

SPEECH AND DISCRIMINATION IN CONSUMER CONTEXTS

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I. INTRODUCTION

Of late, conflicts between speech claims and antidiscrimination claims in consumer contexts have attracted increased judicial attention.¹ In such cases, considerations of freedom and autonomy, of equality of treatment, of marginalization, and of dignity and humiliation have been raised by the opposing parties.² This Article reviews the most relevant considerations, with a special emphasis on what one might fancily call the phenomenology of social interaction.³

Ultimately, this Article seeks to draw, for a broad range of cases, a judicially important line. On one side of the crucial line are

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1. See, e.g., *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. Ct. App. 2015), cert. granted sub nom. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290 (2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013); *Gifford v. McCarthy*, 137 A.D.3d 30 (N.Y. App. Div. 2016); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017). See also *Lexington Fayette Urban Cty. Human Rights Comm'n v. Hands On Originals Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017), review granted, ____ (Ky. Oct. 25, 2017); *Klein v. Oregon Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017) (“Sweetcakes by Melissa” wedding cake case). Additionally, these cases often raise issues of the free exercise of religion, which are herein set aside as involving their own distinct and monumental complications.

2. See *infra* pt. III. THE EXPERIENTIAL CHARACTER OF THE RELEVANT ENCOUNTERS AND RESPONSES THERETO. The primary focus therein is on the experiences of prospective customers, as opposed to sellers, but with the clear stipulation that, for purposes of the argument, the experiences of the sellers can in a given case be no less significant, grave, or weighty than those of the prospective customers.

3. The idea of phenomenology is invoked merely to call attention to first-person, subjective, conscious experiences. See David Woodruff Smith, *Phenomenology*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/phenomenology> (last updated Dec. 16, 2013) (describing phenomenology as “a discipline field in philosophy, or as a movement in the history of the philosophy,” and as the study of “conscious experience as experienced from the subjective or first person point of view”). See, more technically, Ludwig Landgrebe, *The Phenomenological Concept of Experience*, 34 PHIL. & PHENOMENOLOGICAL RES. 1, 12 (1973) (“The phenomenological analysis of experience is a description of our world . . . which we make our own through experience.”).

cases in which the purported speech in question, whether freely spoken or somehow legally compelled, occurs in some form of on-premises or other broadly person-to-person interaction, in a recognizably commercial context, between a business owner or representative thereof and a prospective customer of the commercial enterprise in question. In these cases, otherwise appropriate antidiscrimination claims should generally prevail over conflicting claims to freedom of speech.

There will inevitably be exceptional cases. The presumably rare exceptions may typically involve cases in which, from the prospective customer's standpoint, the main point of requesting a seller's specified performance is not broadly commercial in nature, but rather is about requiring the seller to violate that seller's own basic values in order to advance the customer's understanding of fairness, or of a just social ordering.

On the other side of the line are cases in which the purported speech, again whether freely uttered or somehow legally compelled, occurs in any other context. These other contexts could include general and broadly accessible mission statements on company websites, company public relations releases, widely available company advertising and social media posts or tweets, and owner or company comments in the public square on the public issues of the day. In these cases, the general presumption should run the other direction, and otherwise valid free speech claims should ordinarily prevail.

This line is not intended to be utterly categorical or invariably judicially decisive in its operation. The argument is not that statutorily compelling speech on the former side of the line is invariably permissible, while compelling speech is never permissible on the latter side. Rather, the idea is that the relevant stakes, experiences, interests, and associated values tend to differ systematically on either side of the dividing line, and that the outcomes of the cases should normally, even strongly presumptively, reflect those systematic differences.

The argument below begins by offering a sense of the lived experiential quality of several particular consumer cases that fall on the direct, immediate, and interpersonally interactive side of the line in question. Otherwise appropriate restricting of speech in such cases should, given the conflicting values at stake, typically be permitted. From there, this Article marshals and assesses the

most important, broader considerations underlying and justifying the proposed general line of demarcation.

II. SPEECH & DISCRIMINATION: THE CASES & THE FORMS OF SUBJECTIVELY EXPERIENCED PERSONAL ENCOUNTERS

A. A Case of Face-to-Face Interaction

Appellate case reports are not invariably rich in their accounts of the subtlety and detail of the relevant subjective experience of the parties. As a compensating virtue, however, the case reports also do not invariably accommodate the most self-serving accounts of any particular party. The case reports, in any event, may provide the reader sufficient sense to form a reasonably helpful impression of the circumstances and parties, plus the extent of the latter's sentiments, experiences, inferences, and responses.

The best-known contemporary consumer-context speech and discrimination case is *Craig v. Masterpiece Cakeshop, Inc.*⁴ The brevity of the personal encounter in *Craig*, however, places some limits on our ability to grasp the existential nuances of that encounter, as well as on the clarity of the precise free speech issue, if any, at stake.⁵ It is, however, clear that in *Craig*, the cake shop owner's speech rights, if any, are thought to conflict with a state-level statute prohibiting discrimination on the basis of sexual orientation.⁶

The record of the encounter establishes that Charlie Craig and David Mullins jointly visited the Masterpiece Cakeshop owned by Jack Phillips.⁷ The purpose of the visit by Craig and Mullins was to ask Phillips to "design and create a cake to celebrate their same-sex wedding."⁸ Phillips declined the request for a same-sex wedding cake because of his religious beliefs, "but advis[ed] Craig and Mullins that he would be happy to make and sell them any

4. 370 P.3d 272.

5. The case report does not suggest which party, if either, took the lead in interactively implying that further discussion would not be worth the experiential or other costs involved. For a sense of the differences among amici and commentators on the precise free speech issue reflected by the record, see *infra* notes 162–163 and accompanying text. Our aim herein is to encompass all typical case scenarios.

6. COLO. REV. STAT. ANN. § 24–34–601 (West 2014).

7. *Craig*, 370 P.3d at 276.

8. *Id.*

other baked goods.”⁹ Craig and Mullins at this point left this brief meeting “without discussing with Phillips any details of their wedding cake.”¹⁰ The next day, Phillips responded to a phone call from Craig’s mother by citing his religious beliefs and the fact that Colorado did not at that time recognize same-sex marriages.¹¹

Phillips’ arguments on appeal included an invocation of the compelled speech cases.¹² On Phillips’ theory, Colorado anti-discrimination law compelled his speech in the form of a designed wedding cake for a same-sex marriage.¹³ The realized wedding cake might or might not be distinctive, artistic, accompanied by a disclaimer, individually tailored, or inscribed or otherwise verbally expressive. In any event, any such cake would, on Phillips’ theory, “inherently convey a celebratory message about marriage.”¹⁴ Presumably, though, Phillips had no objection to celebrating marriage in general or all marriages then recognized under Colorado law. His objection was apparently to the idea of a compelled endorsement of same-sex marriage and to other marriages Phillips deemed objectionable on principle.

The Colorado Court of Appeals determined that Phillips’ decision to not provide the cake preceded, and effectively mooted, any discussion of the process or substance of any tailored designing of the wedding cake in question.¹⁵ Thus there was no discussion in particular of any verbal message or of any possible participation in the design process by Craig or Mullins.¹⁶

On the basis of this state of the record, the court found dubious any claim of symbolic speech¹⁷ or of mixed speech and conduct, whether compelled or not.¹⁸ For sufficient speech to be present, there must have been a more or less demonstrable “intent to

9. *Id.* These religiously motivated refusals include generally non-protected categories, including Halloween celebrants and polygamous marriage celebrants.

10. *Id.* It is not entirely clear whether the brevity of the encounter reflected firmness of principle, hostility, existential discomfort, or other motives.

11. *Id.* at 276–77.

12. *Id.* at 283–85.

13. *Id.* at 283.

14. *Id.* Consider how divergent various legal and moral conceptions of “complicity,” lax and scrupulous, can be. *See generally* GREGORY MELLEMA, *COMPLICITY AND MORAL ACCOUNTABILITY* (2016) (distinguishing nine forms of complicity).

15. *Craig*, 370 P.3d at 285.

16. *Id.*

17. *Id.* at 284 (citing *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (the public draft card burning protest case)).

18. *Id.* at 285.

convey a particularized message,”¹⁹ along with a great likelihood²⁰ “that the message would be understood by those who viewed it.”²¹ The court thus crucially assumed that there can be no constitutionally objectionable compelled speech or symbolic conduct unless the speech or symbolic conduct independently conveys a particularized message²² that is likely to be understood by its audience.²³ This is a questionable assumption. It is unclear whether the general test for symbolic speech is invariably translatable into the compelled speech context. Someone might well coherently object to compulsorily bearing some “message” where that message is unclear, ambiguous, or esoteric. One might even object to, say, being compelled to bear any graven image at all. More generally, courts should re-think this dubious assumption.

The court then considered whether any reasonably inferable message would be attributed to the objecting cake designer rather than to the wedding party.²⁴ The court briefly considered the possibility of cases in which reasonable audience members might ascribe any messages to the cake designer, the wedding party, and perhaps to the relevant government jointly, to one degree or another.²⁵ But the court concluded:

the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. . . . [T]o the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.²⁶

19. *Id.* at 284 (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (the flag burning political protest case)).

20. *Id.*

21. *Id.* (quoting *Johnson*, 491 U.S. at 404). *See also* *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (the Vietnam War-era case in which students wore black armbands to public school to protest the war).

22. *See supra* note 19 and accompanying text.

23. *See supra* note 21 and accompanying text.

24. *Craig*, 370 P.3d at 286.

25. *Id.* For a discussion of cases in which reasonable audience members might infer that either a private party or the government or both should be considered the speaker, or the author of the speech in question, see *infra* note 32 and accompanying text.

26. *Id.* The possibility that an audience could be meaningfully divided between two plausible interpretations or two plausible authorship ascriptions is thus largely set aside.

This binary or single-most-likely-outcome approach to the ascribability of speech was then adapted to accommodate Colorado civil rights law. Because Colorado civil rights law:

prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather . . . a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.²⁷

In support of this conclusion, the court relied on the logic of *Rumsfeld v. Forum for Academic & Institutional Rights*.²⁸ This case stands for the proposition that, in many contexts, audiences can intelligently distinguish between freely sponsored or endorsed speech, and speech uttered pursuant to a legal requirement.²⁹

At some point, though, the courts must reconcile this logic with that of other cases in which the likely understandings of reasonable audiences are largely set aside. After all, few informed observers would assume that the speech at issue in the "Live Free or Die" license plate motto case of *Wooley v. Maynard* was that of the individual car owner, who clearly had little choice in the matter.³⁰ Reasonable observers likely do not ordinarily attribute belief in uniformly required official license plate motto-speech to the displayers of such standard plates.

Courts should thus more generally recognize the possibility of divided, mixed, and uncertain audience ascriptions of responsibility for speech. Audiences will not always be of one mind

27. *Id.*

28. 547 U.S. 47 (2006).

29. *Id.* at 65. See also *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980) (explaining that audiences are not as likely to attribute legally protected speech by outsiders on shopping mall premises to either the shopping mall or to the anchor stores thereof).

30. *Wooley v. Maynard*, 430 U.S. 705, 715–17 (1977). See also *id.* at 722 (Rehnquist, J., dissenting) ("The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.'"). Some compelled speech cases afford the compelled speaker some opportunity for creative, if not always transparent, ambiguity. See generally ARTHUR R. MELZER, *PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING* (2014) (discussing, from a philosophical perspective, the expression and communication of unorthodox thoughts through esoteric writing) and more specifically, if not controversially, some of the work of composer Dimitri Shostakovich. See generally LAUREL E. FAY, *SHOSTAKOVICH: A LIFE* (2005) (providing a biographical account of Shostakovich's life and the cultural and political messages portrayed through his music).

in judging matters of speech authorship and endorsement. Compelled speech will not always be composed or dictated by governments directly; the content of a governmentally compelled message may or may not be facilitated or even favored by that government, as distinct from some private third party.³¹ Authorship of, and responsibility for, some messages may reasonably be thought of as somehow jointly held.³²

The court in *Craig* recognized, but did not explore, alternative scenarios in which either party has requested, or actually inscribed, some explicit verbal message, as in the form of lettering associated with the cake in question.³³ Below, we consider cases drawn from a much wider range of case scenarios and contexts.³⁴

The *Craig* court concluded its free speech analysis with a brief reference to the possibility of a speaker's disassociating himself or herself from any possible message by means of some sort of posted or otherwise disseminated disclaimer.³⁵ The effectiveness of similar disclaimers has been judicially doubted in other constitutional contexts.³⁶ In *Craig*, the court reached a two-part result on the permissibility of posted disclaimers by the regulated

31. See, e.g., *Pruneyard*, 447 U.S. at 87–88 (declining to apply the compelled speech doctrine); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (focusing not on any government-mandated or governmentally preferred message, but more broadly on a government compulsion to print any message, even privately sourced, that the newspaper did not otherwise wish to print).

32. For background, see Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (discussing the problems posed by categorizing speech as either private or governmental in the context of First Amendment litigation, instead advocating for a “mixed speech” approach). The Supreme Court itself collectively illustrated the problem by dividing 5-4 as to whether specialty license plates in a given case were either government or private party speech. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). The Court's insistence on treating arguably shared responsibility cases as purely binary, mutually exclusive, and rigidly dichotomous requires a more sophisticated defense than has thus far been provided. For further discussion, see R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347 (2016) (discussing the *Walker* decision in detail and emphasizing the need for broader perspective on the distinction between private and governmental speech).

33. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 288 (Colo. Ct. App. 2015).

34. See *infra* pt. III.

35. 370 P.3d at 288.

36. Note, for example, the assumed constitutional inadequacy of any form of published disclaimer in the Establishment Clause cases of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–06 (2000) (brief prayer at public high school football game) and *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (brief prayer at public middle school graduation ceremony). For much broader background, see R. George Wright, *Your Mileage May Vary: A General Theory of Legal Disclaimers*, 7 PIERCE L. REV. 85 (2008).

enterprise.³⁷ The court rejected the idea of an on-premises sign or notice warning of refusal of service on discriminatory grounds; this would hold whether the proprietor ever actually followed through by denying service to anyone on prohibited grounds or not.³⁸

However, the court also validated somewhat different sorts of disclaimers. Such notices would not threaten a denial of service on protected grounds, but they might clearly indicate the proprietor's disagreement with the applicable requirement or with some relevant belief or conduct associated with a protected group. Or, somewhat less forthrightly, a proprietor might permissibly post a sign indicating merely that some applicable law—beyond the proprietor's control—requires the provision of service on particular grounds, which the sign might specify in whole or in part.³⁹

Of course, some such store-based signs, whether posted on an exterior wall, window, or inside, will be less conspicuous and less confrontational than others. We emphasize much more generally herein an assessment of the phenomenological or experiential quality of all encounters.⁴⁰ As it turns out, the most constitutionally useful general line is between, roughly, speech in the course of an on-premises or otherwise broadly person-to-person interaction, in a consumer commercial transactional context, and speech in any other context, typically including general social media posts, general commentary, indiscriminate advertisements, and other public contexts and formats.⁴¹

To conclude our look at *Craig* we should note that under the civil rights statute in question, the case might alternatively have been brought not only on grounds of sexual orientation discrimination, but also on grounds of discrimination based on differences in the parties' "creeds."⁴² From the standpoint of

37. *Craig*, 370 P.3d at 288.

38. *Id.* A sufficiently conspicuous notice might eventually discourage many categorically protected prospective customers from patronizing the business in question, while perhaps also attracting some of the most committed members of the categorically protected classes.

39. *Id.*

40. See, e.g., *supra* pt. II. SPEECH & DISCRIMINATION: THE CASES & THE FORMS OF SUBJECTIVELY EXPERIENCED PERSONAL ENCOUNTER and *infra* pt. III.

41. For some additional specification of this dividing line, see *supra* pt. I. INTRODUCTION and *infra* pt. IV.

42. For reference to creedal discrimination under the Colorado Statute, see David Cole, *Let Them Buy Cake*, THE N.Y. REV. OF BOOKS (Dec. 7, 2017), <http://www.nybooks.com/articles/2017/12/07/let-them-buy-gay-wedding-cakes/>. *But cf.* the state Civil Rights Statute in *Elane Photography, LLC v. Willock*, 309 P.3d 53, 72 (N.M. 2013) (political viewpoint as an unprotected category).

Phillips, and Craig and Mullins, the disagreement may in part be about beliefs, norms, values, and the associated consciously chosen and approved behaviors.⁴³ One might reasonably think of these differences as going to “creed.”⁴⁴ The distinctive problem with a “creedal” discrimination approach, from our experiential perspective, is that such an approach focuses unduly on matters of abstract belief, at the expense of, in many cases, proper attention to experienced consequences of personal interactions in which the customer’s “creedal” beliefs may not be the central focus.

B. A Case of Email Interaction

The nature of the interactional experience in *Craig* differs to some extent from that in *Elane Photography, LLC v. Willock*.⁴⁵ *Willock* involved person-to-person email correspondence,⁴⁶ as opposed to both direct and immediate face-to-face confrontation, and as opposed to any more remote and impersonal forms of interaction, including visiting social media and corporate general policy statements intended for a universal audience.

In the *Willock* case, Vanessa Willock contacted a person representing the defendant, Elane Photography, LLC, by email, asking explicitly whether the defendant “would be available to photograph her commitment ceremony to another woman.”⁴⁷ As it turned out, the corporate co-owner and lead photographer was “personally opposed to same-sex marriage and [would] not photograph any image or event that violat[e] her religious beliefs.”⁴⁸ In a response email to Willock, the co-owner in question thus indicated that she “photographed only ‘traditional weddings.’”⁴⁹

43. See generally Cole, *supra* note 42 (discussing how “Masterpiece Cakeshop’s objection rests on its owner’s Christian beliefs”).

44. See, e.g., the broad definition of “creed” as encompassing a “system of belief in general; a set of opinions on any subject, e.g. politics or science,” among alternatives available from J.A. SIMPSON & E.S.C. WEINER, THE OXFORD ENGLISH DICTIONARY 1141 (2d ed. 1989). In practice, broad prohibitions of “discrimination” on grounds of political belief tend toward self-destructive incoherence. See *infra* note 102 (discussing several reasons why discrimination must be handled on a case-by-case basis).

45. *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

46. *Id.* at 59.

47. *Id.*

48. *Id.* at 59–60.

49. *Id.* at 60.

At this point, “Willock e-mailed back and asked, ‘Are you saying that your company does not offer your photography services to same-sex couples?’”⁵⁰ The co-owner responded, “Yes, you are correct in saying we do not photograph same-sex weddings.”⁵¹ The co-owner then “thanked Willock for her interest.”⁵² Confirmatory follow-up emails were then exchanged over a period of several weeks between Willock’s partner and the co-owner in question.⁵³

Assuming the presence of constitutionally relevant speech, the court in *Willock* crucially distinguished the compelled speech in the Supreme Court’s *Tornillo*⁵⁴ case.⁵⁵ In the *Willock* court’s view, Elane Photography was not governmentally “commandeered”⁵⁶ for purposes of presenting or publicizing views other than its own.⁵⁷ According to the court, “the allegedly compelled message is Elane Photography’s own work on behalf of its clients, which it distributes only to its clients and their loved ones. The government has not interfered with Elane Photography’s editorial judgment; the only choice regulated is Elane Photography’s choice of clients.”⁵⁸

We need not resolve any controversy over whether the *Willock* case involved “speech” in the constitutional sense in the first place, or whether the speech was compelled in any relevant sense. Any and all such possible permutations are in play for our broader purposes. The general approach we recommend is instead intended to be sufficiently broad and encompassing to accommodate all relevant variations. A broad approach that emphasizes live interactive experience can accommodate any such considerations to the extent of their relevance.

Similarly, we need not specifically endorse or reject the *Willock* court’s conclusion, drawing upon the *Pruneyard* shopping mall case,⁵⁹ that viewers of the same-sex marriage photographs

50. *Id.*

51. *Id.* We might reasonably infer the defendant’s willingness to photograph same-sex couples in a range of other contexts, apart from a marriage ceremony.

52. *Id.*

53. *Id.*

54. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). For discussion, see *supra* note 31 and accompanying text.

55. *Willock*, 309 P.3d at 67.

56. *Id.*

57. *Id.* Or those, presumably, of the company’s human owners.

58. *Id.*

59. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980). For discussion, see *supra* notes 29, 31, and accompanying text.

would not likely infer any endorsement thereby of same-sex marriage.⁶⁰ Nor need we pass specific judgment on the court's endorsement of the efficacy and legitimacy of some forms of a disclaimer.⁶¹ The relevant arguments can be discussed in a more encompassing overall account.

C. A Case of Telephone-Based Personal Interaction

A somewhat distinct experiential encounter took place in the case of *Gifford v. McCarthy*.⁶² This case involved the 100-acre Liberty Ridge Farm owned by the Giffords,⁶³ portions of which were rented to the public for various functions and events, including religious and secular marriages.⁶⁴ The Giffords commonly offered a variety of services, including transportation, refreshments, decorations, flowers,⁶⁵ and general coordination in connection with weddings.⁶⁶

The *Gifford* case involved a person-to-person phone conversation. We think of phone calls as a generally intermediate—in terms of experienced personal intimacy—means of interaction compared to a face-to-face encounter, as in *Craig*,⁶⁷ and a series of personal emails, as in *Willock*.⁶⁸ At the time in question, Melisa McCarthy and Jennifer McCarthy anticipated a same-sex wedding.⁶⁹ The interaction in question was described by the court in the following terms:

60. *Willock*, 309 P.3d at 68–70.

61. *Id.* at 69–70. For discussion, see *supra* note 36 and accompanying text.

62. 137 A.D.3d 30 (N.Y. App. Div. 2016).

63. The premises in question, Liberty Ridge Farms, was established as a limited liability company. *Id.* at 33.

64. *Id.* at 33–34.

65. As in, perhaps more elaborately, the recent case of *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017).

66. *Gifford*, 137 A.D.3d at 33–34.

67. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. Ct. App. 2015).

68. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013). Consider, as well, the intriguing, generationally oriented discussion in JEAN M. TWENGE, IGEN: WHY TODAY'S SUPER-CONNECTED KIDS ARE GROWING UP LESS REBELLIOUS, MORE TOLERANT, LESS HAPPY—AND COMPLETELY UNPREPARED FOR ADULTHOOD, chs. 2–3 (2017) (discussing perceived experiential differences among texts, phone calls, and actual physical immediacy). Of course, some emails, as in the case of cyberstalking, can be of dramatic emotional intensity. See, e.g., *Online Harassment and Cyberstalking*, PRIVACY RIGHTS CLEARINGHOUSE, <https://www.privacyrights.org/consumer-guides/online-harassment-cyberstalking-0> (last updated Oct. 24, 2017).

69. *Gifford*, 137 A.D.3d at 34.

Melisa McCarthy spoke with Cynthia Gifford on the telephone concerning Liberty Ridge as a venue for her wedding ceremony and reception. During their conversation, Melisa McCarthy used the female pronoun to refer to her fiancée, thus indicating that she was engaged to a woman. Cynthia Gifford promptly interjected that there was “a problem” and that the farm did “not hold same [-]sex marriages.” In response to Melisa McCarthy’s query as to the reason for not allowing same-sex marriages, Cynthia Gifford explained that “it’s a decision that my husband and I have made that that’s not what we wanted to have on the farm.”⁷⁰

The McCarthys then filed suit under New York’s anti-discrimination law.⁷¹

The findings as to the telephone conversation in question, rather like those regarding the face-to-face conversation in *Craig*,⁷² do not suggest any discussion as to any particular aspect of the Giffords’ typical range of services that might distinctively involve their speech,⁷³ or in this case, their statutorily compelled speech.⁷⁴ Again, as in *Craig*,⁷⁵ the court in *Gifford* found “that the conduct allegedly compelled [was] not sufficiently expressive so as to trigger First Amendment protections.”⁷⁶ The anti-discrimination statute was said to “not compel the Giffords to endorse, espouse or promote same-sex marriages, nor does it require them to recite or display any message at all,”⁷⁷ as opposed to requiring merely that they “offer the same goods and services to same-sex couples that they offer to other couples.”⁷⁸

Here, the court may have assumed that the idea of offering “the same” product or service to all comers will be more or less unproblematic—this would be a basic mistake. In practice, no two personalized transactions will of course ever be entirely “the

70. *Id.*

71. *Id.*

72. See *supra* text accompanying note 10 (explaining that the baker in *Craig* refused service to a same-sex couple “without discussing . . . any details of their wedding cake”).

73. Their speech being, conceivably, the design of their floral arrangements. See *supra* note 65 and accompanying text, in contrast with *State v. Arlene’s Flowers*, 389 P.3d 543 (Wash. 2017), *supra* note 65.

74. *Gifford*, 137 A.D.3d at 34–35.

75. 370 P.3d 272, 283.

76. *Gifford*, 137 A.D.3d at 42.

77. *Id.* at 41.

78. *Id.*; see also John Corvino, *Religious Liberty, Not Religious Privilege*, in DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 20, 83–84 (2017) (referencing the widely popular “same” as opposed to “different” distinction).

same.” There will always be one or more perhaps quite relevant differences in atmosphere, ambience, attitude, demeanor, tone, enthusiasm, patience, creativity, perfunctoriness, energy, creativity, or transactional distancing or bonding. These differences may be clear and important, but difficult to articulate or judicially prove. Whether any of those differences should count as sufficiently material will require judicial consideration based on reflective judgment.⁷⁹

At a very minimum, relevant “sameness” of good or service judgments will be crucially contextual. Consider, for example, a restaurant owner who offers an otherwise rich and varied menu, but out of conscious hostility, not a single item is consumable by vegetarians. There is, of course, a sense in which vegetarians and non-vegetarians are thereby offered the same product or service. But is that sense the only relevant sense, or the most important sense? The meaning of the “same” object will inevitably depend on the context in which it appears.

In any event, the court concluded, as in *Craig*⁸⁰ and *Willock*,⁸¹ that “there is no real likelihood that the Giffords would be perceived as endorsing the values or lifestyle of the individuals renting their facilities as opposed to merely complying with anti-discrimination laws.”⁸² Again, the possibility of mixed motivations and mixed perceptions of reasonable observers was set aside.

D. A Case of Backgrounded and Elaborated Interaction

Of the minimal sampling of cases herein, the *Arlene’s Flowers* case involves the most elaborate personal interactivity.⁸³ In this case, the owner and operator of Arlene’s Flowers, Inc., Baronelle

79. Query also whether a refusal to provide a good or service to a same-sex couple should be permissible if one actually sells that supposedly “same” good or service, but only to immediate family. See *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 550 (Wash. 2017) (involving a refusal to provide wedding floral services to a same-sex couple by a flower shop owner who ordinarily provided such services to members of her immediate family only). For a range of “sameness” versus “contextually different” puzzles, see Reply Br. For Pet’rs at 16–18, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (2017) (No. 16–111). Loosely related, consider whether consciously “separate” arrangements can be experientially “unequal.” For a sense of the inarticulability of some things we know through and about experience, see MICHAEL POLANYI, *THE TACIT DIMENSION* ch. 1 (Univ. of Chicago Press 2009) (1966).

80. 370 P.3d at 286–87.

81. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 69 (N.M. 2013).

82. *Gifford*, 137 A.D.3d at 42.

83. *Arlene’s Flowers*, 389 P.3d at 543.

Stutzman, declined to sell wedding flowers to Robert Ingersoll on the grounds of her disapproval of same-sex marriages.⁸⁴ More distinctively, Ingersoll had been a regular customer of Arlene's Flowers for the preceding nine years⁸⁵ and had spent several thousand dollars cumulatively at the shop.⁸⁶ Stutzman had been aware of Ingersoll's sexual orientation.⁸⁷ Importantly for our purposes, Ingersoll considered Arlene's Flowers to be his florist.⁸⁸

After some preliminary discussion with an employee of Arlene's Flowers, Ingersoll had returned to the shop, at which point "Stutzman told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs."⁸⁹ There was again, as in *Craig*,⁹⁰ no discussion as to any distinctively individualized floral creativity by either Stutzman or Ingersoll.⁹¹ In this case, the court indicated that "Ingersoll did not have a chance to specify what kind of flowers or floral arrangements he was seeking before Stutzman told him that she would not serve him."⁹² There was also no discussion of other matters of Stutzman's involvement in the wedding, in particular whether Stutzman would be responsible for the actual delivery of the flowers to the site of the wedding.⁹³

At trial, Stutzman testified that she provided Ingersoll with the names of other potentially more willing florists and that "the two hugged before Ingersoll left her store."⁹⁴ For his part, Ingersoll testified that "he walked away from that conversation 'feeling very hurt and upset emotionally.'⁹⁵ Ingersoll and his similarly offended partner, Curt Freed, "lost enthusiasm"⁹⁶ for a large wedding in light of the "emotional toll"⁹⁷ resulting from Stutzman's refusal.

84. *Id.* at 548–49.

85. *Id.* at 549.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. Ct. App. 2015).

91. *Arlene's Flowers*, 389 P.3d at 549. Stutzman testified that she would not have provided even a stock or standardized floral arrangement, maintaining that any of her floral arrangements require "imagination and artistic skill." *Id.* at 550.

92. *Id.* at 549.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

The two stopped planning for the initial date of the wedding due to fears of being denied service by other wedding vendors.⁹⁸

The Washington Supreme Court ultimately concluded that “[t]he decision to . . . provide . . . flowers for a wedding does not inherently⁹⁹ express a message about that wedding.”¹⁰⁰ The court observed that providing wedding flowers for, say, a wedding of atheists or a wedding of Muslims would not necessarily amount to an endorsement of Atheism or of Islam.¹⁰¹ Hesitating to attempt to legally distinguish between sufficiently and insufficiently artistic or creative businesses, the Washington Supreme Court concluded that “Stutzman’s sale of floral arrangements [was] not expressive conduct protected by the First Amendment.”¹⁰²

98. *Id.*

99. Presumably, a floral arrangement featuring a conspicuous, specific, readily intelligible, and unambiguous verbal message would count as a clear instance of expressive speech, whether that speech would ultimately be constitutionally protected or not.

100. *Arlene’s Flowers*, 389 P.3d at 557.

101. *Id.* Of course, one might on principle generally object, whether one is therein religiously motivated or not, to atheism or to any familiar religion or denomination, without objecting in the slightest, on any grounds, to marriages or marriage ceremonies between such persons.

102. *Id.* at 560. Again, we seek herein a broad approach that will responsively address cases of minimal, borderline, and clearly sufficiently expressive speech, in whatever format. The most useful such broad approach should also be able to accommodate legally interesting cases such as that addressed in the recent unpublished opinion of Lexington Fayette Urban Cty. Human Rights Comm’n v. Hands On Originals, No. 2015–CA–000745–MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017), *review granted*, ____ (Ky. Oct. 25, 2017). This case involved one of an important class of unexplored and undertheorized scenarios in which a line must be drawn between actionable discrimination based upon membership in a protected status and typically non-actionable discrimination based on political, cultural, or ideological belief. In some circumstances, a product or service is known or believed to be consumed typically, if not exclusively, by some or all members of a protected class. In those circumstances, denial of the product or service will typically be tantamount to prohibited discrimination. Other products and services may be more or less tightly correlated, in context, with a protected status. At the other extreme, there will be products or services that may be only minimally correlated with membership in a protected status. Some would-be purchasers, thus, may be known by the proprietor only to be somehow associated with broad “united front,” supportive “big tent,” coalition groups, most of whose members, we might assume, are widely understood not to be members of the relevant protected class. One who refuses to sell a good or service in such a case may reasonably, sincerely, and correctly believe that the would-be purchaser is unlikely to fall within a relevantly protected class. For background, see *EEOC v. Catastrophe Mgm’t Solutions*, 852 F.3d 1018 (11th Cir. 2016) (holding that a neutral grooming policy not allowing dreadlocks does not show discrimination based on the protected class of race); James Joyce, *Bayes’ Theorem*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/bayes-theorem> (last updated Sept. 30, 2003) (explaining that Bayes’ Theorem “simplifies the calculation of conditional probabilities and because it clarifies significant features of subjectivist position”). The broader problem, of course, is that legally requiring persons in general to not discriminate on the basis of something like political ideas is obviously self-defeating in practice, if not self-contradictory or incoherent.

Overall, the above sampling of transactional encounters involving at least purported speech and discrimination in consumer contexts gives us a sense of the range of the experiential dynamics. We now consider below some typical responses to and characterizations of such episodes. We draw in particular on notions such as shame, embarrassment, and humiliation, using the available general social science literature.

III. THE EXPERIENTIAL CHARACTER OF THE RELEVANT ENCOUNTERS AND RESPONSES THERETO

The nature of the transactional encounters in question herein can range from incidents within long-established relations of mutual respect, trust, and friendship all the way to one-off text message encounters involving experienced civil rights “testers.”¹⁰³ We know that, even among those sellers who may be disposed toward discrimination on one ground or another, some will not likely discriminate if that would create a “scene” or would involve direct personal insult.¹⁰⁴ Other sellers, however, rank one sort of principle or another above the likelihood of inflicting or suffering real or perceived humiliation or other sorts of dignitary harms.¹⁰⁵

Among the aims of antidiscrimination laws, beyond merely ensuring access to goods and services,¹⁰⁶ is to “protect individuals from humiliation and dignitary harm.”¹⁰⁷ Dignitary harms, in at

103. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (observing that in the context of alleged racial steering (discrimination) practices in violation of the Fair Housing Act, “testers’ are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices”).

104. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 57 (Addison-Wesley Publ’g Co. unabr. 25th anniv. ed. 1979) (1954).

105. For background on a range of understandings of the idea of dignity in legal contexts, see R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397 (1995); R. George Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533 (2000); R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006) [hereinafter “Wright, *Dignity & Conflicts*”].

106. See *Elane Photography v. Willock*, 309 P.3d 53, 64 (N.M. 2013) (explaining that antidiscrimination laws “ensure that services are freely available in the market”). In historic civil rights and nondiscrimination law, the convenient availability of the goods or services from some other supplier has not typically served as a complete defense. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294 (1964), in which non-takeout barbecue was presumably available elsewhere, or the lunch counter sit-in cases in general.

107. *Willock*, 309 P.3d at 64. See also Andrew M. Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 644 (2015) [hereinafter “Koppelman, *Gay Rights*”] (“Antidiscrimination law is also concerned

least one sense, may include humiliation and related responses, including embarrassment or even mortification.¹⁰⁸ Humiliation, embarrassment, and some kinds of frustration may be closely linked,¹⁰⁹ though for some purposes we may wish to distinguish humiliation from embarrassment¹¹⁰ or humiliation from being shamed.¹¹¹ One might also link these conceptions with the idea of “demeaning, dehumanizing, hurtful rejections.”¹¹²

We might think of humiliation as what is called a “thick” moral concept¹¹³ with essential elements of both description and prescription of a distinctly negative character.¹¹⁴ Perhaps the best depictions of the experience of humiliation are literary, rather than narrowly academic.¹¹⁵ Descriptively, we recognize that humiliation

with insult, dignitary harm, and social equality.”); Cole, *supra* note 42 (referring to a statutory goal of preventing “stigma and shame”).

108. See *Mortification*, THE OXFORD DICTIONARY AND THESAURUS 972 (American ed. 1996) (referring to humiliation and embarrassment). More broadly, see PETER BIERI, HUMAN DIGNITY: A WAY OF LIVING ch. 2 (2017) (discussing how dignity in encounters between people can show certain responses such as destroying or distancing from that relationship).

109. See the discussion of such linkages in historic civil rights contexts in Vanita Gupta, *Symposium: Discrimination Is Not a Fundamental American Value*, SCOTUSBLOG (Sept. 12, 2017, 2:28 PM), <http://www.scotusblog.com/2017/09/symposium-discrimination-not-fundamental-american-value/>.

110. See WILLIAM IAN MILLER, HUMILIATION: AND OTHER ESSAYS ON HONOR, SOCIAL DISCOMFORT, AND VIOLENCE 132–33 (1995) (noting that humiliation and embarrassment are often considered together). There may also be a possible distinction between broad “embarrassment” and “direct embarrassment.” See the limited statutory exemption in Kent Greenawalt, *Religious Exemptions for Laws Barring Discrimination Against Same-Sex Couples and Requiring Insurance for Contraceptives: Should They Exist and Who Should Be Eligible?*, COLGATE UNIVERSITY (last visited May 30, 2018), <http://blogs.colgate.edu/lampert/2014/12/religious-exemptions-for-laws-transcript-from-kent-greenawalt.html> (explaining that with religious beliefs, legal exemptions are necessary). The idea of “direct” embarrassment may be related to what we refer to herein throughout as an interactive encounter.

111. MILLER, *supra* note 110, at 133.

112. Michael J. Perry, *Conscience v. Access and the Morality of Human Rights, With Particular Reference to Same-Sex Marriage*, Emory Student Research Paper No. 17-443, 14 (Oct. 8, 2017), <https://ssrn.com/abstract=3049561>. Professor Perry also inquires into whether granting exemptions from nondiscrimination laws would make it more difficult for those discriminated against to obtain the services they seek elsewhere. *Id.* It is generally common ground that such an inquiry would have been, and remains, irrelevant to Jim Crow racial discrimination cases involving places of public accommodation.

113. See, e.g., Pekka Väyrynen, *Thick Ethical Concepts*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/thick-ethical-concepts> (last updated Aug. 16, 2017) (describing a “thick ethical concept” from a philosophical perspective).

114. See Arthur Ripstein, *Responses to Humiliation*, 64 SOC. RES. 90, 90 (1997) (characterizing Avishai Margalit’s conception of “a civilized society as one in which citizens do not humiliate each other”).

115. Among the classics would be the depiction of economic or class-based higher educational exclusion and discrimination in THOMAS HARDY, *JUDE THE OBSCURE* (Penguin

may,¹¹⁶ but need not be,¹¹⁷ intentionally inflicted. Perceived intention can, of course, make a difference in the meaning and response to the act in question.¹¹⁸ But the “complexity and ambiguity”¹¹⁹ of any distinction between the intentional and the unintentional and the “shifting but intimate relevance of its bearing prevent any simple discussion of the actual or imputed meaning of situational offenses.”¹²⁰

Within these unavoidable limits, Professor John Corvino seeks to “distinguish three related but distinct aspects of dignitary harm: (1) treating people as inferior, regardless of whether anyone recognizes the mistreatment; (2) causing people to *feel* inferior, intentionally or not; and (3) contributing to systemic moral inequality, intentionally or not.”¹²¹ In all such cases, the sense of categorical inferiority, or imputations thereof, sets the encounter apart from most garden-variety squabbles, disputes, and hostile encounters in consumer-related contexts.

Such encounters cannot, of course, be evaluated in isolation. Often, humiliation involves an important dimension of gradual accretion,¹²² or of accumulation,¹²³ and perhaps of qualitatively emergent effects. Eventually, “humiliation colors the way . . . humiliation-prone people see the world.”¹²⁴ One element of the cumulating experience of humiliation is the experience of being non-culpably “blindsided,”¹²⁵ or being impugned without warning.¹²⁶

Publishing Group 1980). *See, e.g., id.* at 119–21 (highlighting the reflection of the protagonist on his lot in life, lack of privilege, and titular obscurity). *See generally* BIERI, *supra* note 108, at ch. 2, 60–64, 78, 84, 91 (taking a philosophical approach to humiliation in the context of dignity as an encounter between people).

116. *See* ERVING GOFFMAN, *BEHAVIOR IN PUBLIC PLACES: NOTES ON THE SOCIAL ORGANIZATION OF GATHERINGS* 217, 246 (1963) (discussing the intentionality of offensive conduct).

117. Anthony Quinton, *Humiliation*, 64 *SOC. RES.* 77, 81 (1997).

118. *See* GOFFMAN, *supra* note 116, at 217 (explaining how perceived intention influences “[t]he meaning that offended persons impute to an offensive act”).

119. *Id.*

120. *Id.*

121. Corvino, *supra* note 78, at 74 (emphasis in the original).

122. WAYNE KOESTENBAUM, *HUMILIATION* 11 (2011).

123. *Id.*

124. *Id.* at 12.

125. Br. of Amici Curiae of Lambda Legal Def. & Educ. Fund., et al., at 2, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290, http://www.scotusblog.com/wp-content/uploads/2017/11/16-111_bsac-lambda-legal-et-al.pdf (U.S. Oct. 30, 2017) (No. 16-111) [hereinafter “Br. for the Pet’r”].

126. *Id.*

There can thus be a sense of one's ongoing vulnerability to unpredictable and largely uncontrollable events of blindsiding stigmatization. In a more perfect world, all persons could take a certain ordinariness of all transactions utterly for granted.¹²⁷ Thus, the crucial experiential difference is not between relatively frequent and somewhat less frequent dislocations and irruptions, but between the presence and the utter absence of any such disturbing potential experience from one's cognitive radar screen. In the latter ideal condition, categorically stigmatizing experiences are simply not matters of conscious or even subconscious concern. Not being denied service on the basis of, say, eye color, is in practice typically taken for granted. Any contrary incident that occurs could then reasonably be classifiable as freakish, unrepeatable, and of little moment. The broad policy aim should be to expand the range of such categories.

Of course, there is also value for all parties in an appropriately venued public policy-level debate, with a thorough exposition and confrontation of diverse viewpoints and perspectives relevant to the experiential incidents in question. Most parties have at least a prudential interest in somehow discovering that, at a broader social level, things are either bleaker, or rosier, than they imagine; or in learning which directions the tides of public opinion are flowing; or perhaps in obtaining a clearer sense of everyone's real concerns, grievances, priorities, and actual biases. Either way, ignorance of important dimensions of public sentiment is grossly risky, if not itself harmful or undignified. And there is dignity, as well, in having some appropriate venue in which to express one's most basic considered judgments.

Thus, some time ago, Professor Jeremy Waldron emphasized the value—for John Stuart Mill—of what Waldron called “ethical confrontation.”¹²⁸ This ethical confrontation, however painful,¹²⁹ assumes a social context open to a meaningful exchange of views,¹³⁰

127. See Mary Bonauto, *Symposium: Commercial Products As Speech – When a Cake Is Just a Cake*, SCOTUSBLOG (Sept. 15, 2017, 10:24 AM), <http://www.scotusblog.com/2017/09/symposium-commercial-products-speech-cake> (describing the *Masterpiece Cakeshop* case as being “about equal citizenship of gay people, and whether we may engage in the kinds of ordinary transactions others take for granted in the commercial marketplace and beyond”).

128. JEREMY WALDRON, *Mill and the Value of Moral Distress*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991 115, 124 (1993).

129. *Id.*

130. *Id.* (describing ethical confrontation as “a positive good” that “improves people” and “promotes progress”).

or to a meaningful debate,¹³¹ on the questions and issues posed. Ethical confrontation in this broadly forensic sense need not, or cannot, involve person-to-person unilateralism, preemptiveness, dismissal, or what we have called “blindsid[ing],”¹³² where one or both parties expect instead, under the circumstances, an essentially commercial consumer-oriented discussion.

Consumer-retailer interactions of the sort upon which we have focused above may indeed involve something like experiential blindsiding on the part of one or both of the parties. But such interactions, if anticipated to be essentially commercial in character, are typically outside the social and political contexts in which the values that Mill or Waldron¹³³ seek are optimally furthered. Someone anticipating a wedding, for example, is normally not primed, either emotionally or cognitively, for creedal sparring, cogent rebuttals, or principle-based verbal forensics. That result is not the mutually anticipated nature of the occasion. Constructive, useful debate involving anything like propositional argument and rebuttal is unlikely and inappropriate under such circumstances.¹³⁴ Ample alternative venues for such discourse, of course, remain generally available.

The social interactions with which we are concerned herein may perhaps strike some observers as reflecting a degree of insensitivity, or else of hypersensitivity;¹³⁵ as reflecting

131. *Id.*; see also Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125, 1129, 1152 (2016) [hereinafter “Koppelman, *A Free Speech Response*”] (discussing “the positive valuation of ethical confrontation”).

132. Br. for the Pet’r, *supra* note 125, at 2.

133. WALDRON, *supra* note 128, at 124. Most clearly protected on our approach would be, say, public parades by private organizations on major public streets, or what amount to traditional public fora. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995) (holding that applying a state “public accommodations law to require private citizens who organize a parade to include . . . a group imparting a message that the organizers do not wish to convey violates the First Amendment”).

134. For a range of loosely analogous circumstances, see Wright, *Dignity & Conflicts*, *supra* note 105, at 566–67 (referring to “drive-by” and other instances of epithet speech). One might idly fantasize about a seller who explicitly reports that he or she must deny this sale because to do so would amount to unjustified material cooperation with an intrinsically evil act. A specialized scholar might conceivably speak in this fashion. For general terminological background, see, e.g., 3 GERMAIN GRISEZ, *The Way of the Lord Jesus: Difficult Moral Questions*, app. 2 (1997), available at <http://twotlj.org/G-3-A-2.html> (analyzing the religious implications of formal and material cooperation in the context of Christianity). Typically, though, people do not, whether blindsided or not, approach this level of articulateness and systematization.

135. One might suspect that perceptions of ‘hypersensitivity’ will tend, in contested cases, to track the broader sympathies and convictions of the observers in question. For a

understandable emotional vulnerability given the context;¹³⁶ or perhaps as sometimes involving a display of something like fortitude¹³⁷ or stoicism.¹³⁸ The broad-based social science literature on perceived discrimination, stigmatization, and exclusion suggests that persons who experience what they take to be stigmatizing encounters and the like may well respond in a wide variety of ways.¹³⁹

Understandably, such personal encounters ordinarily result in some form of negative emotional state, including a “compromised sense of safety and security.”¹⁴⁰ Reactions to the kinds of encounters we consider herein can include hostility,¹⁴¹ emotional numbing¹⁴² or emotional shutdown,¹⁴³ or some form of “flight.”¹⁴⁴

sense of the inevitable disputes over alleged hypersensitivity in interesting cases, consider the various opinions in the Establishment Clause context in *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 857 (7th Cir. 2012) (en banc). For a bit of doctrine, again drawn from the Establishment Clause context, see, e.g., *Books v. Elkhart Cty., Ind.*, 401 F.3d 857, 867 (7th Cir. 2005).

136. Recognizing what amounts to understandable vulnerability in a given context will of course potentially involve a remarkable range of specific considerations.

137. See generally SAINT THOMAS AQUINAS, THE “SUMMA THEOLOGICA” OF ST. THOMAS AQUINAS II-II, QQ. 123, 128 (Fathers of the English Dominican Province trans., Benziger Brothers 1948) (providing a classical description of fortitude); ANDRÉ COMTE-SPONVILLE, A SMALL TREATISE ON THE GREAT VIRTUES: THE USES OF PHILOSOPHY IN EVERYDAY LIFE ch. 5 (Catherine Temerson trans., Metropolitan Books 2001) (discussing courage and fortitude as philosophical human virtues that serve both good and evil); JOSEF PIEPER, THE FOUR CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, TEMPERANCE 117–33 (Daniel F. Coogan trans., Harcourt, Brace & World Inc. 1965) (describing fortitude as one of the four cardinal virtues).

138. See generally Dirk Baltzly, *Stoicism*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/stoicism> (last updated Apr. 10, 2018) (describing stoicism from a philosophical perspective). For a less metaphysically grounded version of stoicism, see generally LAWRENCE C. BECKER, A NEW STOICISM (1999) (analyzing stoicism from an ethical perspective and proposing a new version of secular stoic ethics).

139. See Brenda Major & S. Brooke Vick, *The Psychological Impact of Prejudice*, in ON THE NATURE OF PREJUDICE: FIFTY YEARS AFTER ALLPORT 139, 151 (John F. Dovidio, Peter Glick & Laurie A. Rudman eds., 2005) (“[T]argets of prejudice respond in various ways, motivated by their desire to protect their self-esteem and make sense of their world.”).

140. Edward J. Alessi, et al., *Prejudice Events and Traumatic Stress Among Heterosexuals and Lesbians, Gay Men, and Bisexuals*, 22 J. AGGRESSION, MALTREATMENT & TRAUMA 510, 519 (2013).

141. Kipling D. Williams, *Ostracism*, 58 ANNU. REV. PSYCHOL. 425, 436 (2007).

142. Laura Smart Richman & Mark R. Leary, *Reactions to Discrimination, Stigmatization, Ostracism, and Other Forms of Interpersonal Rejection: A Multimotive Model*, 116 PSYCHOL. REV. 365, 366–67 (2009).

143. Williams, *supra* note 141, at 435.

144. *Id.*; Richman & Leary, *supra* note 142, at 376 (discussing “withdrawal and avoidance” responses).

The experienced “hurt, sadness, and anger”¹⁴⁵ may dissipate quickly,¹⁴⁶ or may be sustained over time.¹⁴⁷

One potential determinant of the nature of any actual response to stigmatizing incidents may be social, rather than narrowly personal. It has thus been suggested that a person’s identifying and associating with some contextually relevant group may lead to differences in his or her response.¹⁴⁸ On this view, “[w]hereas rejected individuals without the immediate support of others may experience a threat to their self-esteem, the self-esteem of rejected group members can be simultaneously threatened and supported.”¹⁴⁹ Thus, while “rejection threatens self-esteem, group membership maintains self-esteem.”¹⁵⁰ Repeated rejection from multiple “out-group” sources may intensify one’s group identification¹⁵¹ and promote a collective, rather than a narrowly individual, response to the perceived rejection,¹⁵² perhaps as in the sampling of recent cases considered above.¹⁵³

We can assume that retail customers in metropolitan areas who are discretionarily shopping on a one-off basis, in particular, will not typically count as a “captive audience”¹⁵⁴ of the discriminatory speaker-retailer. Nor will the typical one-off speech or conduct of any particular retailer involved in our cases

145. Richman & Learv, *supra* note 142, at 366.

146. *Id.*

147. *Id.* Much more broadly, and certainly more colorfully, Ervin Goffman refers to “the flustered individual” who at some point “collapses into tears or paroxysms of laughter, has a temper tantrum, flies into a blind rage, faints, dashes to the nearest exit, or becomes rigidly immobile as when in panic.” ERVIN GOFFMAN, *INTERACTION RITUAL: ESSAYS ON FACE-TO-FACE BEHAVIOR* 103 (1967). More clinically, see Br. of the Am. Psychol. Ass’n, et al., at 20, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290, <http://www.scotusblog.com/wp-content/uploads/2017/11/16-111-bsac-The-American-Psychological-Association.pdf> (U.S. Oct. 30, 2017) (No. 16-111) (discussing the physical and psychological health-related issues associated with “[b]eing the target of stigma”).

148. Kevin R. Betts & Verlin B. Hinsz, *Group Marginalization: Extending Research on Interpersonal Rejection to Small Groups*, 34 *PERSONALITY & SOC. PSYCHOL. REV.* 355, 358 (2013).

149. *Id.*

150. *Id.* at 358, 360.

151. *Id.*

152. *Id.* at 360.

153. See *supra* cases accompanying note 1.

154. See, e.g., *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1246 (10th Cir. 1999) (quoting the remarkable opinion in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1536 (M.D. Fla. 1991)), *abrogated on other grounds by Boyer v. Cordant Tech., Inc.*, 316 F.3d 1137, 1140 (10th Cir. 2003). See also J.M. Balkin, *Free Speech and Hostile Environments*, 99 *COLUM. L. REV.* 2295, 2295 (1999) (addressing “captive audience” speech doctrine in the context of workplace speech, with respect to employees).

ordinarily be considered somehow “pervasive”¹⁵⁵ in its discriminatory impact on the consumer, at least at the site of any particular retailer taken in isolation. We thus cannot simply apply, say, Title VII law by analogy to our cases.

Still, it might be useful to loosely compare our customer interaction cases with the treatment, under Title VII, of some forms of discriminatory speech by an employer to an employee.¹⁵⁶ Some writers have argued for substantial free speech protection in some workplace harassment or hostile environment cases, particularly when the purported harasser speaks in a many-to-one person, as opposed to a one-to-one person, context.¹⁵⁷ Whatever the ultimate contours of Title VII doctrine, the Title VII case law at this point does not exalt the value of employer speech over the disvalue of discrimination.¹⁵⁸

This unclarity should suggest that the presence of speech or expressive conduct in any of our cases can hardly be invariably decisive in determining the ultimate outcome of that case. To begin with, it is unclear that current Supreme Court doctrine as to a dividing line between speech and non-speech marks anything of real significance for our cases.¹⁵⁹ An increasing range of behavior

155. For the severity or pervasiveness requirement in Title VII employer-employee contexts, see, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 786–88 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998); *Oncale v. Sundowner Offshore Serv’s, Inc.*, 523 U.S. 75, 78, 81 (1998).

156. See Title VII of the Civil Rights Act of 1964 Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified as 42 U.S.C. §§ 2000e–2000e-17 (1965)) (defining various types of unlawful discriminatory practices by employers); see also *supra* notes 154–155 and accompanying cited material (discussing discriminatory speech in the retail context).

157. See especially the work of Professor Eugene Volokh, including Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1841–42, 1872 (1992) (arguing that although free speech “often exact[s] a high price,” “bigoted statements in the workplace” must nonetheless be protected “because the price the alternative exacts . . . is even higher”); Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 575–76 (1995) (arguing for “constraints of formalism” in “balancing freedom of speech against other [societal] interests” in the harassment law context); Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627, 647 (1997) (noting that finders of fact may find “severity” based on higher or lower threshold requirements). See also Koppelman, *A Free Speech*, *supra* note 131, at 1130–34 (arguing “all of hostile environment law, when it is applied to speech, is unconstitutional under the existing doctrinal framework”).

158. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (stating that conduct “not severe or pervasive enough to create a hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview”).

159. For background, see generally MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* (2017) (supporting the proposition that it is unclear that current Supreme

has been recognized as partaking of “speech.”¹⁶⁰ Eventually, “either the boundaries will seem arbitrary, or they will continue to expand, until the free speech right will come to resemble a general liberty right, implicating all activity.”¹⁶¹

In our cases, opinions vary as to whether the seller’s activities, in the absence of any explicitly and specifically intended verbal message clearly attributable to the seller, should count as “speech.” Some views are, at least in this context, relatively speech expansive.¹⁶² Others are, again, at least in this context, not as expansive.¹⁶³ And it would be possible to view some of our cases as

Court doctrine as to a dividing line between speech and non-speech marks anything of real significance); R. George Wright, *What Counts as “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1224 (2010).

160. See Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFF. 87, 88 (2017) (detailing the expanding interpolation of behavioral speech acts).

161. *Id.* For possible intimations of this outcome, see, e.g., *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786 (2011) (violent video games as constitutionally protected speech); *United States v. Stevens*, 559 U.S. 460 (2010) (animal cruelty videos as speech); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991) (commercial barroom nude dancing as speech). *But see* *Tagami v. City of Chicago*, 875 F.3d 375, 380–84 (7th Cir. 2017) (showing divided opinions in a topless protest demonstration case).

162. It is certainly possible to find sufficient speech in some of our sampled cases on grounds of perceived distinct expressiveness. We seek herein to reduce the importance of, if not bypass, such considerations. For relatively inclusive understandings of what should count as “speech” for constitutional purposes—at least in our cases—see, e.g., Br. Amici Curiae for Pet’rs at 15, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290, 2017 WL 4005667 (U.S. Sept. 7, 2017) (No. 16-111); Br. For Cake Artists as Amici Curiae in Support of Neither Party at 2, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 2017 WL 4004524 (U.S. Sept. 7, 2017) (No. 16-111); Helen Alvare, *Symposium: As a Matter of Marriage Law, Wedding Cake is Expressive Conduct*, SCOTUSBLOG (Sept. 13, 2017, 2:24 PM), www.scotusblog.com/2017/09/symposium-matter-marriage-law (enforced endorsement of the distinct social messages of marriage itself); John O. McGinnis, *The Expressive Society and Masterpiece Cakeshop*, LAW & LIBERTY (July 17, 2017), www.libertylawsite.org/2017/07/17/the-expressive-society (the nature of the good or service in question may require best efforts to bring out the beauty of the underlying activity); Steven Smith, *What Masterpiece Cakeshop Is Really About*, THE WITHERSPOON INST. (Oct. 24, 2017), www.thepublicdiscourse.com/2017/1/20148 (as opposed to say, ensuring access to a perhaps otherwise difficult to obtain product or service, “compelling outward affirmation of same-sex marriage is not merely an incidental consequence of [the] lawsuits; it is their central and sometimes exclusive purpose”) (emphasis in the original).

163. For a mere sampling of such views, beyond those expressed in many of the cases themselves, see, e.g., Caroline Mala Corbin, *Speech or Conduct? The Free Speech Claims of Wedding Vendors*, 65 EMORY L.J. 241, 257 (2015) (“[W]hatever the vendor . . . may communicate by baking and selling a wedding cake, it is not approval or disapproval of the people who buy it or of the event at which it is eaten.”); Vikram David Amar & Alan E. Brownstein, *How First Amendment Speech Doctrine Ought to Be Created and Applied in the Colorado Baker/Gay Wedding Dispute at the Supreme Court*, VERDICT JUSTIA (Sept. 22, 2017), <https://verdict.justia.com/2017/09/22/first-amendment-speech-doctrine> (“Baking a birthday or wedding cake is, as a matter of social reality, unlikely to be understood as a communicative act for free speech purposes. A welcome mat has words on it, but we do not consider the makers and sellers of such mats to be saying anything.”); Andrew Koppelman,

involving speech, but merely commercial speech,¹⁶⁴ which is typically subject to a somewhat lesser degree of constitutional protection.¹⁶⁵

In any event, we have sought herein to much more broadly encompass cases in which speech for constitutional purposes is either absent, contestably present, or else clearly present. Based, then, on the analysis to this point, what sort of fundamental guiding legal distinction can be appropriately drawn, and how might that broad distinction best be defended in terms of the conflicting interests of the affected parties? These fundamental matters are more explicitly addressed immediately below.

IV. SOME IMPLICATIONS & CONCLUSIONS

Based crucially on the experiential quality of the interaction in question, we have focused attention on a line separating two

The Gay Wedding Cake Case Isn't About Free Speech, THE AM. PROSPECT (Nov. 27, 2017), <http://prospect.org/article/gay-wedding-cake-case-isn't-about-free-speech> (“Phillips never found out what message (if any) he might be asked to convey.”); Robert Post, *An Analysis of DOJ's Brief in Masterpiece Cakeshop*, ACSBLOG (Oct. 19, 2017), <https://aclaw.org/acsblog/an-analysis-of-dojs-brief-in-masterpiece-cakeshop> (seeking to distinguish the contributions of “artisans” from those of “artists” by noting that “Phillips is . . . an artisan whose wedding cakes are not understood as expressing the personal messages of Phillips himself”). Somewhat more broadly, see the categorizations in Br. for American Unity Fund and Profs. Dale Carpenter & Eugene Volokh as Amici Curiae Supporting Resp'ts at 6, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290, 2017 WL 4918194 (U.S. Oct. 26, 2017) (No. 16-111), along with Dale Carpenter, *There's No Free Speech Right to Refuse Wedding Cakes to Gay Couples*, WASH. POST (Oct. 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/10/27/theres-no-free-speech-right-to-refuse-wedding-cakes-to-gay-couples/?utm_term=.7a44380a4e7e (arguing that “baking cakes is conduct that is neither historically nor inherently a form of protected speech,” but that cakes with inscribed messages, as well as the work of authors, photographers, and singers, may count as speech, and as constitutionally relevant actual participation in the wedding). Professor Carpenter would classify “[l]imousine drivers, hotel operators, and caterers” as typical actors, but not speakers, in our cases. *Id.*; see also Br. of Prof. Tobias B. Wolff as Amicus Curiae in Support of Resp'ts at 2, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 2017 WL 5152972 (U.S. Oct. 30, 2017) (No. 16-111) (“When a business sells goods and services to the public, it is not a ‘speaker’ engaged in its own expression . . .”).

164. See, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), as perhaps updated by *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011). For background, see STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 88 (2016) (“It is hard to resist the conclusion . . . that the commercial speech doctrine was a mess from the outset.”).

165. See *Central Hudson*, 447 U.S. at 562–63 (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”). In our cases, claims that the seller's speech amounts to deceptive advertising are not typically central, though there may be cases in which a seller, whether compelled to complete the transaction or not, may consciously or subconsciously provide inferior goods or services.

general kinds of interactions. On one side will be cases of non-speech, contestable speech, or clearly articulated and understood speech, whether compelled or not, where the interaction is either on-premises or else essentially person-to-person, even if not literally face-to-face, in character. On this side of the line, antidiscrimination interests should normally predominate. Exceptional cases will, of course, inevitably arise.

On the other side of the line will be speech by the business owner in any other context—including speech in and intended for the proverbial “public square,” but also including speech, whether in social media or not, in the general form of mission statements, general audience business descriptions, public relations statements, and familiar forms of generally disseminated advertising, whether of the public interest sort or not. On this side of the line, genuine free speech interests should predominate. Any appropriate distinctions between political speech and commercial speech protections can be applied in these cases. The motivating idea is that this general line divides, however inevitably imperfectly, significantly qualitatively different experiences, such that strong opposing presumptions should come into play on opposing sides of the line.

Thus, when translated into legal policy, otherwise reasonable civil rights and antidiscrimination policies should generally be upheld in the on-premises or otherwise person-to-person interactional cases. This presumption should include, however controversially, cases where speech is compelled by proportionate means. But again, the prospective customer should not always prevail in this set of cases, even with free exercise of religion claims set entirely aside. A typical rare exception may again involve a prospective customer whose primary interest in making a particular request is neither commercial nor consumption-oriented, but is rooted in promoting a conception of justice or fairness specifically through requiring that the seller violate the seller’s own basic principles.

On the other side of the line, which includes the business owner’s contributions to “public square” discussions as well as general business advertisements and related messages on social media, the free speech rights of the business owner should generally prevail over the interests of potential customers in avoiding interactional indignities and other psychological harms.

It should, of course, still be permissible for governments to prohibit a business's violation of hiring and other employment law, as in the sex-segregated help-wanted advertising case of *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*.¹⁶⁶ Employment cases in typical contemporary labor markets raise issues well beyond those in the cases central to our concern. In *Pittsburgh Press*¹⁶⁷ and similar employment cases, the crucial harm tends to be systemic, economic, structural, or career opportunity-based, often with substantial implications for economic inequality,¹⁶⁸ as opposed to the largely psychic harms of subjective interactional encounters, as in the cases with which we are concerned herein.

This general line of demarcation could, of course, be set elsewhere.¹⁶⁹ Other lines will inevitably have their own problems of vagueness, ascertainability, value-capture, value-sensitivity, and practical manageability. But the logic of the line drawn above is that it seeks to take into proper account typical experiential differences among various sorts of encounters, ranging from intensely personal to largely abstract.

On other possible approaches, businesses might be exempted from compliance if, for example, "they are willing to bear the cost of publicly identifying themselves as discriminatory."¹⁷⁰ Or the law might "permit business owners to present their views to the world, but forbid them either to threaten to discriminate or to treat any individual customer worse than others."¹⁷¹ As to any such alternative approach, we would again insist on the crucial differences between on-site or otherwise somehow direct, immediate, "existential" speech on the one hand, and speech that

166. 413 U.S. 376 (1973).

167. *Id.*

168. *Id.* at 379 (initial complaint filed by the National Organization For Women, Inc.).

169. For a useful typology of legal responses to a narrower range of cases, see Br. for Freedom of Speech Scholars as Amici Curiae Supporting Resp'ts at 16–17, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 137 S. Ct. 2290, 2017 WL 4876116 (U.S. Oct. 25, 2017) (No. 16-111).

170. Koppelman, *Gay Rights*, *supra* note 107, at 620.

171. Koppelman, *A Free Speech Response*, *supra* note 131, at 1128. For a brief critique of the current state of the idea of treating one customer materially differently, or worse, than another, see *supra* note 79 and accompanying text. To similar effect is Corvino, *supra* note 78, at 81 (legally prohibit discrimination, do not grant religious (and other conscience) exemptions, but permit business owners who object to same-sex marriage to post their positions publicly).

is encountered in the public discussion square, or in a variety of more or less impersonal media contexts generally, on the other.

It can be argued to the contrary that “a business owner’s premises are usually the only medium by which she realistically can hope to broadcast her message.”¹⁷² But, particularly for enterprises typically covered by the relevant nondiscrimination laws, on-site communications are trending toward reduced importance by comparison with the burgeoning options for off-premises communication, including the various social media.¹⁷³ And if off-site media are ordinarily realistically available, there is a correspondingly reduced need for personal existential confrontation. As one prospective wedding cake purchaser expressed it, “the nasty surprise was one of the primary reasons for her complaint: ‘Why would they not tell us in one of the emails, before ever allowing us to come into the shop and be humiliated like that?’”¹⁷⁴

On our approach, optimally deploying the legal presumptions unavoidably requires judgment, as well as sensitivity. Optimal freedom of speech in general, for example, is not reducible to any process of merely counting up options, or of purely empirical evidence in general.¹⁷⁵ Across the broad range of the cases with which we are concerned, emotions, values, and interests, including dignitary interests,¹⁷⁶ will be invoked on both sides, in at least some cases, to one degree or another.

172. Koppelman, *A Free Speech Response*, *supra* note 131, at 1129.

173. See, e.g., *BIA/Kelsey Finds 77.6% of Small Businesses Use Social Media for Marketing*, BIA ADVISORY SERVICES (Nov. 21, 2016), www.biakelsey.com/biakelsey-finds-77-6 (stating “social media continues to grow as the dominant marketing channel for small business”).

174. Koppelman, *A Free Speech Response*, *supra* note 131, at 1166 n.194. Of course, in our view, an email thread message would in turn be more generally objectionable than would be a policy announcement in the assumedly more rough-and-tumble public square, or even in impersonal general business advertising. We herein distinguish typical business-related emails from email cyberstalking. See *supra* text accompanying note 68.

175. In the context of political freedom, see MATTHEW H. KRAMER, *THE QUALITY OF FREEDOM* 472 (2003) (extrapolating freedom or unfreedom as combining non-evaluative and evaluative elements); FELIX E. OPPENHEIM, *DIMENSIONS OF FREEDOM* 207 (1961) (comparing greater and lesser liberty as a matter not merely of sheer numbers of available options, but as well as the perceived value of our available options). See also Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1466 (2016) (“[T]here is no account of the First Amendment that maximizes freedom for everyone.”).

176. E.g., *Br. of Amici Curiae in 34 Legal Scholars in Support of Pet’rs at 12, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290, 2017 WL 4005667 (U.S. Sept. 7, 2017) (No. 16-111); Richard Garnett, *Symposium: Conscience, Conditions, and Access to*

Let us therefore simply assume a general hypothetical case in which the various interactional harms on both sides are thought to be equal, or incommensurable.¹⁷⁷ The aim here is to imagine a case in which we cannot simply say that the experiential burdens, including those of conscience, are largely confined to, or obviously weightier on, one side of the transaction. Are there then any reasonable means by which we might call judicial “symmetry-breaking” in these most difficult cases?

One entirely reasonable such approach would draw upon important values of a broader sort that are typically in play in a range of cases, where those values are also typically not shared, equally or at all, by the opposing parties. This approach aims at respectfully taking the parties as they are, or as they freely and expressly profess themselves to be. Specifically, there is in many, if not the overwhelming majority of the cases, a significant difference between the opposing parties as to the values and disvalues of all varieties of what may be called actual or perceived persecution.

This approach is, of course, not to deny that, in the moment, a seller’s primary concern may well be on not violating basic principle, or conscience, rather than on individual or group persecution. But we are herein assuming a case in which the claims of conscience, however the idea of conscience may be understood, have a purchase on both parties to the transaction. The focus at this point on persecution as distinct from conscience is not for any alleged greater significance, but because of its potential for breaking the symmetry of conscience and other subjective experiential claims.

Virtually everyone, regardless of their metaphysical commitments, recognizes that perceived or actual persecution typically involves suffering in at least some obvious sense. And we

Civil Society, SCOTUSBLOG (Sept. 15, 2017, 4:50 PM), www.scotusblog.com/2017/09/symposium-conscience-conditions-access.

177. While incommensurable harms are often casually treated as equal harms, in a stricter sense, one might actually think of equality as an antonym of incommensurability. See generally Nien-hê Hsieh, *Incommensurable Values*, STAN. ENCYCLOPEDIA PHIL., <https://plato.stanford.edu/entries/value-incommensurable> (last updated Jan. 25, 2016) (describing how some values, “such as liberty and equality, are sometimes said to be incommensurable in the sense that their value cannot be reduced to a common measure”); R. George Wright, *Does Free Speech Jurisprudence Rest on a Mistake: Implications of the Commensurability Debate*, 23 LOY. L.A. L. REV. 763, 764–65 (1990) (describing how courts, when analyzing free speech cases, treat certain concepts, such as “harms” and “values,” as synonymous when they are not).

typically think of suffering, at least to begin with, as a disvalue.¹⁷⁸ Persecution, on whatever grounds, need not involve any dramatic public spectacle.¹⁷⁹ “Polite persecution,”¹⁸⁰ for example, may involve “death by a million papercuts from letters announcing lawsuits, fines, dismissals, cancellation of public speakers, store closures,¹⁸¹ and the like.”¹⁸² Persecution on the basis of any protected or unprotected legal category can clearly take many forms.

To test the symmetry-breaking argument, we will assume that in at least some of our cases, both sides may experience what can be called perceived or actual persecution. In fact, we can assume even more strongly that the perceived or actual persecution, as subjectively or imminently experienced by the parties, is identical as between store owners and customers. The symmetry-breaking on these assumptions tends to occur in more or less systematic differences in how the perceived persecution is then evaluated, overall, by the persons subject to the persecution in question. The differences in this respect need not be categorical, universal, invariant, or absolute,¹⁸³ as long as they are systematic enough to be both properly jurisprudentially cognizable and jurisprudentially significant.

As it turns out, many, if not most, of the proprietors in our cases evidently fall by their own explicit claim into belief-groups

178. As emphasized by, e.g., JEREMY BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE COLLECTED WORKS OF JEREMY BENTHAM 11, 12 (J.H. Burns & H.L.A. Hart eds., 1970) (1789).

179. See, e.g., Margaret Harper McCarthy, *Considering Our Options: Deepening Religious Freedom, Witness, and Argument in the Public Square*, PUBLIC DISCOURSE (Nov. 7, 2017), www.thepublicdiscourse.com/2017/11/20318 (contemplating the way that life is to be done by religiously committed people in a world where their religious convictions clash with public opinion). See also ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* ch. 8 (2017) (recognizing the currently shifting gestalt around religious beliefs and considering how to do life in a post-Christian world).

180. McCarthy, *supra* note 179. Persecution thus involves some sort of adverse official or social group response to claims of conscience. For citations to various historical accounts of the idea of conscience itself, see R. George Wright, *Religion Without God and the Future of Free Exercise*, 63 CLEV. ST. L. REV. 147, 153 n.34 (2014) (reviewing RONALD DWORKIN, *RELIGION WITHOUT GOD* (2013)).

181. This is not to suggest that any or all of the particular defendants cited above have no narrower, less financially costly means of complying with antidiscrimination law than by entirely abandoning all their lines of goods or services.

182. McCarthy, *supra* note 179.

183. Thus, there may well be cases in which customers subject to status-based persecution believe that the incident in question strengthened their character in the long term, or meaningfully advanced the struggle for social justice in a way not otherwise obtainable by that party or by others.

that consistently, prominently, and explicitly endorse the idea that persecution, as the belief-group sees it, tends to confer a range of important, if not literally infinitely valuable, benefits on the victim of discrimination, as well as upon others. The nature and perceived magnitude of such benefits, finite and infinite, are sufficiently well and broadly understood so as to legitimately be taken into some account, along with other relevant considerations, in secular courts.

This systematic ambivalence on the part of some belief groups toward perceived or actual persecution is well-known and long-standing. The author of “The Martyrdom of St. Polycarp,”¹⁸⁴ merely for example, reported that Polycarp and others “despised the tortures of the world, thus purchasing eternal life¹⁸⁵ at the price of a single hour.”¹⁸⁶ In our own time, Archbishop Oscar Romero declared, just prior to his assassination, that “we are passing to our liberation through a desert strewn with bodies and where anguish and pain are devastating us.”¹⁸⁷

In general, some belief-groups can clearly, deeply, and distinctly believe that “perceived persecution can promote spiritual worthiness, endurance, character, hope, spiritual boldness, joyfulness, the rewards of heaven, . . . and . . . repentance . . . and

184. *The Martyrdom of St. Polycarp*, in THE APOSTOLIC FATHERS 152 (Ludwig Schopp et al. eds., Francis X. Glimm trans., 1947).

185. Which may well be perceived to be of infinite, or of exaltedly incomparable, value. But this is not to deny that such an infinitely favorable “payoff” might have been obtained, in given cases, by other means.

186. *The Martyrdom of St. Polycarp*, *supra* note 184, at 152. Of course, not all persecution involves what is normally called martyrdom. See *supra* notes 181–183 and accompanying text.

187. Archbishop Oscar Romero, *The Last Sermon* (Mar. 14, 1980), in JAMES B. NICKOLOFF, THE CHURCH AND HUMAN LIBERATION: THE ECCLESIOLOGY OF GUSTAVO GUTIERREZ (1988). See also, DIETRICH BONHOEFFER, THE COST OF DISCIPLESHIP 80 (R.H. Fuller & Irmgard Booth trans., 1959) (1937) (expounding on the practical implication of the life of a disciple and the near assurance of persecution); SANDRO MAGISTER, BLESSED ARE THE PERSECUTED: THE LESSON OF THE SUCCESSOR OF PETER (Apr. 23, 2012), available at <http://chiesa.espresso.repubblica.it/articolo/1350227> (quoting Pope Benedict XVI, The Church Must Not Fear Persecutions (Apr. 18, 2012) (Joseph G. Trabbic trans.)); ORIGEN, AN EXHORTATION TO MARTYRDOM, PRAYER AND SELECTED WORKS (Rowan A. Greer trans., 1979) (dealing with the systematic ambivalence on the part of some belief groups toward perceived or actual persecution); GERTRUD VON LE FORT, THE SONG ON THE SCAFFOLD: A NOVEL OF HORROR AND HOLINESS IN THE REIGN OF TERROR (Sophia Inst. Press 2001) (1933) (serving as the inspiration for the noteworthy opera by Francis Poulenc, Dialogues of the Carmelites (1956)).

deeper conversion¹⁸⁸ in other persons.”¹⁸⁹ Our assumption is roughly that members of such groups are, for our purposes herein, not equally distributed among both the relevantly affected proprietors and the objecting customers in our cases.

More precisely, though, even if the relevant belief-group membership with regard to persecution is indeed equally distributed among proprietors and objecting customers, there can still be a relevant and significant difference, on average, between the two groups. Specifically, objecting customers who feel transactionally discriminated against on particular protected grounds may indeed equally tend to believe that in some cases, persecution on one ground or another can lead to eternal spiritual rewards. But they may not equally believe that the experience of persecution on the specific grounds of their statutorily protected status, with or without redress at law, itself pays off in terms of eternal or infinite rewards.

All these considerations, of course, will be a matter of patterns and tendencies, rather than any sort of pure categorical distinction between the proprietors and their affected customers in the broad range of cases we have sought to address. But, if these patterns and tendencies hold, they should nicely break even the most otherwise daunting symmetries of experience between retailer and customer. All such systematic differences add further cogency to the basic distinction we have drawn herein.

188. The deeper conversion of other persons, too, could easily be seen as an incomparable value, beside which the sufferings of any person, however vivid and severe, are ultimately nothing.

189. R. George Wright, *A Cost-Benefit Analysis of Religious Persecution: Casting Up a Dread Balance Sheet*, 47 U. RICH. L. REV. 695, 719 (2013). None of this is to suggest that the costs, and the infinite benefits, of being subjected to persecution can, on mainstream views, properly be “courted” or strategically sought out. This is a theme of T.S. ELIOT, *MURDER IN THE CATHEDRAL* (Harcourt ed., 1964) (1935) (dealing with the ability to seek out costs and benefits of being subject to persecution).