional" weddings.[48]

Willock filed a complaint with the New Mexico Human Rights Commission based on discrimination due to sexual orientation.[49] The New

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[44] Human Rights Act, N. M. STAT. ANN. §§281-1 to -13 (2016).
[45] *Id.*
[46] 309 P.3d 53, 59 (N.M. 2013).
[47] *Id.*
[48] *Id.* at 59-60.
[49] *Id*. at 60.

Mexico Human Rights Commission concluded there was discrimination and Huguenin appealed the decision.[50] Ultimately, the New Mexico Supreme Court also determined Elane Photography had discriminated against Willock based on sexual orientation, a violation under the NMHRA.[51] The New Mexico Supreme Court did not find that the NMHRA violated the First Amendment rights of Freedom of Speech or Freedom of Exercise of Religion.[52]

This case was appealed to the United States Supreme Court. However, the Supreme Court denied *certiorari* on April 7, 2014.[53]

B. *Hawaii Bed and Breakfast (2007)*

The State of Hawaii Civil Rights Commission enacted HRS Chapter 489 "Discrimination in Public Accommodations" which includes a provision prohibiting discrimination in public accommodations as defined in the therein, including, but not limited to discrimination due to sexual orientation (also defined therein).[54] The case sought injunctive relief on behalf of a same-sex couple visiting friends in Hawaii.[55] According to the Complaint filed therein, the couple attempted to make reservations with Aloha Bed & Breakfast in Honolulu.[56] The owner, Phyllis Young, turned away Diane Cervelli and Taeko Bufford once she discovered the two were of the same sex and only required one bed.[57] The Complaint further alleged that Phyllis defended her actions based on "personal religious beliefs."[58]

The First Circuit Court of Hawaii entered a judgment for the Plaintiffs on the matter in April, 2013.[59] The Court found Aloha Bed & Breakfast operated as a public accommodation and, as such, violated the law against discrimination based on sexual orientation.[60] The Court did not address the subject any further than to issue an injunctive order against Aloha Bed &

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[50] *Id.*
[51] *Id.* at 77.
[52] *Id.*
[53] Elane Photography, LLC v. Willock*,* 309 P.3d 53, 63 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014).
[54] HAW. REV. STAT §§ 489-2, 489-3 (2016).
[55] Complaint for Injunctive Relief, Declaratory Relief, and Damages; Summons, Cervelli v. Aloha Bed & Breakfast, Civil 11-1-3103-12 ECN, 2011 WL 10604318.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Order Granting Plaintiffs' and Plaintiff-Intervenors' Motion for Partial Summary Judgement for Declaratory and Injunctive Relief and Denying Defendant's Motion for Summary Judgement, Cervelli v. Aloha Bed & Breakfast, Civil 11-1-3103-12 ECN, 2013 WL 1614105 (2013).
[60] *Id.*

Breakfast requiring it to cease and desist all discriminatory actions.[61] The Court did not address the issues raised by Aloha Bed & Breakfast in defense of its actions.[62]

The Hawaii case, although offering no guidance, was one of the first to come down based on a claim of sexual orientation discrimination by a public accommodation. It continues the confirmation that those who engage in business are not free to justify refusal of services to same-sex couples based on sexual orientation.

C. *Colorado Cake Baker (2012)*

Like New Mexico and Hawaii, the State of Colorado also has a statewide antidiscrimination act. The Colorado Antidiscrimination Act (CADA), §§ 24-34-301 to -804. C.R.S. 2014, prohibits public accommodations from discriminating based on sexual orientation.[63] In July, 2012, Charlie Craig and David Mullins, a same-sex couple, approached Jack C. Phillips, owner of Masterpiece Cakeshop, Inc., requesting a wedding cake for their wedding reception.[64] Phillips declined to make the cake because of his religious beliefs.[65] Phillips, however, offered to sell Craig and Mullins any other product offered by Masterpiece.[66] This offer later became a part of Phillips defense: he was not discriminating against the couple *because of* their sexual orientation; rather, he simply was unwilling to participate in an event misaligned with his religious beliefs.[67]

Craig and Mullins refused other products offered by Phillips and filed a complaint with the Colorado Civil Rights Division alleging discrimination based on sexual orientation under CADA.[68] At each level of this case, the judge found Phillips and Masterpiece had violated the rights of Craig and Mullins under CADA.[69] Phillips has continued to defend his actions as being protected under the First Amendment (Freedom of Speech and Free Exercise of Religion).[70]

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[61] *Id.*
[62] *Id.*
[63] COLO. REV. STAT. §24-34-601(2) (2016).
[64] Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶3 (Colo. App. 2015).
[65] *Id.*
[66] *Id.*
[67] *Id.* at ¶ 25.
[68] *Id.*at ¶ 6.
[69] *Id.* at ¶¶ 6 & 8.
[70] *Id.* at ¶ 43.

The Colorado Court of Appeals issued its Opinion in *Craig* on August 13, 2015.[71] Phillips and Masterpiece have petitioned the Supreme Court of Colorado for *certiorari*.[72] The Petition is currently still pending.[73]

D. *Washington State Florist (2013)*

One of the most personal cases came out of actions arising in Washington State in 2013. While most of the cases thus far stemmed from interactions between business owners and customers online or via telephone, or having only briefly met in person, this case concerned a business owner and regular patrons.

The State of Washington enacted the Washington Law Against Discrimination ("WLAD"), which includes a provision prohibiting discrimination in public accommodations on the basis of sexual orientation.[74] In the case of *Ingersoll v. Arlene's Flowers, Inc.*[75] ("Ingersoll"), Robert Ingersoll and Curt Freed were regular customers of Arlene's Flowers, and met often with the owner, Baronelle Stutzman.[76] Stutzman frequently prepared flower arrangements for both Freed and Ingersoll, and was aware they were involved in a same-sex relationship.[77] When Ingersoll and Freed decided to marry in March 2013, Ingersoll asked if Stutzman would prepare the flower arrangements for the wedding.[78] Stutzman replied that she was unable, in good conscience, to prepare the flowers because of her religious beliefs.[79]

Ingersoll, Freed, and the State of Washington brought a case against Arlene's Flowers under the WLAD and the Consumer Protection Act.[80, 81] In her Answer, Stutzman claimed First Amendment protections of Free Speech

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[71] *Id.*
[72] American Civil Liberties Union at https://www.aclu.org/cases/charlie-craig-and-david-mullins-v-masterpiece-cakeshop.
[73] American Civil Liberties Union at https://www.aclu.org/cases/charlie-craig-and-david-mullins-v-masterpiece-cakeshop.
[74] WASH. REV. CODE § 49.60.30 (2016).
[75] Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment Based on Plaintiff's Lack of Standing, Granting Plaintiff State of Washington's Motion for Partial Summary Judgment on Liability and Constitution Defenses, and Granting Plaintiffs Ingersoll and Freed's Motion for Partial Summary Judgement, State v. Arlene's Flowers, Inc., 2015 WL 720213 (Wash. Super.), Case No. 13-2-00871-5 (2015).
[76] *Id.* at 6.
[77] *Id.* at 6.
[78] *Id.* at 7.
[79] *Id.* at 7 and 8.
[80] *Id.*at 10.
[81] *Id.* The State of Washington argued a violation of the WLAD is a *per se* violation of the Washington Consumer Protection Act. We will address here only the violation of the WLAD.

and Free Exercise of Religion.[82] Stutzman argued that by preparing flowers for the wedding, she would be participating in an event she did not believe should take place based on her religious instruction.[83] Stutzman also instituted an unwritten policy not to take same-sex weddings, however, she continued to prepare flowers for other weddings.[84]

The Superior Court of the State of Washington did not dispute Stutzman firmly held her religious beliefs that marriage is between one man and one woman.[85] It also did not find that Stutzman's Freedom of Speech and Free Exercise of Religion was infringed upon.[86] However, the Court found in favor of the Plaintiffs for the reasons we will discuss in our Analysis section below. An appeal of this case is pending with the Washington Supreme Court.[87]

E. *Kentucky County Clerk (2015)*

The final case for discussion offers a bit of a different set of circumstances. While the four cases above centered on statewide antidiscrimination laws and public accommodations, the final case contains neither. Rather, *Miller v. Davis*, Civil Action No. 15-44-DLB (E.D. Ky., 2015), pertains to an elected state official, Kim Davis, of the Rowan County Clerk's Office, Rowan County, Kentucky, who refused to issue marriage licenses to *any* couple after the case of *Obergefell v. Hodges* was handed down. As discussed above, the *Obergefell* case legalized same-sex marriage throughout the United States.[88]

Part of the duties of Davis, acting as the Rowan County Clerk, included issuing marriages licenses signed by her as County Clerk.[89] By signing the marriage licenses for same-sex couples, Davis believed she would be endorsing those marriages which are "contrary" to her beliefs as a Christian.[90] Not wanting to discriminate against same-sex couples, she refused to issue any marriage licenses.[91] Furthermore, Davis would not allow any of her deputies to issue marriage licenses as the license form itself

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[82] *Id.* at 37.
[83] *Id.* at 38.
[84] *Id.* at 9.
[85] *Id.* at 37.
[86] *Id.* at 37.
[87] *Ingersoll v Arlene's Flowers*, AMERICAN CIVIL LIBERTIES UNION (Feb. 18, 2015), https://www.aclu.org/cases/ingersoll-v-arlenes-flowers.
[88] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[89] Miller v. Davis, 123 F. Supp. 3d 924, at 931 (E.D. Ky. 2015).
[90] *Id.*
[91] *Id.*

contained Davis' name, so that no marriage licenses were issued from Rowan County.[92]

In this case, the United States District Court for the Eastern District of Kentucky enjoined Davis from implementing her "no marriage licenses" policy.[93] It became common knowledge after the U.S. District Court issued its opinion and order that Davis continued to refuse to issue licenses and that she was held in contempt of court and jailed for several days.[94] Once released, she began issuing a re-worked version of the marriage license that no longer contained her name or signature.[95] She, herself, continued to abstain from issuing the licenses to same-sex couples, although marriage licenses were issued from the Rowan County Clerk's Office by other deputies.[96]

This case also took an interesting turn with new Governor of Kentucky, Matt Bevin, when he removed the county names from the marriage licenses and allowed parties other than the County Clerk's to sign the license.[97] In justifying his actions, Governor Bevin cited the Kentucky Religious Freedom Restoration Act.[98]

F. *Oregon, Texas, Georgia and other States*

There are two other current cases involving sexual orientation discrimination that bear mentioning. The first occurred in Oregon in January, 2013.[99] The Plaintiffs requested a wedding cake from Sweet Cakes by Melissa, a Portland, Oregon bakery.[100] The owners refused to make the cake

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[92] *Id.*
[93] *Id.* at Page 28.
[94] Alan Blinder & Tamar Lewin, *Clerk in Kentucky Chooses Jail Over Deal on Same-Sex Marriage*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/04/us/kim-davis-same-sex-marriage.html?_r=0.
[95] Mike Wynn, *Couples want Kim Davis to stop altering marriage license forms*, THE (LOUISVILLE, KY.) COURIER-JOURNAL (Sept. 21, 2015), http://www.usatoday.com/story/news/nation/2015/09/21/couples-want-kim-davis-stop-altering-marriage-license-forms/72602078/.
[96] *Id.*
[97] Associated Press, *Kentucky Bows to Clerk Kim Davis and Changes Marriage License Rules,* LOS ANGELES TIMES (Dec. 23, 2015, 10:41 AM), http://www.latimes.com/nation/nationnow/la-na-nn-kentucky-kim-davis-20151223-story.html.
[98] *Id.*
[99] Molly Young, *Sweet Cakes by Melissa Violated Same-Sex Couple's Civil Rights When It Refused to Make Wedding Cake, State Finds*, THE OREGONIAN/OREGON LIVE (Jan. 17, 2014, 4:46 PM) (updated Jan. 20, 2014, 10:00 AM), http://www.oregonlive.com/business/index.ssf/2014/01/sweet_cakes_by_melissa_investigation_wraps_up_as_state_finds_evidence_that_bakery_violated_civil_rights_for_refusing_to_make_same-sex_wedding_cake.html.
[100] *Id.*

for the Plaintiffs, citing religious and moral reasons.[101] A complaint was filed under the Oregon Equality Act of 2007.[102] The bakery is now closed and the owners have been ordered to pay $136,927.07 in damages.[103] There is no need to worry for the owners, however. They have received over $500,000 in online donations since this case has made headlines.[104]

A possible additional case has recently come to pass in a small Texas town. In February, 2016 Kern's Bake Shop in Longview, Texas, recently denied services to Ben Valencia and Luis Marmolejo, who plan to be married in March, 2016.[105] The interesting point in this case is that Texas does not have a statewide antidiscrimination law.[106] It does not appear that the town of Longview, Texas, does either. Whether this case will go forward remains to be seen.[107]

Finally, legislation has been proposed in several states which would allow open discrimination based on sexual orientation in public accommodations, if the business owner has a firmly held religious belief. The legislation has been blocked in a few states, but is still pending in others. One of those is Georgia, and it could have implications on the State's National Football League Super Bowl bid.[108] According an article in the Huffington Post dated March 18, 2016:

> Georgia lawmakers passed a bill this week, HB 757, that would prevent the government from taking action against any organization or person with "a sincerely held religious belief regarding lawful marriage between ... a man and a woman." That opens the door to all kinds of discrimination against people in same-sex marriages.

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[101] *Id.*
[102] *Id.*
[103] George Rede, *Sweet Cakes Owners Refused to Make Same-Sex Wedding Cake Now Refuse to Pay $135,000 in Damages*, THE OREGONIAN/OREGON LIVE (Sep. 30, 2015, 4:15 PM) (updated Jan. 7, 2016 at 12:57 PM), http://www.oregonlive.com/business/index.ssf/2015/09/sweet_cakes_owners_who_refused.html.
[104] *Id.*
[105] Starnes, Todd, *Texas Bakers Face Threats After Declining to Make Gay Wedding Cake*, FOXNEWS ONLINE, Feb. 25, 2016. A copy of which can be found at http://www.foxnews.com/opinion/2016/02/25/texas-bakers-face-threats-after-declining-to-bake-gay-wedding-cake.html.
[106] *Id.*
[107] *Id.*
[108] Jennifer Bendery, *Georgia's Anti-Gay 'Religious Liberty' Bill Could Tank Atlanta's Super Bowl Bid: NFL signals it's no fan of discriminatory laws when it picks game sites*, The HUFFINGTON POST (Mar. 18, 2016, 6:12 PM), http://www.huffingtonpost.com/entry/georgia-anti-gay-bill-super-bowl_us_56ec65d8e4b084c672204e3e.

> It's up to Gov. Nathan Deal (R) to decide whether to sign it into law or veto it.[109]

Atlanta has placed a bid with the NFL to host the Super Bowl.[110] The NFL released a statement indicating that such discriminatory policies would not be tolerated by the NFL.[111] If the Governor does sign HB 757 into law, it will also be an interesting situation to watch.

IV. DISCUSSION AND ANALYSIS

In all of the cases above, the defendants argued discrimination based on sexual orientation was permissible by virtue of their First Amendment rights of Freedom of Speech and Free Exercise of Religion. All of the defendants claimed intimate relationships and marriage should be limited to one man and one woman as prescribed in the Christian Bible.

A. *First Amendment Freedom of Speech*

The First Amendment provides in part "Congress shall make no law … abridging the freedom of speech…"[112] The First Amendment has been applied to the States through the Fourteenth Amendment.[113] The defendants in the cases above cited Freedom of Speech infringement on the basis of compelled speech.

The defendants in *Elane Photography, supra,* argued that requiring them to photograph a same-sex marriage was in essence a compelled speech that indicated to others the defendants supported same-sex marriage, when, in fact, their personal beliefs were against it.[114] In *Miller, supra*, Davis argued that requiring her to issue same-sex marriage licenses "violates her free speech rights by compelling her to express a message she finds objectionable."[115] Similarly, in *Masterpiece*, the defendants argued:

> Wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] U.S. CONST. amend. I.
[113] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[114] Elane Photography, LLC v. Willock, 309 P.3d 53, 63 (N.M. 2013).
[115] Miller v. Davis, 123 F. Supp. 3d 924, at 941 (E.D. Ky. 2015).

> compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.[116]

Compelled speech has been established by the U.S. Supreme Court in that "the government may not require an individual to host or accommodate another speaker's message."[117] In *Elane Photography* the Supreme Court of New Mexico held the antidiscrimination laws did not require Elane Photography to "recite or display any message" and do not even require that Elane Photography take photographs.[118] The laws merely require Elane Photography, as a commercial endeavor, not discriminate against potential customers based on sexual orientation.[119] Finally, the *Elane Photography* Court held the antidiscrimination laws simply required businesses to offer services to the public without regard to a potential client's membership in a protected class, such as sexual orientation.[120]

That being said, simply because a business is for-profit does not strip the business of its First Amendment speech protections.[121] The New Mexico Supreme Court in *Elane Photography* reasoned that no one would interpret Elane Photography's photos of same-sex marriages ceremonies as sending a message of approval of the same.[122] The Colorado Court of Appeals similarly reasoned that simply because a business charges for its products does not conclude that the business supports any message conveyed on the finished good or service.[123]

The New Mexico Supreme Court in *Elane Photography* also quoted *West Virginia State Board of Education v. Barnette*, the case which established the right to refrain from speaking.[124] In *Barnette*, the U.S. Supreme Court, in deciding a case in which students were required to salute the U.S. flag, stated the choice of the students not to salute the flag did "not bring them into collision with rights asserted by any other individual."[125] This reasoning is important in demonstrating that one citizen's rights must end where another's begins.

In response to Davis' argument in *Miller*, the United States District Court, Eastern District of Kentucky, noted that the compelled speech cases

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[116] Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶44 (Colo. App. 2015).
[117] *Id.* at ¶74, quoting Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47 (2006), internal quotations omitted.
[118] *Elane,* 309 P.3d at 64.
[119] *Id.* at 64.
[120] *Id.*at 65.
[121] *Masterpiece*, 2015 COA at ¶66.
[122] *Elane* 309 P.3d at 66.
[123] *Masterpiece,* 2015 COA at ¶66.
[124] 319 U.S. 624, (1943).
[125] *Elane* 309 P.3d at 64, citing *Barnette* 319 U.S at 630.

dealt with instances where those compelled to speak were private individuals.[126] In *Miller*, Davis was a public employee making her rights of speech different from private citizens, and giving her employer a "freer hand" to regulate the speech of its employees.[127]

Finally, the court in *Masterpiece* concluded it would be unlikely the public would view a wedding cake as an endorsement of same-sex marriage.[128] The court further stated that the reasonable observer would not conclude compliance with the law as a reflection of a business's beliefs.[129]

B. *First Amendment Free Exercise of Religion*

In all of the cases included herein, the business owners and the County Clerk defended their actions based on their religious beliefs. For example, in the case of *Craig v. Masterpiece*, the defendant argued that by requiring Masterpiece to provide a wedding cake for a same-sex couple by virtue of the antidiscrimination statutes, its First Amendment right to free exercise of religion was infringed upon.[130] Each of the other cases made similar arguments.

The First Amendment provides in part "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof…"[131] The First Amendment has been applied to the States through the Fourteenth Amendment.[132] The courts in these cases reviewed the defendants' arguments and found no infringement on the free exercise of religion.

In *U.S. v. Reynolds*, he U.S. Supreme Court addressed an issue dealing with polygamy, which was permitted under the teachings of the Church of Latter-Day Saints, but prohibited under federal law. The defendant, Reynolds, was arrested and charged with polygamy; he argued the federal law infringed on his free exercise of religion under the First Amendment.[133] The Court found that the law prohibiting polygamy did not infringe upon Reynolds free exercise of religion, because he was *allowed* his belief in polygamy.[134] The Court reasoned, however, to allow Reynolds to deny the law under the pretext of religion was not permissible, as it would "make the professed doctrines of religious belief superior to the law of the land, and in

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[126] Miller v. Davis, 123 F. Supp. 3d 924, at 941 (E.D. Ky. 2015).
[127] *Id.*
[128] *Masterpiece,* 2015 COA at ¶64.
[129] *Id.*
[130] *Id.* at ¶74.
[131] U.S. CONST. amend. I.
[132] Cantwell v. Connecticut, 310 U.S. 296 (1940).
[133] U.S. v. Reynolds, 98 U.S. 145 (1878).
[134] *Id.* at 167 (emphasis added).

effect to permit every citizen to become a law unto himself."[135] The Court also held "[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[136]

Over time, as the U.S. Supreme Court has continued to address the issue of free exercise of religion in regards to laws prohibiting certain practices, it focused on the applicability of a law, i.e., is the law of neutral applicability or specifically motivated to prevent religious conduct.[137] It has held that as long as the law is neutral and of general applicability, it will but upheld as Constitution under the First Amendment.[138] In *Employment Division, Department of Human Resources of Oregon, et al. v. Smith*, the Court held that the Free Exercise Clause does not relieve one from the obligation of complying with a "valid and neutral law of general applicability." A law is not of general applicability if it imposes burdens on religiously motivated conduct, but has exceptions for secular conduct.[139]

The court in *Masterpiece* found that the Colorado antidiscrimination law applied equally to religious and nonreligious conduct, and was, therefore, generally applicable.[140] Similarly, the court in *Elane Photography* found the New Mexico antidiscrimination law to be neutral in applicability.[141] The court in *Miller* went even further, stating "The State is not requiring Davis to express a particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order to perform her duties."[142]

V. CONCLUSION

One of the questions we ask ourselves when faced with situations such as these is when does one person's right trump another. It is well settled, through legislation passed not only through the federal government, but also through the states, that discrimination is not something to which our citizens should be subjected. Of course, what constitutes discrimination depends on the values and beliefs of our society at that particular time. Looking at the history of our country, we are all aware that it was legal to discriminate

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[135] *Id.*
[136] *Id.* at 166.
[137] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872 (1990); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).
[138] *Id.*
[139] *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 543.
[140] Craig v. Masterpiece Cakeshop, Inc., 2015 COA 115, ¶88 (Colo. App. 2015).
[141] Elane Photography, LLC v. Willock, 309 P.3d 53, 73 (N.M. 2013).
[142] Miller v. Davis, 123 F. Supp. 3d 924 (E.D. Ky. 2015) or Miller v. Davis, 2015 WL 9460311 (E.D. Ky. 2015) 25-26.

against African-Americans and women until very recently. Sexual orientation is only just making its way to the forefront of our citizens' focus. Although private intimate relationships and marriage have been made legal through U.S. Supreme Court decisions, the Court has yet to tackle the issue of discrimination based on sexual orientation. As noted above, sexual orientation has not been made a protected class under the Civil Rights Act of 1964, federal legislation prohibiting discrimination based on sexual orientation has not been passed by our Congress, and over half of our states do not have laws to protect against such discrimination in public accommodations.

If the Civil Rights Act were amended to include sexual orientation as a protected class, or if a state law was appealed to the U.S. Supreme Court and *cert* granted, would the Court uphold the antidiscrimination laws as they pertain to private businesses? Would the fundamental rights of free speech and free exercise of religion outweigh the rights of those discriminated against? We can look at past Supreme Court cases to predict a possible answer.

As to the argument based on Free Exercise of Religion, in *United States v. Lee*, the Supreme Court held:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[143]

Furthermore, the U.S. Supreme Court has indicated in numerous cases that although a religious belief may not be imposed upon by the State, certain practices associated with religion may be as long as the laws are applied in a neutral manner. This seems to be the case especially when a person decides to enter into a commercial activity, offering those services to the public.

In *Ingersoll*, the Superior Court Judge summarized the Supreme Court's actions in similar cases regarding religiously motivated actions:

> For over 135 years, the Supreme Court of the United States has held that laws may prohibit religiously motivated action, as opposed to belief. In trade and commerce, and more particularly when seeking to prevent discrimination in public accommodations, the Courts have confirmed the power of the Legislative Branch to prohibit conduct it deems discriminatory, even where the motivation for that conduct is grounded in religious belief.[144]

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[143] 455 U.S. 252, 261 (1981).
[144] Memorandum in *Arlene's Flowers, supra* note 87*,* at 58.

Finally, when faced with the question infringement upon Free of Speech, the *Elane* Court said it the best:

> Antidiscrimination laws have important purposes that go beyond expressing government values: they ensure that services are freely available in the market, and they protect individuals from humiliation and dignitary harm.[145]

Although the U.S. Supreme Court has not yet granted *certiorari* in cases of a similar nature, will the Court uphold the antidiscrimination laws as not infringing on First Amendment rights? The answer to that might all depend on who replaces the late Justice Antonin Scalia.

To end where we began, Justice Bosson said it the best: the "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. … It is the price of citizenship."[146]

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[145] *Elane*, 309 P.3d at 64.
[146] *Id.*