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Wedding Crashers: an Epistemological Model for When Refusal to Provide Service to Protected Groups Is Not Wrongful Discrimination

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Abstract

The question of the relation between wrongful discrimination and the freedom of conscience and religion has been the subject of many debates over the past decade and has occupied both courts and the public. The most well-known legal case in that regard is likely *Masterpiece Cakeshop*, in which a Colorado bakery owner refused to bake a wedding cake for a homosexual couple and was sued for violating the State's Anti-Discrimination law. Recently, the Supreme Court of the U.S has agreed to hear yet another Colorado case, *303 Creative LLC* v. *Elenis*, in which a website designer wanted to post a message saying she will not design websites for same-sex weddings.

The purpose of our article is to point to a significant distinction between a refusal to serve clients on the basis of their race, gender, sexual orientation, etc., and a refusal to serve them because such service requires the providers to engage in activities or projects to which they deeply oppose. We think the latter case, sometimes, might not at all be discrimination. Importantly, we distinguish between a deep objection to the content of the service or product requested and a rejection of the client because of her characteristics.

How can a supplier prove that his or her refusal to serve a client belonging to a "protected class" is based on the content of the product or service requested and not on the client's characteristics? We formulate a two-prong test that courts in the US and UK have implicitly adopted. We ask, first, whether the supplier would refuse the same service to a client not belonging to the protected class, and second, whether

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the supplier would serve the same client (belonging to a protected class) with other products and services. If the answer to both questions is positive, then the supplier's refusal is not wrongful discrimination because it shows an objection to the product or service requested and not a rejection of the client. In practice, this test is not always easy to apply. We therefore developed an epistemological model to substantiate the conditions that may help providers persuade the courts that their refusal to serve a client stems from the content of the request, not from the client's identity.

Keywords

discrimination – religious freedom – conscience – same-sex marriage – *Masterpiece Cakeshop* – Creative LLC

1 Introduction[1]

The question of the relation between wrongful discrimination and freedom of conscience and religion has been the subject of many debates in the past decade and has occupied both courts and the public. The best-known legal case in this regard is likely *Masterpiece Cakeshop*,[2] in which a Colorado bakery owner refused to bake a wedding cake for a homosexual couple and was sued for violating the Anti-Discrimination law of the state.[3] Following a long legal process, the US Supreme Court ruled in favor of the bakery owner (albeit for somewhat technical reasons, as the lower tribunal, Colorado Civil Rights Commission, did not show religious neutrality toward the baker's free exercise of religion, thereby violating it).[4] Recently, the US Supreme Court granted certiorari in yet

1 We thank Itzhak Bombach and Yael Magriso for their tremendous help in research. For enlightening comments, we thank Yitzhak Benbaji, Hanoch Dagan, Joseph Fishkin, William Forbath, Aeyal Gross, Andrew Koppelman, Itay Lifschits, Kasper Lipper-Rasmussen, Menachem Mautner, Barak Medina, Shlomi Segall, Re'em Segev, Meital Pinto, Uriel Proccacia, and Yofi Tirosh, as well as the participants of the Jewish Law Workshop at the Hebrew University of Jerusalem and the participants of the faculty seminar at the Buchmann Faculty of Law at Tel Aviv University. We also are grateful to The Edmond J. Safra Center for Ethics at Tel Aviv University for their generous support.

2 *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 584 U.S. (2018).

3 *Colo. Rev. Stat. § 24-34-601*.

4 Justice Kennedy determined that "The Civil Rights Commission's treatment of this case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his (the baker's) objection." *Ibid.*, at 12. In a similar case in Israel, *Color of the Rainbow*, a printing house refused to print materials for the LGBTQ community of Ben-Gurion University. A lawsuit based on the Israeli Anti-Discrimination Law was filed. The

another Colorado case, *303 Creative LLC v Elenis*, in which a website designer sought to post a message saying she would not design websites for same-sex weddings.[5]

This article makes a significant distinction between a refusal to serve clients on the basis of their race, gender, sexual orientation, etc., and a refusal to serve them because such service requires the providers to engage in activities they deeply oppose. We think that in some instances the latter case may not be discrimination. In some situations, it is possible to distinguish between a deep objection to the content of the service or product requested and a rejection of clients because of their characteristics.

How can suppliers prove that their refusal to serve a client belonging to a "protected class" has to do with the content of the product or service requested and not with the client's characteristics? We formulate a two-prong test that courts in the US and UK have implicitly adopted. We ask, first, whether the supplier would refuse the same service to a client not belonging to the protected class, and second, whether the supplier would serve the same client (belonging to a protected class) with other products and services. If the answer to both questions is positive, the supplier's refusal is not wrongful discrimination because it shows an objection to the product or service requested and not a rejection of the client.

The interpretation we suggest to the law is consistent with a well-known view in the philosophical debate on discrimination, according to which what makes wrongful discrimination wrong is the disrespect it expresses toward the discriminatee.[6] When one is mistreated *because* one is African American, Muslim, or gay, the mistreatment expresses a lack of recognition of the equal respect one is entitled to as a human being. According to this view, when such disrespect does not underlie the action or the policy, no discrimination occurs.[7]

Magistrate's Court accepted the lawsuit in 2017, and the appeal on behalf of the printing house was rejected in the District Court in 2020. Following oral arguments in the Supreme Court, the appeal was withdrawn.

5 https://www.supremecourt.gov/docket/docketfiles/html/qp/21-00476qp.pdf.

6 Richard Wasserstrom, "Preferential Treatment, Color-Blindness, and the Evils of Racism", in Steven Cahn (ed.), *The Affirmative Action Debate* (1995), 153–168; Patrick Shin, "The Substantive Principle of Equal Treatment," 15 *Legal Theory* (2009), 149–172; Benjamin Eidelson, *Discrimination and Disrespect* (2015); Deborah Hellman, *When Is Discrimination Wrong?* (2008).

7 We are aware that the law also refers to indirect or disparate discrimination, but as we later explain, that is not the meaning at the core of anti-discrimination statutes. The philosophical question of whether indirect, unintended discrimination is at all discrimination can be left for some other time. For the view that the notion of discrimination refers only to the intentional policy of exclusion or preference, see Iris Young, *Justice and the Politics of*

Today the disagreement about same-sex marriage is still "reasonable," but this might change, leading to a state of affairs in which an objection to same-sex marriage will be regarded as "beyond the pale," just like an objection to inter-racial marriage is today. If this happens, in such a world, providers will not be exempt from the duty to serve same-sex couples just as they are not exempt from serving inter-racial couples. In the case of same-sex marriage, today we may be in a liminal situation where although the acceptance of the practice is gaining support in some social circles, it is currently not sufficiently widespread to make objectors appear to be out of order.[8]

In Part 2 we present and justify the above distinction and discuss a possible way of interpreting anti-discrimination statutes in a way that reflects it. We also discuss court decisions around the world on cases such as *Masterpiece Cakeshop*. In Part 3, we present an epistemological model that explains the conditions that strengthen providers' claims that their refusal to serve a client stems from the content of the request, not from the client's identity. In Part 4 we discuss "reversed" cases to *Masterpiece Cakeshop*, where conservative plaintiffs sue liberal providers for their refusal to serve them. In Part 5 we conclude.

2 The Basic Idea

To demonstrate the main idea of this article, consider the case of Gwen and Macy:

> Gwen and Macy have been feminist activists for many years. To make a living, they run a printing house. One morning, a religious Muslim couple walks into the shop. The man is 54 years old, and the woman is 14. They wish to print invitations to their religious wedding. (We assume that such marriage is not illegal in their state).[9] Appalled by the fact that the woman is practically still a child, Gwen and Macy refuse to place the couple's order.

Difference (1990), 196; Matt Cavanagh, *Against Equality of Opportunity* (2002), 199; Benjamin Eidelson, *Discrimination and Disrespect* (2015), 19 ("'indirect' discrimination is not usefully thought of as a distinct form of discrimination at all, except as a piece of legal jargon").

8 Indeed, the recent *Dobbs* decision suggests that a conservative tide is on the rise and therefore that same-sex marriage might remain controversial in the US for some time.

9 For a list of minimum marriage ages, see https://worldpopulationreview.com/state-rankings/marriage-age-by-state.

Our project was initiated by the intuition that Gwen and Macy's refusal to place the order does not necessarily constitute discrimination (henceforth we use the term "discrimination" to denote wrongful discrimination). If Gwen and Macy are willing to provide the Muslim couple with any other service that does not involve their wedding, and they would similarly refuse to print invitations for *any* wedding where one of the parties is a minor, their refusal to serve the Muslim couple does not constitute discrimination. These two conditions distinguish between the above case and cases in which the provider's refusal to serve clients stems from a negative attitude rooted in the clients' race, religion, gender, sexual orientation, and so on. In such cases, the discriminator tends to treat the client negatively or less favorably in various spheres of life (employment, club entry, salary ranges, etc.), while treating others fairly and positively in all these spheres. But in our story, Gwen and Macy's refusal to serve the religious Muslim couple is not based on such a generally negative attitude because they are presumably willing to provide the couple with any other service. What motivates Gwen and Macy is their desire to avoid "getting their hand dirty" by participating in a wedding they deeply oppose. Objecting to the planned conduct while not rejecting the client is not a case of discrimination.

The above distinction sounds valid in theory, but in practice, it is quite difficult to prove that some alleged discriminator is entirely (or mainly, we leave this open for now) motivated by an objection to the content of the service required (e.g., an underage wedding), and not also by hostility toward the discriminatee. If Gwen and Macy are so opposed to underage wedding, likely they are also hostile to those supporting such weddings, in particular the Muslim couple. One might suspect that what Gwen and Macy present as an in-principle objection to the content of the service is a cover-up for plain rejection of Muslims on the basis of their religiosity or convictions.

To this, we must add that discriminatory acts are harmful not merely to the individual who is discriminated against but also to the social group to which the individual belongs, and therefore the cost of an error is high. Viewing Gwen and Macy's refusal as non-discriminatory means taking a real moral risk. It may be argued that although we should conceptually distinguish between the refusal to serve a client and the refusal to take a part in conduct to which one objects, *in practice,* because of epistemological difficulties to know what the true basis for discrimination was, it is better to adopt a policy that rejects the above distinction and states that whenever someone is denied service in circumstances *related* to one's race, religion, sexuality or (in some countries)[10] worldview, they are victims of discrimination. This policy focuses on

10 Israeli law, for example, prohibits discrimination on the basis of worldview.

minimizing the false negative error, which is the error of finding suppliers not racist when in fact they are.

We argue that such a policy does not give sufficient consideration to conscience. There is indeed a moral risk in allowing suppliers to refuse to serve certain clients, but there is also a risk in completely banning such refusal because of failure to show proper respect for the supplier's conscience. We think that false-positive errors (finding suppliers to be racist when they are not) also matter. That is why we reject the policy mentioned above and suggest an approach that balances the false-positive and false-negative errors. We suggest interpreting anti-discrimination laws in a way that does not apply to incidents in which the refusal stems only or mostly (we leave this open) from objection to the planned conduct, not from rejection of the client.

It is important to clarify the difference between the role of conscience in the current context and its standard role in law, which is to serve as a ground for exemptions from general rules, as in the case of an exemption from military service granted to pacifists. In the latter case, respecting conscience is the reason why pacifists are exempted from undertaking an action they would otherwise be obliged to take. By contrast, in the current context, respecting conscience provides a reason to reject the mentioned practical policy, according to which any refusal to serve members of disadvantaged groups is seen as discrimination. In our proposal, respecting conscience is the motivation behind and a consideration in favor of a certain interpretation of the prohibition against discrimination, according to which when there is convincing evidence that the provider's refusal to serve a client stems from objection to the content of the service and not from the rejection of the client, it should not be perceived as discrimination.

In our proposal, when Gwen and Macy are allowed to deny the requested service, it is not because respect for their conscience overrides the moral prohibition against discrimination but because in the circumstances of the case their refusal is not an instance of discrimination. But the fact that Gwen and Macy's refusal does not constitute discrimination on conceptual grounds does not mean that the law would deem their refusal legally permissible. In the next sections, we examine the way the law treats this case.

2.1 *A Different Interpretation of Anti-Discrimination Statutes*

If Gwen and Macy were allowed to refuse to serve the Muslim couple, the couple would receive worse treatment than others *because of* their religion, convictions, age, or ethnicity: other clients, who are not engaged in underage weddings will be served, whereas these Muslim clients will not. Can anti-discrimination statutes be interpreted in such a way that they do not apply to

Gwen and Macy, despite this result? We believe that the answer is affirmative. We now turn to suggest possible foundations to establish this answer.

2.1.1 Discrimination "on the Basis of" Anti-Discrimination Statutes

Discrimination "on the basis of" tends to take the following form:

> Suppliers of goods and services shall not discriminate in providing the good or service to the public, on the basis of race, religion or religious group, nationality, country of origin, gender, sexual orientation, etc.[11]

Thus, discrimination occurs when the refusal to serve clients is *on the basis of* the individuals' race, religion, etc. This "on the basis of…" requirement means, on one hand, that proving discrimination does not require proving intent, or even a conscious action, on the part of the discriminator against individuals on the basis of their religion, race, sexual orientation, and so forth. Often, discriminators may not even be aware of their inappropriate motivation and even deny it to themselves. As the Implicit Association Test shows, nearly all humans hold negative stereotypes against certain groups, of which they are not fully aware.[12]

But the fact that people belonging to protected classes need not prove bad intent by the service provider for courts to find the provider has discriminated against them does not entail that proving mere denial of services is enough. According to our interpretation of anti-discrimination statutes, when negative stereotypes against the clients are at the core of the provider's refusal to serve them, wrongful discrimination emerges (and even more so when the provider is aware of it and seeks to harm the discriminated client based on one of the characteristics mentioned above.) By contrast, when the refusal is not based on the client's race, religion, and so on (or any proxies for these), but strictly on the content of the service required, the correct interpretation of the law should be that the refusal is not discrimination.

The rationale for our approach is that when there is good evidence that a provider's refusal does not express disrespect for the client, as is the case when the refusal is due to the content of the planned conduct, the "on the

11 See, for example, the Israeli Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law 2000; US Civil Rights Act 1964; Article 14 of Britain's Human Rights Act; Britain's Equality Act 2010; the State of Colorado's CO Rev Stat § 24-34-601 (2016); Article 21 of EU Charter of Fundamental Rights 2000.

12 See, e.g., Mahzarin R. Banaji & Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* (2013).

basis of" condition is not met, and therefore the refusal does not constitute discrimination.

2.1.2 "Suppliers of Goods and Services"

Another legal path that can be taken to explain why Gwen and Macy's case does not constitute wrongful discrimination is that the service or product they are required to provide is *not* part of the services they offer. A burger joint does not necessarily have vegan options, and vegans cannot claim that they are discriminated against in a burger place. The same holds for a Jewish customer and a non-kosher burger place. The fact that the client is part of some minority group does not grant one a right to a service that the provider does not provide at all. Similarly, on the face of it, Gwen and Macy can argue that the printing invitations to underage weddings are not part of their business, and therefore refusing to perform this service for the Muslim couple does not constitute discrimination.

This interpretation of the law is problematic, however, because it opens the door for many suppliers to evade their duties by claiming that the product or service they refuse to provide the gay, Muslim, African American, etc. customers is simply not part of their business, not part of what they do.

Our response to this difficulty is that it will be artificial to include the identity of those served in the definition of the type of service granted. Consider, for example, a car rental business that serves only Christians. The provider will not be able to escape the charge of discrimination even if he defines his business as *renting cars to Christians* because such definition is exactly what anti-discrimination statutes prohibit: discriminating against individuals on the basis of race, religion, nationality, etc. Similarly, a bakeshop cannot declare that its product is "wedding cakes for heterosexual couples."[13] But the situation may be different if a same-sex couple wants a "gay" wedding cake, say with two grooms hugging as its topper. In this case, the bakeshop may honestly say that it does not provide such cakes as part of its trade, just as a religious or feminist printing house may say that it does not print pornographic material as part of its trade, and Gwen and Macy may claim that they do not print invitations to underage weddings as part of their trade.

13 The justices in the *Masterpiece Cakeshop* debated this very question when discussing whether the cake the baker was asked to make was a "wedding cake," and therefore he could not have refused to prepare it for a same-sex couple, or an "LGBTQ wedding cake," which may have granted him a right to refuse because, on one hand, he was willing to sell the couple any other product, and on the other, he was not willing to sell an LGBTQ wedding cake to anyone. Compare Justice Gorsuch's opinion on pages 9–10 and Justice Ginsburg's opinion on page 5.

Upon closer examination, however, the requirement that the refused service be part of the discriminator's business is closely connected to the condition of "on the basis of" and does not suggest a separate path for obtaining an exemption from the discrimination claim. As noted, to obtain such an exemption two conditions must be met. First, the provider must be willing to provide the client with any other service or product, and second, the provider must refuse to provide the said service to everybody else. In the case of providers who claim that they do not provide a certain service as part of their trade, the second condition is automatically met. And because the provider presumably is willing to provide other services to the client, the first condition is similarly satisfied. In other words, if a provider is not willing to provide service X to anyone but is willing to provide them all with service Y, then (a) it is untrue that the refusal to provide X is based on the client's race, sexual orientation, etc. and (b) it is untrue that providing X is part of the provider's business.

2.2 *Comparative Law*

The distinction between rejecting the *client* and objecting to the planned *conduct* in the interpretation of anti-discrimination statutes can be found, in whole or in part, in some cases around the world. The most important one is the British case of *Ashers,* from 2018.[14] Gareth Lee, a gay rights activist in Belfast, asked the local Ashers bakery to bake him a cake with the writing "Support Gay Marriage" on it. The owners of the bakery were devout Christians, indeed the bakery's name was derived from a verse in the book of Genesis ("Asher's food shall be rich, and he shall provide royal delicacies" [Genesis 49:20]). Lee was not aware of the bakers' religious beliefs and the bakers were not aware of his sexual identity or of his activities in favor of the LGBTQ community. At first, the bakery agreed to accept the order but the owners then changed their minds, returned Lee's money, and canceled the order. Lee then successfully ordered the cake at a different bakeshop.

Lee filed a discrimination lawsuit to the county court and was awarded 500 UKP in damages. The bakery owners appealed to Northern Ireland's Court of Appeals, where they lost, and later appealed to the UK Supreme Court and won. The Court decided that rejection of the planned conduct can be differentiated from the rejection of the client: "The less favorable treatment was afforded to the message not the man."[15]

In determining that the refusal to serve Lee did not constitute wrongful discrimination, the Court relied on the two tests mentioned above. On one hand,

14 *Lee* v *Ashers Baking Company Ltd*, UKSC 49 [2018].

15 *Ibid.*, para. 47.

Ashers would have refused to bake a cake with the required writing for any client; on the other, they would have been happy to provide Lee with any other service.[16]

At the time this ruling was being written, the US Supreme Court decided the *Masterpiece Cakeshop* case, and the UK Supreme Court saw fit to refer to it. The main message the UK Supreme Court elicited from *Masterpiece Cakeshop* fits our thesis, and says as follows:

> The important message from the *Masterpiece Bakery* case is that *there is a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wants such a cake, and refusing to produce a cake for the particular customer who wants it because of that customer's characteristics*. One can debate which side of the line particular factual scenarios fall. But in our case [*Ashers*] there can be no doubt. The bakery would have refused to supply this particular cake to anyone, whatever their personal characteristics. So, there was no discrimination on grounds of sexual orientation."[17]

Masterpiece Cakeshop was decided, as noted, on somewhat technical reasons, but other American courts explicitly ruled in favor of the approach we advance. In *Brush & Nib Studio*, the Arizona Supreme Court discussed whether Christian designers could refuse to design wedding invitations for same-sex weddings. The Court claimed that the designers

> neither testified nor argue that their faith prohibits them from serving a customer based on their sexual orientation. Rather, Duka and Koski have testified that they are willing to serve any customer, regardless of status, and no contrary evidence has been presented. Additionally, the record contains no complaints against Plaintiffs for discriminating against customers based on their sexual orientation.[18]

As it was not proved that the designers had discriminated against clients with a sexual orientation different from their own, their refusal to design such wedding invitations did not constitute wrongful discrimination. The reason

16 In December 2021, the ECtHR decided not to admit an application by Gareth Lee against the UK. See Application no. 18860/19 Gareth Lee against the United Kingdom.

17 *Ibid*., para. 59.

18 *Brush & Nib Studio, LC* v. *City of Phoenix* (2019) available https://adflegal.blob.core.windows.net/mainsite-new/docs/default-source/documents/legal-documents/brush-nib-studio-v.-city-of-phoenix/brush-nib-studio-v-city-of-phoenix---arizona-supreme-court-opinion.pdf.

was that the refusal stemmed from the designers' religious objection to being involved in a same-sex wedding, and not their rejection of the *client* on the basis of their race or their sexual orientation.

An important feature, in this case, was that the requested service, a custom-tailored wedding invitation, would have required the designers to be personally and deeply involved in the conduct to which they object. Presumably, if the clients had asked for a standard wedding invitation, the legal outcome would have been different. Designing a special, custom-made wedding cake for a same-sex couple is not like selling a premade wedding cake (or any other festive cake) off-the-shelf.[19] This was the main reasoning of the Arizona Supreme Court, which in a 4-3 decision held that the City of Phoenix cannot force a local business to design wedding invitations for a same-sex wedding against the owner's religious beliefs.[20]

The last American case we mention is a mirror image of the UK *Ashers*. A man named William Jack addressed several bakeshops in Colorado and asked them to make him a cake decorated with homophobic statements[21] like "God hates sin. Psalm 45:7" and "Homosexuality is a detestable sin. Leviticus 18:22."[22]

19 Compare Justice Thomas's opinion on pages 5–13 and Justice Kennedy's opinion on page 15 with Justice Ginsburg's opinion on pages 4–7 regarding *Masterpiece Cakeshop*, *supra* note 3. A similar observation can be found on page 50 of *State* v. *Arlene's Flowers, Inc*. In 1999, the city of Louisville, Kentucky, passed the Louisville Fairness Ordinance, which prohibits discrimination against LGBTQ members in employment, housing, and public accommodations. Chelsea Nelson is a wedding photographer and a blogger, as well as a Christian who believes that marriage is between a man and a woman. She refuses to photograph same-sex weddings, and publishes it on her website. She filed a lawsuit against enforcing the Fairness Ordinance. In August 2020, the US District Court for the Western District of Kentucky sided with Nelson, determining that her photography is her art, which is equivalent to speech, therefore protected by the First Amendment. But the court denied her request for a general preliminary injunction to prevent the enforcement of the Fairness Ordinance (referring to *Masterpiece Cakeshop*, in which the Supreme Court warned that the decision in favor of the baker should be limited to the specific reasons of the case because not every refusal due to religious and moral reasons is legitimate). *Chelsea Nelson Photography LLC* v. *Louisville/Jefferson County Metro Government*, Civil Action No. 3:19-CV-851-JRW (W.D. Ky. Aug. 14, 2020).

20 See also *Lexington Fayette Urban County Human Rights Comm'n* v. *Hands on Originals, Inc.* (Ky. Ct. App. May 12, 2017), in which the Kentucky Supreme Court ruled in a 2-1 decision that a business owner should not be coerced to print shirts for the Gay Pride Parade.

21 *Jack* v. *Gateaux, Ltd.*; *Jack* v. *Le Bakery Sensual, Inc.*; *Jack* v. *Azcuar Bakery*.

22 The Biblical text Jack wished to use in his campaign against homosexuality is not about same-sex relationships (surely not about marriage), but rather gay anal relations, as is written in *King James Bible*: "Thou shalt not lie with mankind, as with womankind." But in the more recent *New Living Translation*, the message was "updated" to allegedly prohibit a homosexual lifestyle, and that is the version Jack referred to: "Do not practice homosexuality, having sex with another man as with a woman. It is a detestable sin."

The bakeries refused, and Jack claimed that he was religiously discriminated against because the cakes reflected his religious beliefs. Consistent with our proposal, the Colorado court rejected his claim because the bakeshops would have refused to make or sell such cakes to any client, regardless of the client's convictions.

Moreover, even when courts found the providers liable for discrimination, they examined the cases by considering the conditions mentioned above. For example, in the case of *Bull* v *Hall*,[23] which was heard by the UK Supreme Court, a couple of devout Christians who owned a guesthouse adjacent to their home refused to accommodate a gay couple in a room with a double bed, but offered them a room with separate beds. When the clients refused that offer, the hosts apologized, returned the deposit, and even offered to pay for the couple's stay at a different hotel, in addition to some other expenses, to make up for their inconvenience. The gay couple filed a lawsuit and the court ruled in their favor in all three proceedings. The UK Supreme Court ruled against the guesthouse owners and refused to grant them protection of their religious beliefs although the first condition (willingness to provide the clients with a different service) was met. Regarding the second condition, the Court argued that if the owners had refused to accommodate *any* unmarried couple – homosexual or heterosexual – in a room with a double bed, their refusal to offer such a room to the gay couple would not have constituted wrongful discrimination on the basis of sexual orientation. But the Court was convinced that the hotel owners would not have refused an unmarried heterosexual couple and would have refused to accommodate the gay couple even if they were legally married, therefore the refusal to accommodate them in a room with a double bed constituted discrimination on the basis of sexual orientation. We agree.

To sum up, the interpretation we offer to Gwen and Macy's case fits the interpretation made by some courts in similar cases.[24] The rulings of these courts provide support for our conceptual claim that discrimination occurs only when someone refuses to provide service to another because of prejudice against that person, based on characteristics such as race, religion, nationality, or sexual orientation.[25]

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23 *Bull* v *Hall* [2013] UKSC 73.

24 For example, *Elane Photography, LLC* v. *Willock*, NMSC-040, 309 P.3d 53 (2013); *Klein* v. *Or. Bureau of Labor & Indus.* 289 Or. App. 507 (2017).

25 Even Justice Ginsburg, who was considered at times the most liberal justice of the US Supreme Court, and was a dissenting judge in *Masterpiece Cakeshop*, appears to have supported these two conditions. See *Masterpiece Cakeshop*, *ibid.* 3, at page 6 of Justice

3 The Epistemological Model: the Relevant Considerations in Determining Whether the Refusal Should Be Treated as Discrimination

As noted, it is often difficult to distinguish between cases in which the refusal to provide service stems from prejudice against the client or from a fundamental objection to taking part in the conduct itself (underage marriages, same-sex marriage, etc.). Given the moral and legal presumption against discrimination, the burden of proof in such cases is on the refusing providers. They could point to evidence showing that they happily served the client on other occasions and that they have refused in the past to provide the particular service requested to clients not belonging to a protected class. The problem is that such evidence is rarely available. Moreover, at times the nature of the provider or the client makes it especially difficult to find such evidence. For example, an organization acting against abortions would most probably not be interested in printing services other than those related to its social agenda, hence it would be difficult for business owners who refuse to serve such organizations to show that although they cannot provide the requested service that is against their conscience, they would be happy to assist the organization in any other matter. Typically, there are no "other matters" that the organization might ask for.

These difficulties in providing evidence about how the provider *would* have acted vis-à-vis the current client in the provision of different services or vis-à-vis other clients in the provision of the same service indicate that decisions in this area are made under conditions of uncertainty. Nevertheless, in the face of this epistemological lacuna (was the refusal "based on" race, religion, etc.), we present a model in which the following considerations may serve as indirect evidence that can help the provider lift the heavy burden of persuading the court that its refusal should be deemed legal. Courts should ask themselves:

1. How direct would the harm be to the providers' conscience should they be forced to provide that service?
2. How personal and deep is the providers' involvement in the planned conduct they oppose?

Ginsburg's opinion: "The bakers would have refused to make a cake with Jack's requested message for any client, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked good they would have sold anyone else" (Page 4 to RBG opinion). See also "Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the client requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display."

3. Does the social group to which the claimed discriminatee belongs have a history of suffering from discrimination and deprivation?
4. How morally worthy is the content of the provider's conscience?
5. To what extent will the clients be harmed should the provider refuse to serve them?

In the following subsections, we examine each question in detail.

3.1 *How Direct Would the Harm be to The Provider's Conscience?*

The literature on conscientious objection emphasizes that conscience deserves protection only when there is a direct violation of it, namely when the deep principles that provide life with meaning and to which individuals feel obligated are violated.[26] When there is no such violation, citizens are expected to subordinate their will to that of the legislator. If suppliers can show that the service or good that they are required to provide directly violates their deep principles, it is easier to assume that their refusal to provide that service or good is not due to the client's characteristics but to the conflict between the desired service or good and the provider's conscience.

Yet, one's claim that one "cannot" do something because it is profoundly against one's principles should be examined carefully and critically. People often conceptualize their refusal to X as being grounded in their deep beliefs, religious or other, whereas in truth it is driven by problematic prejudice and negative attitude toward the relevant group. Consider an Orthodox Jew who sells meat to secular Jewish clients on Friday afternoon although they explicitly indicate that they are buying the meat for a barbecue they plan to do on the Jewish Sabbath, in clear violation of Sabbath restrictions on lighting a fire and cooking. These are severe restrictions, and according to Jewish law, one is not allowed to help others violate them. Nevertheless, only a small number of Orthodox suppliers would refuse to sell meat to secular clients under these circumstances not to be complicit in the presumptive desecration of the Sabbath. A religious business owner who agreed to sell under these circumstances

26 For example, see Jocelyn Maclure and Charles Taylor: "[T]he beliefs that engage my conscience and the values with which I most identify, and those that allow me to find my way in a plural moral space, must be distinguished from my desires, tastes, and other personal preferences, that is, from all things liable to contribute to my well-being but which I could forgo without feeling as if I were betraying myself or straying from the path I have chosen. The nonfulfillment of a desire may upset me, but it generally does not impinge on the bedrock values and beliefs that define me in the most fundamental way; it does not inflict 'moral harm,'" Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (2011).

would find it difficult to persuade us that his conscience does not allow him to sell goods to a gay couple wishing to celebrate their marriage.

Our analysis suggests that in some situations the court will be required to investigate the religious law in-depth to understand whether the alleged infringement of conscience of an observant provider is indeed direct and significant. To this end, the court will need to hear experts of both parties, and possibly appoint an expert on its behalf. But decisions regarding religious matters are not necessarily more challenging than those regarding complex matters of medical malpractice or design defects, in which courts are routinely involved.[27]

In sum, the more providers can persuade the court that the requested service directly and fundamentally violates their deep beliefs, which are based on an objective religious test they can reasonably claim to be shaping their world, the better they will persuade the court that the refusal to serve some client is based on this violation, rather than on prejudice against the client for what the client is.

3.2 *How Personal and Deep Is the Providers' Involvement in The Conduct They Oppose?*

Another factor that must be taken into consideration, related to the discussion in the previous subsection, is how involved the providers would be in the conduct they oppose. For example, a pro-life physician who carries out an abortion would be heavily involved in deeply offensive conduct. But the anesthesiologist is less involved in the procedure, which is even more true for the administrative staff. The more one is required to be personally and heavily involved, the more justified is one's request for an exemption. Regarding claims of discrimination, the less providers are engaged in the conduct they oppose, the heavier the burden of proof to show that their refusal to serve the client is not motivated by disrespect but from an authentic objection to being heavily involved in the conduct itself.

Even if same-sex marriage is against the religious beliefs of John Doe, there is a difference between a case in which a car rental company he owns is asked to rent a car to a gay couple on their wedding day and one in which he is asked to personally drive them in a convertible from their home to the wedding. Similarly, there is a difference between a printing shop that is asked to print photos taken at a same-sex wedding, just as it is asked to do with photos

27 Whether or not courts should intervene in religious interpretation is a serious question to which we cannot do justice here. For a representative refusal to do so, see *Syndicat Northcrest* v. *Amselem* 2 S.C.R. 551 (2004).

taken at a heterosexual wedding, and a print shop that is asked to design custom-made invitations for such a wedding. The heavier the personal involvement of the suppliers, the easier it is for them to persuade the court that they deserve exemption.

In the same vein, the Supreme Court in Washington State ruled that making flower arrangements for a same-sex wedding does not express any message regarding the wedding, or we may say that the involvement is not "thick" enough, and a refusal to do so cannot be justified on grounds of free speech or free exercise of religion. The plaintiffs also admitted that they would provide flower arrangements for an atheist wedding because their service would not be an endorsement of such a wedding, therefore they could not argue *bona fide* that doing so for a gay marriage would constitute such an endorsement.[28]

Last, this consideration was also at the bottom of the justification for the UK Supreme Court ruling in *Bull* v *Hall*.[29] Although the Court ruled against the guesthouse owners for other reasons, in our view the owners' refusal was unjustified also because providing the requested service would involve only a "thin" involvement of the guesthouse owners: giving the couple a key to a regular double room.

3.3 *Does the Social Group Have a History of Suffering from Discrimination and Deprivation?*

While the language of anti-discrimination statutes often does not distinguish between refusals to serve a minority group and the majority group, legislative history and the case law make it clear that groups with a history of persecution and oppression are granted special protection.[30] Therefore, if the clients belong to such groups, the burden on the providers is heavier to persuade the court that they are not motivated by prejudice and hostility. If, by contrast, the provider refused service to someone from the majority group, it will be easier to persuade the court that the refusal was principled and based on the content of the service.

Note, however, that like all the considerations discussed in this section, this one also plays an evidentiary role. If the relevant group is one with a history of suffering from discrimination, hostility, and prejudice, there are grounds for

28 *State* v. *Arlene's Flowers, Inc.*, 389 P.3d 543, para 44, 187 Wash. 2d 804 (2017).

29 *Bull* v *Hall* [2013] UKSC 73.

30 For example, in the explanatory materials of the Israeli Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law it is said that: "If a person is denied entry to a public place, or services, or goods based solely on him being part of a certain group, and especially one that has a history of discrimination against it, it is a severe violation to a person's dignity." On the American approach, see....

suspicion that what motivated the providers, even if not entirely consciously, in their refusal to serve the group members was not their objection to the content of the required service but their rejection of the individuals for who they are. Thus, when dealing with disadvantaged groups, providers have a heavier burden of proof to show that these characteristics played no part in the refusal to serve the clients.

3.4 *How Morally Worthy Is the Content of the Provider's Conscience?*

When the supplier's values are known to be hostile toward a certain group of people because of their race, religion, sexual orientation, etc., even if there is no direct evidence that the refusal to serve group members stems from hostility, it is a likely conjecture. Therefore, the burden of proof on the supplier to show that this is not so is heavy. Consider, for example, a member of a white supremacy organization who refuses to serve black or Jewish clients but who claims that the refusal has to do with the content of the required service, and not with who the clients are. Such a provider would have to bring substantial evidence to persuade the court that this was indeed the case. A corrupt conscience is typically one that denies the equal rights of humans, hence the more corrupt the conscience, the more difficult the task of the provider to prove that the refusal of service was not motivated by racism or other discriminatory reasons.

A complementary consideration to the supplier's conscience is the content of the services requested from the supplier. Consider the case of a racist organization that asks a public relations firm to produce a corporate video, calling on the public not to buy from Muslim-owned businesses. In this case, the burden placed on the suppliers to persuade the court that they deeply oppose the content of the service they were asked to perform is lighter than the burden of justifying rejecting the opposite request, to produce a corporate video calling on the public to buy from everyone. There is something wrong and hypocritical when a client engaged in discrimination asks for the protection of the court under an anti-discrimination law.[31]

The above discussion helps elucidate the logic in distinguishing between the baker's refusal in the cases of *Masterpiece Cakeshop* and of *Jack*. In the first case, the refusal was directly linked to the baker's worldview, which is at best ambivalent and at worst hostile toward homosexuals and their right to equality. In the case of *Jack*, however, the refusal did not stem from such a

31 At the same time, the more outrageous the client's requested service is, the greater the likelihood that the supplier will decline to provide any service to the client. Therefore, in this situation, the burden of proof placed on the provider increases.

perception, but rather from an approach that respects everyone and their right to equality. Moreover, there was no concern that the three bakers would not be willing to provide the client with any other service. Therefore, in our view, the burden of proof that should have been placed on the bakers in the *Jack* case to show that they did not act out of wrongful motives is significantly lighter than the one that should have been placed on the baker in *Masterpiece Cakeshop*.

What about cases involving practices in which social acceptability is still in the making, in other words, liminal cases? Compare, in the American context, underage marriages with inter-racial marriages and gay marriages. Today, marriages between old men and young girls are considered beyond the pale, although in the past, even the not-so-distant past, this was not the case.[32] Therefore suppliers like Gwen and Macey who refuse to print invitations to minor weddings can easily be seen as motivated by a "reasonable" attitude. By contrast, in the past inter-racial marriages were considered somewhat unacceptable, whereas today they are acceptable like any other marriage. If Gwen and Macey refused to print invitations to inter-racial weddings today, it would be considered unreasonable.

The status of gay marriages today is somewhere in between the status of inter-racial and underage wedding marriages. Until a decade or two ago, gay marriages appeared unlikely. But the situation has changed quickly and today gay marriages are legal in the US. Nevertheless, religious or conscience-based refusal to take part in gay marriage does not appear to be unreasonable, unlike the case of inter-racial marriages. This means that it is still possible to tolerate honest conscientious objections to being deeply involved in such weddings.

This does not mean that our analysis is limited in time. It is relevant for any refusal based on a view that is not unreasonable, that is, any refusal with regard to questions about which there is a reasonable disagreement. For example, as noted, it may be applied to providers refusing to take part in weddings between humans and robots[33] or for physicians refusing to perform sex-change surgeries on minors without their parents' consent, a controversial issue that has made the headlines recently in the US.[34]

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32 An ancient example is the marriage between Isaac and Rebecca who, according to one tradition in Jewish commentary, Rebecca was only three years old when she married Isaac, who was forty. See, for example, Rashi's commentary to Genesis 25:20.

33 https://qz.com/871815/sex-robots-experts-predict-human-robot-marriage-will-be-legal-by-2050/. The 2050 prediction might have been too conservative; see https://pandagossips.com/posts/5619.

34 See for example https://www.breitbart.com/politics/2022/04/07/alabama-lawmakers-pass-bill-criminalizing-sex-change-surgeries-puberty-blockers-minors/ and https://www.politifact.com/factchecks/2019/nov/11/cindi-castilla/what-does-law-say-about-children-and-sex-reassignm/.

3.5 *To What Extent Will the Clients Be Harmed Should the Provider Refuse to Serve Them?*

Should suppliers such as Gwen and Macy be allowed to deny clients service because of the content of the requested service, it may result in clients not being able to receive a service they need, which may cause them financial losses. This would be the case if, for example, Gwen and Macy's printing house were the only one in town. In such a case, we may suspect that the refusal to serve the clients is not motivated only by Gwen and Macy's desire to keep "their hands clean" but also from a desire to prevent the Muslim couple from being served anywhere. By contrast, if the clients have easily available options to obtain the service elsewhere, the burden of proof placed on the suppliers is lighter, especially if they themselves direct the clients to other suppliers.

As a side note, we observe that an alternative way of explaining the relevance of the criterion regarding other easily available alternatives for obtaining the service is to regard it as an external policy consideration that can override the legitimacy of the refusal to supply the requested services, in some kind of a balancing test. Therefore, even if, based on our approach, Gwen and Macy were *not* discriminating against the Muslim couple when they refused to serve them, if the couple cannot receive the service at any other printing house nearby, the interest of the client and that of the market in general would override Gwen and Macy's objection, and, according to this argument, Gwen and Macy would be required to provide the service.

The problem with this conceptualization is that in cases that involve a service that is opposed to the provider's conscience, it is unclear why the client's interest of finding a suitable provider should be preferred *a priori* over the interest of the providers not to act against their conscience. In the reverse situation, the difficulty is even greater. If one concludes that John Doe, who is a supplier, wrongfully discriminates against somebody, how can the fact that there are available alternatives undo the discrimination? In other words, it is necessary to clarify why market conditions are at all relevant to deciding whether or not the supplier discriminated against a client.

Back to the main argument in the current digital age, one supplier's refusal to serve certain clients would rarely prevent them from obtaining the service elsewhere, or place an unbearable burden on them in obtaining it. There is nearly always more than one baker in town, and normally one can order from photographers online. Therefore, in most cases, the burden of the providers in identifying other options for the client is not unduly heavy. Indeed, sometimes the refusing supplier can help finding an alternative one.[35]

35 As did the Florist in *State* v. *Arlene's Flowers, Inc, supra note 28, at paragraph 7.*

Other cases in which harming the clients is relevant to our discussion are those in which the service or goods requested are closely linked to the client's identity and the practices it involves. In such cases, refusal to serve the client causes unusual non-economic damages of exclusion and humiliation, and it may be more difficult to believe that the supplier's refusal is not a rejection of the client, but only of the requested service. For instance, consider two religious guesthouse owners. The first entirely refuses to rent a room to an LGBTQ couple, and the second refuses to rent them a room with a double bed (similarly to *Bull* v. *Hall*). The humiliation in the first case is greater, and there is concern that the suppliers are seeking not only to avoid being personally involved in a service that allegedly directly conflicts with their conscience, but also to prevent the couple from engaging in sodomy. By contrast, in the second case suppliers may be perceived as attempting to cause minimal harm from their point of view to the LGBTQ couple, and respect the couple as much as they can. Therefore, their burden to persuade the court that their refusal does not stem from a comprehensive negative attitude toward the clients is smaller than that of the first supplier.[36]

To reduce the potential harm and humiliation to clients whose request to be served would be refused when incompatible with the provider's conscience, Andrew Koppelman proposed that wedding vendors be exempted from anti-discrimination law only "on condition that they give prior notice of their objections to facilitating same-sex marriages."[37] Such notice would reduce the potential feelings of humiliation and exclusion of same-sex couples, who would know in advance not to turn to certain businesses. A notice of this kind may also indicate the depth of the business owners' commitment to the principles they profess to believe in because placing such a notice may result in losing not only gay clients but also others who identify with them. Thus, businesses willing to take the economic and social risk are probably truly invested in their religious opposition to same-sex marriage and therefore potential candidates for protection.

In our view, to balance the potential offense of such notice, it should be formulated not only negatively but also positively, along the following lines:

36 The issue of humiliation (non-economic damages) discussed in the main text raises a similar analysis to the one dealing with economic harm caused to the client by not being served, and can be analyzed from the point of view of "external policy considerations," with all the difficulties that arise applying here as well.

37 Andrew Koppelman, *Gay Marriage and Religious Liberty* (2020), 138.

> We happily serve all clients regardless of their religion, race, gender, or sexual orientation. But for religious reasons, we apologize for not being able to provide [for instance] photography services at same-sex weddings.

Koppelman's idea is compatible with our argument above that when the requested service conflicts with the provider's conscience, the service can be regarded as not being part of the supplier's business. Thus, suppliers who explicitly publicize in advance (before being approached by individual customers) that they do not provide a particular service (distinct from not serving particular clients) will be able to reasonably claim that this service is not part of the goods and services they provide and that therefore their refusal to provide it is not discrimination.

The main problem with Koppelman's proposal is that the disclaimers he calls for, exactly because of their overtness, might be "contagious," increase social polarization, and make service providers less compromising and less tolerant. In liberal places, like San Francisco, where announcing such a disclaimer would involve a high economic risk for the business, it would be likely to limit the number of businesses obtaining an exemption from serving same-sex couples while minimizing the harm and humiliation to such couples. In more conservative towns and neighborhoods, the cost to businesses may be much lower (these businesses might even benefit financially from such disclaimers), and same-sex couples might be worse off as a result. A great deal depends on contingent factors that are difficult to assess from an armchair. We think that in *303 Creative LLC* the US Supreme Court should not adopt anything similar to Koppelman's proposal because the risk of anti-gay sentiments spreading in the country is too high.[38]

Before concluding this section, we wish to emphasize three points. First, as we mentioned in passing, there is a substantial difference between the way we conceptualized the abovementioned considerations and a different possible way to conceptualize them. In our epistemological model, all five considerations concern the burden of proof placed on the suppliers when there is no clear evidence that they objected only to the content of the service and did not reject the client. These considerations influence the level of the burden of

38 On the market response to Masterpiece Cakeshop see Netta Barak-Corren, A License to Discriminate? The Market Response to Masterpiece Cakeshop, 56 Harvard Civil Rights-Civil Liberties Law Review pp-315–366(2021) (conducting a large-scale field experiment showing vendors are less willing to provide wedding services to same-sex couples after the USSC rules in favor of Masterpiece cakeshop).

proof required of suppliers to persuade the court that their refusal to serve the clients was not on the basis of their race, religion, etc. For example, if the service is required by a member of the majority group, and the service, which requires substantial personal involvement of the provider, deeply offends the supplier's moral beliefs, and if many others can provide the same service, persuading the court that the supplier objected only to the conduct and did not reject the client should be relatively easy. This was the case of *Jack*. Alternatively, it is possible to consider at least some of these considerations as "external," which need to be balanced against the wrongfulness of discrimination. The reason we object to this approach is that if there is convincing evidence that John Doe's refusal to serve a client was not caused by disrespect or hostility toward the client, there is no basis for saying that, because of policy considerations, he nevertheless violated the anti-discrimination statute;[39] and *vice versa*, there is no justification of determining, based on the aforementioned external considerations, that the conduct of a provider who clearly discriminated against a client (on the basis of the client's characteristics), was non-discriminatory merely because there happen to be other shops in that area.

Second, these considerations do not constitute necessary or sufficient conditions for regarding a refusal to serve as non-discriminatory. The court must take these considerations into account when it examines the claim that a provider's refusal to serve clients was not motivated by characteristics like race or gender but by the provider's fundamental opposition to engage in perceived wrongful conduct. Because such considerations concern the evidence, the weight given to each may vary from case to case.

Third, our analysis is relevant to situations of reasonable disagreement at a given time and place. This is why it applies to refusal to be involved in same-sex, but not in inter-racial marriages, in the early 21st century in the US. As noted, our analysis is relevant to other practices that are controversial but are not considered beyond the pale, such as marriage between humans and robots or sex-change surgeries for minors without their parents' consent.

4 Reverse Cases

Many of the cases we focused on concerned religious suppliers who refused service to people from the LGBTQ community. But what about reverse cases,

39 We agree with Sepinwall that "where the conscientious objector seeks an exemption from an anti-discrimination law, balancing has no place" (Amy Sepinwall, "Conscience in Commerce: Conceptualizing Discrimination in Public Accommodations," 53 *Connecticut Law Review* (2021), 30), but in our opinion, when the one's refusal is grounded in one's conscientious inability to provide the requested service, no discrimination occurs.

that is, lawsuits from the other side of the political and ideological spectrum, such as *Jack,* where pro-gay bakers refused to bake an anti-gay cake? Such cases can lead to two different results, both desirable from the perspective of, in this case, the anti-gay client-plaintiff. One is an amendment in the relevant anti-discrimination statutes that would grant providers wider discretion to refuse service to some clients based on conscientious objection to the planned conduct. Such an amendment may benefit anti-gay bakers in the future. The other would follow from a court decision *against* the client (as indeed was the case in *Jack*), which would then allegedly expose the hypocrisy of the legal system, often regarded by conservative circles as biased against them.

A recent Israeli case illustrates this dilemma. In response to a court decision in *Color of the Rainbow* (where the court ruled against a religious owner of a printing shop who refused to print an invitation to a party held by an LGBTQ group), a fundamentalist right-wing organization that encourages Jews to "Return to the [Temple] Mount" where one of the most important Muslim mosques currently resides and where the biblical Temple had stood, initiated a "reverse" lawsuit. First, it asked an Israeli-Muslim printing house to print material for them. As the group expected, the Muslim owner immediately refused, adding something like, "what's this nonsense about the Temple Mount. We're talking about our Al-Aqsa mosque. Go to hell." Following this refusal to be served, the Return to the Mount organization filed a suit for discrimination. The Small Claims Court in Nazareth accepted the suit because it found that the supplier rejected the client based on their political view (which is a forbidden ground in Israel), but granted the plaintiff only minimal compensation because choosing a Muslim printing house was seen as a provocation.[40]

In our view, neither in *Color of the Rainbow* nor in *Return to the Mount* were the owners of the printing houses entitled to an exemption from paying compensation for their refusal to serve the claimants. The reason, in both cases, is that the refusal was quite explicitly based on an objection – a revulsion – against the claimants' way of life or worldview, and not on the legitimate desire not to take part in an activity that might have conflicted with the owners' deep principles. Such a refusal to serve gays just because they are gays or to serve Orthodox right-wing Jews just because of their political agenda is precisely what anti-discrimination laws seek to uproot.[41]

40 *Kehati* v. *Mahameed*, 53966-05-21.

41 It remains to be settled whether the supplier should only pay damages for refusing to provide the service, or should also be required to provide the service (through an injunction). Although an injunction might involve some compromise on one's integrity, if the refusal is deemed discriminatory, why not order to stop it?.

A related problem is that of "constitutional bullying," which happens when the same suppliers are required again and again to provide services that are against their publicly stated principles or conscience. This allegedly happened in the case of Jack Phillips from *Masterpiece Cakeshop,* who seems to have been a target of such bullying, for example when asked to bake a cake with Satanic themes or with messages promoting marijuana, requests that he refused.[42] In our opinion, courts should handle such cases in the same way they handle other frivolous suits.

5 Conclusion

Discriminating against people based on religion, race, sexual orientation, etc. is as iniquitous as it is widespread. Legislators worldwide pass statutes that entitle discriminatees to compensation from those who discriminated against them. When suppliers refuse to accommodate a client with goods or services with no apparent justification, and when the refused client is a member of a protected class, a *prima facie* case of discrimination arises. At this point, the burden of proof is on the suppliers to show that their motivation was different, namely to refrain from "dirtying their hands" in what they perceived as a wrongful cause or conduct, and that they did not reject the client as such. That is a very heavy burden to lift, but we sought to show that it can be lifted and when it is, the provider's refusal to serve a client should not be seen as a case of discrimination.[43]

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42 See *Masterpiece Cakeshop Inc. v. Elenis*, 445 F. Supp. 3d 1226 (D. Colo. 2019) at 1233.

43 Sepinwall, *ibid.*, proposed a different explanation for the exemptions granted to vendors from serving some clients. According to this proposal, the market should be a "hate-free zone," which means that "businesses may refuse to supply goods or services that would be used in projects promoting animus toward individuals or groups on the basis of their protected characteristics" (40). This is an original proposal that merits more consideration than can be given here. For now, let us note two problems with it. First, if the focus is on the reduction of hate, we see no justification for limiting it to *protected* groups. It is noteworthy that hate crimes do not have this limitation. Second, if by "hate" Sepinwall means an intense negative emotion against somebody, some paradigmatic cases she refers to do not seem to qualify. For instance, a priest who refuses to officiate at a gay marriage does not necessarily hate homosexuals, and the same applies to a devout baker who is happy to serve homosexuals but cannot be part of a gay wedding. In anticipation of this problem, Sepinwall used a wider notion of hate that includes the promotion or the perpetuation of oppression and/or complicity in projects/policies/practices that involve oppression, rights violations, etc. But according to this definition, it could be claimed that one's refusal is motivated by a desire to *reduce* hate. Consider refusals to serve abortion

This conclusion in no way licenses the mistreatment of certain group members merely because the provider's religious or other views prohibit them from accommodating the clients. Owners of a printing house may not refuse to develop panoramic photos for a gay client on the basis of the claim that they oppose homosexuality, not homosexuals. The involvement that might exempt providers from their duty to serve all people is involvement in a project or activity that can be independently characterized and that does not depend on the client's identity. Under these circumstances, the providers may be exempt if they refuse to accommodate a client as long as they did not refuse to provide other services to that particular client or others belonging to the same religious, racial, national, etc. group.

Our proposal is not about striking a better balance between the prohibition against discrimination and the freedom of conscience. Rather, we argue that some cases that initially appear to be discriminatory in practice are not so because the presumed discriminator does not act out of hostility or disrespect toward the discriminatee. If a catholic priest refuses to officiate at a gay or a Jewish wedding but he officiates at Christian heterosexual weddings, in the conceptualization we propose, at least at this time in history, no discrimination on the basis of religion or sexual orientation necessarily takes place.

Our proposal is relevant to cases involving moral dilemmas that have not yet been resolved. Whereas in the US the social acceptability of inter-racial marriages has been established and therefore one cannot refuse service at inter-racial weddings, even for conscience or religious reasons, and the unacceptability of minor marriages has also been established, and therefore one can more easily escape discrimination laws for refusing service related to such wedding, the social acceptability of gay marriage is still contested. In these situations, in certain conditions that we described above, we think that it is appropriate to allow individuals to adhere to their moral conscience and refuse service.

One may fear that exempting religious providers from the duty to serve all people is dangerous because the social acceptability of the conduct for which the service is required is still being established, and it might lead to widespread discrimination against disadvantaged communities at large, and the LGBTQ community specifically. As Stern said, "inevitably, it will soon stretch to restaurants, hotels, movie theaters – in short to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay

supporters because they allegedly hate human fetuses; refusals to serve Trump fans because they spread hate; and so on.

segregation."[44] But in the US at least, it seems that the fear of such a slippery slope is unfounded because, as Koppelman said, nearly all exemptions requested by religious people are linked to weddings, which many religious people understand to have a religious meaning, which excludes same-sex couples, whether we like it or not. Even devout Christians in the US do not, for the most part, deny that members of the LGBTQ community are entitled to other services, just like any other person. In other countries, like a recent case in Israel demonstrates, there may be stronger cause for such fear.[45]

Finally, the suggested interpretation of anti-discrimination laws assumes and reinforces a certain stance in the philosophical debate on discrimination, according to which what makes discrimination wrongful is the unequal respect toward people expressed by it. The main point we tried to make in this article is that when a refusal to provide services does not express such failure to respect other people, it is not wrongful discrimination.

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44 Mark Joseph Stern, "Anti-Gay Segregation May Soon Be Coming to Oregon". Slate, 4 February 2014. Retrieved 21 November 2021, https://slate.com/human-interest/2014/02/oregon-anti-gay-referendum-the-initiative-is-homophobic-segregation.html. Cited by Koppelman, *supra* note 34, at 50.

45 In *Color of The Rainbow*, the print shop owner refused to print an invitation to a Hanukkah party by the LGBTQ group of Ben Gurion University.