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Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?

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ABSTRACT

Across the country, we see institutions and businesses advocating for the right not to comply with antidiscrimination mandates on the grounds that doing so violates their religious beliefs. Bucolic inns and bakeries close their doors to same-sex couples, businesses seek to deny their workers insurance coverage for contraception, and religiously affiliated schools fire employees because they are unmarried and pregnant. This Essay puts today's debate about religious exemptions in historical context and addresses the most common arguments proffered in defense of the religious objector.

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Across the country, in more than fifty lawsuits, various institutions—ranging from the University of Notre Dame, to a chain of arts and crafts stores, to Catholic Archdioceses, to a mining company—are challenging the requirement that they include prescription birth control among the services covered by the insurance they provide employees.[1] In every case, the plaintiffs claim the contraception requirement violates their religious freedom.

These challenges to the contraception requirement are the most prominent of a rash of cases challenging antidiscrimination rules in the name of religion. Bakeries and bucolic inns close their doors to same-sex couples,[2] Christian schools fire employees who get pregnant while unmarried,[3] and nurses protest even taking the blood pressure of abortion patients.[4] At the same time, we see calls for exemptions in antidiscrimination measures being debated in state legislatures. In every case, the refusal to provide services or equal treatment is rooted in religious beliefs.

These cases and legislative debates pose fundamental questions: Does the right to religious freedom include the right to impose your views on others? Does it include the right to impose your views on a diverse workforce? On customers and patients seeking services you offer the public? Does it include the right to close the door on customers—in your office or your bakery or your emergency room—because you disagree with the person seeking services? This Essay briefly addresses these questions by placing today's debate in historic context and by

1. *Challenges to 'Contraception Mandate*,' WASH. POST, Jan. 20, 2013, http://www.washingtonpost.com/politics/challenges-to-contraception-mandate/2013/01/20/cda6b9c8-636c-11e2-9e1b-07db1d2ccd5b_graphic.html; *Challenges to the Federal Contraceptive Coverage Rule*, AM. CIVIL LIBERTIES UNION (Mar. 19, 2013), http://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule.
2. *E.g.*, Settlement Agreement, Baker v. Wildflower Inn, No. 183-7-11-CACV (Vt. Super. Ct. Aug. 23, 2012), http://www.aclu.org/files/assets/fully_executed_settlement_agreement_8_23_12_0.pdf; Charlie Craig v. Masterpiece Cakeshop, No. P2013008X (Colo. Civil Rights Div. Oct. 22, 2012); Complaints of Civil Rights Violation, Wathen v. Beall Mansion Bed & Breakfast, No. 2011-SP-2486-2487-2488-2489 (Ill. Human Rights Comm'n Nov. 1, 2011); *see also* Elane Photography, LLC v. Willock, 284 P.3d 428 (N.M. Ct. App. 2012).
3. *See* Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316 (11th Cir. 2012); Tom Beyerlein, *Archdiocese Responds to Pregnancy Lawsuit by Ex-teacher*, DAYTON DAILY NEWS, Jan. 3, 2013, http://www.daytondailynews.com/news/news/archdiocese-responds-to-pregnancy-lawsuit-by-ex-te/nTmRd; *see also* Herz v. Diocese of Fort Wayne-South Bend, Inc., No. 1:12-cv-122-RM, 2012 WL 3870528 (N.D. Ind. Sept. 5, 2012); Dias v. Archdiocese of Cincinnati, No. 1:11-CV-00251-SJD, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012); Complaint, Quinlan v. Roman Catholic Archdiocese of Cincinnati, No. 3:12-CV-417-TSB (S.D. Ohio Dec. 14, 2012); Complaint, James v. San Diego Christian Coll., No. 37-2013-00034751-CU-WT-CTL (Cal. Super. Ct. Feb. 14, 2013).
4. Defendants' Brief in Opposition to Plaintiffs' Application for Preliminary Injunctive Relief at 10, Danquah v. Univ. of Med. & Dentistry of N.J., No. 2:11-CV-6377-JLL-MAH (D.N.J. Nov. 22, 2011).

addressing the most common arguments proffered in defense of the religious objector.

It is a not a surprise that we are seeing this pitched battle at this moment; we often see conflicts of this nature at moments of historic social change. During the civil rights era, we saw resistance to racial integration couched in terms of religious liberty. For example, Piggie Park, a franchise of barbecue establishments in South Carolina, resisted mandates to integrate places of public accommodation. Its owner argued that "his religious beliefs compel[ed] him to oppose any integration of the races whatever."[5] Religion was also invoked to resist interracial marriage in the case of *Loving v. Virginia*. The lower court judge even stated that "Almighty God . . . did not intend for the races to mix."[6] And as late as the 1980s, in the U.S. Supreme Court, Bob Jones University sought to defend a discriminatory policy on the grounds that "the Bible forbids interracial dating and marriage."[7]

Similar challenges arose as society moved to accord women greater equality. Religiously affiliated schools, for example, invoked religion as a justification for compensating married women less than married men, on the basis of religious beliefs that men are supposed to be the heads of households.[8] In every case, the courts rejected the claims. In every case, the courts found the principle of nondiscrimination to outweigh the religious freedom concerns.

We are now at another historic juncture—this time with gains for lesbian, gay, bisexual, and transgender (LGBT) rights and renewed protection of women's equality. There is extraordinary progress in the movement for equality for LGBT people. We have seen the end of Don't Ask, Don't Tell. The Obama administration is no longer defending the constitutionality of the Defense of Marriage Act. An increasing number of states are recognizing same-sex relationships. And cities, states, and agencies are increasingly adopting measures that prohibit discrimination based on sexual orientation and gender identity. We also see progress in women's equality in the form of the long overdue prescription that

5. Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 944 (D.S.C. 1966), *rev'd*, 377 F.2d 433 (4th Cir. 1967), *aff'd per curiam*, 390 U.S. 400 (1968).

6. Loving v. Virginia, 388 U.S. 1, 3 (1967) (quoting the trial judge's opinion in the Lovings' criminal case).

7. Bob Jones Univ. v. United States, 461 U.S. 574, 580 (1983). Immediately following enactment of the Fourteenth Amendment, courts invoked religion to justify continued segregation. *See, e.g.*, W. Chester & Phila. R.R. Co. v. Miles, 55 Pa. 209, 213 (1867) ("It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix."); *see also* State v. Gibson, 36 Ind. 389, 404 (1871) (quoting *W. Chester* in upholding criminal prohibition of interracial marriage).

8. *E.g.*, Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990); EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1368 (9th Cir. 1986).

employers must include contraception as preventive care in their insurance packages. As a result, the debate over religious exemptions has intensified once again. Those who object to these culture changes on religious grounds are now struggling to slow the progress or carve out enclaves in which change can be halted.

The issue is currently most visible and vociferous in two contexts: mandates of nondiscrimination against LGBT people in public accommodations and the federal rule requiring coverage of prescription contraception in insurance. In today's discussions, even those sympathetic to LGBT and women's rights raise questions suggesting that different rules might be acceptable when discrimination is animated by religious belief.[9] These objections should not be countenanced any more than were those made to civil rights or to equal pay for women in the name of religion. While the constitution protects the right of individuals to worship and have diverse beliefs, the right to religious exercise does not extend to conduct that would threaten the rights, welfare, or wellbeing of others.

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When inns and bridal shops and bakeries and photography shops refuse to provide their services to celebrate same-sex relationships, people often ask: "What's the harm? What if there is another establishment nearby that would provide service? Do you really want someone who objects to your wedding making your cake or hosting your wedding reception?" In thinking about these questions, it is instructive to examine other contexts.

The court in *Piggie Park* did not ask whether there was another restaurant nearby where African Americans could be served.[10] The court did not care whether the customers could have been accommodated elsewhere. By that point in time, the nation had come to understand the harm created by a "Whites Only" sign in a restaurant window. We understood the imperative of ending discrimination: African Americans could not achieve equality if we continued to sanction discrimination in businesses that otherwise opened their doors to the public. As a prescient court stated in 1890 in *Ferguson v. Gies*, when addressing the right of a restaurant to segregate its seating:

> The man who goes either by himself or with his family to a public place must expect to meet and mingle with all classes of people. He cannot ask, to suit his caprice or prejudice or social views, that this or that man shall be excluded because he does not wish to associate with them. He may draw his social line as closely as he chooses at home, or

9. *See Conscience in the Public Square*, AM. CONST. SOC'Y L. & POL'Y (June 15, 2012), http://www.acslaw.org/news/video/conscience-in-the-public-square.

10. The Piggie Park case arose after passage of the Civil Rights Act, such that the facilities were integrating.

> in other private places, but he cannot in a public place carry the privacy of his home with him . . . .[11]

Moreover, when we thought of restaurants turning away customers because of their race, the question was not, "Why would African Americans want to dine at Piggie Park—or for that matter at the lunch counter in Woolworths?" We should not reason differently in the LGBT context. When it turns away a lesbian or gay couple, the inn that advertises as a destination-wedding site, or the bridal shop that opens its doors to the public, in effect posts a "Heterosexuals Only" sign in its window. It is insufficient to answer that the U.S. Constitution accords different levels of protection to race than to sexual orientation. Sex, after all, gets less protection than race as well, but we would not tolerate the bakery with a "Men Only" sign on its door, no matter how heartfelt the objection of the owner. We cannot remedy discrimination and historical exclusion if we sanction such indignities.

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The second manifestation of this issue concerns the requirement that contraception be provided as a part of health insurance. Here, I often confront objections like this: "Is access to birth control really a state interest sufficiently compelling to require compliance with the mandate in the face of religious objections? I might be able to agree with you when LGBT people are turned away from places of public accommodation, but this is different." I offer four ways to respond, all of which speak to the state interest in sex equality that justifies the requirement.

First, and most fundamentally, access to contraception is critical to women's equality. Just imagine what the world would look like for women in its absence. Contraception allows women to control decisions about childbearing and thus about family, education, work, and politics.[12] As the plurality in *Planned Parenthood v. Casey* emphasized, "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to

11. Ferguson v. Gies, 46 N.W. 718, 721 (Mich. 1890).

12. *See, e.g.*, ADAM SONFIELD ET AL., GUTTMACHER INST., THE SOCIAL AND ECONOMIC BENEFITS OF WOMEN'S ABILITY TO DETERMINE WHETHER AND WHEN TO HAVE CHILDREN (2013), http://www.guttmacher.org/pubs/social-economic-benefits.pdf; *see also Presentation of Kristen Luker*, *Video of Panel I – Sexual Freedom*, WILLIAMS INST. (Jan. 18, 2013), http://williamsinstitute.law.ucla.edu/highlight/acs-conference-jan-2013/ (follow "Click here to watch" hyperlink) (citing Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions* (Nat'l Bureau of Econ. Research, Working Paper No. 7527, 2000), for the proposition that advent of the birth control pill correlates with dramatic increases in rates of women entering graduate school).

control their reproductive lives."[13] The state interest in sex quality is thus inexorably tied to access to birth control.

Second, excluding prescription contraception from insurance is about excluding a service only women need—and that most every woman uses at some point.[14] It is, for that reason alone, sex discrimination.[15] In that sense, it is no answer that the contraception rule addresses an exclusion from insurance and not a ban on access to birth control. Imagine an insurance plan that excluded coverage of care for children with Tay-Sachs, a disease almost exclusively affecting Ashkenazi Jews; of treatment for sickle cell anemia, a disease disproportionately affecting African Americans; or of treatment for testicular and prostate cancer. Would the response in those cases be, "Well, it's just insurance coverage. People aren't actually barred from getting the services"? I doubt it.[16]

The third point takes the second to a deeper level. What does it mean to refuse women who want access to contraception? What does it mean for a court or a legislature to embrace an exemption to a rule that an insurance plan provide for contraception? It is to embrace a view that the proper role for women is to accept pregnancy or to refrain from nonprocreative sex.[17] What else, after all, can it mean to instantiate in law the view that it is objectionable to facilitate women having the means to prevent pregnancy?

But long gone are the days when women could be excluded from the legal bar on the grounds that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign office of wife and mother."[18] And we have rejected the notion that women can be presumptively exempt from juries on the grounds that a "woman is still regarded as the center of home and family life"[19] or that women can be barred from accessing contraception.[20] More recently, in the context of

13. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 856 (1992).
14. RACHEL K. JONES & JOERG DREWEKE, GUTTMACHER INST., COUNTERING CONVENTIONAL WISDOM: NEW EVIDENCE ON RELIGION AND CONTRACEPTIVE USE 4 (2011).
15. *Cf.* 42 U.S.C. § 2000e(k) (2006) (defining discrimination based on sex to include discrimination in benefits "on the basis of pregnancy, childbirth, or related medical conditions").
16. *See* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2990 (2010) (citing Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.")).
17. Rush Limbaugh made this point dramatically in 2012 when he called Sandra Fluke, a student who sought to testify before a Congressional committee about the need for contraceptive coverage in insurance, "a slut." *Rush's "Slut" Attack Sparks Furor; President Obama to Address AIPAC*, CNN, http://transcripts.cnn.com/TRANSCRIPTS/1203/04/rs.01.html (last visited May 1, 2013).
18. Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).
19. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57, 62 (1961).
20. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972) (holding unconstitutional a Massachusetts law making it illegal to provide unmarried persons with contraceptives); Griswold v. Connecticut,

abortion, the Supreme Court stated "[t]hat these sacrifices [to become a mother] have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others . . . cannot alone be grounds for the State to insist she make the sacrifice."[21] We cannot tolerate using the law to perpetuate these stereotypes.

Finally, some argue that refusing to provide coverage for contraception is simply discriminating based on what service or good is being sought, whereas refusing to provide a cake or a reception room for a celebration of a same-sex relationship is discrimination based on status. Discrimination based on a good or service, so the argument suggests, does not rise to the level of status discrimination.

This argument harks back to one we have come to reject in the LGBT context. Sodomy laws were once defended on the grounds that they condemned certain sexual conduct, not gay people. In *Bowers v. Hardwick*,[22] for example, the Court framed the issue as whether there is "a fundamental right [of] homosexuals to engage in sodomy," and upheld the constitutionality of a law that made sodomy illegal.[23] More than fifteen years later, the Court wrote:

> That statement . . . discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.[24]

To cast the contraception mandate as about a good, perhaps to be denied the way other services are denied in insurance, is similarly a "failure to appreciate the extent of the liberty at stake."[25] The Court in *Lawrence v. Texas* compared the liberty at issue there to that involved in personal decisions about "marriage, procreation, contraception, family relationships, child rearing, and education."[26] Looking to *Planned Parenthood v. Casey*, the *Lawrence* Court noted

381 U.S. 479, 485 (1965) (holding unconstitutional a Connecticut statute criminalizing the provision of contraceptives to all persons, including married couples).

21. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 852 (1992).
22. 478 U.S. 186 (1986).
23. *Id.* at 190.
24. Lawrence v. Texas, 539 U.S. 558, 567 (2003); *see id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."); *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 130 S. Ct. 2971, 2990 (2010) (rejecting distinction between conduct and sexual orientation).
25. *Lawrence*, 539 U.S. at 567.
26. *Id.* at 573–74.

"the respect the Constitution demands for the autonomy of the person in making these choices,"[27] emphasizing that "[a]t the heart of liberty is the right to define one's own concept of existence."[28] That, and not just a pill, is what is at stake in today's debate about contraception. The reasoning of the *Lawrence* Court readily applies: "While it is true that the [rule] applies only to [a service], the [service] targeted . . . is closely correlated with being [a woman]. Under such circumstances, [the] law is targeted at more than [a service]. It is instead directed toward [women] as a class."[29]

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The question these cases present is not whether we should let society continue to discriminate against LGBT people or women. It is whether we should grant institutions and individuals with devout religious objections exemptions from societal mandates against discrimination. It all goes back to the core principles: What are we trying to achieve with mandates to end discrimination? What harm are we addressing? Simply stated, we are striving to end the second-class status we have reified in the law for certain classes of people. And in doing so, we are seeking to foster equality. We are seeking to eliminate the stigma and harm of having the door closed in your face. A patchwork of fairness and dignity is not equality.

27. *Id.* at 574.
28. *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992)).
29. *Id.* at 583 (O'Connor, J., concurring).