Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech

INTRODUCTION: A PICTURE IS WORTH 1,000 WORDS, OR $6,637.94

Imagine a young woman, Elaine, who is a gifted photographer. She launches a small photography business with her husband, and soon she is in demand throughout the state. Her specialty is weddings. One day Elaine receives a request to photograph a same-sex commitment ceremony. Politely, she declines, explaining that she only photographs traditional weddings. Several months later, she is contacted by the state's Human Rights Commission. Elaine learns that a complaint has been filed against her, and she is being charged with discrimination on the basis of sexual orientation.

Imagine a young man, Michael, who is a gifted filmmaker. While his true gift lies in the creation of short films and

documentaries, Michael funds his passion by shooting various advertisements and other more "commercial" projects. As the next presidential election draws near, Michael is approached and asked to film an ad for the challenger, a conservative, gun-toting business owner of a multinational corporation who favors an increase in oil exploration and owns a fleet of gas-guzzling SUVs. While flattered, Michael has long supported the liberal incumbent, and has already produced several ads for his campaign. Therefore, he politely declines. Within weeks, a complaint is filed against Michael for discriminating on the basis of political ideology.

One of these scenarios is all too real, and Elaine's business, Elane Photography, was forced to pay fees in excess of $6,000.[1] The second could quickly become a reality, as the legal framework already exists to sustain it.[2] While state, and later federal, public accommodation laws proscribing discrimination have played a key role in "protecting the civil rights of historically disadvantaged groups,"[3] defenders of liberty should agree that decisions which force a Christian photographer to provide services for a same-sex commitment ceremony or force a liberal filmmaker to shoot political advertisements for conservative candidates are untenable. Indeed, these situations are readily distinguishable from a hotel owner refusing to provide lodging for blacks in violation of the Civil Rights Act of 1964.[4]

The reason decisions like the one in *Willock v. Elane Photography* feel different is simple: they *are* different. Elaine's situation involved more than opening her business to the public. Rather, Elaine—by being told that she must use the expressive art of photography to communicate a particular message about same-sex commitment ceremonies—was compelled to express a viewpoint she disagreed with, in violation of her First Amendment free speech

---

1. Willock, HRD No. 06–12–20–0685 (N.M. Human Rights Comm'n Apr. 9, 2008) (final order), *available at* http://www.telladf.org/UserDocs/ElaneRuling.pdf; *see* Chris Potts, *Point & Shoot*, TRUTH & TRIUMPH, Feb. 2009, at 6 (describing the story of Elaine Huguenin) (on file with author).

2. *See, e.g.*, D.C. CODE § 2–1402.31(a) (2001) (making it unlawful to discriminate based on political affiliation); SEATTLE, WASH., MUN. CODE § 14.08.020(M) (2010) (dealing with housing, and defining "discrimination" to include political ideology), *cited in* Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 n.2 (2000).

3. Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (explaining the primary role that state public accommodation laws played prior to federal legislation in this arena).

4. Civil Rights Act of 1964, Pub. L. No. 88–352, § 201, 78 Stat. 243 (codified as amended at 42 U.S.C. § 2000a (2006); *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 247, 250 (1964) (discussing the accommodation provisions of the Civil Rights Act of 1964 and their purpose).

rights. Similarly, forcing Michael to use the medium of videography to communicate a message about a particular candidate would be a violation of his First Amendment rights. Despite the distinctness of cases like *Elane Photography*, the state district court hearing Elaine's case concluded that the law did not infringe on Elaine's First Amendment rights because the law simply prohibited the "*act* of discriminati[on]."[5] However, the Supreme Court has explicitly held—in the very case cited by the district court for its rationale—that attempting to end discrimination does not supply a sufficient justification for applying public accommodation laws to expressive conduct.[6] To find otherwise could produce results that run contrary to national ideals of justice and autonomy by forcing an individual to engage in expression that violates his or her beliefs. With these ideals at stake, greater clarity is needed in the area of public accommodation laws. The expansion of such laws has resulted in an increase in cases like *Elane Photography*, and courts must be able to evaluate properly the interests involved when public accommodation laws clash with free speech rights.

This Note examines the limits of public accommodation anti-discrimination laws as they pertain to private businesses. Part I explores the origins and development of public accommodation laws, paying close attention to their original purpose as compared to their contemporary implementation. It also reviews the development of First Amendment jurisprudence and the protection the Supreme Court has provided for speech. Using *Elane Photography* as an example, Part II demonstrates the failure of some courts to properly analyze cases involving expressive conduct by a private business that falls within the bounds of First Amendment protection. Part III concludes that public accommodation laws violate the First Amendment when they compel expression by private businesses, such as Elane Photography. To remedy this constitutional violation, Part III first proposes that legislatures more carefully delineate the reach of—and groups covered by—public accommodation laws. Second, it urges courts to apply more consistently the Supreme Court's standard for expressive activity and look to *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston* for guidance in balancing governmental interests against First Amendment protections.

---

5. Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 22 (N.M. Jud. Dist. Ct. Dec. 11, 2009) (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995)), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009.

6. *Hurley*, 515 U.S. at 578–79.

I. HISTORY OF PUBLIC ACCOMMODATION LAWS AND THE FIRST AMENDMENT

A. Accommodation to Domination: The Growth of Public Accommodation Anti-Discrimination Laws

Public accommodation laws have come a long way since the beginning of the Civil Rights Era. Early legislation proscribing discrimination in places of public accommodation was focused primarily, if not exclusively, on discrimination based on race or color. Indeed, the federal government's first foray into public accommodation laws came with the passage of the Civil Rights Act of 1875, which prohibited such discrimination in access to inns, public conveyances, and places of amusement such as theaters.[7]

Although the intent of the Civil Rights Act was laudable, the Act's initial impact was short-lived. Just eight years after its passage, the Supreme Court found the Act unconstitutional in the *Civil Rights Cases*.[8] This early setback in federal efforts shifted the responsibility of proscribing discrimination to the states, which they accepted, albeit slowly. As with the early federal legislation, these state statutes focused on discrimination based on race or color.[9] Massachusetts entered the field first;[10] in fact, its statute predated even the Civil Rights Act of 1875.[11] New York and Kansas followed nine years later.[12] Other states passed similar laws during the next two decades, including eleven between 1883 and 1885, and states continued to act in the late nineteenth and early twentieth centuries.[13] The federal government reentered the arena with the Civil Rights Act of 1964, which "was enacted with a spirit of justice and equality in order to

---

7. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

8. 109 U.S. 3 (1883); *see also* 1 RODNEY A. SMOLLA, FEDERAL CIVIL RIGHTS ACTS § 1:4 (3d ed. 2009) (discussing the *Civil Rights Cases* and the constitutional framework of civil rights law).

9. *See, e.g.*, Act Forbidding Unjust Discrimination on Account of Color or Race (Mass. Discrimination Act), 1865 Mass. Acts ch. 277, *reprinted in* MILTON KONVITZ, A CENTURY OF CIVIL RIGHTS 156 (1961) (prohibiting discrimination based on race or color "in any licensed inn, in any public place of amusement, public conveyance or public meeting"); *see also* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. REV. L. & SOC. CHANGE 215, 238–39 (1978) (discussing the history of state public accommodations statutes).

10. *See* Mass. Discrimination Act; *Hurley*, 515 U.S. at 571 (citing Lerman & Sanderson, *supra* note 9).

11. *See* Mass. Discrimination Act.

12. Lerman & Sanderson, *supra* note 9, at 238.

13. *Id.* at 239.

remove *racial discrimination* from certain facilities which are open to the general public."[14]

These early laws not only focused specifically on race discrimination, but also narrowly defined "public accommodation." Beginning with the Civil Rights Act of 1875, statutes commonly included inns, theaters, restaurants, and other "places of public amusement."[15] Similarly, the Massachusetts law covered only places providing "certain essential goods and services."[16] When President John F. Kennedy urged Congress to act in 1963, he asked that they pass legislation requiring "equal service in places of public accommodation, such as hotels and restaurants and theaters and retail stores."[17] This plea culminated in the passage of the Civil Rights Act of 1964,[18] which continued to define public accommodations narrowly. In order to be a public accommodation under the Act, an establishment (1) must affect commerce or (2) its discrimination must be supported by state action. The establishment must also fall within one of the following four categories:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, . . .
>
> (2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, . . .
>
> (3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and
>
> (4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.[19]

These categories are further limited by the meaning of "commerce" within the section of the statute.[20] In category two, commerce is limited to establishments that "serve[] or offer[] to serve

---

14. Miller v. Amusement Enters., Inc., 394 F.2d 342, 352 (5th Cir. 1968) (emphasis added) (discussing Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006)); *see also* SMOLLA, *supra* note 8, at § 7:2 (discussing the purpose of the Civil Rights Act of 1964).

15. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

16. Lerman & Sanderson, *supra* note 9, at 238.

17. President John F. Kennedy, Radio and Television Report to the American People on Civil Rights (Jun. 11, 1963), *available at* http://www.jfklibrary.org/Research/Ready-Reference/JFK-Speeches/Radio-and-Television-Report-to-the-American-People-on-Civil-Rights-June-11-1963.aspx.

18. *The People's Vote: Civil Rights Act of 1964*, U.S. NEWS, http://www.usnews.com/usnews/documents/docpages/document_page97.htm (last visited Feb. 22, 2011).

19. 42 U.S.C. § 2000a(b).

20. *Id.* § 2000a(b)–(c).

interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce."[21] Category three is limited to those establishments that "customarily present[ ] films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce."[22]

Current state public accommodation laws have cast off their historical roots and embrace a wide range of business activity.[23] New Jersey is a typical example, where "public accommodation" includes—but is not limited to—more than fifty types of places.[24] While some of the locations included are consistent with a traditional understanding of public accommodations, such as restaurants and public libraries, the list also includes places such as summer camps, shooting galleries, and roof gardens.[25] Moreover, while traditional laws like the Civil Rights Act of 1964 cover establishments "*principally* engaged" in selling food,[26] the New Jersey statute covers "any restaurant, eating house, or place where food is sold for consumption on the premises."[27] This language conceivably allows businesses that only incidentally make food available for sale to be subject to the act. The law also has a catch-all provision, which encompasses "any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind."[28] In other words, a New Jersey business of any type, carrying on any activity, likely falls within the state's definition of a "public accommodation."

Current laws also include a larger number of groups as protected classes. A District of Columbia statute covers not just discrimination based on race and color, but also "religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, or place of residence or business of any

21. *Id.* § 2000a(c).

22. *Id.*

23. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 571–72 (1995) (tracing the expansion of Massachusetts antidiscrimination law).

24. N.J. STAT. ANN. § 10:5–5(*l*) (West Supp. 2010); Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

25. N.J. STAT. ANN. § 10:5–5(*l*).

26. 42 U.S.C. § 2000a(b).

27. N.J. STAT. ANN. § 10:5–5(*l*).

28. *Id.*

individual."[29] The New Jersey statute mentioned above is similarly broad with respect to the variety of classes covered.[30]

This significant increase in coverage comes at a price. As the Supreme Court has noted, such changes have increased "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations."[31] Indeed, the more broadly these laws are written, the larger the shadow they cast over First Amendment free speech rights.[32]

B. Free Speech: Some Restrictions May Apply, See Your State for Details

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[33] This protection extends to corporate speakers as well as private individuals,[34] covers more than spoken words,[35] and includes a right of silence.[36]

1. First Amendment Protection Extends to Corporate Speakers

The Supreme Court stated in *Pacific Gas and Electric Co. v. Public Utilities Commission of California* that "speech does not lose its protection because of the corporate identity of the speaker."[37] In 2010, the Court reaffirmed this principle in *Citizens United v. Federal Election Commission*, stating plainly, "First Amendment protection

29. D.C. CODE § 2–1402.31(a) (2001); *see Dale*, 530 U.S. at 656 n.2 (2000) (drawing attention to the D.C. law's inclusion of personal appearance, source of income, and place or residence as bases for discrimination).

30. N.J. STAT. ANN. § 10:5–4 (West 2006).

31. *Dale*, 530 U.S. at 657.

32. This unrestrained expansion of public accommodation laws raises an important legal question addressed only briefly by this Note in Part IV: Are there inherent limits on the state's power to add prohibited classifications under a discrimination law? Is the Constitution the only limiting restraint on state power in this area of law? Moreover, are states in danger of debasing or distorting the legal protections against discrimination when it places racial discrimination on the same level as discrimination based on "political affiliation" or "source of income"?

33. U.S. CONST. amend. I.

34. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986) (citing First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978)).

35. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

36. *Pac. Gas*, 475 U.S. at 16; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

37. *Pac. Gas*, 475 U.S. at 16.

extends to corporations."[38] This principle holds regardless of whether the speaker is being paid, a fact the Court noted in *Riley v. National Federation of the Blind of North Carolina, Inc.*: "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."[39]

An important distinction must be drawn between speech by a commercial entity and "commercial speech." The latter receives more limited protection by the First Amendment, and applies to "expression related solely to the economic interests of the speaker and its audience."[40] Commercial speech is "generally in the form of *commercial advertisement* for the sale of goods and services, or speech proposing a commercial transaction."[41] This Note addresses the former category, speech by a commercial entity, which means that the speaker is "no less a speaker" and his rights are not diminished.[42] Despite the broad protection afforded to speech made by commercial entities, however, some commentators suggest that participating in the marketplace should automatically "subject an enterprise to civil rights laws" and deprive them of any First Amendment protection.[43] This approach—allowing for limits on speech made by commercial

38. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 899 (2010) (citations omitted); *see also* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 777 (1978) (finding that speech which would otherwise be subject to protection is not forfeited based on the corporate identity of the speaker and stating, "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual").

39. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 801 (1988).

40. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (emphasis added).

41. 16A AM. JUR. 2D *Constitutional Law* § 499 (2010) (internal citations omitted) (emphasis added); *see, e.g.*, United States v. Bell, 238 F. Supp. 2d 696, 703 (M.D. Pa. 2003) ("Commercial speech is 'broadly defined as expression related to the economic interests of the speaker and its audience, generally in the form of a commercial advertisement for the sale of goods and services.' " (quoting *In re* Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 793 (3d Cir. 1999))).

42. *Riley*, 487 U.S. at 801.

43. *See, e.g.*, Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 119 n.158 (citing Mark Hager, *Freedom of Solidarity: Why the Boy Scout Case Was Rightly (But Wrongly) Decided*, 35 CONN L. REV. 129, 157 (2002)) (arguing that organizations participating in commerce should not be free to determine the rationale for their exclusion of members); Maureen E. Markey, *The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World*, 29 RUTGERS L.J. 487, 549–52 (1998) (recommending no compelling state interest should be necessary for anti-discrimination laws in free exercise cases when religious individuals are engaging in voluntary commercial activity); Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 1201, 1231 (1989) (suggesting there should be no protection from civil rights laws when a religious group provides services to others in the community).

entities—is problematic for three primary reasons. First, it directly contradicts a plain reading of the First Amendment, essentially adding "except as it pertains to business" to the constitutional mandate that "Congress shall make no law . . . abridging the freedom of speech."[44] Second, it contradicts Supreme Court decisions stating that the First Amendment extends to commercial activity.[45] Third, such an approach would, in essence, allow First Amendment protection to vary from state to state, depending on the specific language of each state's public accommodation laws.[46]

2. Expressive Activity Falls Under the Protection of the First Amendment

The First Amendment protects more than words[47]—its protection extends to "pictures, films, paintings, drawings, and engravings."[48] The Court, perhaps recalling the old adage that a picture is worth a thousand words, reasoned that "symbolism is a primitive but effective way of communicating ideas."[49] As such, the Court has long recognized protection for a variety of popular—and unpopular—expressive acts, including "saluting a flag (and refusing to do so), wearing an armband to protest a war, . . . and even [m]arching, walking or parading in uniforms displaying the swastika."[50]

In evaluating whether conduct is sufficiently expressive to invoke the First Amendment, the Court asks whether "an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it."[51] While some expressive words or conduct may be easily identified, "protected expression may also take the form of quiet persuasion, inculcation of traditional values, instruction of the young,

---

44. U.S. CONST. amend. I.

45. *See, e.g.*, Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986).

46. For instance, in a state including "sexual orientation" as a protected class, Elane Photography would have no free speech rights, but in a state not including the classification, she would be free to exercise her First Amendment rights.

47. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

48. Kaplan v. California, 413 U.S. 115, 119–20 (1973); *see also* Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment at 21, Elane Photography, L.L.C. v. Willock, No. D–202–CV–200806632 (N.M. Jud. Dist. Ct. N.M. Jul. 9, 2009) [hereinafter Plaintiff's Memorandum] (on file with author) (citing *Kaplan*).

49. *Hurley*, 515 U.S. at 569 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943)).

50. *Id.* (internal citations and quotation marks omitted).

51. Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing Spence v. Washington, 418 U.S. 405, 409–10 (1974)).

and community service."[52] Though applying these factors may be difficult in certain instances, some modes of expression, such as the arts, are presumed to be expressive—and therefore deserving of protection—without debate. In the context of artistic expression, "[i]t goes without saying that artistic expression lies within . . . First Amendment protection,"[53] and "is entitled to full protection because . . . [of the] ideal of governmental viewpoint neutrality."[54]

3. "Free Speech" Also Applies to Those Things You Choose *Not* to Express

The Supreme Court has held that the First Amendment protects expression not only from being curtailed, but also from being compelled. The First Amendment "protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[55] It "prohibit[s] improper restraints on the *voluntary* public expression of ideas" which includes "a concomitant freedom *not* to speak publicly."[56] Or, put simply, freedom of speech "includes . . . the choice of what *not* to say."[57] Therefore, the government cannot compel affirmance of a belief with which the speaker disagrees.[58] When it attempts to do so, it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[59]

C. Key Cases Examining the Clash Between Public Accommodation Laws and Free Speech

As the Supreme Court has observed, the expansion of public accommodation laws has led to increasing conflicts with the First Amendment.[60] While *Elane Photography* is unique in many ways, a few Supreme Court cases reveal key principles necessary to arbitrate

52. Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring).

53. Plaintiff's Memorandum, *supra* note 48, at 21 (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 602 (1998)).

54. *Finley*, 524 U.S. at 603 (Souter, J., dissenting) (internal quotation marks omitted) (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

55. Wooley v. Maynard, 430 U.S. 705, 715 (1977).

56. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 11 (1986).

57. *Id.* at 16 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)) (emphasis added).

58. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

59. *Id.*

60. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

the conflict. Specifically, the cases discussed below demonstrate that a state "may not compel affirmance of a belief with which the speaker disagrees,"[61] even if the stated motivation is to "produce a society free of. . . [discriminatory] biases."[62] The First Amendment protects the right of a speaker to choose what to say, and also to choose "what not to say."[63]

1. Follow the Parade: Supreme Court Precedent Says Free Speech Comes First

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,[64] the leading case illustrating the clash between public accommodation laws and First Amendment free speech rights, expresses the principle that free speech must take priority in such conflicts.[65] In *Hurley*, the U.S. Supreme Court held that Massachusetts violated the First Amendment by using its public accommodations law to force parade organizers to include a group "imparting a message the organizers do not wish to convey."[66] The case involved a St. Patrick's Day-Evacuation Parade, organized since 1947 by private citizens and featuring up to 20,000 marchers and one million viewers.[67] Although the parade was a private event, the city nonetheless provided support, including funding, printing services, and use of the city's official seal.[68]

The case began after parade organizers refused to allow the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB")—a group formed by gay, lesbian, and bisexual descendants of Irish immigrants and other supporters—to march in the 1992 and 1993 parades.[69] The state trial court found the parade to be a public accommodation[70] and rejected the argument that it was "private," noting there was little selectivity (even though the Ku Klux Klan had been excluded) and declaring that "the only common theme among the participants and sponsors is their public involvement in the Parade."[71]

---

61. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

62. *Id.* at 578.

63. *Id.* at 573.

64. *Id.* at 557.

65. *Id.* at 573.

66. *Id.* at 559.

67. *Id.* at 560–61.

68. *Id.* at 561.

69. *Id.*

70. *Id.*

71. *Id.* at 562 (citations omitted) (internal quotation marks omitted).

The court also held that GLIB's inclusion would fail to infringe on the First Amendment rights of parade organizers, since the parade was not "focus[ed] on a specific message, theme, or group."[72] Finally, the trial court held that "because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only 'incidental' and 'no greater than necessary to accomplish the statute's legitimate purpose' of eradicating discrimination."[73] The Supreme Judicial Court of Massachusetts affirmed.[74]

A unanimous U.S. Supreme Court reversed, rejecting the logic and rulings of the lower courts and holding that the state "may not compel affirmance of a belief with which the speaker disagrees."[75] The Court found that the parade was expression deserving of First Amendment protection, citing the broad understanding of expression developed in previous cases,[76] and noting that if a parade were to receive no media coverage, "it may as well not have happened."[77] The Court added that this freedom of expression extends "not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid."[78] This protection is available for both "ordinary people" and "business corporations," including publishers, and is meant to "shield . . . those choices of content that in someone's eyes are misguided, or even hurtful."[79] While the Court assumed without deciding that the parade could fall within the meaning of "public accommodation" as defined by the statute, it held that Massachusetts was effectively "declaring the sponsors' speech itself to be the public accommodation," violating the First Amendment right of a speaker to "choose the content of his own message."[80] Additionally, the Court stressed the right of speakers to choose "what not to say."[81] Moreover, the Court observed that the organizers were not endeavoring to ban gays from the parade, but

72. *Id.* at 563 (citations omitted) (internal quotation marks omitted).

73. *Id.* (internal citations omitted).

74. *Id.*

75. *Id.* at 573 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

76. *Id.* at 567.

77. *Id.* at 568 (quoting SUSAN G. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH-CENTURY PHILADELPHIA 171 (1986)) (additional citations omitted).

78. *Id.* at 573 (citations omitted).

79. *Id.* at 574 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949)).

80. *Id.* at 573.

81. *Id.*; *see also supra* notes 56–59 and accompanying text.

rather were excluding the pro-gay message that GLIB was attempting to impose.[82]

The *Hurley* Court also rejected the argument that the parade could be seen as a passive conduit of another party's message.[83] Noting that the situation differed from one in which a cable company presents "individual, unrelated segments," the Court stated that the parade units are "understood to contribute something to a common theme" and added that there is "no customary practice . . . [to] disavow any identity of viewpoint."[84] Contrasting the parade with a situation in which disclaimers may be posted near the speaker, such as at a shopping mall, the Court noted that such a practice would be "quite curious" if employed in a parade.[85]

Finally, the Court soundly rejected any contention that a law restricting speech would be permissible if its purpose was to "produce a society free of . . . [discriminatory] biases"[86]:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.[87]

The Court added that although the law may "promote all sorts of conduct in place of harmful behavior," it may not "interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[88] Applying these principles to the case at hand, the Court held the parade organizers were free to exclude GLIB from the parade, no matter what the reason.[89]

Hurley was not the Court's first venture into the matter of compelled speech. Decades before *Hurley* was decided, the Supreme Court took to the road in defense of free speech. In *Wooley v. Maynard*, the Supreme Court held that the state could not "require an individual

---

82. *Id.* at 572–73.

83. *Id.* at 576.

84. *Id.* (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994) (finding there was little risk cable viewers would believe cable operators endorsed the messages conveyed via their cable system)).

85. *Id.* at 576–77 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980)).

86. *Id.* at 578.

87. *Hurley*, 515 U.S. at 579 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 20 (1986)). As discussed earlier, the use of "noncommercial" should not be understood to eliminate applicability to cases such as *Elane Photography*. *See supra* Part B.1. As *New York Times Co. v. Sullivan* makes clear, speech is not "commercial" simply because a business has paid for it. 376 U.S. 254, 266 (1964).

88. *Hurley*, 515 U.S. at 579.

89. *Id.* at 575.

to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."[90] In this case, New Hampshire citizen George Maynard sought relief after being subjected to various sanctions for covering the state motto, "Live Free or Die," on his license plate, in violation of state law.[91] The Court noted that this law forced Maynard "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."[92] Ruling against the state, the Court held the First Amendment "protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."[93] The Court further stated that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[94]

2. Other Supreme Court Cases Support the Analysis in *Hurley* and *Wooley*

Other Supreme Court cases have addressed this conflict between the First Amendment and public accommodation laws in the context of expressive *association*. While they are thus distinguishable from *Hurley*, *Wooley*, and *Elane Photography*, the cases nevertheless provide additional insight into the Court's analysis of this issue.

In *Boy Scouts of America v. Dale*, the Court faced the question of whether New Jersey's public accommodation law violated the Boy Scouts' First Amendment right of expressive association by requiring the Boy Scouts to admit a homosexual scoutmaster.[95] The Court pointed to *Hurley* and concluded that the public accommodation law would "interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."[96] The Boy Scouts maintained that "homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law."[97] While the Court noted that these materials did not expressly mention sexuality or sexual orientation, it held that

90. 430 U.S. 705, 713 (1977).
91. *Id.* at 707–09 & n.3.
92. *Id.* at 715.
93. *Id.*
94. *Id.* at 717.
95. 530 U.S. 640, 644 (2000).
96. *Id.* at 654.
97. *Id.* at 650.

"it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[98]

The Court went on to reject the New Jersey Supreme Court's suggestion that an association must have the "*purpose* of disseminating a certain message in order to be entitled to the protections of the First Amendment," noting that the parade in *Hurley* was not established to "espouse any views about sexual orientation."[99] The Court in this case thus reinforced the holding of *Hurley* by demonstrating that an organization may not be forced to communicate a particular message, even when the organization does not exist principally for the purpose of communicating its views on the topic.

In contrast to *Dale*, *Roberts v. United States Jaycees* provides an example of a discriminatory policy with no clear connection to the values or beliefs held by the group.[100] This case, like *Dale*, addressed rights of association, but it also shed light on a few relevant principles regarding free speech protection. In *Jaycees*, the Court reversed the Eighth Circuit and concluded that the Minnesota Human Rights Act[101] required the Jaycees, an organization that was founded for young men, to admit women as full voting members.[102] Previously, women could be "associated" (nonvoting) members, and in fact women made up approximately two percent of the total membership.[103] The lawsuit arose when the president of the national organization threatened two chapters in Minnesota with revocation of their charters, due to their nearly decade-long practice of admitting women as regular, voting members.[104] In response, the chapters filed a complaint, alleging a violation of the Minnesota Human Rights Act, which prohibited, among other things, discrimination on the basis of sex in places of public accommodation.[105]

Unlike in *Dale* and *Hurley*, where a contrary decision would have forced the groups to communicate a message they did not want to convey,[106] including women as full voting members would not inhibit

98. *Id.* at 650–51.

99. *Id.* at 655 (emphasis added) (internal quotation marks omitted).

100. 468 U.S. 609 (1984).

101. Minnesota's public accommodation law forbids discrimination on the basis of sex in places of public accommodation. MINN. STAT. § 363A.11, subdiv. 1 (2004); *Jaycees*, 468 U.S. at 615.

102. 468 U.S. at 612.

103. *Id.* at 612–13.

104. *Id.* at 614.

105. MINN. STAT. § 363A.03, subdiv. 34 (2004); *Jaycees*, 468 U.S. at 614–15.

106. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

the Jaycees's ability to express its views nor force it to communicate a message with which it disagreed.[107] As the Court noted, the Jaycees "promot[ed] the interests of young men."[108] Including women would not prohibit this mission; the Jaycees "already invites women to share the group's views and philosophy and to participate in much of its training and community activities."[109] Moreover, the Court's ruling did nothing to restrict "the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members."[110]

Jaycees is also instructive in the way it reveals the effect of broadly written public accommodation laws.[111] The Minnesota statute defined "place of public accommodation" as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."[112] The lower courts rejected the Jaycees's claim that the organization was not a public accommodation and found that the Act was "applicable to *any* public business facility."[113] Of note is the Minnesota Supreme Court's interpretation of "facility"; the court held that the Jaycees met this requirement because the group "conducts its activities at fixed and *mobile* sites within the State of Minnesota."[114] This finding was not disturbed by the Supreme Court in *Jaycees*; however, sixteen years later in *Dale*, the Court criticized the application of public accommodation laws when "place" was not tied to a physical location.[115] Such a critique is relevant when evaluating businesses that provide services without being linked to a particular retail location.[116]

---

107. *Jaycees*, 468 U.S. at 627.

108. *Id.*

109. *Id.*

110. *Id.*

111. As discussed in Part III, broad definitions of "public accommodation" greatly expand the reach of such statutes as compared to the traditional coverage for "places of public amusement" or those providing "essential goods and services."

112. MINN. STAT. § 363A.03, subdiv. 34 (2004).

113. *Jaycees*, 468 U.S. at 616 (emphasis added) (citations omitted) (internal quotation marks omitted).

114. *Id.* (emphasis added).

115. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000). *See generally Jaycees*, 468 U.S. 609.

116. *See infra* Part III.

3. The Inapplicability of *O'Brien* to *Elane Photography* and Similar Cases

In *United States v. O'Brien*, the Court held that burning a draft card combined " 'speech' and 'nonspeech' elements" and stated that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[117] The Court went on to note that any government regulation must fulfill the following requirements: (1) the regulation must "further an important or substantial governmental interest;" (2) the governmental interest must be "unrelated to the suppression of free expression;" and (3) "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest."[118]

The *O'Brien* test, however, is appropriate solely for "review of a governmental regulation that has *only an incidental effect* on protected speech."[119] This limitation caused the Court to reject the *O'Brien* test in *Dale*, stating that the public accommodations law "directly and immediately affects . . . associational rights that enjoy First Amendment protection."[120] Similarly, in *Hurley*, which was decided more than twenty-five years after *O'Brien*, the Court found *O'Brien* irrelevant to the case at hand.[121] Even *Wooley*, which referred to *O'Brien*, nevertheless found a state's interest in "disseminat[ing] an ideology" does not trump an individual's desire to "avoid becoming the courier" for that message. Therefore, if the regulation directly compels protected expression by an individual or business, *O'Brien* does not apply.

II. PROTECTED ARTISTIC EXPRESSION, OR PROHIBITED DISCRIMINATION?

A. A Snapshot of Elane Photography *as It Develops*

Elane Photography is co-owned by Jonathan and Elaine Huguenin and is licensed to do business in New Mexico.[122] Elaine is the head photographer and primarily photographs weddings, but she

117. 391 U.S. 367, 376 (1968).

118. *Id.* at 377.

119. *Dale*, 530 U.S. at 659 (emphasis added).

120. *Id.*

121. *See generally* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995) (failing to even mention *O'Brien*).

122. Plaintiff's Memorandum, *supra* note 48, at 3.

also provides other services, including "[photos for] engagements, individual and family portraits, and high-school graduation pictures."[123] Far from a glorified one-dollar photo booth, Elaine is a trained professional photographer who approaches her work with a photojournalist style, which she considers both "artistic" and "*personally* expressive."[124] When shooting a wedding, Elaine "takes approximately sixteen hundred photos, searching for candid images that best capture the story of the day," makes artistic and technical modifications to the best three or four hundred photos, and then makes those photos available for purchase by her clients.[125] In addition, Elaine commonly creates a coffee-table book that "illustrates the wedding story through pictures."[126] The pictures bear the company's logo prior to purchase, and Elane Photography has copyright ownership of all pictures taken, even after purchase.[127]

While Elane Photography offers the services described above, it declines certain opportunities as well. For example, the company turned down an invitation to photograph the production of a horror movie, due to an unwillingness to "be associated with, or implicitly promote" such works.[128] The company's policy also "prohibits the use of business resources to positively portray or otherwise endorse abortion, pornography, nudity, or a marital union between anyone other than one man and one woman, including polygamy or same-sex 'marriage.' "[129] This last restriction proved costly in a way that Elaine and Jonathan never anticipated.[130]

When Vanessa Willock discovered Elane Photography's website in September 2006, she e-mailed to inquire about the possibility of having the company provide its services for her and her partner's same-sex commitment ceremony.[131] Because this would violate the company's policy and force Jonathan and Elaine to "commemorate and promote a message contrary to their sincerely held religious and moral beliefs,"[132] Elaine politely declined to participate.[133] Near the end of

123. *Id.*

124. *See id.* at 4 (emphasis added).

125. *Id.*

126. *Id.* at 5.

127. *Id.*

128. *Id.* at 3.

129. *Id.* at 4.

130. Willock, HRD No. 06–12–20–0685 (N.M. Human Rights Comm'n Apr. 9, 2008) (final order), *available at* http://www.telladf.org/UserDocs/ElaneRuling.pdf (ruling against Elane Photography); *see also* Potts, *supra* note 1, at 6.

131. Plaintiff's Memorandum, *supra* note 48, at 5–6 (internal quotation marks omitted).

132. *Id.* at 6.

133. *Id.* at 7.

November, more than two months after the initial exchange, Willock sent a second e-mail to Elane Photography, asking, "Are you saying that your company does not offer your photography services to same-sex *couples*?"[134] Elaine explained in her response that the company "does not photograph same-sex *weddings*."[135]

After the commitment ceremony between Willock and her partner (for which they hired a different photographer), Willock filed a discrimination complaint with the Human Rights Commission of the State of New Mexico ("Commission"), claiming that Elane Photography violated New Mexico's public accommodation law, the New Mexico Human Rights Act ("NMHRA"), by discriminating against her because of her sexual orientation.[136] In April of 2008, the Commission found that Elane Photography had violated the NMHRA and ordered the company to pay $6,637.94 in attorney's fees and costs to Vanessa Willock.[137] Elane Photography appealed the order to the Second Judicial District Court in New Mexico, but on December 11, 2009, the Court awarded summary judgment to Willock.[138] Elane Photography is appealing the ruling.[139]

B. First Amendment v. Anti-Discrimination: The Price Is Wrong

As evidenced by cases like *Hurley*, *Wooley*, *Dale*, and *Jaycees*, the expanded scope of public accommodation laws makes conflict with First Amendment rights of free speech a virtual certainty.[140] What may initially seem less clear, however, is which interest should prevail. By examining the New Mexico District Court's decision in *Elane Photography*, this Note identifies the analysis that must occur in such cases; although the district court held otherwise, *Elane Photography* represents the prototypical situation in which the First Amendment must triumph.

---

134. *Id.* (emphasis added).

135. *Id.* (emphasis added) (internal quotation marks omitted).

136. N.M. STAT. § 28–1–7(F) (2004); Plaintiff's Memorandum, *supra* note 48, at 8–9.

137. Willock, HRD No. 06–12–20–0685 (N.M. Human Rights Comm'n Apr. 9, 2008) (final order), *available at* http://www.telladf.org/UserDocs/ElaneRuling.pdf.

138. Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 22 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009.

139. Press Release, Alliance Def. Fund, ADF to Appeal Court Decision against NM Photographer (Dec. 16, 2009), *available at* http://www.adfmedia.org/News/PRDetail/3595.

140. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000) (stating such expansion has "[increased] the potential for conflict"); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995) (noting possibility of First Amendment conflict); Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) (recognizing possible First Amendment conflict and tensions).

1. Public Accommodation Analysis

Under traditional state public accommodation laws, as well as current federal law, an entity is not a public accommodation unless it provides an "essential good or service" and falls within one of the categories established by law.[141] Current state laws, however, often construe the phrase "public accommodation" more broadly. For instance, the law at issue in *Elane Photography* expansively defines public accommodation to include "any establishment that provides or offers its services, facilities, accommodations or goods to the public."[142] In order to effectively address clashes between the First Amendment and public accommodation laws, courts must first agree on how to interpret such laws.

a. When Is an Entity Correctly Deemed a Public Accommodation?

Even though state public accommodation laws have been stretched broadly through the years,[143] some courts have narrowed their application by looking to history and early statutes in determining whether a particular entity should be found to be a public accommodation.[144] For example, in *Human Rights Commission of New Mexico v. Board of Regents of University of New Mexico College of Nursing*, the New Mexico Supreme Court suggested that due to the narrow history of public accommodation laws, a university should not be considered a public accommodation unless mandated by statute.[145] Similarly, in *Faulkner v. Solazzi*, the Connecticut Supreme Court noted that if it were to consider a barber shop a public accommodation, it would effectively result in all services being public accommodations, a conclusion the court maintained was clearly not the intent of public accommodation laws.[146] Likewise, the Illinois Supreme Court stated in *Cecil v. Green* that a statute requiring full

141. *See* 42 U.S.C. § 2000a (2006); Mass. Discrimination Act, 1865 Mass. Acts ch. 277 *reprinted in* MILTON KONVITZ, A CENTURY OF CIVIL RIGHTS 156 (1961); Lerman & Sanderson, *supra* note 9, at 238.

142. N.M. STAT. § 28–1–2 (2004).

143. *See Hurley*, 515 U.S. at 571–72 (providing brief history of how courts interpret public accommodations provisions).

144. *See, e.g.*, Human Rights Comm'n v. Bd. of Regents of Univ. of N.M. Coll. of Nursing, 95 N.M. 576, 577–78 (1981) (finding a university was not a public accommodation and noting that public accommodation laws arose from "common law duties of innkeepers and public carriers to provide their services to the public without imposing unreasonable conditions" and did not include universities).

145. *See id.* at 578.

146. 65 A. 947, 948–49 (Conn. 1907).

and equal enjoyment of public accommodations did not apply to business transactions by a drug store proprietor who sold soda, nor did the law require physicians, lawyers, merchants, or farmers to do business with anyone "unless of his own volition."[147]

Other courts have more liberally interpreted public accommodation laws. Sixty years after Connecticut determined that a barber shop was not a public accommodation, the Supreme Court of Washington issued a contrary ruling, finding that the statute at issue was properly applied to a downtown barbershop that "render[ed] . . . personal services."[148] In *Crawford v. Robert L. Kent, Inc.*, the Massachusetts high court determined that a dancing school fell within the public accommodation law.[149]

The district court in *Elane Photography* embraced the broader view of public accommodations, concluding that an entity need not be providing a traditional "essential service" to be a public accommodation.[150] The court also rejected Elane Photography's request that it consider the original NMHRA in making its decision, which listed five types of public accommodations: "(1) hotels and other places of lodging; (2) restaurants and other places where food or beverages are served; (3) hospitals, clinics, and places for healthcare or medicine; (4) places of entertainment; and (5) common carriers or other places of public transportation."[151]

In addition to determining the types of entities generally covered by public accommodation statutes, courts must decide whether such laws apply to entities that do not occupy a physical retail location. The Supreme Court has addressed this issue on more than one occasion, though the results have not been wholly consistent. In *Jaycees*, the Court faced the question of whether the organization fell within the statute's application to "public business facilit[ies]."[152] Answering in the affirmative, the Court found that the Jaycees conducted activities at "fixed and *mobile* sites" within the state.[153] The Court further noted that the local chapters were "neither small nor

147. 43 N.E. 1105, 1106 (Ill. 1896).

148. *In re* Johnson, 427 P.2d 968, 973 (Wash. 1960).

149. 167 N.E.2d 620, 621 (Mass. 1960).

150. Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 8 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009.

151. N.M. STAT. § 49–8–5 (1955); *Elane Photography*, No. CV–2008–06632, ¶ 7; Plaintiff's Memorandum, *supra* note 48, at 11.

152. Roberts v. U.S. Jaycees, 468 U.S. 609, 616 (1984).

153. *Id.* at 616, 625–26 (emphasis added).

selective."[154] However, in *Boy Scouts of America v. Dale*, the Court criticized the lower court for failing to connect "place" to an actual location.[155] This stricter view of "place" seems consistent with the Court's finding in *Hurley*, where it rejected the state court's attempt to essentially "declare[ ] the sponsors' speech itself to be the [place of] public accommodation."[156]

This question arose in *Elane Photography*, and the court relied on *Jaycees* in finding that the company was a place of public accommodation.[157] Rejecting the plaintiff's claim that the NMHRA is limited by its terms to only "establishments," which is defined to be "a place of business or residence with its furnishings and staff,"[158] the court pointed to the Internet and its effect on commercial activity as support for its finding that a physical location was not essential.[159]

Determining what entities are correctly deemed public accommodations is much more than an academic exercise; the implications are significant. A narrow view exempts businesses supplying expressive services, such as Elane Photography, from the application of public accommodation laws. In contrast, a broad view expands the original purpose of public accommodation laws, essentially substituting "place of business" for "place of public accommodation."[160] The approach taken by courts in regard to the question of whether an entity is a *place* of public accommodation will often be outcome determinative. As such, it is imperative that public accommodation laws are interpreted consistently.

b. When Is the Public Accommodation Law Actually Violated?

Just as courts must carefully determine whether an entity falls within the statutory definition of a public accommodation, they also must take care to not gloss over the question of whether the law has

154. *Id.* at 621.

155. 530 U.S. 640, 657 (2000).

156. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

157. *Jaycees*, 468 U.S. at 625–26; Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶¶ 10–12 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009.

158. *Elane Photography*, No. CV–2008–06632, ¶¶ 10–12 (quoting MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.m-w.com/dictionary/establishment); *see also* N.M. STAT. § 28–1–2(H) (2004).

159. *Elane Photography*, No. CV–2008–06632, ¶ 12.

160. *See supra* notes 15–32 and accompanying text; *see also supra* note 143 and accompanying text regarding *Faulkner* (discussing the drawbacks to a broad interpretation of "public accommodations").

actually been violated. Public accommodation laws prohibit discrimination *based* on improper grounds such as race or religion.[161] While this might appear to be a simple determination to make, *Elane Photography* illustrates that the inquiry can be complicated.

In *Elane Photography*, the company contended that its decision to decline the defendant's request was not because of her sexual orientation, but because the company refuses to photograph any alternative marriage ceremonies.[162] Elane Photography cited the proposition that in such cases, it must be shown "that the [business] intentionally discriminated against her on the basis of her ['sexual orientation']."[163] The district court dismissed this argument, stating that Elane Photography "has an existing policy that excludes same-sex couples from its wedding photography services."[164] While at first glance the policy operates just as the court contended, a closer look reveals it does not prohibit photography services for gay or lesbian individuals. Rather, it prohibits the company from "positively portray[ing]. . . a marital union between anyone other than one man or one woman."[165] This means that, according to its policy, Elane Photography would take senior pictures for a gay high school student, for example. It even means that Elane Photography would agree to photograph a traditional wedding between a lesbian woman and gay man, and would refuse to photograph a same-sex commitment ceremony between two straight men.[166] Indeed, Elane Photography maintains that it would have willingly provided other photography services to the defendant, and refused the commitment ceremony simply "because of the message conveyed by that event."[167] According to the Tenth Circuit, if evidence can "plausibly be interpreted two different ways—one discriminatory and the other benign," there is no direct evidence of discrimination.[168]

---

161. *See, e.g.*, 42 U.S.C. § 2000a (2006).

162. Plaintiff's Memorandum, *supra* note 48, at 14–15.

163. Sonntag v. Shaw, 130 N.M. 238, 243 (2001), *cited in* Plaintiff's Memorandum, *supra* note 48, at 15.

164. *Elane Photography*, No. CV–2008–06632, ¶ 18.

165. Plaintiff's Memorandum, *supra* note 48, at 4.

166. "Self-identified homosexuals do in fact marry persons of the opposite sex." Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 4 n.2, Elane Photography, L.L.C. v. Willock, No. D-202–CV–200806632 (N.M. Jud. Dist. Ct. Sept. 22, 2009) [hereinafter Plaintiff's Reply Memorandum] (on file with author) (citing GARY J. GATES ET AL., THE WILLIAMS INSTITUTE, MARRIAGE, REGISTRATION, AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 10 (2008), *available at* http://escholarship.org/uc/item/5tg8147x#page-1).

167. Plaintiff's Memorandum, *supra* note 48, at 18.

168. Hall v. U.S. Dep't of Labor, Admin. Review Bd., 476 F.3d 847, 855 (10th Cir. 2007). While this Note does not address discrimination under Title VII, the test described in *McDonnell Douglas Corp. v. Green* is arguably applicable to discrimination by public accommodations. In

One can readily imagine other situations that would create similar uncertainty regarding a business's motivation. Michael, the liberal filmmaker described in the Introduction, might allege his refusal to produce a political advertisement for a conservative candidate was not based on the political ideology of the candidate, but rather due to Michael's decision not to portray excessive gasoline consumption as desirable, whether endorsed by liberal or conservative candidates. Such a scenario underscores the importance of a consistent approach in determining the scope and reach of public accommodation laws.

2. First Amendment Analysis

While *Hurley* demonstrates that public accommodation laws do not nullify First Amendment protection, it is necessary to determine whether the First Amendment in fact applies to the particular situation. The following considerations are relevant to answering this critical question.

a. Is the Activity Sufficiently Expressive?

When an entity claims a First Amendment defense in response to a charge of discrimination by a public accommodation, the court must determine whether the alleged expression is protected. As Chief Justice Rehnquist opined in *City of Dallas v. Stanglin*, "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[169] Therefore, the court should first apply *Texas v. Johnson* and determine whether " 'an intent to convey a particularized message was present, and [whether]

Title VII cases, a plaintiff is able to use direct or indirect evidence to show discriminatory intent. Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). Direct evidence, which is rarely used to establish discriminatory intent, requires no inference or presumption. *Standard*, 161 F.3d at 1330; *see also* Robinson v. Runyon, 149 F.3d 507, 513 (6th Cir. 1998) ("Rarely will there be direct evidence from the lips of the defendant proclaiming his or her [discriminatory] animus."). If direct evidence is produced, a defendant can avoid liability " 'only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the [illegitimate criterion] into account.' " Evans v. McClain of Ga., Inc., 131 F.3d 957, 962 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)). If direct evidence is not available, and indirect evidence is offered, the court implements the *McDonnell Douglas Corp. v. Green* framework. *Standard*, 161 F.3d at 1331 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). In short, once a plaintiff establishes a prima facie case of discrimination, the defendant must offer a "legitimate, nondiscriminatory reason" to rebut a presumption of discrimination. *McDonnell Douglas*, 411 U.S. at 802. The burden then returns to the plaintiff to show that the reason provided was a pretext. *Id.* at 807.

169. 490 U.S. 19, 25 (1989).

the likelihood was great that the message would be understood by those who viewed it.' "[170] If not, the First Amendment does not apply, and the defense fails.[171]

In cases such as *Elane Photography*, it should be relatively simple to determine that the entity engages in expressive activity.[172] As discussed above, First Amendment protection may be extended to pictures.[173] *Kaplan v. California* and *Bery v. City of New York* provide strong evidence that "expression means more than the spoken word."[174] Thus, pictures of a same-sex commitment ceremony could easily be understood to communicate a message of approval or celebration for that ceremony, or, at the very least, recognition.

While the facts of *Elane Photography* are unique, courts have considered this question in other cases pitting the First Amendment against public accommodation laws. In *Ocean Grove Camp Meeting Association v. Vespa-Papaleo*, a religious organization filed suit against New Jersey officials in response to an investigation the state launched after the organization "refused to allow a same-sex civil union ceremony at one of its worship facilities."[175] The ministry alleged that its free speech rights were violated, in addition to its rights of expressive association and free exercise.[176] In a hearing, the

---

170. Texas v. Johnson, 491 U.S. 397, 404 (1989) (alteration in original) (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

171. *See id.* (noting that the conduct must "possess[ ] sufficient communicative elements to bring the First Amendment into play").

172. *See supra* notes 47–54 and accompanying text.

173. *Supra* notes 48–49 and accompanying text.

174. Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 19 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009 (citing Kaplan v. California, 413 U.S. 115, 119 (1973) ("The Court has applied . . . First Amendment standards to moving pictures, to photographs, and to words in books.")); *see* Bery v. City of New York, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]aintings, photographs, prints and sculptures, such as those appellants seek to display and sell in public areas of the City, always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." (internal quotation marks omitted)).

175. Press Release, Alliance Def. Fund, N.J. Ministry Sues to Prevent State from Forcing Church to Violate its Religious Beliefs (Aug. 13, 2007), *available at* http://www.adfmedia.org/News/PRDetail/2034?search=1.

176. Complaint ¶¶ 37, 42, 48, Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo, No. 3:33–av–00001 (D.N.J. Aug. 11, 2007), *available at* http://www.telladf.org/UserDocs/OceanGroveComplaint.pdf. Though Ocean Grove raised a free association claim in addition to its "expressive" claims, the Supreme Court held in *Employment Division v. Smith*, that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." 494 U.S. 872, 879 (1990) (citations omitted) (internal quotation marks omitted). Essentially, this ruling greatly reduced free exercise protection under the First Amendment by requiring only rational basis review for "a neutral law of general applicability" but strict scrutiny for laws "directed at religious practices."

State of New Jersey Division on Civil Rights found that "[p]robable [c]ause exists to credit the allegations of the complaint."[177] The Division held that "a civil union ceremony before invited guests . . . conveys no message and is not *expressive* association."[178] Applying the *Johnson* test, it seems curious to argue that conducting a civil union ceremony in front of invited guests did not have a purpose of communicating any type of message, and illogical to suggest the guests would not understand the message communicated. Moreover, the ongoing debate among U.S. churches regarding homosexuals and gay "marriage"[179] only strengthens the argument that such a ceremony is expressive activity. Once again, this question is an important one, as whether or not expression is involved in cases like *Elane Photography* and *Ocean Grove* will often be outcome determinative.

Other situations that would generate controversy regarding whether an activity is sufficiently expressive are easy to imagine. For example, should First Amendment protection extend to a Mormon contractor who refuses a request to build the new headquarters for Lambda Legal, or a homosexual contractor who refuses a request to build the new headquarters for the Christian ministry Focus on the Family? Is a coffee shop owner engaging in expressive activity when he selects musical acts to perform at his establishment? Such hypothetical scenarios demonstrate the complexity of the issue, and further demand a clear answer.

b. Was the Entity Compelled to Speak?

The mere presence of expressive activity does not end the inquiry. The court must next determine whether the statute operated in such a way as to compel the expression. In *Hurley*, while finding the statute did not, "on its face, target speech or discriminate on the basis of its content," the Supreme Court nonetheless found that, as applied, the law forced the parade organizers to communicate a message they did not approve.[180]

---

177. Finding of Probable Cause at 12, Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB–03008 (N.J. Div. on Civil Rights Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf.

178. *Id.* at 11 (emphasis added).

179. *See, e.g.*, Eric Gorski, *Evangelical Church Opens Doors Fully to Gays*, ASSOCIATED PRESS, Dec. 19, 2009, *available at* http://www.msnbc.msn.com/id/34493087/ns/us_news-faith/ (discussing the divide within the mainline Protestant and Evangelical churches regarding homosexuality).

180. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572–73 (1995).

In applying *Hurley* to *Elane Photography*, one may argue—and indeed, the district court held—that Elane Photography's message had never been about same-sex marriage.[181] Therefore, forcing Elaine to create photographs commemorating a ceremony and message with which she personally disagrees does not constitute compelled speech.[182] However, such a holding directly conflicts with *Hurley*, where the parade in question was not established to "espouse any views about sexual orientation."[183] This lack of a central message involving sexual orientation was insignificant. As the Court noted, "[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[184]

Another potentially relevant case in a court's analysis of whether speech was compelled is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[185] In *Rumsfeld*, the Court held that the Solomon Amendment did not compel speech by requiring institutes of higher education to give military recruiters the same access to the school as nonmilitary recruiters or forfeit federal funding.[186] However, a key element in *Rumsfeld* is that schools had a choice to continue their educational mission without interference by simply forfeiting federal funding[187]—a solution that several schools implemented.[188] This distinction is relevant in a case like *Elane Photography*, where an entity is placed in the unenviable position of either forfeiting its discretion or leaving a particular field of business entirely. A more appropriate case to analogize to such situations may be *Wooley v.*

181. Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 25 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009.

182. *See id.*

183. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 655 (2000) (discussing *Hurley*).

184. *Hurley*, 515 U.S. at 575.

185. *Elane Photography*, No. CV–2008–06632, ¶ 23 (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006)). This case may seem to be a surprising choice considering the widespread criticism this decision has prompted in academic circles. *See, e.g.*, *Protest and Amelioration*, SOLOMONRESPONSE.ORG, http://www.law.georgetown.edu/solomon/smaterials.html (last visited Feb. 22, 2011) (referring to *Rumsfeld* as a "veritable invitation to law schools to protest the Solomon Amendment").

186. *Rumsfeld*, 547 U.S. at 52, 64.

187. *Id.* at 56.

188. Neither Hillsdale College nor Grove City College accepts federal funds. David Bernstein, *Very Much Precedented Tying of Federal Aid to Colleges to Obeying Government Rules*, VOLOKH CONSPIRACY (Nov. 29, 2005 7:09 PM), http://volokh.com/posts/1133312972.shtml. Also, Vermont Law School and William Mitchell College of Law have declined federal funds, allowing them to ban military recruiters from campus. Katie Zezima, *Law School Pays the Price in 'Don't Ask' Rule Protest*, N.Y. TIMES, June 29, 2008, at A15, *available at* http://www.nytimes.com/2008/06/29/education/29vermont.html?_r=1.

Maynard, where state law forced motorists to display the state motto on their plates, or effectively forfeit the ability to drive.[189] There, the Court found that the state could not require the plaintiff to display the state motto.[190]

c. Is the Entity Simply a Conduit for Its Clients' Speech?

While *Hurley* and *Wooley*, taken alone, demonstrate that public accommodation laws may not force an entity to communicate a message with which it disagrees, the court's inquiry is not finished. When a speaker is merely a "conduit" for others' messages, the Supreme Court says there is "little risk" that others will assume the speaker is endorsing those messages.[191] In such cases, the First Amendment provides less protection.[192] This is perhaps the most appealing argument against providing full First Amendment protection to businesses accused of violating public accommodation laws, but as explained below, this principle has limited applicability to entities like Elane Photography.[193]

The central case on this issue is *Turner Broadcasting System, Inc. v. FCC*, in which the Supreme Court applied intermediate scrutiny to cable must-carry provisions that were "content-neutral" and imposed only an "incidental burden on speech" by the cable operators.[194] In *Turner*, the cable providers simply selected the programming sources and then transmitted the material provided on a "continuous and unedited basis," exercising "no conscious control over program services provided by others."[195]

Turner is easily distinguished from *Elane Photography*. Elane Photography operates in sharp contrast to how the cable providers operated in *Turner*, exercising artistic discretion, selecting the appropriate moments to capture on film, and then consciously and

189. *See* 430 U.S. 705, 707 (1977) (considering whether New Hampshire could enforce criminal sanctions on persons who cover the motto "Live Free or Die" on their license plate).

190. *Id.* at 717.

191. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–62 (1994).

192. *Id.* at 655–56.

193. *See* Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 25 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009 ("Plaintiff is conveying its client's message of a day well spent.").

194. *Turner*, 512 U.S. at 661–62. "Must-carry provisions" refer to the Cable Television Consumer Protection and Competition Act's requirement that cable companies "devote a portion of their channels to the transmission of local broadcast television stations." *Id.* at 626.

195. *Id.* at 629 (quoting Daniel Brenner, *Cable Television and the Freedom of Expression*, 1988 DUKE L.J. 329, 339 (1988)).

stylistically editing those moments to create a finished product that tells a story from the photographer's perspective.[196] Because of this high level of involvement in the creation of the expression at issue, Elane Photography is not simply a conduit of another party's speech. *Turner* would also be inapplicable to Michael, the liberal filmmaker described in the Introduction, as he takes an active role in capturing, editing and displaying a candidate's message in a political advertisement.

Turner is most relevant to those situations in which an entity provides a service to its clients without any control over the content of their speech. For example, a company that provided translation services for clients would simply be serving as a conduit for the clients' speech. Not coincidentally, such a company may also struggle to demonstrate that its service is sufficiently expressive to warrant First Amendment protection. This again demonstrates the need for clarity not only in defining the scope of public accommodation laws, but also in determining what constitutes expressive activity.

d. May the Entity Easily Disclaim the Message of Its Speech?

Whether the speaker may disclaim the message being communicated also bears on whether an entity has been compelled to speak.[197] The *Hurley* Court distinguished *Turner*, noting that in a parade, "there is no customary practice whereby private sponsors disavow any identity of viewpoint between themselves and the selected participants."[198] In contrast, the *Turner* Court observed that cable has a "long history of serving as a conduit for broadcast signals," and thus there is "little risk" that viewers will attribute particular station messages to the operator.[199] Moreover, network operators benefit from the added safeguard of issuing routine disclaimers. As the Court in *Turner* stated, "[I]t is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility."[200] Similarly, in *PruneYard Shopping Center v. Robins*, the Court explained that a

196. *See supra* notes 121–24 and accompanying text.

197. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 575–76 (1995).

198. *Id.* at 576 (internal quotation marks omitted).

199. *Turner*, 512 U.S. at 655.

200. *Id.* (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980)).

shopping center owner could easily post signs to disclaim any connection with messages from speakers or handbillers.[201]

Elane Photography is factually distinct from the cable company in *Turner* and the shopping center in *PruneYard*. Photos taken, edited, and copyrighted by the plaintiff, and bearing the company's watermark when displayed on the website,[202] are unlikely to be viewed as abstractly as a cable company's offerings or handbills in a shopping center. Of course, even the Court's assumption regarding broadcasters may not hold true in practice, as past events such as the infamous Janet Jackson Super Bowl halftime show debacle demonstrate.[203] Elane Photography would find it even more difficult to distance itself from the message, short of posting a disclaimer on its website, or printing a disclaimer on the photos themselves. The first alternative would be ineffective when the printed photographs are displayed or viewed apart from the website, and the second "solution" can hardly be expected to be embraced by either party. The liberal filmmaker described in the Introduction could face similar difficulties in disclaiming the message communicated through his work. *Turner*'s limitation on First Amendment protection may be relevant, however, to a coffee shop owner who welcomes poets or musicians to present their work during an "open mic night."

3. A Spectrum of Expressive Activity

Although the New Mexico district court found otherwise, Elane Photography *is* an example of a business engaged in expressive activity.[204] On the other end of the spectrum are cases that illustrate the prototypical public accommodation situation, such as *Lombard v. Louisiana*.[205] In *Lombard*, cited in *Hurley*, the Supreme Court reversed the trespass convictions of four college students—three black and one white—who were arrested for their refusal to leave a refreshment counter that served only whites.[206] The Court held that, since the restaurant was a place of public accommodation, it was—like

201. *PruneYard*, 447 U.S. at 87.

202. *See supra* notes 120–24 and accompanying text.

203. *FCC Launches Probe into Super Bowl Halftime Show*, FIRST AMENDMENT CTR. (Feb. 2, 2004) (discussing liability CBS could face for broadcasting the Janet Jackson "wardrobe malfunction"), http://www.firstamendmentcenter.org/news.aspx?id=12558.

204. *See supra* notes 120–24 and accompanying text.

205. 373 U.S. 267 (1963).

206. *Id.* at 268–69 (noting that the white petitioner was likely asked to leave because he was "in the company of Negroes").

railroads, inns, and places of public amusement—an "instrumentalit[y] of the State."[207]

Lombard and cases like it differ from the facts in *Elane Photography* in a critical respect: the store's business activity did not entail expressive conduct, and thus presented no compelled-speech issue.[208] Between *Elane Photography* and *Lombard* are a variety of situations in which a business, though arguably engaging in nonexpressive activity, nonetheless enhances or makes possible the expression of its customer.

Bono Film and Video, Inc. v. Arlington County Human Rights Commission is one such case.[209] In 2005, Tim Bono, President of Bono Film and Video, Inc., received a request from Lilli Vincenz to make video duplicates of betacams entitled "Second Largest Minority" and "Gay and Proud."[210] When Bono refused, stating that the betacams "involved the gay agenda," Vincenz filed a complaint with the Arlington County Human Rights Commission, stating that "Bono Film had discriminated against her on the basis of her sexual orientation" in violation of the county's public accommodation law.[211] The commission later dismissed the case because the underlying legislation failed to include "sexual orientation" among its "prohibited categories of discrimination."[212]

If the case had moved forward, and Bono had raised the same objection made by Elane Photography—that he was not refusing to serve a lesbian, he was refusing to help promote a message advocating a "homosexual agenda" and would gladly make copies of other materials for Ms. Vincenz—would a court apply *Hurley* and find the public accommodation law was "compel[ling] affirmance of a belief with which the speaker disagrees"?[213] Or, consider a different context: should an atheist contractor who believes that organized religion is dangerous to society and denigrates women be able to refuse a contract to build a megachurch, when he would willingly provide another service to the pastor, such as building his house? The difficulty of such questions highlights the continued need for clarity

207. *Id.* at 281 (Douglas, J., concurring) (quoting The Civil Rights Cases, 109 U.S. 3, 58–59 (1883) (Harlan, J., dissenting)) (internal quotation marks omitted).

208. *See generally id.* (involving a privately owned restaurant facility).

209. 72 Va. Cir. 256, 257 (Va. Cir. Ct. 2006).

210. *Id.*

211. *Id.* (internal quotation marks omitted).

212. *Id.* at 258–59.

213. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

and consistency in resolving the conflict between public accommodation laws and First Amendment rights.

Similar situations could arise in a variety of contexts, as many private businesses involve elements of expressive activity: consider a freelance writer, an artist, or a web designer. Failure to make a clear distinction between the refusal to endorse a message and the refusal to provide a nonexpressive service deals a severe blow to First Amendment freedom. Further, automatically holding such businesses to be public accommodations—and prohibiting some messages while compelling others—is turning a blind eye to the reality of how these entities carry on business. It is simply not a workable solution.

C. Focusing: The Appropriate Level of Scrutiny

After a court has determined that (1) a business is engaging in expressive activity protected by the First Amendment and (2) a public accommodation law is being applied in such a way as to diminish or prohibit that activity, it must determine which interest outweighs the other. To do so, it must first determine the appropriate level of scrutiny.[214] As a general rule, strict scrutiny is appropriate for laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content," or that compel speech, while those that are "unrelated to the content of speech are subject to an intermediate level of scrutiny."[215]

1. Strict Scrutiny

The Supreme Court applies "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content," as well as to those laws which "compel speakers to utter or distribute speech bearing a particular message."[216] When subject to strict scrutiny, restrictions on speech must be "narrowly tailored to a compelling state interest" for a court to uphold them as constitutional.[217] The Court has held that this is an "exacting" test and requires a "pressing public necessity" and "essential value," which must still "restrict as little speech as possible."[218] *Jaycees* indicated that the government in that case had a compelling interest in reducing acts of discrimination against women,

214. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).
215. *Id.*
216. *Id.*
217. *Id.* at 680 (Stevens, J., concurring) (citing Boos v. Barry, 485 U.S. 312, 321 (1988)).
218. *Id.*

which was sufficient to "justif[y] the . . . application of the statute."[219] However, as discussed in Part I.C.2, the restriction in *Jaycees* did not actually restrict the group's speech or compel it to proclaim a message with which it disagreed.[220] Because the application of the public accommodation law failed to restrict the group's expression, this case would have been more appropriately analyzed under intermediate scrutiny.[221]

In contrast to *Jaycees*, both *Hurley* and *Dale* invalidated the application of laws that would force the groups to communicate a message they did not want to convey.[222] Of these three cases, *Hurley* is far more relevant—and is in fact determinative—in regard to restrictions on expressive *activity*, as both *Jaycees* and *Dale* dealt primarily with rights of expressive *association*.[223] In *Hurley*, the state presumably had the same interest as New Mexico in *Elane Photography*—eliminating discriminatory biases.[224] However, the Court swiftly declared this rationale was insufficient when "[r]equiring access to a speaker's message" is a means to this end.[225] The Court stated:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.[226]

For these reasons, and the "Nation's commitment to protect freedom of speech," the *Hurley* Court found that the state failed to satisfy the compelling interest requirement.[227] As the Supreme Court has said

---

219. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

220. *Id.* at 627.

221. *See infra* notes 229–37 and accompanying text.

222. Boy Scouts of Am. v. Dale, 530 U.S. 640, 643 (2000); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995).

223. *Compare Hurley*, 515 U.S. at 578–79, *with Dale*, 530 U.S. at 647–48, *and Jaycees*, 468 U.S. at 622–23.

224. *Compare Hurley*, 515 U.S. at 578 (saying it could be argued that "the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases"), *with* Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 22 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009 (holding that nondiscrimination laws prohibit "the *act* of discriminating against individuals") (quoting *Hurley*, 515 U.S. at 572).

225. *Hurley,* 515 U.S. at 578–79.

226. *Id.* at 579.

227. *Id.* at 581.

elsewhere, such regulations "cannot be tolerated under the First Amendment."[228]

2. Intermediate Scrutiny

Intermediate scrutiny applies to "regulations that are unrelated to the content of speech."[229] When this standard of review is applied to a content-neutral regulation, the regulation "need not be the least speech-restrictive means of advancing the Government's interests," and instead only needs to promote a " 'substantial government interest that would be achieved less effectively absent the regulation.' "[230] Expressed differently, this requires that three prongs be met:

> (1) the government must have had the actual purpose of suppressing secondary effects when it enacted the ordinance;
>
> (2) the entity must have had a reasonable evidentiary basis for concluding that its regulation would have the desired effect, which requires that the entity show that the evidence upon which it relied was reasonably believed to be relevant to the problem that the entity sought to address; and
>
> (3) the ordinance must leave the quantity and accessibility of speech substantially intact.[231]

Turner suggests that the way to determine whether the law is content neutral is to determine "whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys."[232] This was an easy determination for the Court in *Turner*, as the must-carry provision focused on the preservation of free television programming rather than on any particular subject matter.[233]

The question calls for a different answer in *Elane Photography*, however, where the law has the effect of forcing the plaintiff to communicate at least recognition and acceptance, if not endorsement, of same-sex ceremonies. Moreover, adding sexual orientation as a protected class in public accommodation laws—as some states have done[234]—is akin to agreeing with the message of same-sex

---

228. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (citing Regan v. Time, Inc., 468 U.S. 641, 648–49 (1984)).

229. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

230. *Id.* at 662 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

231. 16A AM. JUR. 2D *Constitutional Law* § 480 (2010) (citing 729, Inc. v. Kenton Cnty. Fiscal Court, 515 F.3d 485 (6th Cir. 2008)).

232. 512 U.S. at 642 (citations omitted).

233. *Id.* at 646.

234. *See, e.g., supra* notes 29–30 and accompanying text.

commitment ceremonies, or at the very least disagreeing with any message that disapproves of such ceremonies. While this is a nuanced distinction, another statement by the *Turner* Court sheds light on the proper conclusion:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right.[235]

Moreover, the principle set forth in *Hurley* makes it clear that when a public accommodation law is applied in a manner that limits or compels speech, it is in fact a speech restriction, and therefore must satisfy strict scrutiny.[236] The situation presented in *Elane Photography* more closely resembles *Hurley* than *Jaycees* in this regard.[237]

The application of the *Hurley* principle to cases like *Elane Photograpy* is clear—because strict scrutiny requires laws limiting speech to be narrowly tailored to a compelling state interest, businesses will be more likely to prevail in a First Amendment challenge if strict scrutiny is applied. The likelihood of different outcomes depending on the level of scrutiny employed illustrates the importance of this stage of the analysis, and the need for clear direction.

III. SOLUTION: FRAMING THE PICTURE

Hurley provides the necessary framework to evaluate cases like *Elane Photography*, recognizing that First Amendment rights to freedom of speech must not take a backseat to public accommodation laws.[238] However, the district court's decision in *Elane Photography*, as well as other situations described above, highlights the need for greater clarity and consistency.[239] There are steps that both legislatures and courts can take to achieve this clarity. First, the legislature should draft public accommodation laws more narrowly in regard to the places defined as public accommodations, as well as the

---

235. *Id.* at 641 (citations omitted).

236. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 578–79 (1995); *see also Turner*, 512 U.S. at 641–42.

237. *Compare* Roberts v. U.S. Jaycees, 468 U.S. 609, 627 (1984), *with Hurley*, 515 U.S. at 559–61, *and* Plaintiff's Memorandum, *supra* note 48, at 23.

238. *See Hurley*, 515 U.S. at 572–73.

239. Other situations include the filmmaker described in the Introduction, the Bono case, and the atheist contractor described in Part II.B.3.

groups defined as protected classes. Second, courts should construe such statutes narrowly when determining whether the law has been violated, follow the principles set forth in *Hurley*, and protect First Amendment rights when public accommodation laws are applied in a way that compel—or restrict—speech.

A. Legislative Changes

The first, and easiest, way to address the clash between public accommodation laws and the First Amendment right of free speech is to avoid it altogether. By drafting public accommodation laws narrowly in light of the original purpose and scope of such laws,[240] the legislature will enable the judicial system to avoid many of the more troublesome conflicts it would otherwise face. This requires not only a more narrow understanding of what types of businesses are public accommodations,[241] but also what groups should be covered by these laws as a protected class.[242]

As discussed above, the more broadly that public accommodation laws are written, the greater "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations."[243] Therefore, it is important that legislatures look to the historical purpose of public accommodation laws as they draft and refine such laws. The Civil Rights Act of 1964 provides an excellent example of the types of establishments that should be covered.[244] Carefully setting the parameters would avoid many of the problematic examples discussed earlier by confining these laws to establishments that provide nonexpressive, nondiscretionary services to the public at large.

Although this first step, if taken, would be most effective in eliminating unnecessary conflict with the First Amendment, the legislature should also rein in the expansion of those groups labeled a protected class. As the Court noted in *Jaycees*, public accommodation laws "provide[ ] the primary means for protecting the civil rights of *historically disadvantaged* groups."[245] This, of course, is why early

240. *See supra* notes 7–32 and accompanying text.

241. *Compare* Mass. Discrimination Act, 1865 Mass. Acts ch. 277 *reprinted in* MILTON KONVITZ, A CENTURY OF CIVIL RIGHTS 156 (1961), *with* N.J. STAT. ANN. § 10:5–5 (West Supp. 2010).

242. *Compare* Mass. Discrimination Act, *with* D.C. CODE § 2–1402.31 (2001).

243. Boy Scouts of Am. v. Dale, 530 U.S. 640, 657 (2000).

244. *See supra* notes 18–22 and accompanying text.

245. Roberts v. U.S. Jaycees, 468 U.S. 609, 624 (1984) (emphasis added).

laws focused narrowly on race discrimination.[246] When these laws are rewritten to include marital status, personal appearance, sexual orientation, political affiliation, and other criteria, they not only move outside the realm of historically disadvantaged groups, but also serve to remove a certain measure of discretion which private businesses have long been held to possess.[247] While the question of precisely which groups should be considered a "protected class" is, to a large extent, outside the scope of this Note, it is important to recognize that expanding the reach of the term "protected class" necessarily reduces the amount of protection received by historically protected groups.[248]

The current expansion of public accommodation laws is problematic in another way when applied to cases like *Elane Photography*. By placing particular sexual behaviors under the protection of public accommodation laws, the government is taking—and enforcing—a position that the behavior at issue is, if not morally right, at least morally neutral.[249] This is evidenced by the simple fact that there are few, if any, laws protecting pedophiles, bigamists, or other such groups from discrimination.[250] Such a stance, implicit or otherwise, has significant implications for cases like *Elane Photography*. If the government is viewed as communicating that a behavior is at least morally neutral, if not beneficial, by a group's designation as a protected class, it is reasonable for a photographer to claim that being forced to photograph a same-sex commitment ceremony requires an admission of the same. Such a situation is what the Court spoke against in *Dale* when it stated that "this [changing perception of homosexuality] is scarcely an argument for denying First Amendment protection to those who refuse to accept these views."[251] Regardless of the government's view—or society's view—of a

246. *See supra* notes 7–14 and accompanying text.

247. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (upholding the "long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal").

248. If a public accommodation law prohibits discrimination based on hair color as well as discrimination based on race, a court must either evaluate the protection due each group on a sliding scale based on the judge's personal hierarchy, or set the level of protection to the lowest common denominator. The first is unworkable, and the second cheapens protection for those groups that most need it.

249. *See* Feldblum, *supra* note 43, at 85 ("My argument is simply that when government decides, through the enactment of its laws, that a certain way of life does not harm those living that life and does not harm others exposed to such individuals, the government is necessarily staking out a position of moral neutrality with regard to that way of living.").

250. *See id.* at 86.

251. Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000).

particular message, the First Amendment "protects expression, be it of the popular variety or not."[252]

B. Changes in the Courts

Because of the broad scope of many current state public accommodation laws, some conflict with the First Amendment is inevitable.[253] Following the canon of constitutional avoidance, courts should construe these statutes in a way that avoids "constitutional problems" if possible.[254] One might argue that this could be accomplished by simply denying that the effect on speech was sufficient to violate the First Amendment.[255] Such an assumption, however, fails to avoid the question. Rather, it summarily—and prematurely—dispatches an important constitutional issue at the *expense* of First Amendment freedom. This is an incorrect application of the doctrine. If conflict can be avoided, it is more appropriate to do so by finding that the entity's expressive activity was not a public accommodation. This would avoid the constitutional problem while protecting constitutional rights.

The following four considerations will also enable courts to more consistently determine when public accommodation laws must accommodate the First Amendment.

1. When "Discrimination" Is Simply a Refusal to Endorse a Message

First, courts must more clearly evaluate when public accommodation laws have actually been violated, as opposed to when the individual or business is simply refusing to endorse a particular message.[256] The circumstances in which a business is alleging a violation of its free speech rights should be particularly relevant in determining whether the public accommodation law is being used to regulate conduct or speech. Specifically, if the business in question would willingly provide a service to the complaining party that is not associated with an expressive message, courts should be hesitant to

252. *Id.*

253. *See id.* at 657 (noting that "the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased" as the definition of "public accommodation" has broadened).

254. Boumediene v. Bush, 553 U.S. 723, 787 (2008) (internal quotation marks omitted).

255. *See, e.g.*, Elane Photography, L.L.C. v. Willock, No. CV–2008–06632, ¶ 22 (N.M. Jud. Dist. Ct. Dec. 11, 2009), *available at* http://www.scribd.com/doc/24425459/Elainte-Photography-LLC-v-Vanessa-Willock-N-M-2nd-Dist-2008-06632-Dec-11-2009.

256. *See infra* Part II.B.1.b.

find a violation of the statute. For instance, a freelance designer may be more than happy to produce a brochure promoting the café run by a lesbian (or a conservative, pro-gun advocate), but be unwilling to produce a brochure for an organization in which the lesbian (or conservative, pro-gun advocate) serves on the board, when the organization is an advocacy group for the legalization of same-sex marriage (or the legalization of personal possession of automatic weapons). Such a decision is clearly not based on discrimination against the individual, but is rather a refusal to endorse a particular message. And while *Hurley* provides the necessary framework for courts to make these important distinctions, *Elane Photography* demonstrates the unwillingness of some courts to do so.[257]

2. Measuring the Expressiveness

Second, courts must consistently apply the standard the Supreme Court has established for what constitutes expressive activity protected by the First Amendment. To determine whether conduct is sufficiently expressive to invoke the First Amendment, courts should apply the *Johnson* test and ask (1) whether "an intent to convey a particularized message was present" and (2) "whether the likelihood was great that the message would be understood by those who viewed it."[258]

While not all cases provide a clear answer to this question,[259] courts should err on the side of protecting expression. In *Johnson*, Justice Brennan emphasized the First Amendment's role in protecting unpopular expression: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[260] Because this can be a difficult determination to make, it further highlights the need for the legislature to more narrowly and more accurately define public accommodations and protected classes in order to avoid some of these unnecessary conflicts.

---

257. *Compare* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 572 (1995) ("Petitioners disclaim any intent to exclude homosexuals as such . . . ."), *with Elane Photography*, No. CV–2008–06632, ¶ 18.

258. Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 409–10 (1974)); *see supra* note 51 and accompanying text.

259. *See supra* paragraph following note 179 (describing examples such as a homosexual contractor who refuses a request to build the new headquarters for a Christian ministry).

260. 491 U.S. at 414.

3. Political Speech: It's Not Just for Politicians

Third, courts must be careful to protect political speech from far-reaching public accommodation laws. Occasionally, the message that an entity refuses to endorse may be a political one, which strengthens its First Amendment claim. In *Citizens United*, the Court held that "political speech must prevail against laws that would suppress it, whether by design or inadvertence."[261] In *Landmark Communications, Inc. v. Virginia*, the Court stated that "there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[262] Considering the continuing controversy surrounding the federal Defense of Marriage Act ("DOMA") passed in 1996,[263] in addition to the often contentious battles surrounding the marriage amendments adopted by thirty states,[264] it is a plausible argument that expression on such topics should be deemed political.

Additionally, at least one influential scholar advocates a broad interpretation of political speech which would almost certainly encompass the expression in both *Elane Photography* and *Ocean Grove*.[265] Cass Sunstein suggests that political speech should include all speech which "is both intended and received as a contribution to public deliberation about some issue."[266] Sunstein adds that this deliberation can deal with "social norms" or "legal requirements" and mentions "an attack on private discrimination against homosexuals" as an example of political speech.[267] This theory gives added weight to the proposition that courts should be very reluctant to enforce a public accommodation law when it infringes on an entity's expression regarding such topics.

---

261. Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 898 (2010).

262. 435 U.S. 829, 838 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

263. *See, e.g.*, *State Sues U.S. Over Marriage Law*, WASH. POST, July 9, 2009, at A02; *Federal Defense of Marriage Act (DOMA)*, DOMA WATCH, http://www.domawatch.org/about/federaldoma.html (last visited Feb. 22, 2010).

264. *See, e.g.*, Press Release, Alliance Def. Fund, Wis. Supreme Court Upholds Will of the People on Marriage, (May 30, 2008), *available at* http://www.alliancedefensefund.org/News/PRDetail/4098; Press Release, Alliance Def. Fund, Court Affirms Will of Oregon Voters: Marriage Amendment Constitutional (May 22, 2008), *available at* http://www.alliancedefensefund.org/News/PRDetail/1872 (last visited Feb. 14, 2011); Press Release, Alliance Def. Fund, ADF Attorney Available to the Media Following Debate on Arizona Marriage Amendment (May 22, 2008), *available at* http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=4539.

265. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 130–31 (The Free Press 1995) (1993).

266. *Id.* at 130 (emphasis omitted).

267. *Id.* at 131.

4. Applying *Hurley* to Balance Competing Interests

Fourth, once a court has found that an entity's conduct is expressive and determined that the conduct does actually violate the public accommodation law as written, it must balance the alleged governmental interests to be served against the importance of preserving First Amendment protections. While action by the legislatures and courts in the previous steps will likely address many situations before they reach this point, this step is nonetheless critically important to the cases to which it applies.

At this step, courts must first decide what level of scrutiny is appropriate. While a law such as New Mexico's public accommodation statute may seem, on its face, to be content neutral, its application will sometimes require endorsement of specific messages. And legislation that has the effect of compelling certain types of speech should not be considered content neutral, but rather should be subject to strict scrutiny.[268]

Because, as the Court stated in *Hurley*, "[t]he Speech Clause has no more certain antithesis" than a speech restriction which is "used to produce thoughts and statements,"[269] courts should apply the "traditional First Amendment analysis"[270] when expressive conduct is at issue. In short, the court puts the government interest on one side of the scale, and the individual interest on the other. If the government's interest is "forbidding acts of discrimination . . . to produce a society free of the corresponding biases," and this interest infringes on the individual's First Amendment free speech interests, the First Amendment must prevail.[271]

Under *Hurley*, the federal public accommodation law as well as more traditional state laws will still be enforceable in most cases because these laws target, on the whole, nonexpressive activity. Only broadly written and broadly construed laws that include virtually all businesses and define "protected class" to include a wide range of groups will be consistently problematic.

CONCLUSION

Public accommodation laws were historically designed to ensure that individuals were not discriminated against in access to

268. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 578–79 (1995); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994).

269. *Hurley*, 515 U.S. at 578–79.

270. Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (discussing the analysis in *Hurley*).

271. *Hurley*, 515 U.S. at 578–79.

inns, public conveyances, and places of amusement, such as theaters, based on their race or color.[272] But the drastic expansion of the coverage of the laws and the groups to which they apply has led to unnecessary conflict with First Amendment rights of expression.[273] Unfortunately, some courts have issued rulings that incorrectly—and unconstitutionally—limit free speech by compelling individuals and businesses to communicate messages or affirm beliefs with which they disagree.[274] *Elane Photography* is an example of this, as the court not only failed to recognize the activity as expressive, but also failed to appropriately evaluate whether discrimination had even taken place.

The solution to this problem is two-fold. First, legislatures must take responsibility to draft public accommodation laws narrowly, with an eye toward the original purpose and scope of such laws. By carefully defining what businesses are public accommodations, as well as what groups are to be considered a protected class, legislatures would eliminate many unnecessary clashes between free speech rights and anti-discrimination laws. Second, courts must narrowly construe the law at issue, being careful not to find discrimination when the individual or business is simply refusing to endorse a particular message. Courts must also carefully evaluate whether the activity is expressive.[275] And courts must recognize, as *Hurley* established, that when there is a conflict between free speech and public accommodation law, free speech must prevail.[276]

James M. Gottry[*]

272. Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336 (1875), *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000a (2006).

273. *See supra* notes 23–32 and accompanying text.

274. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

275. Texas v. Johnson, 491 U.S. 397, 404 (1989) (citing Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

276. *Hurley*, 515 U.S. at 578–79.

* Candidate for Doctor of Jurisprudence, May 2011, Vanderbilt University Law School. I am grateful for the edits made by my colleagues on the VANDERBILT LAW REVIEW. Special thanks to Jordan Lorence, David French, Tim Chandler, Travis Barham, Joe Infranco, and David Hudson for their guidance during the drafting process. Finally, thank you to my beautiful wife, Lea Gottry, for your constant love and encouragement, and for your belief in me.