

Accommodation as Compromise: Turning Hard Cases into Easier Ones

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1. Introduction: Hard Cases

“Hard cases,” Justice Oliver Wendell Holmes Jr. once said, make “bad law.” So let’s start with an easy case--in fact something that probably doesn’t even deserve the title of “case”:

A woman walks into a bakery. She says to the baker, “I need a cake for my wedding ceremony next week.” The baker replies, “Sorry, I’m just too busy. I can’t do it.” The woman sighs and says, “Oh well, I’ll find someone else. Thanks”

Something like this probably happens *a lot*--and life goes on. The baker in this story seems to be doing well, so he’s not going out of business anytime soon. And the woman, we hope, is able to find another baker to bake the cake for her wedding day. Like I said: an easy case, probably not a case at all. What’s the big deal? It would still be an easy case, I think, if the baker simply said that he was tired, or that he didn’t feel like it--life would still go on.

Now let me add some new facts, which may make the story into a *case*, but still (I think) an easy one:

A woman walks into the bakery. She says to the baker, “I need a cake for my wedding ceremony next week.” The baker replies, “Sorry, we don’t serve women here. I can’t do it.”

Whoa! Now we have a case, but still an *easy* case. Put aside the legal complexities of what the claim, actually, would amount to: but isn’t this gender discrimination? The reason the baker can’t bake the cake isn’t because he’s busy or tired or doesn’t feel like it. It’s because (it seems)

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his bakery has a *policy of discriminating against women*. That's just wrong.² I'll return to this question, when we get to some hard cases.

But consider one more story, another easy case.

A woman walks into the bakery. She says to the baker, "I need a cake for my KKK rally next week." The baker replies, "Sorry, I don't agree with the KKK's message. I can't do it."³

Here it's the *baker* who seems to be within his rights to refuse service to someone, someone who is peddling a racist message. The baker should be able to say to the woman who wants a KKK cake to buzz off, and find someone else to bake her cake (or that she should bake it herself).

These cases are *easy*, I want to say, either because they don't really involve any claims of principle (the baker is too busy, or tired, or doesn't feel like baking that day) or if they do, the principle is only on one side. The woman is right to *insist* that she not be discriminated against by the baker; or the baker is right to *insist* that he shouldn't have to bake a racist cake. Hard cases are when we have principles on both sides. And now we should turn to some hard cases, and unlike the stories above, these are real cases.

2. When Principles Are on Both Sides: Hard Cases

The hard cases I want to discuss deal with *equality*, but they also deal with *religion*.

These are the two principles that clash in these hard cases: freedom of religion, on the one hand, and equality on the other. I will have more to say about both, later. But first the cases:

² For a related story, this one involving a barber shop, see <http://www.news.com.au/finance/small-business/close-shave-with-human-rights-commission-for-menonly-barber-store/news-story/96b3dfab677fee8c5c4a3bbca4eebabb>.

³ A fake story to this effect made the rounds a few years ago. See <http://www.snopes.com/media/notnews/kkkbakery.asp>

Case one: Vanessa Willock contacts Elane Photography, in New Mexico via e-mail to ask if the company could photograph her same-sex commitment ceremony. The owner of Elaine's, Elaine Huguenin, replied that she was personally opposed to same-sex marriage, and would not photograph any event that violated her religious beliefs. Later, Vanessa's partner, Misti Collinsworth, called Elane Photography and asked about whether they would photograph a wedding, without mentioning whether it was same or opposite sex. This time, Elaine said "sure," and sent her pricing information.

Vanessa Willock filed a discrimination complaint with the New Mexico Human Rights Commission against Elaine Photography for discrimination on the basis of sexual orientation, and the New Mexico Supreme Court later upheld the complaint.⁴

Case two: Robert Ingersoll regularly bought flowers from Arlene's Flowers in Kennewick, Washington, so it was a no-brainer whom to ask to make flower arrangements for his same-sex wedding ceremony -- he would ask Baronelle Stuntzman, owner of Arlene's, to do it. But Baronelle said "no", citing her religious beliefs about same-sex marriage; for her, marriage was only between a man and a woman. In her words, it went down like this:

[Robert] came in and we were just chit chatting and he said that he was going to get married. Wanted something really simple ... I believe he said. And I just put my hands on his and told him because of my relationship with Jesus Christ I couldn't do that, couldn't do his wedding.

⁴ Elane Photography LLC v. Willock, available at https://www.bloomberglaw.com/public/desktop/document/Elane_Photo%20graphy_LL%20C_v_Willock_2013NMSC040_309_P3d_53_Court_Opin/1?1476729259

Robert sued Arlene's under Washington's state anti-discrimination law. Arlene's Flowers lost the first round, but the case is currently on appeal before the Washington Supreme Court.⁵

Are these hard cases? I think so, but you may not think so. You may think these aren't really hard cases for two reasons. On the one hand, you may think *whatever we want to say about religion, if you're going to run a business, you can't use religion to discriminate. You should do the job, and not let your bigotry get in the way. Treat people as equals and take the photos and make the flowers; put your personal opinions away.*

Or you might think, on the other hand, *that whatever you want to say about discrimination, it's just photography and it's just flowers. It should be easy enough to get another florist or another photographer. And, really, why would you want these people to be involved in your wedding anyway? Robert and Vanessa should take their business elsewhere.*

These are pretty persuasive points, but I think they miss the fact that there are important principles on both sides. They make these cases too easy. So let me try to convince you that the cases of Elane Photography and Arlene's Flowers are hard cases, and not easy ones. This requires me to say a few things about what principles are on each side, which makes these two cases into hard cases.

The first principle is religious liberty. We believe in this; it's not only in our Constitution's First Amendment, it's also in a statute that the federal government passed, and which many states--including New Mexico--called the "Religious Freedom Restoration Act." The Act says, in so many words, that if you are going to make it harder for people to practice their religion, you have to have a really good reason.

⁵ State of Washington v. Arlene's Flowers, available at http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/washington_v_arelene_flowers.pdf

To put it simply, religious liberty *is liberty*. It's a civil right to be able to practice your religion in your own way. You might not be religious yourself, that's fine. But a lot of people are, and a lot of people find that *the entire meaning of life is wrapped up in religion*. I want to try to say, maybe in language a little too flowery, a little bit about why some people think religion is so important:

Religion is a way of looking at the world that doesn't see it as exhausted by secular values or concerns, for money, prestige, or even exhausted by morality. It asks, repeatedly, of those who believe in it to do seemingly impossible things. It counts on miracles. It sees the world and our lives, fundamentally, as something that we did not make and which comes to us as sort of a gift; it tells us that others should be at the center of our universe and not ourselves. And religion, to the believer, pervades that person's life. It is a structure of commands, in part; a collection of virtues, in part, a set of techniques for making it through the day, in part; a relationship, in part. To many, there is nothing quite like religion.⁶

If we find something in that vision that is attractive, even stirring, we might want to protect religion, and people's ability to practice their religion. And now here comes the hard part: if we really believe in religious liberty, that means protecting religious liberty even when it leads to things we don't agree with. It's not really protecting someone's *right to do something* if the condition is that, "provided you do the right thing." Being principled about religious liberty means saying that we ought to protect it even when people do things with it we think are crazy, or wrong, or even harmful.⁷ Even when it means that some people take a stand on religious

⁶ From Flanders, *In Partial Praise of Compromise* (draft in progress).

⁷ See also Flanders, Finding Middle Ground on Religious Liberty http://www.stltoday.com/news/opinion/finding-middle-ground-on-religious-liberty/article_98312a99-d222-5221-a4f1-f243c164ceeb.html

liberty and--sincerely--refuse to bake cakes for people, or arrange flowers because of their religious beliefs.

And to those who say that religious believers should separate their private lives and their public ones, can't the believer say, *Why should I have to?* If you're a believer, you can't say "this part of my life is religious, and this one isn't." Rather, you'll want to say something like "My whole life is religious, even when I'm at work. So don't ask me to compartmentalize my life and make me violate my beliefs just because that's part of my job. But it's not just 'my job'—it's my life. And I should be able to do my job *and live my life* according to my religion."

But this brings us to the second principle at stake in what I think are "hard" cases. Anti-discrimination is a principle. Equal rights is a principle. More expansively, we believe that people should be treated equally, and you shouldn't be able to discriminate against people for who they are. Governments, especially, shouldn't do this, but private companies shouldn't be able to it, either. Discrimination is bad, discrimination hurts, whenever and wherever it occurs.

And to those who might say, well, these are just wedding flowers or these are just wedding photographs, discrimination doesn't stop being a bad thing, an evil thing, just because it involves *small things*--even stipulating that wedding flowers and wedding photographs are indeed small. These are offenses against a person's dignity, real expressions of a kind of disrespect. Elaine is saying to Vanessa, and Baronelle is saying to Robert, something like, "We don't want any part of your wedding, that thing that is so important to you, the thing that you take to be such an important part of your life. We don't want to help you make it special." Even if Vanessa and Robert could find someone else, *why should they have to?* Why should they have to put up with *any* discrimination? I find Robert's case especially painful. He had been buying flowers from Arlene's for years and years, but when it comes to his *wedding*, where the flowers

will really matter and of course he would want Baronelle to do the honors, all of a sudden, Robert's money is no longer good. How did this make Robert feel? Not good, I imagine. Not good at all.

So here I see some hard cases. We value religious liberty, and we value equality. And here they come into conflict. If we value religious liberty, that may mean the liberty to make some decisions that other people don't like, because they come from someplace deep inside of a person's worldview. We can suppose--even if we disagree with them--that Elaine and Baronelle really are sincerely pained by the fact that their beliefs are this way; but they do not want to, in some sense they cannot, go against their religion. *They just can't.* Some things just cut too deep. But the result of this--let's not mince words--is that some people are discriminated against--Vanessa and Robert are told, well, they just can't be served, *because of who they are, because of who they love.*

Is there any way out of this?

3. Race and Sexual Orientation: A Slight Detour

So let me say, again, that I see the cases of Elaine Photography and Arlene's Flowers as hard cases. What would make them easier? Here let me make a confession. These two cases would become very easy for me if the facts were changed only slightly. Suppose that Elaine and Baronelle said that they would not take photos or arrange flowers, not because of the sexual orientation of Vanessa and Robert, but because of their race. Suppose Elaine discriminated because Vanessa was African-American, and Baronelle discriminated because Robert's wedding (with a woman this time) was going to be interracial. When the facts are changed in this way, my intuitions are clear: religious liberty *should lose*.

I find this a rather interesting result. Does it mean that I take sexual orientation discrimination less seriously than racial discrimination? It would seem that way, wouldn't it? But of course I also want to say, wait a minute, *discrimination is discrimination*. Haven't I already said that I find the cases hard because what Elaine and Baronelle are doing is discriminatory, a violation of equality? So I need to see if I can find a principled way to distinguish my responses to the sexual orientation case and the race case. This is not going to be easy, and maybe I can't do it, but let me say a few things.

The thing about racial discrimination is that we can, I think, truly talk in terms of a *system* of discrimination, one that has deep roots, as deep--and even deeper--than the history of America. It goes back into Jim Crow laws, and further into slavery, and now stretches up to the inequality we see even to this day. By saying this, I do not mean to diminish the unfairness that has been put up with and *suffered* by gays and lesbians; that, too, is real, and palpable. But does it rise to the level of systematic discrimination? I am less sure about that.

Consider what John Corvino, a leading philosopher of gay rights, has said about the difference between discrimination on the basis of race as opposed to discrimination on the basis of sexual orientation:

When civil rights laws were passed, discrimination against blacks was pervasive, state-sponsored and socially intractable. Pervasive, meaning that there weren't scores of other photographers clamoring for their business. State-sponsored, meaning that segregation was not merely permitted but in fact legally enforced, even in basic public accommodations and services. Socially intractable, meaning that without higher-level legal intervention, the situation was unlikely to improve. To treat the lesbian couple's

situation as identical — and thus as obviously deserving of the same legal remedy — is to minimize our racist past and exaggerate L.G.B.T.-rights opponents' current strength.⁸

That sounds right to me. But I should hasten to add that this doesn't, yet, solve my problem.

The fact that discrimination against gays and lesbians is not as bad as racial discrimination doesn't yet tell us how the hard cases should turn out. After all, it is still discrimination when people refuse to serve gays and lesbians. That it is not the *worst* form of discrimination doesn't mean we don't have to worry about it, don't have to be troubled by it, don't have to take it really seriously and call it out by its name, even when the reason for that discrimination is a claim of religious liberty.

So this detour may, in the end, have been just that -- a detour, a distraction, from the task at hand, which is trying to figure out how to decide the "hard case" of religious based-discrimination against gays and lesbians. Let us, for now, put it to the side and return to the hard cases.

4. Making Hard Cases Easier

Our hard cases are hard, again, because they seem to involve a clash of principles: equality versus religious liberty. It is not obvious that one side should win, or that some kind of accommodation can be worked out between them. But maybe some facts on the ground can suggest how a sort of compromise could be made. Consider that gay rights have made enormous strides over the past decades. We have gone from gay-bashing to gay marriage. Doubtless we have a long way to go, but that should not blind us to the progress we have made on gay rights, in a relatively short span of time. This history points to the possibility, in fact, that

⁸ Jon Corvino, Gay Rights and the Race Analogy, <http://opinionator.blogs.nytimes.com/2015/08/22/gay-rights-and-the-race-analogy/>

discrimination against gays is less “sticky” than race discrimination in America (why this is the case I leave to historians and sociologists).

I think those who think that gay rights are a mistake, or maybe better, a sin--the Elaines and the Barronellees of the world--are becoming fewer and fewer. In some places in America, they still have a large amount of sway. But again, they have less power overall. If we want to talk in these terms, they are on the *wrong side of history*. I don't mean by this phrase necessarily to pass judgment on those who believe homosexuality is sinful. What I mean, more boringly, is just that for the most part, modern culture is against them.

Even more concretely, those who oppose gay rights can no longer pass laws--like the Defense of Marriage Act--that institutionalize their positions. The most they can hope for is some protection for their ability to practice their religion, including running their businesses in ways that correspond to their religious beliefs. Laws relating to religious accommodations, including RFRA (the Religious Freedom Restoration Act) are increasingly used this way, but precisely for this reason, they are the subject of great controversy. A lot of people will say, why should a person's religion give them the right to discriminate?

Then again, don't we think, for the reasons I presented earlier, that religious liberty is worth protecting, too? We think freedom of speech is worth protecting, even when we disagree with the speech. Why doesn't the same thing apply to religion? People can have a right to be wrong.

So let me present something like a compromise, which, like most compromises, is pretty unsatisfying. The compromise rests on a *short term decision* and a *long term prediction*. I think that we should give Elane Photography and Arlene's Flower the victory in their discrimination cases. They should be able to refuse service and not be fined or hauled into court

for it. Supposing that Elaine and Barronelle are sincere in their beliefs, they do have religious liberty interests at stake, and we ought at least to *recognize* these interests. Recognizing them in this case means that they can say, “Well, my religion just doesn’t let me do this.” This means allowing what looks like discrimination, at least in the short term.

But I have to add, and I hasten to add, that this decision comes with a long term prediction, one that I do not think is without empirical foundation. *I do not think that places like Elane Photography and Arlene’s Flowers are very long for our world.* People will not go to them; the market will pick the winners and the losers, and those who discriminate will be losers. Those who do not discriminate will be winners. If you can’t get photos at Elane Photography or flowers at Arlene’s flowers because of your sexual orientation, then you will go somewhere else, *and you will encourage others to go somewhere else, too, even if they could get served at Elane’s or Arlene’s.* Places that discriminate will end up being outliers in the marketplace and in the culture: people will not shop at them, people will not work for them; people, in general, will just not like them.⁹ They will die out. Or so it seems reasonable to predict.

And now, finally, we get to what my title promises: a way of thinking about religious accommodations, when those accommodations allow people to discriminate on the basis of their religion. This is going to sound a little complicated, so bear with me. In our current era, and given our current conflicts, I believe that religious accommodations can be a way of *structuring cultural change*. Call this a “modus vivendi,” or “mode of living”—a way of compromising, so that we can at least live together, in the short term. We allow accommodations to places like Elane’s and Arlene’s to let them, and let society, figure out how we are going to implement things like gay rights in the wider world, and how we’re going to enforce them.

⁹ Consider the backlash, not too long ago, against the CEO of Target for giving money to an anti-gay politician. http://www.huffingtonpost.com/2010/07/27/target-homophobia-ceo-gre_n_660990.html

After all, one way of resolving and dissolving the hard case of religious liberty versus equality is to *not have places that discriminate any more*. Equality wins, almost by default. But here's the important thing. We can have equality win by *forcing* some places out of business by fines and by laws. Or we can do this by having people decide--by voting with their dollars--that they don't want to shop or work at these places anymore. For the sake of what I take to be *enduring* social change and also--let us not forget the values on the other side--for the sake of religious liberty, I think this kind of compromise is better: not perfect, but better. Don't force change; let it happen, gradually.

Am I implying by all of this that photos and flowers are no big deal, because gays and lesbians can go someplace else to get them? Sort of. Again, though, *this is discrimination*. My position means that there will be some discrimination allowed, because the accommodations are going to be there: Elaine and Barronelle (again) win in the short term.¹⁰ But the idea is that, over time, Elaine and Barronelle will lose, because the culture just won't support them anymore. And this is where I need to be clear that if I am *wrong* about this, if anti-gay discrimination is as entrenched as race discrimination, if the facts aren't as they seem to be (or as I hope they are), then I have to be open to changing my mind. It may be that the law needs to make a much stronger stand on equality, a stand that says we can't tolerate any discrimination, because we can't wait for society to change on its own. We have to bring the law in, and maybe bring it in hard--and say Elaine and Barronelle have such weak claims, and so they should never win.

Maybe this is the right result, that the law *should* come down hard and firmly be against discrimination in these sorts of cases and not tolerate it, even if there is a religious interest on the

¹⁰ I should add that even under RFRA, the win is not guaranteed. The interests have to be weighed. The suggestion here is that perhaps in many cases--under the RFRA balancing--Elaine and Barronelle may win. I think my point is probably better (and more modestly put) as Elaine and Barronelle should at least have their claims considered.

other side and even if those institutions that do discriminate are few and getting fewer. Maybe the facts on the ground don't support any optimism that the types of conflicts will go away, or sort themselves out. Maybe things will get worse. So the law shouldn't accommodate religion, because not only is the discrimination on the ground actually *harmful* enough and persistent enough not to warrant it, but also even because the accommodation *itself* ratifies the (harmful and persistent) discrimination that is going on.¹¹

But we should be sure to note what kind of result this is. It is a conclusion that rests in part on what the facts on the ground are--that the facts on the ground are bad enough that we cannot wait, that we have to remove the discrimination *now*.¹² Nothing I have said above really rules this out: my hope for a sort of reconciliation between the claims of liberty and the claims of equality was based on a prediction, and that prediction may be wrong both about what is going on now, and what will go on in the near or not-so-near future. It may, in fact, be badly wrong. If that is the case, then religious liberty *should* lose, and equality should win--just like it should when it comes to discrimination on the basis of race.

There is something, though, that my argument *does* commit me to, which is that *even when it should lose, the religious interest is still there*. Even if the facts on the ground make this, overall, an *easy* case because the equality interest is so great, this only means that the equality interest win, and not that there is no religious interest. There still is an interest, and there is at least a little in the way of tragedy that it should be defeated. Now, we can give different glosses on the nature of that tragedy. It could be that the tragedy is that there is no way we can accommodate the religious interest in this case; that it is there but always loses. Or it may be,

¹¹ This point came up during discussion at Lincoln University, and it is an excellent one.

¹² As in Martin Luther King's great essay, *Why We Can't Wait* (New York: Signet Classics, 2000).

more deeply, that it is tragic that the religions in these cases cannot find on their own terms and within their own doctrines and beliefs, a way to accommodate the claims to equality of gays and lesbians.

But let me close with an observation about things that are happening on the ground, right now, that may make us more hopeful about where things are going. In some places--Utah, for one--compromises are being made where religious accommodation for religious nonprofits are being coupled with anti-discrimination laws. That is, states are saying, sure, you can practice your religious beliefs--and discriminate--in church and in your non-profit religious organizations but you can't discriminate in the marketplace. *And both sides are coming together on this.* Both sides get things. Non-discrimination on the one hand, and protection for core religious institutions on the other.

This looks to me like a good bargain and a good legal solution, and one I support. It is another way of managing cultural change, and it turns a zero-sum game into a win-win. Gays and lesbians get more protections in the marketplace, and religious groups get more protection in their private, uniquely religious endeavors--in church. If we can get more democratically-arrived-at solutions like this, then the number of hard cases we have may get fewer and fewer. The transition to equality gets easier, and religious liberty gets protected along the way. If this is the best we can do, I don't think it's all that bad.