

THE RIGHT SIDE OF HISTORY: PROHIBITING SEXUAL  
ORIENTATION DISCRIMINATION IN PUBLIC  
ACCOMMODATIONS, HOUSING, AND EMPLOYMENT

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## INTRODUCTION

Collin Dewberry and his partner Kelly Williams enjoyed breakfast at a local Big Earl's Restaurant in Pittsburg, Texas.<sup>2</sup> As they were leaving the restaurant, a waitress—the daughter of “Big Earl” Cheney—told them, “we don't serve fags here.”<sup>3</sup> As if in clarification, she continued, “[h]ere at Big Earl's we like for men to act like men and for ladies to act like ladies, so we want you to never return.”<sup>4</sup> Earl Cheney later defended his daughter's behavior by explaining that “[s]he's a young lady, didn't know what else to say, and they just kept on and she finally said we just don't like fags.”<sup>5</sup>

Marissa Higgins and her wife, Danielle, met with a real estate broker to rent an apartment in Manhattan.<sup>6</sup> They were told that a studio would not be appropriate for them, as it would not fit two beds.<sup>7</sup>

*“We'll only need one bed.”*

*“If only one of you is actually living there, I can only take one person's income information.”*

*“We're a couple. We share a bed. We told you this in the email.”*

*“Oh! I...uh... I... uh... I just thought you were roommates. I thought you would sleep separately, like, with twin beds or something.”*

*“We're a couple. We're looking for a studio as we discussed with you. Is the one we reached out about still available?”*

*“Uh, sorry, no. I don't think we have anything available to suit your... needs.”*

*“There are no studios or one-bedrooms available in Chelsea?”*

*“Nothing is available currently, sorry.”<sup>8</sup>*

Marissa and Danielle were ultimately unable to secure housing from that broker.<sup>9</sup>

Brooke Waits was an inventory control manager at Cellular Sales of Texas.<sup>10</sup> “Excited to take on a position of such importance and

2. See Cavan Sieczkowski, *Gay Couple Says Waitress Told Them ‘We Don't Serve Fags Here,’* [http://www.huffingtonpost.com/2014/05/29/gay-couple-texas-restaurant-fags\\_n\\_5410664.html](http://www.huffingtonpost.com/2014/05/29/gay-couple-texas-restaurant-fags_n_5410664.html) (last updated Feb. 2, 2016).

3. *Id.*

4. *Id.*

5. *Id.*

6. See Marissa Higgins, *Would a Husband and Wife Be Asked to Sleep in Separate Bedrooms?* [http://www.huffingtonpost.com/marissa-higgins/would-a-husband-and-wife-be-asked-to-sleep-in-separate-bedrooms\\_b\\_3469891.html](http://www.huffingtonpost.com/marissa-higgins/would-a-husband-and-wife-be-asked-to-sleep-in-separate-bedrooms_b_3469891.html) (last updated Feb. 2, 2016).

7. *Id.*

8. *Id.*

9. *Id.*

responsibility,” Brooke consistently arrived early to work.<sup>11</sup> She implemented and programmed a new and improved inventory system on her own time.<sup>12</sup> She overlooked her co-workers’ derogatory comments about the LGBTQ community and her manner of walking.<sup>13</sup> She loved her job, and she kept her personal life to herself.<sup>14</sup> One afternoon Brooke’s supervisor spotted a picture on Brooke’s cell phone of her and her partner kissing.<sup>15</sup> Brooke was fired the next morning.<sup>16</sup>

These three narratives offer poignant examples of sexual orientation discrimination. Such discrimination pervades the very fabric of our society, often preventing gay, lesbian, and bisexual individuals from accessing basic necessities like public accommodations, housing, and employment. The natural reaction to these instances of discrimination should be that the discriminatory conduct is unlawful and that the victims are entitled to legal redress. Surprisingly, under current federal and state law, that assumption is far from certain. This essay argues that the current legal framework prohibiting sexual orientation discrimination is seriously deficient and outlines several legal and political strategies to ensure robust protection against sexual orientation discrimination.

Part I outlines the current legal landscape for sexual orientation discrimination—within the realms of public accommodations, housing, and employment—taking into account federal statutes, state statutes, and relevant common law precedent. Part I emphasizes that federal statutes, most state statutes, and the common law of every state except New Jersey fail to explicitly prohibit sexual orientation discrimination in public accommodations, housing, and employment.

Part II introduces legislative arguments for state and federal lawmakers to establish a statutory framework with robust anti-discrimination protection. Part II offers a normative argument focusing on values like equal access to public markets, equal dignity of persons, individual autonomy, and religious liberty. Part II also proposes an economic argument focusing on considerations like participation in public markets, homelessness, healthcare, litigation, and corporate boycott.

Part III discusses legal arguments for courts to increase protection against sexual orientation discrimination through statutory interpretation and common law principles. Part III argues that sexual orientation

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10. See American Civil Liberties Union, *Testimony Of Brooke Waits Before The Health, Education, Labor And Pensions Subcommittee Of The House Education And Labor Committee In Support Of ENDA* (Mar. 1, 2016, 4:30 PM), <https://www.aclu.org/testimony-brooke-waits-health-education-labor-and-pensions-subcommittee-house-education-and-labor>.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

discrimination invariably involves sex discrimination and statutes prohibiting sex discrimination should be interpreted as also prohibiting sexual orientation discrimination. Part III also argues that courts should formally renounce the discriminatory history of the predominant public accommodations common law rule and return to the original common law rule endorsed by the state of New Jersey, which prohibits arbitrary discrimination by all privately owned businesses open to the public. Finally, Part III contends that courts should extend the language and rationale of the New Jersey public accommodations rule to prohibit sexual orientation discrimination in housing and employment.

### I. CURRENT LEGAL LANDSCAPE

Current legal protections against sexual orientation discrimination in public accommodations, housing, and employment are seriously deficient. This deficiency exists throughout the legal system, encompassing the federal statutory, state statutory, and common law levels. There is currently no explicit protection against sexual orientation discrimination at the federal statutory level, inconsistent protection at the state statutory level, and minimal protection under state common law. As a result, businesses, restaurants, and other places of public accommodation may legally refuse service on the basis of sexual orientation in twenty-nine states.<sup>17</sup> Likewise, landlords and employers may legally discriminate on the basis of sexual orientation in twenty-eight states.<sup>18</sup>

#### A. Federal Statutes

There are currently no federal statutes that explicitly prohibit sexual orientation discrimination in public accommodations, housing, or employment. Title II of the Civil Rights Act of 1964 prohibits discrimination in “any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.”<sup>19</sup> Sex and sexual orientation are both conspicuously omitted from the list of protected classes.<sup>20</sup> The Fair Housing Act of 1968 prohibits “[d]iscrimination in sale or rental of housing . . . to any person because of race, color, religion, sex, familial status, or national origin.”<sup>21</sup>

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17. See *infra* note 25.

18. See *infra* note 27.

19. 42 U.S.C. §2000a (2012).

20. It is also worth noting that the list of public accommodations covered under Title II is inadequate. Inns, restaurants, gas stations, and places of entertainment are covered, but other public accommodations, such as common carriers and businesses like retail stores, are omitted. 42 U.S.C. §2000a (2012).

21. 42 U.S.C. §3604 (2012).

Although sex is included as a protected class,<sup>22</sup> sexual orientation is not explicitly protected. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>23</sup> Again, although sex is included as a protected class,<sup>24</sup> sexual orientation is not expressly protected.

### B. State Statutes

In light of the absence of explicit federal protection against sexual orientation discrimination, state statutes become particularly important bulwarks against discrimination. Unfortunately, statutory protection at the state level is also seriously deficient. In the realm of public accommodations, only twenty-one states<sup>25</sup> and the District of Columbia<sup>26</sup> explicitly prohibit sexual orientation discrimination. In the realms of housing and employment, only twenty-two states<sup>27</sup> and the District of

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22. See *infra* Part III for an argument that sexual orientation discrimination is also actionable sex discrimination and should be prohibited whenever sex discrimination is prohibited.

23. 42 U.S.C. §2000e (2012).

24. See *supra* note 22.

25. These states are California, see CAL. CIV. CODE § 51 (West 2014); Colorado, see COLO. REV. STAT. § 24-34-601 (2013); Connecticut, see CONN. GEN. STAT. § 46a-81d (2013); Delaware, see DEL. CODE ANN. tit. 6, § 4503 (2014); Hawaii, see HAW. REV. STAT. § 489-3 (West 2014); Illinois, see 775 ILL. COMP. STAT. 5/1-102 (2012); Iowa, see IOWA CODE § 216.7 (2014); Maine, see ME. REV. STAT. tit. 5, § 4592 (2014); Maryland, see MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis 2014); Massachusetts, see MASS. GEN. LAWS ch. 272, § 98 (2014) (criminalizing such discrimination); Minnesota, see MINN. STAT. § 363A.11 (2013); Nevada, see NEV. REV. STAT. § 233.010 (2014); New Hampshire, see N.H. REV. STAT. ANN. § 354-A:17 (2014); New Jersey, see N.J. STAT. ANN. § 10:5-4 (West 2014); New Mexico, see N.M. STAT. ANN. § 28-1-7(F) (2013); New York, see N.Y. EXEC. LAW § 296 (McKinney 2014); Oregon, see OR. REV. STAT. § 659A.403 (2013); Rhode Island, see R.I. GEN. LAWS § 11-24-2 (2013) (criminalizing such discrimination); Vermont, see VT. STAT. ANN. tit. 9, § 4502 (2014); Washington, see WASH. REV. CODE. § 49.60.215 (2013); and Wisconsin, see WIS. STAT. § 106.52 (2014).

26. See D.C. CODE § 2-1402.31 (2014).

27. These states are California, see CAL. CIV. CODE § 51 (West 2014) and Government Code § 12940; Colorado, see COLO. REV. STAT. § 24-34-502 and COLO. REV. STAT. § 24-34-402; Connecticut, see CONN. GEN. STAT. § 46a-64c and CONN. GEN. STAT. § 46a-60; Delaware, see DEL. CODE ANN. tit. 6, § 4603 and DEL. CODE ANN. tit. 19, § 711; Hawaii, see HAW. REV. STAT. § 515-3 and HAW. REV. STAT. § 378-2; Illinois, see 775 ILL. COMP. STAT. 5/3-102 and 775 ILL. COMP. STAT. 5/2-102; Iowa, see IOWA CODE § 216.8 and IOWA CODE § 216.6; Maine, see ME. REV. STAT. tit. 5, § 4581-A and ME. REV. STAT. tit. 5, § 4572; Maryland, see MD. CODE ANN., STATE GOV'T § 20-705 and MD. CODE ANN., STATE GOV'T § 20-606; Massachusetts, see MASS. GEN. LAWS ch. 151B, § 4; Minnesota, see MINN. STAT. § 363A.09 and MINN. STAT. § 363A.08; Nevada, see NEV. REV. STAT. § 233.010; New Hampshire, see N.H. REV. STAT. ANN. § 354-A:8 and N.H. REV. STAT. ANN. § 354-A:6; New Jersey, see N.J. STAT. ANN. § 10:5-4; New Mexico, see N.M. STAT. ANN. § 28-1-7(G) and N.M. STAT. ANN. § 28-1-7(A); New York, see N.Y. EXEC. LAW § 296; Oregon, see OR. REV. STAT. § 659A.421 and OR. REV. STAT. § 659A.030; Rhode Island, see R.I. GEN. LAWS § 34-37-4 and R.I. GEN. LAWS § 28-5-7;

Columbia<sup>28</sup> explicitly prohibit sexual orientation discrimination. In the remaining states there is no statutory protection against sexual orientation discrimination. Three states have gone so far as to effectively endorse sexual orientation discrimination by statutorily prohibiting the passage or enforcement of local nondiscrimination ordinances.<sup>29</sup> Mississippi has gone yet a step further by enacting a statewide statute that expressly authorizes discrimination in public accommodations,<sup>30</sup> as well as a broad “license to discriminate” statute that authorizes sexual orientation discrimination as a protected exercise of religious liberty.<sup>31</sup>

### C. Common Law

When federal and state statutory protection is inadequate, as it is within the context of sexual orientation discrimination, common law may provide a final layer of protection against discrimination. This section will outline the current common law landscape for public accommodations, housing, and employment.

The predominant common law rule for public accommodations discrimination is that “with the exception of inn keepers and common carriers, privately owned premises that serve the public may exclude individuals arbitrarily unless a statute specifically prohibits the discriminatory conduct.”<sup>32</sup> Indeed, this is “the law in every jurisdiction in the United States except the State of New Jersey.”<sup>33</sup> The common law rule in New Jersey provides far more expansive protection against discrimination in public accommodations:

[W]hen property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, innkeepers, owners of gasoline stations, or to private hospitals, but to all property owners who open their premises to the public. Property owners have no

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Utah, *see* UTAH CODE ANN. § 57-21-6 and UTAH CODE ANN. § 35A-5-106; Vermont, *see* VT. STAT. ANN. tit. 9, § 4503 and VT. STAT. ANN. tit. 21, § 495; Washington, *see* WASH. REV. CODE. § 49.60.222 and WASH. REV. CODE. § 49.60.180; and Wisconsin, *see* WIS. STAT. § 106.50 and WIS. STAT. § 111.31.

28. *See* D.C. CODE § 2-1402.21 (2001) and D.C. CODE § 2-1402.11(2001).

29. These states are Arkansas, *see* Ark. Code Ann. §§ 14-1-401, 402, 403 (2015); North Carolina, *see* N.C. Gen. Stat. § 143-422.2 (2016); and Tennessee, *see* Tenn. Code Ann. §§ 4-21-102, 7-51-1801, 1802 (2015).

30. Miss. Stat. Ann. § 97-23-17 (1994).

31. H.B. 1523, 2016 Reg. Sess. (Miss. 2016).

32. Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1290 (1996).

33. *Id.*

legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.<sup>34</sup>

Part III of this essay will outline the historical development of the common law rule for public accommodations discrimination, highlight the perverse interests behind the national trend toward the predominant rule, and argue that courts should return to the original common law rule endorsed by the State of New Jersey.

The common law rule for housing discrimination is functionally equivalent to the predominant public accommodations rule: Property owners who enter the public real estate market may arbitrarily refuse to sell or rent housing unless a state or federal statute, or local ordinance, specifically prohibits housing discrimination.<sup>35</sup> Part III of this essay will argue that the language of the New Jersey public accommodations rule<sup>36</sup> is broad enough to prohibit arbitrary discrimination (including sexual orientation discrimination) in the sale and rental of housing, and that even if the language were not broad enough to encompass housing the rationale of the rule should be extended to housing.

The common law rule for employment discrimination is also functionally equivalent to the predominant public accommodations rule: Employers may arbitrarily choose whom to hire and fire unless a state or federal statute, or local ordinance, specifically prohibits employment discrimination.<sup>37</sup> Part III of this essay will argue that courts should extend the language and rationale of the New Jersey public accommodations rule to prohibit arbitrary discrimination (including sexual orientation discrimination) in employment.

## II. REMEDIAL ARGUMENTS FOR LEGISLATURES

The primary way to remedy the previously mentioned deficiencies in the legal protection against sexual orientation discrimination is through legislative reform. Legislative reform would provide clear and expansive

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34. *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

35. This common-law rule stems from the traditionally expansive right of property owners to exclude, even on arbitrary or discriminatory grounds, and a traditional presumption that the sale or rental of housing does not fall within the public accommodations exception, or any other exception, to that right to exclude. *See, e.g.*, JOSEPH SINGER, *Property* (4th ed. 2013), 26-31; Andrew Scherer & Hon. Fern Fisher, *Residential Landlord Tenant L. in N.Y. § 3:1*, (“At common law, an owner of residential real property could rent to or refuse to rent to whomever he/she wished, regardless of the reason.”) (Westlaw 2015); Daniel Finkelstein & Lucas A. Ferrara, *N.Y. Prac, Landlord and Tenant Practice in New York § 5:4* (“[T]here is no cause of action for housing discrimination per se under New York common law...”) (Westlaw 2015) (citing *Thoreson v. Penthouse Intern., Ltd.*, 80 N.Y.2d 490 (1992)).

36. *Utson*, 445 A.2d at 375.

37. *See, e.g.*, Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire a Noble Warrior?*, 61 *MERCER L. REV.* 551, 552-3 (2010) (The common law doctrine that governs firing decisions is employment at-will, under which “an employer may terminate employees for good cause, bad cause, or no cause at all.”).

protection against sexual orientation discrimination in public accommodations, housing, and employment. Legislation at the federal level would be particularly effective, as it would provide national protection and send the clearest normative message condemning sexual orientation discrimination. The Equality Act is a paradigmatic example of federal legislation that would offer expansive national protection against sexual orientation discrimination in public accommodations, housing, and employment.<sup>38</sup> There are compelling normative and economic arguments for why legislatures should enact such statutes.

#### A. Normative Argument

Annie has been married to Amy for seven years. They have two young children. Annie and Amy, together with their children, just moved from Boston to a small town in Georgia for Annie's job. Annie and Amy need to buy food. Should restaurants, grocery stores, and other privately owned businesses open to the public be able to turn them away because of their sexual orientation? Annie and Amy need to rent an apartment. Should the two landlords renting housing in the public housing market in this small town be able to turn them away because of their sexual orientation? Annie has a job. Amy needs a job. Should the few employers in this small town be able to refuse to hire Amy because of her sexual orientation? Should Annie's employer be able to dismiss a competent employee like Annie because of her sexual orientation? Should the laws of a free and democratic society allow landlords, businesses, and employers to deny Annie, Amy, and their family access to housing, groceries, and employment solely because of Annie and Amy's sexual orientation? From a normative perspective, the answer to these questions must be "no." In this section of my essay, I will consider principles like equal access to public markets, equal dignity of persons, individual autonomy, and religious liberty, and I will develop a normative argument for prohibiting sexual orientation discrimination in public accommodations, housing, and employment.

##### i. Equal Access to Public Markets

The normative argument for prohibiting sexual orientation discrimination in public accommodations, housing, and employment is grounded in the principle of equal access to public markets. A free and democratic society cannot survive absent a right of access to public markets for fundamental human necessities like food, shelter, and work. We are not an agrarian society populated by self-sufficient, self-employed citizens who stake out their own land and cultivate their own food. We all rely on public markets for food and shelter. We all rely on access to gainful employment in order to secure food and shelter. We have recognized this reality. We have rejected a caste system that limits access to public

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38. Equality Act, S.1858, 114th Cong. (2015).

markets on the basis of arbitrary personal or social characteristics, and we have implemented legal safeguards intended to ensure equal access to such necessities through federal statutes,<sup>39</sup> state statutes,<sup>40</sup> and common law principles.<sup>41</sup> Although these legal protections are imperfect in their current form,<sup>42</sup> they demonstrate that we, as a society, acknowledge the necessity of access to public accommodations, housing, and employment without discrimination based on arbitrary characteristics like race, religion, nationality, disability, sex, and—with increasing consistency—sexual orientation. That sexual orientation discrimination violates the normative principle of equal access to public markets is undisputable. Denying individuals access to food, shelter, and work on the basis of sexual orientation by definition violates equal access to public markets. Moreover, public accommodations, housing, and employment are particularly essential public markets, and denial of equal access to those markets is especially destructive. We generally consider access to these fundamental public markets as central to human existence, and exclusion from such markets on the basis of personal characteristics like sexual orientation is both dangerous and dehumanizing.

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39. See 42 U.S.C. §2000a, 42 U.S.C. §3604, 42 U.S.C. §2000e.

40. California, see CAL. CIV. CODE § 51 (West 2014) and Government Code §12940; Colorado, see COLO. REV. STAT. § 24-34-601, COLO. REV. STAT. § 24-34-402 (2013), and COLO. REV. STAT. § 24-34-502; Connecticut, see CONN. GEN. STAT. § 46a-81d, CONN. GEN. STAT. § 46a-64c, and CONN. GEN. STAT. § 46a-60 (2013); Delaware, see DEL. CODE ANN. tit. 6, § 4503, Delaware, see DEL. CODE ANN. tit. 6, § 4603, and DEL. CODE ANN. tit. 19, § 711(2014); Hawaii, see HAW. REV. STAT. § 489-3, Hawaii, see HAW. REV. STAT. § 515-3, and HAW. REV. STAT. § 378-2 (West 2014); Illinois, see 775 ILL. COMP. STAT. 5/3-102 and 775 ILL. COMP. STAT. 5/1-102 (2012); Iowa, see IOWA CODE § 216.8, IOWA CODE § 216.6, and IOWA CODE § 216.7 (2014); Maine, see ME. REV. STAT. tit. 5, § 4592, ME. REV. STAT. tit. 5, § 4581-A and ME. REV. STAT. tit. 5, § 4572 (2014); Maryland, see MD. CODE ANN., STATE GOV'T § 20-304, MD. CODE ANN., STATE GOV'T § 20-705 and MD. CODE ANN., STATE GOV'T § 20-606 (LexisNexis 2014); Massachusetts, see MASS. GEN. LAWS ch. 272, § 98 (2014) (criminalizing such discrimination) and MASS. GEN. LAWS ch. 151B, § 4; Minnesota, see MINN. STAT. § 363A.11 (2013), MINN. STAT. § 363A.09 and MINN. STAT. § 363A.08; Nevada, see NEV. REV. STAT. § 233.010 (2014); New Hampshire, see N.H. REV. STAT. ANN. § 354-A:8 and N.H. REV. STAT. ANN. § 354-A:17 (2014); New Jersey, see N.J. STAT. ANN. § 10:5-4 (West 2014); New Mexico, see N.M. STAT. ANN. § 28-1-7(F), N.M. STAT. ANN. § 28-1-7(G) and N.M. STAT. ANN. § 28-1-7(A) (2013); New York, see N.Y. EXEC. LAW § 296 (McKinney 2014); Oregon, see OR. REV. STAT. § 659A.403, OR. REV. STAT. § 659A.421 and OR. REV. STAT. § 659A.030 (2013); Rhode Island, see R.I. GEN. LAWS § 11-24-2 (2013) (criminalizing such discrimination), R.I. GEN. LAWS § 34-37-4 and R.I. GEN. LAWS § 28-5-7; Utah, see UTAH CODE ANN. § 57-21-6 and UTAH CODE ANN. § 35A-5-106; Vermont, see VT. STAT. ANN. tit. 9, § 4502 and VT. STAT. ANN. tit. 9, § 4503 (2014); Washington, see WASH. REV. CODE. § 49.60.215, WASH. REV. CODE. § 49.60.222 and WASH. REV. CODE. § 49.60.180.

41. *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

42. See *supra* Part I.

## ii. Equal Dignity of Persons

The normative argument for prohibiting sexual orientation discrimination in access to public accommodations, housing, and employment is also grounded in the closely related principle of equal dignity of persons. Equal dignity of persons incorporates the “fundamental assumption that human beings are to be treated with dignity and respect”<sup>43</sup> and the equally fundamental assumption that human beings are to be treated with “equal dignity in the eyes of the law.”<sup>44</sup> This principle is perhaps the most basic tenet of a free and democratic society, and it is a cornerstone of American society. Our very Declaration of Independence begins with the “self-evident” principle of equal human dignity.<sup>45</sup> Our Fourteenth Amendment reinforces equal dignity by prohibiting state and federal governments from “deny[ing] to any person within its jurisdiction the equal protection of the laws.”<sup>46</sup> The Supreme Court has repeatedly reaffirmed the constitutional protection of equal dignity of persons.<sup>47</sup> And yet, despite the fundamental importance of equal dignity and the fact that it is not contingent upon the vicissitudes of history or society, we tend to be rather slow at recognizing clear violations of this normative principle.

To clarify this point, it is helpful to consider some scenarios where the principle of equal dignity is clearly violated. Slavery is a clear violation of equal dignity. *De jure* racial segregation is a clear violation of equal dignity. Denying women the franchise is a clear violation of equal dignity. No rational person today would contest these statements. Yet not long ago the overwhelming majority of American society accepted these profound inequalities as perfectly morally justifiable and consistent with equal dignity.<sup>48</sup> The Framers protected slavery in the very text of the Constitution,<sup>49</sup> and slavery was not formally abolished until 1865.<sup>50</sup> The Supreme Court upheld the constitutionality of racial segregation in 1896,<sup>51</sup> and *de jure* racial segregation was widely condoned until *Brown v. Board of Education*.<sup>52</sup> American women were not extended the franchise until 1920.<sup>53</sup> These historical examples do not, of course, represent the sudden *emergence* of novel violations of equal dignity. They represent the gradual societal *recognition* of long-entrenched violations of equal dignity. These

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43. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 959 (2009).

44. *Obergefell v. Hodges* 135 S.Ct. 2584, 2608 (2015).

45. DECLARATION OF INDEPENDENCE (U.S. 1776).

46. U.S. Const. amend. XIV, § 1.

47. *See e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Obergefell v. Hodges* 135 S.Ct. 2584, 2608 (2015).

48. *See infra* notes 49-53.

49. U.S. CONST. art. I, §§ 2, 9; art. IV, § 2.

50. U.S. CONST. amend. XIII.

51. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

52. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954).

53. U.S. CONST. amend. XIX.

examples demonstrate that we, individually and collectively, are notoriously imperfect at recognizing clear violations of equal dignity.

Sexual orientation discrimination in public accommodations, housing, and employment is a similarly clear violation of equal dignity, but one that we have—unfortunately—not yet all come to recognize as such. The similarities between sexual orientation discrimination and sex discrimination support this conclusion. As I will argue later in this essay,<sup>54</sup> sexual orientation discrimination *necessarily involves* sex discrimination—both because there is an inextricable substantive link between the two types of discrimination<sup>55</sup> and because sexual orientation discrimination is deeply rooted in sex-based and gender-based stereotyping.<sup>56</sup> Moreover, both sexual orientation discrimination and sex discrimination involve historically marginalized and politically disadvantaged populations, and both forms of discrimination target immutable characteristics.<sup>57</sup> We all accept that invidious sex discrimination violates equal dignity, and it is logically impossible to accept that notion without also accepting that sexual orientation discrimination violates equal dignity.

### iii. Individual Autonomy

But, even accepting that sexual orientation discrimination violates the normative principles of equal access to public markets and equal dignity of persons, what about other, competing normative interests? What about the individual autonomy of business owners, landlords, and employers to control their property and businesses? This counterargument requires us to balance the normative interests of consumers, tenants, and employees against the competing interests of business owners, landlords, and employers. The best standard for weighing these interests within the context of discrimination is one that balances individual autonomy and the potential harm caused by such autonomy.

This standard has its roots in John Stuart Mill's "harm principle" articulated in his book *On Liberty*, in which he stated that "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."<sup>58</sup> In a slightly punchier form, "[y]our right to swing your arms ends just where the other man's nose begins."<sup>59</sup> This standard should appeal to most people across the political and ideological spectrum—as it seeks to maximize both liberty and security—and it is easily applied to the discrimination context. Before applying this standard to the question of

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54. *See infra* Part III.

55. *Id.*

56. *Id.*

57. *Obergefell v. Hodges* 135 S.Ct. 2584, 2596 (2015).

58. JOHN STUART MILL, *ON LIBERTY* 21-22. (3d ed. 1864).

59. Zechariah Chafee, *Freedom of Speech in Wartime*, 32 HARV. L. REV. 932, 957 (1919).

sexual orientation discrimination, consider its application to other, closely related, types of discrimination. We restrict the individual autonomy of business owners, landlords, and employers when we prohibit racial discrimination in public accommodations, housing, and employment. We do the same when we prohibit sex discrimination, discrimination on the basis of national origin, and discrimination on the basis of religion. We accept these prohibitions as legitimate and prudent restrictions on individual autonomy, because we recognize such discrimination as an unacceptably harmful manifestation of individual autonomy.<sup>60</sup> We acknowledge that these legal prohibitions impose some degree of harm on the autonomy of the regulated parties, but we recognize that any such harm is negligible compared to the substantial societal and personal harm that would result from condoning discriminatory exclusion from public markets.<sup>61</sup> On the other hand, within the context of exclusively private conduct, we do not enact laws establishing race, sex, or religion-based quotas for dinner parties, social circles, or private religious gatherings, because we recognize that such laws would unduly burden individual autonomy without addressing a substantial public or personal harm.

Analogizing from these scenarios and applying the same standard to the question of sexual orientation discrimination supports the legal prohibition of sexual orientation discrimination in public accommodations, housing, and employment. Sexual orientation discrimination—like race, sex, and religious discrimination—in public accommodations, housing, and employment is an unacceptably harmful manifestation of individual autonomy, because it severely impairs the individual autonomy—as well as the equal dignity—of the persons subject to discrimination. Autonomy fundamentally depends on access to public markets. There can be no meaningful exercise of autonomy without access to basic human necessities like food, shelter, and work. Therefore, I contend that the autonomy of business owners, landlords, and employers, although important, must take a back seat to the right of equal access to public markets, because allowing sexual orientation discrimination in public accommodations, housing, and employment would ultimately cause more substantial harm to individual autonomy than would prohibiting such discrimination.

#### iv. Religious Liberty

Building upon our consideration of these competing normative interests, we must pay special attention to a particularly sensitive and complex aspect of individual autonomy, namely, religious liberty. Like

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60. These considerations and conclusions culminated in the enactment of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 and the Fair Housing Act. *See* 42 U.S.C. §2000a; 42 U.S.C. §2000e; 42 U.S.C. §3604.

61. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 and Fair Housing Act. *See* 42 U.S.C. §2000a; 42 U.S.C. §2000e; 42 U.S.C. §3604.

equal dignity, religious liberty is a fundamental normative value and a cornerstone of any free and democratic society. We should respect the protected space for exercising religious liberty guaranteed by our Constitution.<sup>62</sup> That said, it is important to recognize that this protected space has boundaries and that religious liberty has limitations.

The Supreme Court has outlined the general scope and limitations of religious liberty in several influential cases. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court held that “[i]f the object of a law is to infringe upon or restrict practices because of their religious motivation the law is not neutral; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.”<sup>63</sup> In other words, laws purposefully crafted to burden religious beliefs or practices are presumptively unconstitutional. That notwithstanding, the Court held in *Employment Division, Department of Human Resources of Oregon v. Smith* that “if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.”<sup>64</sup> In other words, religious liberty does not give each citizen a personal veto power over generally applicable or neutral laws they consider incompatible with their religion, and these laws are presumptively constitutional. In *Cantwell v. Connecticut*, the Court further refined the limitations of the free exercise of religion, emphasizing the distinction between belief and conduct: “the [First] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. *Conduct remains subject to regulation for the protection of society.*”<sup>65</sup> In these three cases, the Court acknowledges the tension between religious liberty and a societal need for generally applicable regulation of conduct, and the Court prudently concludes that religious liberty does not include a right to an exemption from generally applicable legislation that only incidentally burdens the exercise of religion.

Building within the framework provided by this Supreme Court precedent, I argue that religious liberty should not involve a right to discriminate on the basis of sexual orientation and, therefore, that prohibiting sexual orientation discrimination in access to public accommodations, housing, and employment does not unduly burden the legitimate exercise of religious liberty. This argument is centered on the “Golden Rule” and analogies to racial discrimination and sex discrimination.

The Golden Rule, also referred to as ethics of reciprocity, is a fundamental moral principle shared by nearly all prominent ancient and contemporary religions. For example, the Golden Rule is expressed as “love

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62. See U.S. CONST. amend. I.

63. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993).

64. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 892 (1990).

65. *Cantwell v. Connecticut*, 310 U.S. 296, 303-4 (1940).

your neighbor as yourself”<sup>66</sup> in Judaism and “do to others what you would have them do to you”<sup>67</sup> in Christianity. Applying the Golden Rule to our analysis, it is clear that members of a religious community would not wish to be discriminated against because of their religion. Christians would be outraged if they were refused service at a restaurant or excluded from a grocery store on the basis of their religion, and rightly so. Jews would be appalled if they were refused housing on the basis of their religion, and for good reason. Muslims would be dismayed if they were fired on the basis of their religion, as would we all.

Furthermore, members of a religious community would not accept such discrimination as a legitimate or acceptable exercise of another person’s religious liberty. As a hypothetical, imagine Sarah, a Christian bride-to-be living in small, rural town. Sarah visits the only bakery in town and orders a cake for her wedding. The bakery is open to the public, and there is a common understanding that service will be rendered upon payment. Sarah presents the baker with payment in full. The baker tells Sarah that he will not bake her a wedding cake, because contributing to a Christian wedding would violate his sincerely held religious beliefs. Or imagine Steve, a hardworking Jewish carpenter who always shows up to work on time and consistently exceeds expectations professionally. One day his boss, Parker, discovers that Steve is Jewish and fires him, explaining that employing a Jewish worker would violate his sincerely held religious beliefs. In a particularly unfortunate turn of events, Parker is also Steve’s landlord. Parker refuses to continue renting to Steve on the same religious liberty grounds. Even if Sarah and Steve were to accept the sincerity of the baker and employer’s religious beliefs, they would not consider this discriminatory conduct to be a legitimate or acceptable exercise of religious liberty, and they would expect the law to prohibit such conduct.

In sum, the Golden Rule compels those of us who belong to a religious community to consider how we would feel if we were arbitrarily excluded from public accommodations, refused housing, or denied employment on the basis of another individual’s religious liberty; and it compels us to treat others as we would wish to be treated, with equal dignity, equal access to public markets, and equal protection under the law.

Analogies to racial discrimination and sex discrimination offer additional support for the argument that religious liberty should not involve a right to discriminate on the basis of sexual orientation. No rational person today would argue that racial discrimination or sex discrimination is a legitimate or acceptable manifestation of religious liberty. Nobody would argue that restaurants, landlords, or employers should be able to rely on religious liberty to turn away customers, evict tenants, or fire employees based on characteristics like race or sex. Those

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66. *Leviticus* 19:18 (NIV).

67. *Matthew* 7:12 (NIV).

arguments seem almost unfathomable today, as they so clearly conflict with the principles of equal dignity and equal access to public markets. And yet seemingly rational individuals still make arguments based on sincerely held religious beliefs that sexual orientation discrimination is a legitimate expression of religious liberty. I contend that time is the great equalizer and that it is high time for us to recognize that sexual orientation discrimination—to the same degree as racial discrimination and sex discrimination—is an illegitimate and unacceptable exercise of religious liberty.

To this end, it is important to remember that religious arguments supporting racial discrimination and sex discrimination were commonplace not long ago. Racial discrimination, including slavery and *de jure* segregation, was defended on Biblical and religious liberty grounds.<sup>68</sup> Courts routinely relied on religious principles to uphold racially discriminatory laws. In a particularly poignant example, the trial judge who upheld Virginia's statute prohibiting interracial marriage in *Loving v. Virginia* stated in his judicial opinion that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix."<sup>69</sup> The Alabama Supreme Court similarly relied on religious principles to uphold racial segregation in railway cars: "God has made [the races] dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids [racial intermarriage] and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to [the races] different natures."<sup>70</sup>

Sex discrimination was similarly defended on Biblical and religious liberty grounds,<sup>71</sup> and religious justifications for racial discrimination and sex discrimination were often based directly on scripture.<sup>72</sup> For example,

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68. See, e.g., Larry R. Morrison, *The Religious Defense of American Slavery Before 1830*, 37 J. OF RELIGIOUS THOUGHT 16 (1980); PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH: A BRIEF HISTORY WITH DOCUMENTS* 31–32 (2003) (discussing the religious defense of slavery with biblical references); *id.* at 108 (discussing *De Bow's Review* from 1850, an antebellum summary of the Bible's argument for slavery); *id.* at 123 (quoting Thornton Stringfellow in *Cotton is king, and pro-slavery arguments* (1860)); Jane Dailey, *Sex, Segregation, and the Sacred after Brown*, 91 J. AM. HIST. 119, 121 (2004).

69. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

70. *Bowie v. Birmingham Ry. & Elec. Co.*, 125 Ala. 397, 408 (1900).

71. See, e.g., Evelyn A. Kirkley, "This Work is God's Cause": Religion in the Southern Woman Suffrage Movement, 1880–1920, 59 CHURCH HIST. 507, 508–09, 511–12, 522 (1990); Angela L. Padilla and Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 COLUM. J. GENDER & L. 67, 69, 73–78 (1991).

72. See Michael Kent Curtis, *A Unique Religious Exemption From Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those*

anti-suffragists in the early 1900s claimed “the Bible, as no one will deny, is the basic rock upon which all Christian governments are founded, and the secondary relation of woman is clearly set forth through the entire volume from Genesis to Revelation.”<sup>73</sup> Even more striking, the Supreme Court in the late 19<sup>th</sup> Century explicitly relied on a religious justification to uphold the constitutionality of denying women a license to practice law. In the Court’s own words, “[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. *This is the law of the Creator.*”<sup>74</sup>

The historical similarities between these religious liberty justifications for racial and sex discrimination and the religious liberty justifications for sexual orientation discrimination are striking. During the Middle Ages “ecclesiastical courts enforced the Biblical prohibition against sodomy by prosecuting homosexuals as heretics and burning them at the stake.”<sup>75</sup> Deemed an “infamous crime against nature” by Blackstone,<sup>76</sup> “homosexual behavior was prohibited in all fifty states and the District of Columbia through some form of sodomy statute.”<sup>77</sup> Some of these statutes relied explicitly on religious justifications; for example, the North Carolina sodomy statute stated that “[a]ny person who shall commit the abominable and detestable crime against nature, not fit to be named among Christians . . . shall be adjudged guilty of a felony and shall suffer death without the benefit of clergy.”<sup>78</sup> As recently as 1986, the Supreme Court in *Bowers v. Hardwick* upheld a Georgia law criminalizing homosexual intimacy.<sup>79</sup> Relying on religious principles, Chief Justice Burger called homosexual intimacy an “infamous crime against nature,” cited the “ancient roots” of proscriptions against homosexual conduct, and emphasized that “[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>80</sup>

More recently, courts and society in general have all but renounced religious liberty justifications for racial discrimination and sex discrimination, but many still rely on religious liberty justifications for sexual orientation discrimination.<sup>81</sup> Notwithstanding that discrepancy,

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*Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 187–88 n.69 (2012).

73. A. ELIZABETH TAYLOR, *THE WOMAN SUFFRAGE MOVEMENT IN TENNESSEE* 79 (1957) (quoting A. A. Lyon, *Suffragettes and Suffragettism*).

74. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (emphasis added).

75. Yao Apasu-Gbotsu et al., *Survey on the Constitutional Right to Privacy In the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

76. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 215 (16<sup>th</sup> ed. 1825).

77. *See supra* note 75 at 526.

78. N.C. REV. STAT. ch. 34 § 6 (1836–37).

79. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

80. *Id.* at 196–97.

81. *See, e.g., Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. denied sub nom Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 2016 WL

historical analysis demonstrates the distinct similarities between sexual orientation discrimination and discrimination based on sex or race, and supports the conclusion that discrimination based on traditionally marginalized and immutable characteristics like race, sex, and sexual orientation is not a legitimate or acceptable exercise of religious liberty. Considering this historical context and the notable similarities between these types of discrimination, it is clear that religious liberty should not involve a right to discriminate on the basis of sexual orientation, and therefore that prohibiting sexual orientation discrimination—to the same degree as racial discrimination and sex discrimination—does not unduly burden the legitimate exercise of religious liberty.

Finally, the religious liberty of LGBTQ individuals is an important, yet often overlooked, aspect of this analysis. More than half the LGBTQ community self-identify as religious,<sup>82</sup> and a rapidly increasing number of religions—including Conservative and Reform Judaism, the Episcopal Church, the Presbyterian Church, and the Unitarian Universalist Association of Churches—officially recognize the dignity of same-sex attraction and marriage.<sup>83</sup> Denying access to public markets on sexual orientation grounds impairs the religious liberty of excluded gay, lesbian, and bisexual individuals. The exercise of religious liberty, like the exercise of individual autonomy, depends on the fulfillment of fundamental human necessities, which in turn depends on access to public markets. Moreover, exclusion from public markets on sexual orientation grounds—and, perhaps more importantly, the lack of legal redress for such exclusion—sends the normative message that the religious liberty of LGBTQ individuals is secondary to the religious liberty of non-LGBTQ individuals.

In conclusion, equal access to public markets and equal dignity of persons are fundamental normative principles central to any free and democratic society, and sexual orientation discrimination violates those foundational principles. Balancing competing normative interests and relative societal harms, it is clear that sexual orientation discrimination—like racial discrimination and sex discrimination—is an illegitimate and unacceptably harmful manifestation of individual autonomy and religious liberty. Therefore, legislatures should prohibit sexual orientation discrimination in public accommodations, housing, and employment.

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1645027 (Colo. Apr. 25, 2016), *petition for cert. filed*, 85 U.S.L.W. 3048 (U.S. July 25, 2016) (No. 16-111); *State of Washington v. Arlene's Flowers, Inc.*, 2015 WL 720213 (Wash. Super. Ct. Feb. 18, 2015) (trial court order); *Miller v. Davis*, 123 F.Supp.3d 924 (E.D. Ky. Aug. 12, 2015) (order granting preliminary injunction).

82. PEW RES. CTR., *AMERICA'S CHANGING RELIGIOUS LANDSCAPE* 87 (2015), <http://www.pewforum.org/files/2015/05/RLS-08-26-full-report.pdf>.

83. David Masci & Michael Lipka, *Where Christian churches, other religions stand on gay marriage*, PEW RES. CTR.: FACT TANK (Dec. 21, 2015), <http://www.pewresearch.org/fact-tank/2015/12/21/where-christian-churches-stand-on-gay-marriage/>.

*B. Economic Argument*

In addition to the normative argument previously discussed, there is a powerful economic argument for why the laws of a free and democratic society should prohibit sexual orientation discrimination in public accommodations, housing, and employment. Several academic studies and institutional reports have demonstrated a strong association between sexual orientation discrimination and negative economic outcomes.<sup>84</sup> Specifically, these studies and reports indicate that “countries with more rights for LGBT people have higher per capita income and higher levels of [economic] well-being,”<sup>85</sup> that “discrimination against employees based on their sexual orientation and gender identity negatively impacts the economic performance of businesses [by negatively affecting recruitment, retention, productivity, and marketing, and by increasing litigation costs],”<sup>86</sup> and that “[sexual orientation discrimination] diminishes worker morale and retention, which can lower productivity and lead to reduced economic growth.”<sup>87</sup> The Congressional findings for the Equality Act further emphasize the connection between sexual orientation discrimination and negative economic outcomes.<sup>88</sup> Recognizing the powerful association between sexual orientation discrimination and negative economic outcomes, ninety-three percent of Fortune 500 companies have prohibited sexual orientation discrimination.<sup>89</sup> The mechanics underlying the relationship between sexual orientation discrimination and negative economic outcomes are relatively straightforward. In short, sexual orientation discrimination contributes to decreased participation in economic markets, increased governmental expenses associated with homelessness and healthcare, increased governmental and corporate costs associated with litigation, and a

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84. U.S. CONGRESS JOINT ECONOMIC COMMITTEE DEMOCRATIC STAFF, *THE ECONOMIC CONSEQUENCES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* (2013); CROSBY BURNS, CENTER FOR AMERICAN PROGRESS, *THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE 3* (2012); M.V. LEE BADGETT ET AL., THE WILLIAMS INST., *THE RELATIONSHIP BETWEEN LGBT INCLUSION AND ECONOMIC DEVELOPMENT: AN ANALYSIS OF EMERGING ECONOMIES* (2014).

85. M.V. LEE BADGETT ET AL., THE WILLIAMS INST., *THE RELATIONSHIP BETWEEN LGBT INCLUSION AND ECONOMIC DEVELOPMENT: AN ANALYSIS OF EMERGING ECONOMIES* (2014).

86. CROSBY BURNS, CTR. FOR AM. PROGRESS, *THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE 2-3* (2012).

87. U.S. CONG. JOINT ECON. COMM. DEMOCRATIC STAFF, *THE ECONOMIC CONSEQUENCES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* (2013).

88. Equality Act, S. 1858, 114th Cong. (2015) (Sexual orientation discrimination “prevents the full participation of LGBT people in society and disrupts the free flow of commerce” and “contributes to negative social and economic outcomes.”).

89. HUMAN RIGHTS CAMPAIGN FOUNDATION, *CORPORATE EQUALITY INDEX 2016: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 7* (2016).

mounting corporate boycott movement targeting states that condone—or, worse, expressly authorize—LGBTQ discrimination.

i. Participation in Public Markets

Sexual orientation discrimination discourages a considerable population of individuals from participating in economic markets, including the public accommodations market, the housing market, and the employment market. According to the Center for Disease Control, at least 2.3% of American adults self-identify as gay, lesbian, or bisexual.<sup>90</sup> That means that in 2014 there were over 5.6 million gay, lesbian, or bisexual adults.<sup>91</sup> These adults include talented employees, responsible homeowners and tenants, and active consumers who contribute considerably to the American economy. Sexual orientation discrimination in public accommodations discourages gay, lesbian, and bisexual individuals from patronizing businesses, restaurants, and places of entertainment; sexual orientation discrimination in housing diminishes the housing market by turning away prospective homeowners and tenants; and sexual orientation discrimination in employment reduces participation of gay, lesbian, and bisexual individuals in the workforce, thereby decreasing the diversity, volume, and productivity of the workforce.

ii. Homelessness and Healthcare

Sexual orientation discrimination also impairs physical and mental health and increases the prevalence of homelessness, thereby increasing healthcare costs, decreasing economic productivity, and increasing governmental costs associated with homelessness. Scientific studies have determined that LGBTQ individuals are significantly more likely to experience discrimination than non-LGBTQ individuals,<sup>92</sup> and increased prevalence of discrimination has widespread negative physical and mental

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90. Brian W. Ward et al., U.S. Dep't. of Health and Human Servs., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, 77 NAT'L HEALTH STATS. REPS. 1, 3 (2014).

91. *QuickFacts: United States*, CENSUS.GOV, <http://www.census.gov/quickfacts/table/PST045215/00> (last visited Nov. 6, 2016).

92. See e.g., Katie A. McLaughlin et al., *Responses to Discrimination and Psychiatric Disorders Among Black, Hispanic, Female, and Lesbian, Gay, and Bisexual Individuals*, 100 Am. J. Public Health 1477 (2010); Vickie M. Mays and Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 90 American Journal of Public Health 1869 (2001); Nancy Krieger and Stephen Sidney, *Prevalence And Health Implications A Study Of Black And White Women And Men In The Cardia Cohort Of Anti-Gay Discrimination*, 27 Int'l J. of Health Services 157 (1997); Gary Remafedi et al., *The relationship between suicide risk and sexual orientation: Results of a population-based study*, 88 Am. J. Public Health 57, 58 (1998).

health outcomes.<sup>93</sup> For example, a comprehensive meta-analysis of 134 scientific studies found that “the perception of discrimination is related to heightened physiological stress responses, more negative psychological stress responses, increased participation in unhealthy behaviors, and decreased participation in healthy behaviors . . . .”<sup>94</sup> Another scientific study found “strong associations between past-year discrimination and psychiatric disorders . . . consistent with a growing body of evidence documenting elevated risk for psychological distress and mental health problems among individuals who experience discrimination.”<sup>95</sup> Another study found “that male bisexuality/homosexuality was associated with a greater than sevenfold increased odds of a suicide attempt.”<sup>96</sup> With regard to negative housing outcomes, a report by the Williams Institute found that approximately 40% of homeless youth are members of the LGBTQ community.<sup>97</sup>

These negative health and housing outcomes, in addition to causing substantial—and sometimes irreparable—personal suffering, adversely affect the economy by significantly increasing healthcare costs, increasing governmental costs associated with homelessness, and decreasing overall economic productivity. For example, a report by the Williams Institute focusing solely on the State of New York found that “[e]mployment discrimination costs the State of New York more than \$1 million annually in Medicaid expenditures . . . [and] [h]ousing discrimination in the State of New York may cost from \$475,000 to \$5.9 million annually in federal and state housing program expenditures and other costs related to homelessness . . . not including additional millions in state income tax revenues that could be generated if employment discrimination was reduced.”<sup>98</sup>

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93. See e.g., Katie A. McLaughlin et al., *Responses to Discrimination and Psychiatric Disorders Among Black, Hispanic, Female, and Lesbian, Gay, and Bisexual Individuals*, 100 Am. J. Public Health 1477 (2010); Vickie M. Mays and Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 90 Am. J. of Public Health 1869 (2001); Nancy Krieger and Stephen Sidney, *Prevalence And Health Implications A Study Of Black And White Women And Men In The Cardia Cohort Of Anti-Gay Discrimination*, 27 Int'l J. of Health Services 157 (1997); Gary Remafedi et al., *The relationship between suicide risk and sexual orientation: Results of a population-based study*, 88 Am. J. Public Health 57, 58 (1998).

94. Elizabeth A. Pascoe and Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 Psychol. Bull. 531 (2009).

95. See McLaughlin, *supra* note 92.

96. See Remafedi *supra* note 92.

97. Laura E. Durso and Gary J. Gates, *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth Who are Homeless or at Risk of Becoming Homeless*, The Williams Institute with True Colors Fund and The Palette Fund (2012).

98. Jody L. Herman, *The Cost of Employment and Housing Discrimination Against Transgender Residents of New York*, The Williams Institute, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-NY-Cost-of-Discrimination-April-2013.pdf>.

## iii. Litigation

Sexual orientation discrimination also triggers litigation, which increases costs to businesses and the court system. For example, in 2010, “the top 10 private plaintiff employment discrimination lawsuits cost firms more than \$346 million” in litigation expenses.<sup>99</sup> In 2013, “the cost of the 10 most expensive discrimination class action settlements totaled over \$638 million.”<sup>100</sup> In addition to imposing steep corporate expenses, discrimination lawsuits also place a substantial economic burden on the government and, by extension, taxpayers who are ultimately responsible for the considerable judicial costs imposed by discrimination litigation.

## iv. Corporate Boycott

Finally, recent years have seen a formidable and rapidly growing corporate boycott movement targeting states that condone or expressly authorize LGBTQ discrimination through “license to discriminate” legislation.<sup>101</sup> For example, when Indiana passed a “license to discriminate” law in 2015, Angie’s List cancelled a planned \$40 million expansion of its headquarters in Indianapolis, which was “touted to add 1,000 good-paying jobs over five years and help revitalize a struggling Eastside neighborhood.”<sup>102</sup> Facing intense corporate and political pressure, the Indiana legislature amended the law to expressly state that the statute does not allow discrimination based on sexual orientation or gender identity.<sup>103</sup>

When the Georgia legislature passed a “license to discriminate” bill in March 2016, many of the largest entertainment companies in the world publicly condemned the bill, threatening Georgia’s \$1.7 billion in annual revenue from the entertainment industry.<sup>104</sup> Facing mounting corporate and political pressure, Georgia Governor Nathan Deal vetoed the bill.<sup>105</sup>

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99. CROSBY BURNS, CTR. FOR AM. PROGRESS, *THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE* 3 (2012).

100. Chris Dimarco, *Top 10 most expensive discrimination settlements of 2013* (Mar. 7, 2016, 12:30 PM), <http://www.insidecounsel.com/2014/07/08/top-10-most-expensive-discrimination-settlements-o>.

101. See Miss. House Bill No. 1523 as an example of “license to discriminate” legislation.

102. Tim Evans, *Angie’s List Canceling Eastside expansion over RFRA* (Apr. 4, 2016, 10:30 PM), <http://www.indystar.com/story/money/2015/03/28/angies-list-canceling-eastside-expansion-rfra/70590738/>.

103. Indiana Code §34-13-9-07 (2015).

104. Adam Howard, *Disney, NFL could boycott Georgia over ‘religious freedom’ bill* (Apr. 4, 2016, 11:30 PM), <http://www.msnbc.com/msnbc/disney-nfl-could-boycott-georgia-over-religious-freedom-bill>.

105. Sandhya Somashekhar, *Georgia governor vetoes religious freedom bill criticized as anti-gay* (Apr. 4, 2016, 11:30 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay/>.

Within one week after North Carolina passed a particularly insidious “license to discriminate” law in March 2016, 120 of the largest companies in the world—including Apple, Facebook, Twitter, and Bank of America—publicly condemned the law and demanded its repeal.<sup>106</sup> On April 5, 2016, PayPal scratched its plans for a \$3.6 million global operations center in North Carolina, which “was expected to bring 400 skilled jobs to North Carolina, with an annual payroll impact of more than \$20 million.”<sup>107</sup> In subsequent months, major sports organizations including the NBA and NCAA relocated championship and all-star sporting events from North Carolina, a move costing the state approximately \$100 million in sports-related business.<sup>108</sup> A report by the Williams Institute strikingly estimates that, in total, the North Carolina “license to discriminate” law could cost the state up to *\$5 billion a year* in federal funding and business investments.<sup>109</sup>

v. Negligible Economic Costs of Prohibiting Discrimination

While the economic benefits of prohibiting sexual orientation discrimination are substantial, the economic costs of prohibiting such discrimination are negligible. Any potential economic costs associated with prohibiting sexual orientation discrimination would likely stem from the psychological harm to those who wish to exclude members of the LGBTQ community from public accommodations, housing, and employment. One could plausibly argue that a certain percentage of business owners, landlords, and employers would rather exit the economic market than suffer the psychological harm of not being able to discriminate against LGBTQ individuals. Any such departure from the economic market would presumably have a marginally negative effect on the economy. Although there is an apparent dearth of literature on the specific economic costs associated with withdrawal from economic markets after the enactment of non-discrimination legislation, it seems reasonable to conclude that any

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106. Stephen Peters, *120 Major CEOs & Business Leaders Urging North Carolina To Repeal Discriminatory Anti-LGBT Law* (Apr. 4, 2016, 11:30 PM), <http://www.hrc.org/blog/more-businesses-join-list-of-over-120-ceos-leaders-urging-nc-to-repeal-anti>.

107. Human Rights Campaign, *Breaking: PayPal Will Move 400 Jobs, \$3.6 Million Investment Outside of North Carolina, Citing HB2* (Apr. 5, 2015, 11:50 AM), <http://www.hrc.org/blog/breaking-paypal-will-move-400-jobs-3.6-million-investment-outside-of-north>.

108. Nicholas Wells, *North Carolina to lose millions in sports tourism over 'bathroom law'* (Oct. 13, 2016, 4:45 PM), <http://www.cnbc.com/2016/09/16/acc-and-nba-north-carolina-to-lose-millions-in-sports-tourism-over-bathroom-law.html>.

109. Christy Mallory and Brad Sears, *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina's HB2* (Oct. 13, 2016, 4:45 PM), <http://williamsinstitute.law.ucla.edu/research/discrimination-diversity-and-development-the-legal-and-economic-implications-of-north-carolinas-hb2/>.

such hypothetical cost would be negligible compared to the substantial economic benefits of prohibiting sexual orientation discrimination.

In conclusion, economic analyses indicate that prohibiting sexual orientation discrimination in public accommodations, housing, and employment would significantly benefit the American economy by increasing productive and diverse participation in economic markets, decreasing physical and mental healthcare costs associated with discrimination, decreasing governmental expenses associated with homelessness, decreasing governmental and corporate costs associated with litigation, and avoiding the targeted corporate boycott of states that condone or authorize LGBTQ discrimination. Since any collateral economic costs would be negligible, Congress and state legislatures should strengthen the American economy by enacting statutes prohibiting sexual orientation discrimination in public accommodations, housing, and employment.

### III. REMEDIAL ARGUMENTS FOR COURTS

While legislative reform would provide the most clear and expansive protection against sexual orientation discrimination, it is not the only path to increased anti-discrimination protection. There are also several potential strategies for courts to improve protection through statutory interpretation and common law. This portion of the essay will propose three such arguments. First, courts should recognize that sexual orientation discrimination is also sex discrimination and should interpret federal and state statutes prohibiting sex discrimination as also prohibiting sexual orientation discrimination. Second, courts should adopt the New Jersey common law rule (*Uston*) prohibiting arbitrary discrimination (including sexual orientation discrimination) in public accommodations. Third, courts should extend the language and rationale of *Uston* to also prohibit arbitrary discrimination (including sexual orientation discrimination) in housing and employment. These strategies would dramatically increase protection against sexual orientation discrimination in public accommodations, housing, and employment.

#### A. Statutory Interpretation

A significant number of federal and state public accommodations,<sup>110</sup> housing,<sup>111</sup> and employment<sup>112</sup> statutes prohibit sex discrimination but do

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110. See Alaska Stat. §18.80.230; Ariz. Rev. Stat. §41-1442; Ark. Code §16-123-107; Fla. Stat. §760.08; Idaho Code §67-5909; Indiana Code §22-9-1-2; Kan. Stat. §§44-1001; Ky. Rev. Stat. §344.145; La. Rev. Stat. §51:2247; Mich. Comp. Laws §§37.2012, 2302; Mo. Stat. §213.065; Mont. Code §49-2-304; Neb. Rev. Stat. §20-134; N.D. Cent. Code §14-02.4-14; Ohio Rev. Code §4112.02; Okla. Stat. tit. 25, §1402; Penn. Stat. tit. 43, §953; S.C. Code §45-9-10; S.D. Cod. Laws §20-13-23; Tenn. Code §4-21-501; Utah Code §13-7-3; Va. Code §2.2-3900; W. Va. Code §5-11-2; Wyo. Stat. §6-9-101.

not expressly prohibit sexual orientation discrimination. That notwithstanding, there is persuasive legal precedent and compelling logic supporting the conclusion that sexual orientation discrimination is intrinsically also sex discrimination cognizable under statutes prohibiting sex discrimination. Courts should embrace this line of reasoning and interpret statutes prohibiting sex discrimination as also prohibiting sexual orientation discrimination.

i. Why is Sexual Orientation Discrimination Sex Discrimination?

There are two principal reasons why sexual orientation discrimination is also sex discrimination. First, there is an inextricable substantive link between the two types of discrimination. A (wo)man who is discriminated against for being physically or emotionally attracted to, or in a relationship with, another (wo)man is discriminated against *because (s)he is a (wo)man*. Chief Justice John Roberts crisply illustrated this reasoning through a hypothetical at oral arguments in the landmark gay marriage case, *Obergefell v. Hodges*: “I’m not sure it’s necessary to get into sexual orientation to resolve this case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?”<sup>113</sup> This hypothetical is similar to our real world example of Brooke Waits, who was fired because of a picture of her and her partner kissing.<sup>114</sup> If Ms. Waits were male, she would not have been fired. She was fired not just because of her sexual orientation, but also because of her sex. These examples can be generalized to any and all instances of sexual orientation discrimination, demonstrating that sexual orientation discrimination inherently involves sex discrimination.

The second reason why sexual orientation discrimination is also sex discrimination is that sexual orientation discrimination is deeply rooted in sex-based and gender-based stereotyping. As articulated by the U.S. Court

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111. See Ala. Code § 24-8-4; Alaska Stat. §18.80.240; Ariz. Rev. Stat. §41-1491.14; Ark. Code §16-123-107; O.C.G.A. §8-3-202; Fla. Stat. §760.23; Idaho Code §67-5909; Kan. Stat. §44-1001; Ky. Rev. Stat. §344.360; La. Rev. Stat. §51:2606; Mich. Comp. Laws §37.2012; Mo. Stat. §213.040; Mont. Code §49-2-305; Neb. Rev. Stat. §20-321; N.C. Gen. Stat. §41A-4; N.D. Cent. Code §14-02.5-02; Ohio Rev. Code §4112.02; Okla. Stat. tit. 25, §1452; Penn. Stat. tit. 43, §953; S.C. Code §31-21-40; S.D. Cod. Laws §20-13-20; Tenn. Code §4-21-601; Tex. Prop. Code §301.021; Va. Code §36-96.1; W. Va. Code §5-11A-5.

112. See Alaska Stat. §18.80.220; Ariz. Rev. Stat. §41-1463; Ark. Code §16-123-107; Fla. Stat. §760.10; Idaho Code §67-5909; Kan. Stat. §44-1001; Ky. Rev. Stat. §344.040; La. Rev. Stat. §23:332; Mich. Comp. Laws §§37.2202; Mo. Stat. §213.055; Mont. Code §49-2-303; Neb. Rev. Stat. §48-1104; N.C. Gen. Stat. Ann. §143-422.2; N.D. Cent. Code §14-02.4-03; Ohio Rev. Code §4112.02; Okla. Stat. tit. 25, §1302; Penn. Stat. tit. 43, §953; S.C. Code §1-13-80; S.D. Cod. Laws §20-13-10; Tenn. Code §4-21-401; Tex. Lab. Code § 21.051; Va. Code §2.2-3900; W. Va. Code §5-11-9; Wyo. Stat. §27-9-105.

113. Transcript of Oral Argument at 61-2, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (No. 14-571).

114. See American Civil Liberties Union, *supra* note 10.

of Appeals for the Sixth Circuit in *Vickers v. Fairfield Medical Center*, gay and lesbian individuals “by definition, fail to conform to *traditional gender norms* in their sexual practices.”<sup>115</sup> Sexual orientation discrimination is often rooted in condemnation of that failure to conform to gender norms in sexual preferences or practices. For instance, consider our real world example of Mr. Dewberry and Mr. Williams, who were discriminated against at the Big Earl restaurant.<sup>116</sup> This discrimination involved a fundamental element of sex-based stereotyping. The waitress made this unmistakably clear in her statement, “[h]ere at Big Earl’s we like for *men to act like men* and for *ladies to act like ladies* . . . .”<sup>117</sup> If Mr. Dewberry or Mr. Williams had “act[ed] like men”—that is, if they had eschewed the same-sex attraction inconsistent with traditional gender norms—they would not have been discriminated against. They were discriminated against not just because of their sexual orientation, but also because of their failure to conform to traditional gender stereotypes.

#### ii. Precedential Support

A substantial number of federal court, state court, and administrative decisions offer persuasive legal precedent supporting the conclusion that sexual orientation discrimination is also sex discrimination. These cases have primarily involved same-sex marriage and workplace discrimination. The Ninth Circuit Court of Appeals in *Latta v. Otter* held that statutes and constitutional amendments in Idaho and Nevada prohibiting same-sex marriages and refusing to recognize same-sex marriages validly performed in other states violated the Equal Protection Clause.<sup>118</sup> Although the court based its holding directly on sexual orientation discrimination grounds, the court noted that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant’s theory.”<sup>119</sup> Judge Berzon’s concurrence focused exclusively on sex discrimination. Judge Berzon reasoned that the Idaho and Nevada laws unconstitutionally authorized unlawful sex discrimination, as “the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with *gender-based expectations*.”<sup>120</sup> A federal district court in *Videckis v. Pepperdine University* likewise concluded that sexual orientation discrimination is also sex discrimination.<sup>121</sup> In denying Pepperdine’s motion to dismiss the plaintiff’s Title IX claim, the court stated, “sexual orientation discrimination is not a

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115. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

116. See SIECZKOWSKI, *supra* note 2.

117. *Id.* (emphasis added).

118. *Latta v. Otter*, 771 F.3d 456, 476 (9th Cir. 2014).

119. *Id.* at 474.

120. *Id.* at 495 (emphasis added).

121. *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1159 (C.D. Cal. 2015).

category distinct from sex or gender discrimination. Thus, claims of discrimination based on sexual orientation are covered by Title VII and IX, but not as a category of independent claims separate from sex and gender stereotype. *Rather, claims of sexual orientation discrimination are gender stereotype or sex discrimination claims.*<sup>122</sup> Numerous other federal court cases have endorsed similar logic and concluded that sexual orientation discrimination is also sex discrimination.<sup>123</sup>

State court cases have similarly determined that sexual orientation discrimination is also sex discrimination. In a particularly notable case, *Baehr v. Lewin*, the Supreme Court of Hawaii held that a state statute prohibiting same-sex marriage was presumptively unconstitutional under the Hawaii Constitution, because the statute relied on a sex-based classification.<sup>124</sup> In another landmark case, *Baker v. State*, the Supreme Court of Vermont held that “the State [of Vermont] is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law.”<sup>125</sup> Although the Court based its holding on the Common Benefits Clause of the Vermont Constitution, Justice Denise Johnson’s concurrence endorsed the rationale of *Baehr v. Lewin* and concluded that *Baker v. State* represented “a straightforward case of sex discrimination.”<sup>126</sup> In another notable case, *Brause v. Bureau of Vital Statistics*, the Superior Court of Alaska relied on sex discrimination grounds to strike down a state ban on same-sex marriage.<sup>127</sup> The court concluded, “[t]hat this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code’s

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122. *Id.* (emphasis added).

123. *See, e.g., Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1287 (E.D. Ark. 2014) (holding that Arkansas’s laws defining marriage as between a man and a woman violate the Equal Protection Clause by discriminating on the basis of gender); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845, 860 (D.S.D. 2014) (“[b]ecause South Dakota’s law, for example, prohibits a man from marrying a man but does not prohibit that man from marrying a woman, the complaint has stated a plausible claim for relief [based on gender discrimination]”); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014) (“[t]he State’s permission to marry depends on the genders of the participants, so the restriction is a gender-based classification.”); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1206 (D. Utah 2013) (“the court finds that the fact of equal application to both men and women does not immunize Utah’s Amendment 3 from the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex”); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010) (under Proposition 8, whether a couple can obtain a marriage license and enter into marriage depends on the genders of the two parties relative to one another. A man is permitted to marry a woman but not another man. A woman is permitted to marry a man but not another woman). *See also infra* note 133.

124. *Baehr v. Miike*, 852 P.2d 44, 68 (1993).

125. *Baker v. Vermont*, 744 A.2d 864, 867 (1999).

126. *Id.* at 905.

127. No. 3AN-95-6562 CI., 1998 WL 88743, at \*6 (Alaska Feb. 27, 1998).

requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious.”<sup>128</sup>

Administrative agencies have offered further support for the conclusion that sexual orientation discrimination is also sex discrimination. In a highly influential decision, *Baldwin v. Foxx*, the U.S. Equal Employment Opportunity Commission (EEOC)—the governmental agency responsible for enforcing federal employment discrimination laws—held that “[s]exual orientation discrimination is sex discrimination” prohibited under Title VII of the Civil Rights Act of 1964.<sup>129</sup> Relying on the two arguments discussed earlier in this section, the Commission concluded that “sexual orientation is inseparable from and inescapably linked to sex,”<sup>130</sup> that “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms,”<sup>131</sup> and that “[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.”<sup>132</sup> A growing number of federal courts have endorsed *Baldwin v. Foxx*’s reasoning and denied motions to dismiss sexual orientation discrimination claims under Title VII,<sup>133</sup> and the EEOC recently filed an amicus brief in *Burrows v. The College of Central Florida* urging the Eleventh Circuit, and all federal courts, to recognize that claims of sexual orientation discrimination are also sex discrimination claims cognizable under Title VII.<sup>134</sup>

Although the U.S. Supreme Court has not expressly concluded that sexual orientation discrimination is also sex discrimination, it offered powerful support for this argument in *Price Waterhouse v. Hopkins*, which held that employment discrimination based on sex-based stereotyping is unlawful sex discrimination under Title VII of the Civil Rights Act of

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128. *Id.*

129. EEOC Decision No. 0120133080, at 7 (2015).

130. *Id.* at 6.

131. *Id.*

132. *Id.* at 9.

133. *See, e.g.,* *Boutillier v. Hartford Pub. Sch.*, 2014 WL 4794527 (D. Conn. Sept. 25, 2014) (denying an employer’s motion to dismiss a Title VII sex discrimination claim alleging employment discrimination on the basis of sexual orientation); *Hall v. BNSF Ry Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (denying an employer’s motion to dismiss a Title VII sex discrimination claim challenging the employer’s policy of providing health insurance coverage for employees’ legally married opposite-sex—but not same-sex—spouses); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying an employer’s motion to dismiss a Title VII sex discrimination claim alleging sexual orientation discrimination based on sex role stereotyping); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012) (denying an employer’s motion to dismiss a Title VII sex discrimination claim alleging sexual orientation discrimination based on sex role stereotyping and reasoning that sexual orientation discrimination “is a claim of discrimination because of sex.”). *See also* *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015).

134. Brief for EEOC as Amicus Curiae Supporting Appellant, *Burrows v. Coll. Cent. Fla.*, No. 15-14554 (11th Cir. Jan. 8, 2016).

1964.<sup>135</sup> The Eleventh Circuit in *Glenn v. Brumby* extended *Price Waterhouse* to hold that discrimination based on gender non-conformity constitutes actionable sex discrimination.<sup>136</sup> The *Price Waterhouse* rationale may be applied without difficulty to encompass sexual orientation discrimination, as sexual orientation discrimination—like gender non-conformity—fundamentally involves sex stereotyping. Specifically, sexual orientation discrimination involves heteronormative<sup>137</sup> stereotypes about how persons of a certain sex should act toward persons of another (and the same) sex. As the EEOC stated in its amicus brief in *Burrows v. The College of Central Florida*, “[i]ntentional discrimination on the basis of the gender of an individual’s preferred partners—whether that individual is lesbian, gay, bisexual or straight—necessarily implicates stereotypes relating to “proper” sex-specific roles in romantic and/or sexual relationships.”<sup>138</sup> In light of these considerations, lower federal courts and state courts should extend the U.S. Supreme Court’s decision in *Price Waterhouse* to conclude that sexual orientation discrimination is also sex discrimination cognizable under sex discrimination statutes.

iii. “Indiscriminate Imposition of Inequalities”<sup>139</sup>

Some might argue that sexual orientation discrimination cannot be sex discrimination, because sexual orientation discrimination affects both sexes equally. A gay man is discriminated against because he is a man to the same extent that a lesbian woman is discriminated against because she is a woman. There can be no sex discrimination if the sexes are treated equally, right? The Supreme Court has rejected this argument, for good reason. In the case of *Shelley v. Kraemer*, the Supreme Court held the judicial enforcement of racially based restrictive covenants unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.<sup>140</sup> One of the arguments presented by the respondents was that “since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected.”<sup>141</sup> Since the races were equally affected by racially based restrictive covenants, the respondents argued, the covenants could not constitute racial discrimination. The Court rejected this argument: “The rights created by the first section of the

135. 490 U.S. 228, 258 (1989).

136. 663 F.3d 1312, 1317 (2011).

137. NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) (defined as “denoting or relating to a world view that promotes heterosexuality as the normal or preferred sexual orientation.”).

138. See Brief for EEOC, *supra* note 134, at 22.

139. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

140. *Id.* at 20.

141. *Id.* at 21.

Fourteenth Amendment are, by its terms, *guaranteed to the individual*. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. *Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.*<sup>142</sup>

A similar argument was made in the landmark case *Loving v. Virginia*, in which the Supreme Court struck down laws prohibiting inter-racial marriage as unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>143</sup> One of the arguments raised by the government was that the statute could not be said to discriminate on the basis of race, because it affected each race equally: black persons could not marry white persons, and white persons could not marry black persons.<sup>144</sup> The Court again rejected this argument as fundamentally invalid.<sup>145</sup> These decisions relied on two principal rationales. First, equal treatment at a high level of generality cannot justify discriminatory treatment at the individual level, because equality rights are “guaranteed to the individual.”<sup>146</sup> Second, equal treatment in name only can still be discriminatory in practice if there are background social norms and facts that would make the “equal” application of the law promote hierarchy.

In both cases, the contested laws *ostensibly* provided equal treatment, but *in practice* the laws actually promoted racial hierarchy. Applying this precedent to the question of sexual orientation discrimination, it is clear that, even if sexual orientation discrimination affects both sexes equally *in general*, it still constitutes sex discrimination within the context of the *individual instance of discrimination*, and it still has the impermissible practical effect of promoting a heteronormative hierarchy in access to public markets.

#### iv. What About Legislative Intent?

Others might argue that interpreting statutory prohibitions of sex discrimination as also prohibiting sexual orientation discrimination might involve disregarding the intent of the enacting legislature. This counterargument might assert, for example, that the authors of Title VII of the Civil Rights Act of 1964 did not intend for the word “sex” to include sexual orientation, and they did not intend for sexual orientation to be a (directly or indirectly) protected statutory class. There are two compelling responses to this counterargument.

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142. *Id.* at 22 (emphasis added).

143. 388 U.S. 1, 12 (1967).

144. *Id.* at 10.

145. *Id.*

146. *Shelley*, 334 U.S. at 22.

The first response, endorsed in cases like *Baldwin v. Foxx*,<sup>147</sup> acknowledges the importance of legislative intent, but argues that fidelity to legislative intent is not dependent upon whether the enacting legislatures contemplated sexual orientation discrimination as a form of sex discrimination or intended for sexual orientation to be a protected statutory class. Even if enacting legislatures did not intend for sexual orientation to be protected within the statutory term, “sex,” the essential consideration is that the legislatures undeniably intended to protect against discrimination on the basis of sex, regardless of the shape or form any particular instance of sex discrimination might take. Sexual orientation discrimination invariably involves sex discrimination; you simply cannot have sexual orientation discrimination without sex discrimination. Therefore, prohibiting sexual orientation discrimination under statutes that prohibit sex discrimination is fundamentally compatible with legislative intent.

A second compelling response to the legislative intent counterargument challenges the importance of legislative intent and argues that statutes “should—like the Constitution and the common law—be interpreted ‘dynamically,’ that is, in light of their present societal, political, and legal context.”<sup>148</sup> This perspective, called “dynamic statutory interpretation,” is particularly compelling when there have been dramatic societal, political, and legal shifts between the enactment of the legislation and the moment of statutory interpretation, as is the case with the issues of sex and sexual orientation. Since the enactment of the Civil Rights Act of 1964, the Supreme Court—mirroring societal and political shifts—has recognized sex as a quasi-suspect classification requiring heightened scrutiny under the Fourteenth Amendment,<sup>149</sup> has moved from upholding the constitutionality of criminalizing homosexual intimacy<sup>150</sup> to rejecting the constitutionality of criminalizing homosexual intimacy,<sup>151</sup> and has moved from upholding the constitutionality of limiting marriage to persons of opposite sex<sup>152</sup> to rejecting the constitutionality of limiting marriage to persons of opposite sex.<sup>153</sup> Considering these dramatic shifts in context demonstrating a clear and powerful trend toward increased protection for sex and sexual orientation, and considering the contemporary societal, political, and legal landscape for the issues of sex discrimination and sexual orientation discrimination, courts should

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147. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 at \*7 (July 17, 2015).

148. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 UNIV. OF PA. L. REV. 1479, 1479 (1987).

149. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

150. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

151. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

152. *Baker v. Nelson*, 191 N.W.2d 185, 187 (1971), appeal *dismissed*, 409 U.S. 810 (1972).

153. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2608 (2015).

dynamically interpret statutes prohibiting sex discrimination as also prohibiting sexual orientation discrimination.

v. Why the Delay?

Finally, some might argue that, if sexual orientation were so clearly also sex discrimination, courts would not have taken so long to reach this conclusion. This *ex post* rationalization fails to take into account the underlying societal norms that had to change in order for courts—and society in general—to appreciate the argument that sexual orientation discrimination is sex discrimination. First, attitudes towards sex discrimination had to change considerably. Sex discrimination was simply not a social or legal concern for the large majority of American history. Recall that women were not even allowed to vote until 1920,<sup>154</sup> and the Court did not treat sex as a (quasi) suspect classification until 1976.<sup>155</sup> Only quite recently did the majority of our society become genuinely concerned with sex discrimination. Second, attitudes toward sexual orientation had to change dramatically. Recall that homosexuality was considered a mental disorder until 1973,<sup>156</sup> homosexual intimacy was criminalized in thirteen states as recently as 2003,<sup>157</sup> and same-sex marriage was prohibited in thirty-eight states as recently as 2013.<sup>158</sup> Particularly important, sexual orientation was not considered an immutable characteristic like sex, as opposed to a mutable “lifestyle choice,” until very recently.<sup>159</sup> Prior to these important changes in the societal understanding and treatment of sex and sexual orientation, courts were not in a position to consider the argument that sexual orientation discrimination is also sex discrimination. Our evolving understanding of sex and sexual orientation has ultimately cleared the way for courts to appreciate the merits of this argument.

In conclusion, persuasive legal precedent and compelling logic supports the conclusion that sexual orientation discrimination is also sex discrimination. Courts should follow this precedent and reasoning, and should interpret statutory prohibitions of sex discrimination as also prohibiting sexual orientation discrimination. This interpretation would drastically increase anti-discrimination protection for the LGBTQ community. Under this interpretation, federal law would provide nationwide statutory protection against sexual orientation discrimination

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154. See U.S. CONST. amend. XIX.

155. Craig v. Boren, 429 U.S. 190, 197 (1976).

156. See American Psychiatric Association, *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM-II*, 6th Printing, page 44, TORAH DECLARATION (1973), [http://www.torahdec.org/uploads/1/5/5/3/15535872/dsm-ii\\_homosexuality\\_revision.pdf](http://www.torahdec.org/uploads/1/5/5/3/15535872/dsm-ii_homosexuality_revision.pdf).

157. Lawrence v. Texas, 539 U.S. 558, 559 (2003).

158. See Obergefell v. Hodges, 135 S.Ct. 2584, at 2611.

159. *Id.* at 2596.

in housing and employment;<sup>160</sup> state housing statutes would provide protection in forty-seven states,<sup>161</sup> as opposed to only twenty-two states;<sup>162</sup> and state employment statutes would provide protection in forty-six states,<sup>163</sup> as opposed to only twenty-two states.<sup>164</sup> Although

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160. See 42 U.S.C. § 3604 (2012); 42 U.S.C. § 2000e (k) (2012).

161. See Ala. Code § 24-8-4; Alaska Stat. §18.80.240; Ariz. Rev. Stat. §41-1491.14; Ark. Code §16-123-107; O.C.G.A. §8-3-202; Fla. Stat. §760.23; CAL. CIV. CODE § 51 (West 2014) and Government Code § 12940; COLO. REV. STAT. § 24-34-502 and COLO. REV. STAT. § 24-34-402; CONN. GEN. STAT. § 46a-64c and CONN. GEN. STAT. § 46a-60; DEL. CODE ANN. tit. 6, § 4603 and DEL. CODE ANN. tit. 19, § 711; HAW. REV. STAT. § 515-3 and HAW. REV. STAT. § 378-2; Idaho Code §67-5909; 775 ILL. COMP. STAT. 5/3-102 and 775 ILL. COMP. STAT. 5/2-102; IOWA CODE § 216.8 and IOWA CODE § 216.6; Kan. Stat. §44-1001; Ky. Rev. Stat. §344.360; La. Rev. Stat. §51:2606; ME. REV. STAT. tit. 5, § 4581-A and ME. REV. STAT. tit. 5, § 4572; MD. CODE ANN., STATE GOV'T § 20-705 and MD. CODE ANN., STATE GOV'T § 20-606; MASS. GEN. LAWS ch. 151B, § 4; Mich. Comp. Laws §37.2012; Mo. Stat. §213.040; Minnesota, see MINN. STAT. § 363A.09 and MINN. STAT. § 363A.08; Mont. Code §49-2-305; Neb. Rev. Stat. §20-321; N.C. Gen. Stat. §41A-4; N.D. Cent. Code §14-02.5-02; Ohio Rev. Code §4112.02; NEV. REV. STAT. § 233.010; N.H. REV. STAT. ANN. § 354-A:8 and N.H. REV. STAT. ANN. § 354-A:6; N.J. STAT. ANN. § 10:5-4; N.M. STAT. ANN. § 28-1-7(G) and N.M. STAT. ANN. § 28-1-7(A); N.Y. EXEC. LAW § 296; OR. REV. STAT. § 659A.421 and OR. REV. STAT. § 659A.030; Okla. Stat. tit. 25, §1452; Penn. Stat. tit. 43, §953; S.C. Code §31-21-40; S.D. Cod. Laws §20-13-20; R.I. GEN. LAWS § 34-37-4 and R.I. GEN. LAWS § 28-5-7; Tenn. Code §4-21-601; Tex. Prop. Code §301.021; Va. Code §36-96.1; W. Va. Code §5-11A-5; UTAH CODE ANN. § 57-21-6 and UTAH CODE ANN. § 35A-5-106; VT. STAT. ANN. tit. 9, § 4503 and VT. STAT. ANN. tit. 21, § 495; WASH. REV. CODE. § 49.60.222 and WASH. REV. CODE. § 49.60.180; WIS. STAT. § 106.50 and WIS. STAT. § 111.31.

162. See CAL. CIV. CODE § 51 (West 2014) and Government Code § 12940; COLO. REV. STAT. § 24-34-502 and COLO. REV. STAT. § 24-34-402; CONN. GEN. STAT. § 46a-64c and CONN. GEN. STAT. § 46a-60; DEL. CODE ANN. tit. 6, § 4603 and DEL. CODE ANN. tit. 19, § 711; HAW. REV. STAT. § 515-3 and HAW. REV. STAT. § 378-2; 775 ILL. COMP. STAT. 5/3-102 and 775 ILL. COMP. STAT. 5/2-102; IOWA CODE § 216.8 and IOWA CODE § 216.6; ME. REV. STAT. tit. 5, § 4581-A and ME. REV. STAT. tit. 5, § 4572; MD. CODE ANN., STATE GOV'T § 20-705 and MD. CODE ANN., STATE GOV'T § 20-606; MASS. GEN. LAWS ch. 151B, § 4; MINN. STAT. § 363A.09 and MINN. STAT. §363A.08; NEV. REV. STAT. § 233.010; N.H. REV. STAT. ANN. § 354-A:8 and N.H. REV. STAT. ANN. § 354-A:6; N.J. STAT. ANN. § 10:5-4; N.M. STAT. ANN. § 28-1-7(G) and N.M. STAT. ANN. § 28-1-7(A); N.Y. EXEC. LAW § 296; OR. REV. STAT. § 659A.421 and OR. REV. STAT. § 659A.030; R.I. GEN. LAWS § 34-37-4 and R.I. GEN. LAWS § 28-5-7; UTAH CODE ANN. § 57-21-6 and UTAH CODE ANN. § 35A-5-106; VT. STAT. ANN. tit. 9, § 4503 and VT. STAT. ANN. tit. 21, § 495; WASH. REV. CODE. § 49.60.222 and WASH. REV. CODE. § 49.60.180; WIS. STAT. § 106.50 and WIS. STAT. § 111.31.

163. See Alaska Stat. §18.80.220; Ariz. Rev. Stat. §41-1463; Ark. Code §16-123-107; Fla. Stat. §760.10; CAL. CIV. CODE § 51 (West 2014) and Government Code § 12940; COLO. REV. STAT. § 24-34-502 and COLO. REV. STAT. § 24-34-402; CONN. GEN. STAT. § 46a-64c and CONN. GEN. STAT. § 46a-60; DEL. CODE ANN. tit. 6, § 4603 and DEL. CODE ANN. tit. 19, § 711; HAW. REV. STAT. § 515-3 and HAW. REV. STAT. § 378-2; Idaho Code §67-5909; Kan. Stat. §44-1001; Ky. Rev. Stat. §344.040; La. Rev. Stat. §23:332; 775 ILL. COMP. STAT. 5/3-102 and 775 ILL. COMP. STAT. 5/2-102; IOWA CODE § 216.8 and IOWA CODE § 216.6; ME. REV. STAT. tit. 5, § 4581-A and ME. REV. STAT. tit. 5, § 4572; MD. CODE ANN., STATE GOV'T § 20-705 and MD. CODE ANN., STATE GOV'T § 20-606; MASS. GEN. LAWS ch. 151B, § 4; Mich. Comp. Laws §§37.2202; Mo. Stat. §213.055; MINN. STAT. § 363A.09 and MINN. STAT. § 363A.08; Mont. Code

federal public accommodations law does not prohibit sex discrimination and thus could not be interpreted as prohibiting sexual orientation discrimination,<sup>165</sup> state public accommodations statutes would prohibit

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§49-2-303; Neb. Rev. Stat. §48-1104; N.C. Gen. Stat. Ann. §143-422.2; N.D. Cent. Code §14-02.4-03; NEV. REV. STAT. § 233.010; N.H. REV. STAT. ANN. § 354-A:8 and N.H. REV. STAT. ANN. § 354-A:6; N.J. STAT. ANN. § 10:5-4; N.M. STAT. ANN. § 28-1-7(G) and N.M. STAT. ANN. § 28-1-7(A); N.Y. EXEC. LAW § 296; Ohio Rev. Code §4112.02; Okla. Stat. tit. 25, §1302; OR. REV. STAT. § 659A.421 and OR. REV. STAT. § 659A.030; Penn. Stat. tit. 43, §953; S.C. Code §1-13-80; R.I. GEN. LAWS § 34-37-4 and R.I. GEN. LAWS § 28-5-7; S.D. Cod. Laws §20-13-10; Tenn. Code §4-21-401; Tex. Lab. Code § 21.051; UTAH CODE ANN. § 57-21-6 and UTAH CODE ANN. § 35A-5-106; VT. STAT. ANN. tit. 9, § 4503 and VT. STAT. ANN. tit. 21, § 495; Va. Code §2.2-3900; WASH. REV. CODE. § 49.60.222 and WASH. REV. CODE. § 49.60.180; W. Va. Code §5-11-9; Wyo. Stat. §27-9-10; WIS. STAT. § 106.50 and WIS. STAT. § 111.31.

164. See CAL. CIV. CODE § 51 (West 2014) and Government Code § 12940; Colorado, see COLO. REV. STAT. § 24-34-502 and COLO. REV. STAT. § 24-34-402; Connecticut, see CONN. GEN. STAT. § 46a-64c and CONN. GEN. STAT. § 46a-60; Delaware, see DEL. CODE ANN. tit. 6, § 4603 and DEL. CODE ANN. tit. 19, § 711; Hawaii, see HAW. REV. STAT. § 515-3 and HAW. REV. STAT. § 378-2; Illinois, see 775 ILL. COMP. STAT. 5/3-102 and 775 ILL. COMP. STAT. 5/2-102; Iowa, see IOWA CODE § 216.8 and IOWA CODE § 216.6; Maine, see ME. REV. STAT. tit. 5, § 4581-A and ME. REV. STAT. tit. 5, § 4572; Maryland, see MD. CODE ANN., STATE GOV'T § 20-705 and MD. CODE ANN., STATE GOV'T § 20-606; Massachusetts, see MASS. GEN. LAWS ch. 151B, § 4; Minnesota, see MINN. STAT. § 363A.09 and MINN. STAT. §363A.08; Nevada, see NEV. REV. STAT. § 233.010; New Hampshire, see N.H. REV. STAT. ANN. § 354-A:8 and N.H. REV. STAT. ANN. § 354-A:6; New Jersey, see N.J. STAT. ANN. § 10:5-4; New Mexico, see N.M. STAT. ANN. § 28-1-7(G) and N.M. STAT. ANN. § 28-1-7(A); New York, see N.Y. EXEC. LAW § 296; Oregon, see OR. REV. STAT. § 659A.421 and OR. REV. STAT. § 659A.030; Rhode Island, see R.I. GEN. LAWS § 34-37-4 and R.I. GEN. LAWS § 28-5-7; Utah, see UTAH CODE ANN. § 57-21-6 and UTAH CODE ANN. § 35A-5-106; Vermont, see VT. STAT. ANN. tit. 9, § 4503 and VT. STAT. ANN. tit. 21, § 495; Washington, see WASH. REV. CODE. § 49.60.222 and WASH. REV. CODE. § 49.60.180; and Wisconsin, see WIS. STAT. § 106.50 and WIS. STAT. § 111.31.

165. 42 U.S.C. §2000a (2012).

sexual orientation discrimination in forty-five states,<sup>166</sup> as opposed to only twenty-one states.<sup>167</sup>

*B. Common Law: Public Accommodations*

The common law rule governing public accommodations discrimination “in every jurisdiction in the United States except the State of New Jersey”<sup>168</sup> is that “with the exception of inn keepers and common carriers, privately owned premises that serve the public may exclude individuals arbitrarily unless a statute specifically prohibits the discriminatory conduct.”<sup>169</sup> In contrast, the New Jersey common law rule is that “when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises.”<sup>170</sup> This rule turns the predominant rule on its head and provides far more expansive protection against discrimination in public accommodations. Courts across the country should consider the public

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166. See Alaska Stat. §18.80.230; Ariz. Rev. Stat. §41-1442; Ark. Code §16-123-107; see CAL. CIV. CODE § 51 (West 2014); COLO. REV. STAT. § 24-34-601 (2013); CONN. GEN. STAT. § 46a-81d (2013); DEL. CODE ANN. tit. 6, § 4503 (2014); Fla. Stat. §760.08; Idaho Code §67-5909; Indiana Code §22-9-1-2; HAW. REV. STAT. § 489-3 (West 2014); 775 ILL. COMP. STAT. 5/1-102 (2012); IOWA CODE § 216.7 (2014); Fla. Stat. §760.08; Idaho Code §67-5909; Indiana Code §22-9-1-2; ME. REV. STAT. tit. 5, § 4592 (2014); MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis 2014); MASS. GEN. LAWS ch. 272, § 98 (2014) (criminalizing such discrimination); Mich. Comp. Laws §§37.2012, 2302; MINN. STAT. § 363A.11 (2013); Mo. Stat. §213.065; Mont. Code §49-2-304; Neb. Rev. Stat. §20-134; NEV. REV. STAT. § 233.010 (2014); N.H. REV. STAT. ANN. § 354-A:17 (2014); N.J. STAT. ANN. § 10:5-4 (West 2014); N.M. STAT. ANN. § 28-1-7(F) (2013); N.Y. EXEC. LAW § 296 (McKinney 2014); Mo. Stat. §213.065; Mont. Code §49-2-304; Neb. Rev. Stat. §20-134; OR. REV. STAT. § 659A.403 (2013); R.I. GEN. LAWS § 11-24-2 (2013) (criminalizing such discrimination); S.D. Cod. Laws §20-13-23; Tenn. Code §4-21-501; Utah Code §13-7-3; Va. Code §2.2-3900; VT. STAT. ANN. tit. 9, § 4502 (2014); W. Va. Code §5-11-2; Wyo. Stat. §6-9-101; WASH. REV. CODE. § 49.60.215 (2013); WIS. STAT. § 106.52 (2014).

167. See CAL. CIV. CODE § 51 (West 2014); COLO. REV. STAT. § 24-34-601 (2013); CONN. GEN. STAT. § 46a-81d (2013); DEL. CODE ANN. tit. 6, § 4503 (2014); HAW. REV. STAT. § 489-3 (West 2014); 775 ILL. COMP. STAT. 5/1-102 (2012); IOWA CODE § 216.7 (2014); ME. REV. STAT. tit. 5, § 4592 (2014); MD. CODE ANN., STATE GOV'T § 20-304 (LexisNexis 2014); MASS. GEN. LAWS ch. 272, § 98 (2014) (criminalizing such discrimination); MINN. STAT. § 363A.11 (2013); NEV. REV. STAT. § 233.010 (2014); N.H. REV. STAT. ANN. § 354-A:17 (2014); N.J. STAT. ANN. § 10:5-4 (West 2014); N.M. STAT. ANN. § 28-1-7(F) (2013); N.Y. EXEC. LAW § 296 (McKinney 2014); OR. REV. STAT. § 659A.403 (2013); R.I. GEN. LAWS § 11-24-2 (2013) (criminalizing such discrimination); VT. STAT. ANN. tit. 9, § 4502 (2014); WASH. REV. CODE. § 49.60.215 (2013); WIS. STAT. § 106.52 (2014).

168. See *supra* note 32, at 1290.

169. See *supra* note 32, at 1290.

170. *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

policy benefits of the New Jersey rule<sup>171</sup> and the history behind the two common law rules—specifically the perverse interests behind the development of the predominant rule—and should uniformly adopt the New Jersey rule.

The New Jersey rule was most likely the original public accommodations rule and is certainly the better rule. Professor Joseph Singer conducted an extensive historical analysis of the origins and development of the two public accommodations rules—taking into account English common law, English and early American legal commentators, and early American common law—and determined that the New Jersey rule was the uniformly accepted common law rule prior to the Civil War: “[B]efore the Civil War, the law probably required *all businesses that held themselves out as open to the public to serve anyone who sought service . . . the formal law exempting businesses other than inns and common carriers from the duty to serve did not come into being until the late 1850’s. In other words, the current common-law rule did not crystallize until around the Civil War.*”<sup>172</sup>

If the New Jersey rule was uniformly accepted prior to the Civil War, why is it dead in every state but New Jersey today? As Professor Singer’s analysis uncovered, the change from the New Jersey rule to the currently predominant rule was “not an accident;” it was a concerted movement rooted in systemic racial discrimination.<sup>173</sup> As Professor Singer notes, the first cases exempting businesses other than inns and common carriers from the duty to serve directly coincided with the post-Civil War extension of legal rights to African Americans.<sup>174</sup> This extension of legal rights meant that businesses that held themselves out as open to the public suddenly had the common law duty to serve African Americans. Courts responded to this novel situation by changing the common law rule to one that dramatically restricted the duty to serve and authorized most businesses to choose their customers at will.<sup>175</sup> As Professor Singer notes, “[r]eversing the presumption of access and substituting a right to exclude served to limit these newfound civil rights.”<sup>176</sup> This rule, which “had a disparate racial impact and was undoubtedly intended to have such an impact,”<sup>177</sup> was ultimately adopted by courts in every state and became the predominant common law rule across the nation.

Surprisingly, it was not until 1982 that the Supreme Court of New Jersey disrupted the national consensus by noting the “less than dignified origins” of the predominant rule and officially returning to the original,

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171. See *supra* Part II for an analysis of the public policy benefits of expansive protection against sexual orientation discrimination.

172. Singer, *supra* note 32, at 1292, 1331.

173. *Id.* at 1331-45.

174. *Id.*

175. See, e.g., *McCrea v. Marsh*, 78 Mass. 211, 213 (1858).

176. Singer, *supra* note 32, at 1345.

177. Singer, *supra* note 32, at 1344.

pre-Civil War common law rule imposing a general duty to serve on all businesses open to the public.<sup>178</sup> Perhaps more surprisingly, over the past three decades no other states have adopted the New Jersey rule.

One possible reason for the failure to adopt the New Jersey rule might be that courts assume that common law remedies are unnecessary, because federal and state public accommodation statutes adequately address the problem of discriminatory exclusion. This is a prevalent and reasonable assumption, but it is far from accurate. As previously noted, federal and state legislation offers seriously deficient protection against discriminatory exclusion in access to public accommodations.<sup>179</sup>

Another possible reason for the failure to adopt the New Jersey rule might be that courts are concerned about undermining the authority of businesses to exclude unruly, disruptive, or dangerous customers. This potential concern is unfounded. The New Jersey rule clearly states that the general duty to serve only prohibits businesses from excluding customers “unreasonably . . . [or] in an arbitrary or discriminatory manner.”<sup>180</sup> The court in *Uston* emphasized that “[n]o party in this appeal questions the right of property owners to exclude from their premises those whose actions disrupt the regular and essential operations of the [premises] . . . or threaten the security of the premises and its occupants”<sup>181</sup> and that “[i]n some circumstances, proprietors have a duty to remove disorderly or otherwise dangerous persons from the premises.”<sup>182</sup> In other words, the court in *Uston* adopted a “good cause” or “reasonableness” standard for exclusion, where business owners are legally authorized (sometimes *required*) to exclude unruly, disruptive, or dangerous customers but are prohibited from excluding customers arbitrarily or unreasonably.

A final reason for the failure to adopt the New Jersey rule might be that courts are concerned that adopting the “reasonableness” standard under *Uston* could decrease the predictability of the law. Although the concern that legal standards are less predictable than legal rules is common and intuitive, legal scholars like Professor Singer have argued that “[c]ontrary to the intuitive view, rules do not always promote predictability. Because justified expectations are based on both informal and formal sources, predictability will sometimes be improved by framing [legal] doctrines in the form of a standard.”<sup>183</sup> Building on this argument, it seems clear that adopting the *Uston* reasonableness standard would actually *increase* predictability of law. When a privately owned business is open to the public, patrons have the justified expectation that they will be served without regard to personal characteristics like the color of their

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178. See *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

179. See *supra* Part I.

180. *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

181. *Id.*

182. *Id.*

183. Joseph Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1373 (2013).

skin, the object of their religion, the composition of their anatomy, the location of their nation of origin, or the nature of their sexual orientation. Furthermore, business owners generally do not expect to be able to legally exclude customers based on these personal characteristics. On the other hand, patrons of public accommodations do not expect that they can behave disorderly or dangerously without consequence, while business owners do expect that they can legally exclude unruly, disruptive, and dangerous customers. The *Uston* standard comports with these justified expectations to a greater degree than does the predominant public accommodations rule. Consequently, moving from the predominant rule to the *Uston* standard will actually increase the predictability of the law.

In conclusion, it is high time for courts across the country to recognize the discriminatory history of the predominant rule and uniformly abandon that rule in favor of the New Jersey rule. Not only would this decision formally renounce the “less than dignified origins” of the predominant rule, but it would also increase the predictability of the law and serve important public policy objectives by extending common law protection to LGBTQ individuals in the twenty-nine states lacking statutory protection within the context of public accommodations.<sup>184</sup>

### C. Common Law: Housing and Employment

The common law rules governing housing and employment discrimination are functionally equivalent to the predominant public accommodations rule. Property owners who enter the public real estate market may refuse to sell or rent housing arbitrarily unless a statute specifically prohibits housing discrimination.<sup>185</sup> Similarly, employers may arbitrarily choose whom to hire and fire unless a statute specifically prohibits employment discrimination.<sup>186</sup> However, there is a reasonable argument that the language of the New Jersey public accommodations rule is broad enough to encompass housing, and that the rationale for prohibiting arbitrary discrimination in public accommodations applies with equal force to—and should be extended to—housing and employment.

The language of the New Jersey public accommodations rule is broad. As previously noted, the rule states, “when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory

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184. Note that this extended common law protection will remain subordinate to any conflicting state statutes like Miss. Stat. Ann. § 97-23 -17 (1994), which expressly authorizes discrimination in access to public accommodations.

185. See Singer, *supra* note 35, at 26-31; Scherer & Fisher, *supra* note 35; Finkelstein & Ferrara, *supra* note 35.

186. See Kenneth, *supra* note 37, at 552-53.

manner toward persons who come on their premises.”<sup>187</sup> This rule appears to be broad enough to encompass housing. When a property owner enters the public real estate market to sell or rent housing, she necessarily “opens [her] premises to the general public in the pursuit of [her] own property interests.” There is no functional difference between the real estate market and a food market, or a restaurant, or a movie theater, insofar as they all involve privately owned property open to the general public in pursuit of financial gain. In light of these considerations, there is reason to believe that the language of the *Uston* rule is already broad enough to prohibit housing discrimination.

Even if the language of the *Uston* rule were insufficiently broad to cover housing or employment discrimination, *Uston’s* rationale for prohibiting arbitrary discrimination in public accommodations applies with equal force to—and should be extended to—the realms of housing and employment. The rationale is essentially about maintaining a reasonable balance between the interests of private parties in managing their professional affairs and the interests of the public in equal access to public markets.

Applying *Uston’s* rationale to housing, the interests of the public to enjoy housing free from arbitrary discrimination are more substantial than the interests of the property owners in managing their property in a discriminatory manner. Both public accommodations and housing are fundamentally necessary for comfortable human existence. In fact, one could reasonably argue that housing is more fundamentally necessary than public accommodations, as housing is generally considered a basic human right.<sup>188</sup> Therefore the public has an extremely strong interest in equal access to housing. In contrast, although private property interests are important and should be given significant deference, arbitrary discrimination against certain members of the public is not a legitimate property interest when the property owner has “open[ed] their premises to the general public in the pursuit of their own property interests.”<sup>189</sup> Even if arbitrary discrimination or exclusion is considered a legitimate property interest for owners of purely private property, opening that property to the public for financial gain substantially delegitimizes that interest.

Applying the *Uston* rationale to employment, the interests of the public to participate in gainful employment—to the same degree as

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187. *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

188. See, e.g., United Nations, *Right to Adequate Housing*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. (2009), [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf); United Nations, *Universal Declaration of Human Rights* (Apr. 12, 2016, 1:50 PM), <http://www.un.org/en/universal-declaration-human-rights/>; United Nations, *International Covenant on Economic, Social and Cultural Rights* (Apr. 12, 2016, 1:50 PM), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

189. *Uston v. Resorts Int’l Hotel, Inc.*, 445 A.2d 370, 375 (N.J.1982).

housing and public accommodations—free from arbitrary discrimination are more substantial than the interests of employers in managing their businesses in a discriminatory manner. The public employment market is similar in important ways to the public housing market and the public accommodations market. First, all three markets involve private parties and businesses open to the general public for financial gain. Second, access to gainful employment—like access to housing and public accommodations—is generally seen as fundamentally necessary for comfortable human existence, as evidenced by the fact that employment, like housing, is widely considered a basic human right.<sup>190</sup> In light of these considerations, the public has a very strong interest in equal access to employment. In contrast, arbitrary discrimination against certain members of the public is not a legitimate employment interest when the employer has purposefully entered the public employment market.

In conclusion, public accommodations, housing, and employment are functionally equivalent for the purposes of *Uston*, and courts should extend the language and rationale of *Uston* to prohibit arbitrary discrimination (including sexual orientation discrimination) in the housing and employment markets. This decision would extend common law protection to LGBTQ individuals in the twenty-eight states lacking statutory protection within the realms of housing and employment.<sup>191</sup>

#### CONCLUSION

History judges every generation. We all scramble to be on its good side, but we frequently fall short—sometimes spectacularly so. We are presently at a historical crossroads for LGBTQ rights, the civil rights issue of our generation. In most states individuals can be denied service, housing, and work solely because of their sexual orientation. We have the opportunity to remedy this injustice. We have the opportunity to build on the momentum of the gay marriage movement and enact robust legal protections against sexual orientation discrimination. We have the opportunity to ensure that gay, lesbian, and bisexual persons and their families are able to access fundamental human necessities like public accommodations, housing, and employment free from discrimination. In essence, we have the opportunity to stand resolutely on the right side of history, and we have the responsibility to act on this opportunity.

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190. See, e.g., United Nations, *supra* note 188.

191. See *supra* note 184.