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### Response to Commentaries on Who's the Bigot?

Linda McClain

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**RESPONSE TO COMMENTARIES ON  
*WHO'S THE BIGOT?***

**LINDA C. McCLAIN\***

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Thanks very much to Joe Bacchi, Brad Baranowski, Chris Hamilton, and the editors of the *Boston University Law Review* for providing this space for conversation about my book, *Who's the Bigot?* Thanks, of course, to Professors Sonu Bedi, John Corvino, James Fleming, Imer Flores, Melissa Murray, and Douglas NeJaime for engaging with my book manuscript and contributing to this symposium. Extra thanks to Imer Flores for hosting the live conference at the Instituto de Investigaciones Jurídicas at Universidad Nacional Autónoma de México, where I was able to benefit from earlier versions of most of these commentaries. Thanks also to Justin Dyer, Director of the Kinder Institute on Constitutional Democracy, University of Missouri, for including a book symposium on my manuscript, in which Professor Bedi was a commentator, as part of the fifth Annual Shawnee Trail Conference, held on March 7-8, 2019.

## INTRODUCTION

One of the joys of writing a book is the chance to have its arguments and observations evaluated by creative and engaged readers. I am very grateful that the scholars included in this book symposium provided such constructive commentary on the manuscript of my book, *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law*.<sup>1</sup> One of those commentators, Professor Imer Flores, also generously hosted a wonderful live conference at which I had the chance to hear and engage with early versions of several of these commentaries.<sup>2</sup> The final book, I hope, reflects improvements that grew out of those exchanges. For that reason, one simple format for this response would be a series of statements saying "I agree!" or, to paraphrase the old Prego spaghetti sauce advertisement, "It's in there!"<sup>3</sup> The commentaries, however, also offer some valuable normative prescriptions<sup>4</sup> and spark useful questions about important future investigations, such as the contested boundaries of public and private space (and morality) in controversies over civil rights laws and religious liberty,<sup>5</sup> the application of the rhetoric of bigotry to past and present gender discrimination,<sup>6</sup> and the ways a law-and-literature lens might inform and complement my study of bigotry.<sup>7</sup> This response acknowledges (briefly) my basic agreement with these commentaries and then offers preliminary thoughts about some areas of future investigation.

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<sup>1</sup> See generally LINDA C. McCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (forthcoming 2020) (on file with the Boston University Law Review). Page references to *Who's the Bigot?* in this Essay refer to the penultimate version of the book (indicated as "manuscript").

<sup>2</sup> The conference took place on October 4-5, 2018, at the Instituto de Investigaciones Jurídicas at Universidad Nacional Autónoma de México. Professors Corvino, Fleming, Murray, and NeJaime participated in that conference.

<sup>3</sup> See Michelle Peddycord-Iasta, *Prego & Supplier: "It's in There!"*, ESOURCING F. (Oct. 28, 2013), <http://www.esourcingforum.com/archives/2013/10/28/prego-supplier-data-its-in-there/> [https://perma.cc/AJH4-V3RS].

<sup>4</sup> For example, Professor Corvino's caution about the risks of the rhetoric of bigotry and reasons to use it sparingly is valuable. See generally John Corvino, *Puzzles About Bigotry: A Reply to McClain*, 99 B.U. L. REV. 2587 (2019).

<sup>5</sup> The commentaries by Professors Bedi, Fleming, and Murray sound these themes. See generally Sonu Bedi, *Moral Disapproval and the Meaning, Boundary, and Accommodation of Bigotry*, 99 B.U. L. REV. 2633 (2019); James E. Fleming, *The Unnecessary and Unfortunate Focus on "Animus," "Bare Desire to Harm," and "Bigotry" in Analyzing Opposition to Gay and Lesbian Rights*, 99 B.U. L. REV. 2671 (2019); Melissa Murray, *The Geography of Bigotry*, 99 B.U. L. REV. 2611 (2019).

<sup>6</sup> For this issue, see generally Douglas NeJaime, *Bigotry in Time: Race, Sexual Orientation, and Gender*, 99 B.U. L. REV. 2651 (2019).

<sup>7</sup> Imer Flores suggests this through a provocative pairing of my book with Harper Lee's novels in Imer B. Flores, *The Rhetoric of Bigotry in Law, Life, and Literature: On Linda McClain's Who's the Bigot?*, 99 B.U. L. REV. 2685 (2019).

## I. JOHN CORVINO

In Professor John Corvino's lucid commentary, he views, "through a philosophical lens," the several puzzles about bigotry that I take up in *Who's the Bigot?*<sup>8</sup> Corvino offers conceptual clarity about the messy language of bigotry by proposing a working definition: "*stubborn and unjustified contempt toward groups of people, typically in the context of a larger system of subordination.*"<sup>9</sup> By contrast to some definitions, Corvino emphasizes "stubbornness" as a key feature of bigotry.<sup>10</sup> Corvino then sets out to show how the puzzles I raise become "less puzzling" with this understanding in place.<sup>11</sup> Reading his essay is enough to give one philosophy envy: if only the discourse about bigotry and everyday usages of the rhetoric of bigotry were equally clear. "Would that it were so simple!"<sup>12</sup>

While my book's project was not to offer a philosophical account of bigotry, I find Corvino's analysis and his emphasis on bigotry as "stubborn" illuminating. Particularly interesting are his descriptions of bigotry as a "moral vice," as well as (in some cases) an "epistemic vice," and "a matter of bad epistemic hygiene regarding our fellow humans' moral worth."<sup>13</sup> With such terms, Corvino focuses on the issue of how people arrive at their beliefs and whether they are willing, with education and new information, to revise them. I also concur with Corvino's emphasis upon the importance of reasons and whether an underlying belief is supported by reasons. Corvino argues that, because it is "generally rational for young children to accept what their parents tell them," a five-year old who "accepts white supremacy but who with education will later abandon that view is a racist but not a bigot."<sup>14</sup> Corvino adds that, "under normal circumstances, any modern adult who accepts that view is bigoted."<sup>15</sup> In my chapter on the scientific study of prejudice, I discuss a similar analysis by pioneering prejudice scholar Gordon Allport, who explained that children are not born bigots but become so through (mis)education by parents and other adult figures; further education and social contact on terms of equality with minority groups can lead to shame about those earlier beliefs and insight that those earlier

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<sup>8</sup> Corvino, *supra* note 4, at 2589.

<sup>9</sup> *Id.* at 2590.

<sup>10</sup> *Id.* (citing William M. Ramsey, *Bigotry and Religious Belief*, 94 PAC. PHIL. Q. 125, 128 (2013)).

<sup>11</sup> *Id.* at 2594.

<sup>12</sup> The allusion is to a ridiculous scene in the Coen brothers movie *Hail Caesar!*, in which Ralph Fiennes, portraying a refined British actor, attempts to teach Alden Ehrenreich, portraying a rodeo star in a musical-Western, how to utter the line quoted in text in a drawing room drama. See *HAIL CAESAR!* (Universal Pictures 2016), [https://www.youtube.com/watch?v=G629a\\_3MkkI](https://www.youtube.com/watch?v=G629a_3MkkI).

<sup>13</sup> Corvino, *supra* note 4, at 2593.

<sup>14</sup> *Id.* at 2597.

<sup>15</sup> *Id.*

beliefs were wrong.<sup>16</sup> Allport used the term bigot to refer to students who showed inflexibility and a lack of insight about the origin of their beliefs.<sup>17</sup>

To return to Corvino's focus upon the importance of reasons, he argues that "bigotry is a refusal to enter the realm of reasons."<sup>18</sup> He offers the "paradigmatic case of racists who point to the Bible to justify their belief in segregation," observing that "on the surface . . . they are not bigoted," because they offer reasons for their belief.<sup>19</sup> If, Corvino argues, this appeal to the Bible is "not a genuine reason but merely a *post hoc* justification," then their belief is, in reality, "stubborn, unjustified contempt cloaked in a conscience costume."<sup>20</sup> Corvino suggests that I "lump[] sincerity and conscience together," instead of treating them as distinct.<sup>21</sup> On his view, following one's conscience concerns "acting according to what one believes to be right," while sincerity means an "absence of deceit."<sup>22</sup>

I think this criticism misses my point. In my book, I observe that, in some recent controversies in which the rhetoric of bigotry features, such as religious objections to same-sex marriage, people treat bigotry as the opposite of either sincerity *or* conscience, so that neither a sincere, religious belief nor a belief derived from conscience can be bigoted.<sup>23</sup> Though Corvino offers interesting hypotheticals about how a person acting on conscience may have a duty to be insincere (e.g., misleading an axe-murderer at the door about the whereabouts of your family members), my analysis focuses on real-world usage in recent, high-profile constitutional litigation: before the U.S. Supreme Court, baker Jack Phillips and his many amici described him as a "man of faith," whose "sincere religious belief" and "conscience" would be violated by having to create a wedding cake for a same-sex couple.<sup>24</sup> He was, they insisted, not a bigot by contrast to racists of yesteryear.<sup>25</sup> I pointed out that this contrast depends both on arguing that racists who opposed desegregation and interracial marriage were insincere and used their beliefs as a pretext and arguing that their beliefs were clearly wrong and odious, by contrast to Phillips's reasonable beliefs.<sup>26</sup>

I will not repeat my entire analysis here; my point was to illustrate the strategies used to distinguish present-day religious objections to civil marriage equality from past objections to racial equality. As Corvino and I both agree, a problem with the appeal to "reasonableness" in these kinds of arguments

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<sup>16</sup> McCLAIN, *supra* note 1 (manuscript at 25, 26, 31-32).

<sup>17</sup> *Id.* (manuscript at 26).

<sup>18</sup> Corvino, *supra* note 4, at 2595.

<sup>19</sup> *Id.* at 2596.

<sup>20</sup> *Id.* at 2596-97.

<sup>21</sup> *Id.* at 2595.

<sup>22</sup> *Id.*

<sup>23</sup> McCLAIN, *supra* note 1 (manuscript at 6-7).

<sup>24</sup> *Id.* (manuscript at 6-7, 195-96).

<sup>25</sup> *Id.* (manuscript at 195-97).

<sup>26</sup> *Id.* (manuscript at 129, 197).

concerns the temporal dimension of bigotry: understandings of what is reasonable change over time. While Phillips's amici could confidently assert that religious racists were "wicked" and could not rely on the Bible or on conscience for their beliefs, my book shows the pervasiveness of the theology of segregation during the 1950s and 1960s and how opponents and proponents of segregation appealed to different parts of the same Bible verse.<sup>27</sup> To counter charges of bigotry and prejudice, religious defenders of segregation appealed not only to the Bible and to their conscience but also to science and reason.<sup>28</sup>

It is interesting to apply Corvino's analysis of bigotry, with his emphasis on bad epistemic hygiene, to a recent news story that seemed a throwback to a racist past, when the theology of segregation was prevalent: an owner of a wedding venue in Boonerville, Mississippi, informed a couple who had been coordinating with the owner about hosting their wedding that she could not let them use her hall.<sup>29</sup> She had discovered that they were an interracial couple and explained, "First of all, we don't do gay weddings or mixed race [weddings] . . . because of our Christian race, I mean, our Christian belief."<sup>30</sup> In a recording of a follow-up encounter, when LaKambria Welch, the white bride-to-be, asked the woman, "So what in the Bible tells you that[?]" the woman interrupted, saying, "Well, I don't want to argue my faith."<sup>31</sup> What happened next is particularly interesting: the hall owner apologized but also explained that she had come to see that "the reasoning" behind her turning away the couple was "incorrect."<sup>32</sup> As *The Washington Post* reported, her apology included an attempt to explain how she had only recently discovered that the Bible did not support her views on interracial marriages:

She began by writing that "as a child growing up in Mississippi" it was an unspoken understanding that people stayed "with your own race." But then on Saturday, when her husband asked her to point to relevant sections of the Bible, she couldn't. After spending hours scouring the text and sitting down with her pastor, the owner wrote that she finally concluded that the reasoning behind her decision to turn away [the couple] was incorrect.

"As my bible reads, there are 2 requirements for marriage and race has nothing to do with either!" the Facebook post read. "All of my years I had

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<sup>27</sup> *Id.* (manuscript at ch. 4). The verse was Acts 17:26: "Of one blood has God made all nations for to dwell on all the face of the earth, and hath determined the times before appointed, and the bounds of their habitation." *Id.* (manuscript at 84) (quoting *Acts* 17:26 (King James)).

<sup>28</sup> *Id.* (manuscript at 81-85).

<sup>29</sup> Allyson Chiu, *A Mississippi Wedding Venue Rejected an Interracial Couple, Citing 'Christian Belief.' Facing a Backlash, the Owner Apologized*, WASH. POST: MORNING MIX (Sept. 3, 2019, 7:04 AM), <https://www.washingtonpost.com/nation/2019/09/03/mississippi-wedding-venue-rejects-interracial-couple-christian-belief-apologized/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

‘assumed’ in my mind that I was correct, but have never taken the opportunity to research and find whether this was correct or incorrect until now.”<sup>33</sup>

I offer three observations about this incident (although there are many more I could offer, if space permitted). First, on Corvino’s analysis, because this owner was willing to examine the basis for her beliefs and recognize that she was wrong about what the Bible said and that her “reasoning” was incorrect, she did not show the “stubbornness” characteristic of a bigot who systematically discounts evidence that “would upset the bigot’s views.”<sup>34</sup> While her underlying belief was racist, she claimed to be able to recognize the wrongness of her belief and to apologize. Second, by contrast to her inability to find Bible verses supporting the childhood teaching to stay “with your own race,” ministers and politicians several decades ago would have readily and confidently cited numerous biblical verses to support their argument that God was the “greatest segregationist,” that interracial marriage violated God’s plan, and that segregation was the “Christian” way.<sup>35</sup> Third, her appeal to her childhood training suggests the disturbing persistence of “folkways” teaching, supporting, and practicing racial separation, despite official repudiation (at the denominational level) of support for segregation and repentance for that support (as I discuss with respect to the Southern Baptist Convention).<sup>36</sup>

Notably, under Mississippi’s “Protecting Freedom of Conscience from Government Discrimination Act,” this wedding venue owner could deny service to a same-sex couple on the basis of her “sincerely held religious beliefs or moral convictions” that marriage “is or should be recognized as the union of one man and one woman.”<sup>37</sup> The law does not, however, protect “sincerely held religious beliefs or moral convictions”<sup>38</sup> that people should stay “with your own race” and not intermarry.<sup>39</sup> Some commentators, nonetheless, have linked this conscience protection law to objections like that of the owner, arguing that it “lays the groundwork for people to assert that beliefs alone are enough to validate racial discrimination.”<sup>40</sup> Some of the contributors to this book symposium express similar concerns that it is hard to cabin the scope of religious objections once state laws allow them into the marketplace, as I now discuss.

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<sup>33</sup> *Id.*

<sup>34</sup> Corvino, *supra* note 4, at 2591.

<sup>35</sup> McCLAIN, *supra* note 1 (manuscript at chs. 4-5).

<sup>36</sup> *Id.* (manuscript at 86-90, 101).

<sup>37</sup> H.B. 1523, 2016 Leg., Reg. Sess. (Miss. 2016).

<sup>38</sup> *Id.*

<sup>39</sup> Chiu, *supra* note 29.

<sup>40</sup> *Id.*

## II. MELISSA MURRAY

I agree with Murray's insightful argument about the evolution over time in the type of rhetoric used in objecting to opposing civil rights for LGBTQ people as well as marriage equality.<sup>41</sup> In Chapter Seven of *Who's the Bigot?*,<sup>42</sup> I attempt to provide some sense of that evolution by tracing the trajectory from *Bowers v. Hardwick*<sup>43</sup> to *Obergefell v. Hodges*.<sup>44</sup> The Court's setting limits upon moral disapproval as a justification for using both criminal (in *Lawrence v. Texas*)<sup>45</sup> and civil (in *Romer v. Evans*)<sup>46</sup> law to deny the liberty and equality of LGBTQ persons contributed to that shift in argumentation. For example, arguments shifted from appeals to collective moral judgments against "homosexuality" and in favor of heterosexuality and "traditional marriage," to appeals to definitional arguments (that marriage has always and universally been the union of one man and one woman), responsible procreation, gender complementarity, and the unforeseen consequences of working a dramatic change to the definition of marriage.<sup>47</sup> Even as those arguments shifted, however, one constant was the insistence that opposition to same-sex marriage or support for drawing distinctions between heterosexual and gay citizens did not rest on bigotry or animus but on some legitimate reason.<sup>48</sup>

I also agree with Murray that in the ongoing legal conflicts over state public accommodations laws and access by same-sex couples to wedding goods and services, a salient issue is "recasting the public sphere."<sup>49</sup> Murray evocatively expresses this in terms of the "geography of bigotry."<sup>50</sup> Murray compellingly writes of how "the aggregative effect of religious accommodations is to *shrink* the public sphere—and the domain of state-endorsed laws and norms—and *expand* the private sphere and the authority of private actors who operate outside of the State's reach."<sup>51</sup> She urges caution over this simultaneous shrinking and expanding and worries about the risk of instability of the public-private divide and of reconfiguring the discursive language.<sup>52</sup> She argues that "religious accommodations recharacterize the challenged portions of the public sphere as *private* space where dissenting views—and rank bigotry—may be safely expressed."<sup>53</sup>

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<sup>41</sup> Murray, *supra* note 5, at 2617-22.

<sup>42</sup> McCLAIN, *supra* note 1 (manuscript at ch. 7).

<sup>43</sup> 478 U.S. 186 (1986).

<sup>44</sup> 135 S. Ct. 2584 (2015).

<sup>45</sup> 539 U.S. 558 (2003).

<sup>46</sup> 517 U.S. 620 (1996).

<sup>47</sup> McCLAIN, *supra* note 1 (manuscript at ch. 7).

<sup>48</sup> *Id.* (manuscript at 160-61, 164-69, 170-71).

<sup>49</sup> Murray, *supra* note 5, at 2623-28.

<sup>50</sup> *Id.* at 2629.

<sup>51</sup> *Id.* at 2627.

<sup>52</sup> *Id.* at 2627-28.

<sup>53</sup> *Id.* at 2616.



Murray persuasively argues that there are “high stakes involved in the current debate over same-sex marriage and religious accommodations.”<sup>54</sup> She cogently advises that there are lessons to learn from efforts by white southerners to resist mandated integration by “appealing to the private sphere,” both through resorting to “restrictive covenants that prevented property from being sold to racial minorities” and through the creation of private ““segregation academies” that provided a segregated alternative to integrated public schools.”<sup>55</sup> I agree with Murray that it is important to learn from the Civil Rights Movement and the significance of the Supreme Court upholding the Civil Rights Act of 1964 against a variety of constitutional challenges,<sup>56</sup> as in *Heart of Atlanta Motel, Inc. v. United States*<sup>57</sup> and *Newman v. Piggie Park Enterprises, Inc.*<sup>58</sup> As I discuss in Chapters Five and Eight, those challenges effectively denied the legitimacy of public accommodations laws and their reach, instead appealing to private property, involuntary servitude, freedom of association, and freedom of religion to justify continuing to segregate in spaces supposedly “open” to the public.<sup>59</sup> The Court upheld the government’s compelling interest in ending discrimination in such spaces.<sup>60</sup> Notably, and encouragingly, the majority opinion in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*<sup>61</sup> cited to *Piggie Park* on the basic legitimacy of public accommodations laws and on the general obligation to serve customers notwithstanding sincere philosophical or religious objections, including to same-sex marriage.<sup>62</sup>

Perhaps the most frequently invoked image in arguments for a robust space in the public sphere of the marketplace for religious dissenters is that conjured by Justice Alito in his *Obergefell* dissent. There, Justice Alito warned that dissenters from the new “orthodoxy” about marriage may still be able to whisper their beliefs in their homes but that if they utter them in public, they will “risk being labeled as *bigots* and treated as such by governments, employers, and schools.”<sup>63</sup>

While Murray insists upon the importance of learning lessons about the attempt to continue race discrimination in public by deeming spaces “private,” Justice Alito argued that the majority’s analogies between race and sex discrimination in marriage and the exclusion of same-sex couples will invite the bigotry label. The recent Arizona Supreme Court opinion in *Brush & Nib Studio*,

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<sup>54</sup> *Id.* at 2631.

<sup>55</sup> *Id.* at 2625.

<sup>56</sup> *Id.* at 2630-31.

<sup>57</sup> 379 U.S. 241 (1964).

<sup>58</sup> 390 U.S. 400 (1968) (per curiam).

<sup>59</sup> McCLAIN, *supra* note 1 (manuscript at chs. 5, 8).

<sup>60</sup> *Id.* (manuscript at 111, 125-27, 189, 203, 206-07).

<sup>61</sup> 138 S. Ct. 1719 (2018).

<sup>62</sup> *Id.* at 1727.

<sup>63</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting) (emphasis added).

*LC v. City of Phoenix*<sup>64</sup> indicates the continuing power of Alito’s evocative image.<sup>65</sup> Arizona’s highest court upheld the free speech and free exercise of religion claims (brought under Arizona’s Constitution) of the owners of a stationery store against a new Phoenix antidiscrimination ordinance, in which they asserted that they “hold traditional Christian beliefs about marriage,” including that “‘God created two distinct genders in His image,’ and that only a man and a woman can be joined in marriage.”<sup>66</sup> Therefore, they filed an action to enjoin the City of Phoenix from enforcing its antidiscrimination ordinance against them and for declaratory relief.<sup>67</sup> The court began its lengthy opinion with this sentence: “The rights of free speech and free exercise, so precious to this nation since its founding, are not limited to soft murmurings behind the doors of a person’s home or church, or private conversations with like-minded friends and family.”<sup>68</sup> Instead, “[t]hese guarantees protect the right of every American to express their beliefs in public,” including, in the stationery store’s case, “the right to create and sell words, paintings . . . and art that express a person’s sincere religious beliefs” and, more critically to the case, the right to refuse to create when it is not consistent with those beliefs.<sup>69</sup> In this forum, I will not offer a full evaluation of the court’s opinion; my point is simply to show the emphatic insistence by some that faith must not be relegated to the private sphere—behind closed doors—but instead be exercised “in public,” including in the market.

In *Who’s the Bigot?*, I argue for a framework inspired by Justice Bosson’s concurring opinion in *Elane Photography, LLC v. Willock*.<sup>70</sup> I contend that such a framework fits Justice Kennedy’s admonition in *Masterpiece Cakeshop* that future disputes involving religious objections by merchants to complying with public accommodations law “must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”<sup>71</sup> In *Elane Photography*, Justice Bosson treated the sincere religious beliefs of the business owners respectfully, while also explaining to them that the “price of citizenship” in a pluralistic society requires that, while religious people may live out their faith in many parts of their lives, once they enter the narrower sphere of the marketplace and open their business to the public, they must practice civility and tolerance and serve customers.<sup>72</sup> Justice Bosson made this case by appealing to

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<sup>64</sup> 448 P.3d 890 (Ariz. 2019).

<sup>65</sup> *Id.* at 895 (echoing, without citing, Justice Alito’s dissent in *Obergefell*).

<sup>66</sup> *Id.* at 898.

<sup>67</sup> *Id.* at 899.

<sup>68</sup> *Id.* at 895.

<sup>69</sup> *Id.* (omission in original).

<sup>70</sup> 2013-NMSC-040, 309 P.3d 53.

<sup>71</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1732 (2018).

<sup>72</sup> *Elane Photography*, ¶ 92, 309 P.3d at 79-80.

landmark civil rights cases to show the compelling governmental interests at stake in antidiscrimination laws and by never labeling the plaintiffs, Elaine and John Huguenin, bigots. Justice Bosson also powerfully explained how state antidiscrimination laws that have expanded to prohibit discrimination based on “sexual orientation” reflect a judgment that “to discriminate in business on the basis of sexual orientation is just as intolerable as discrimination directed toward race, color, national origin, or religion.”<sup>73</sup>

I continue to believe that Justice Bosson’s approach provides a useful way forward, but I also know that conservative critics of *Elane Photography* who argue for robust exemptions contend that the “price of citizenship” is too high. To use Murray’s framework, those critics claim that the public marketplace must have more space carved out for the exercise of religion, even when it has the effect of excluding members of the public.

### III. SONU BEDI

I appreciate Professor Sonu Bedi’s insightful reading of my book through the lens of what it teaches about how moral disapproval of racial desegregation and of homosexuality took the form of what he calls a “public and private morality.”<sup>74</sup> I am glad that Bedi finds my book’s use of the idea of a “lagging indicator” useful for pointing out how “understanding the meaning of bigotry” changes over time, which we can see in the “current moral debate about homosexuality.”<sup>75</sup> Bedi suggests that, in presenting to readers arguments made against landmark civil rights legislation, my book manages to bring to the reader arguments against civil rights laws that “now sound like voices from another world” and also makes clear that the “debate over desegregation was also a debate over the public and private sphere.”<sup>76</sup>

As with Professor Murray’s commentary, Bedi raises the question about “the boundary of bigotry,” focusing on the ongoing issue of religious objections by owners of businesses that are covered by state public accommodations laws.<sup>77</sup> Supporters of merchants like Jack Phillips, who refused to bake a wedding cake for a gay couple based on his religious beliefs about marriage, appeal to the right to live out one’s faith in the marketplace. As Bedi recounts, I invoke Justice Bosson’s concurring opinion in *Elane Photography*.<sup>78</sup> As discussed above in my response to Murray, Justice Bosson nowhere describes the Huguenins as “bigots” and instead insists that their beliefs demand our respect; however, he also appeals to the “price of citizenship” as requiring that they be willing to serve customers once they enter the smaller, more focused world of “the marketplace

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<sup>73</sup> *Id.* ¶ 89, 309 P.3d at 79.

<sup>74</sup> Bedi, *supra* note 5, at 2635.

<sup>75</sup> *Id.* at 2640-41.

<sup>76</sup> *Id.* at 2647 (quoting Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimmel*, 110 YALE L.J. 441, 493 (2000)).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2644.

of commerce.”<sup>79</sup> Without using the rhetoric of bigotry, Bosson, as Bedi observes, concludes that “moral disapproval of homosexuality” or, I would add, refusing a customer service based on moral disapproval of homosexuality, has “no place in the sphere of commerce and the marketplace.”<sup>80</sup> Similarly, Bedi argues that civil rights statutes, like the Civil Rights Act of 1964, and Supreme Court cases affirming such laws, like *Piggie Park*, “hold that racial bigotry has no place in restaurants, movie theaters, businesses, and other such nongovernmental spaces.”<sup>81</sup> Once again, I would add “acting on racial bigotry by denying customers service” to stress that civil rights law focuses on conduct, not beliefs or attitudes, even as one effect of such laws may be to change “hearts and minds.”<sup>82</sup>

I very much look forward to learning from Bedi’s new book, *Private Racism*,<sup>83</sup> which will undoubtedly help theorize and make progress on the relationship between public and private racism and how conceptions of the boundary between public and private may hinder steps to advance equality.

#### IV. DOUGLAS NEJAIME

Professor Douglas NeJaime persuasively argues that Professor Reva Siegel’s “insight” about preservation-through-transformation “helps us to make sense of the role of bigotry in contemporary struggles over LGBT equality.”<sup>84</sup> Indeed, I view my project in *Who’s the Bigot?* as compatible with Siegel’s assertion that “[i]f we reconstruct the grounds on which our predecessors justified subordinating practices of the past, we may be in a better position to evaluate contested practices in the present.”<sup>85</sup> I am gratified that NeJaime believes that I have succeeded in undertaking that reconstruction and providing “a more clear-eyed assessment of the role that bigotry plays in struggles over inequality.”<sup>86</sup>

I appreciate that NeJaime notices the critical role of time in assessing bigotry as well as in assessing what is “reasonable.” I largely agree with his analysis of the arguments made in *Masterpiece Cakeshop*, and the Court’s decision illustrates the dynamics of which NeJaime is acutely aware. As he points out, “temporality is key to the Court’s reasoning”: because Phillips’s views “are still considered reasonable and are widely held,” it “seems wrong to compare his views” to religious justifications for slavery and racism, as those views “justified

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<sup>79</sup> See *supra* text accompanying notes 70-73.

<sup>80</sup> Bedi, *supra* note 5, at 2645.

<sup>81</sup> *Id.*

<sup>82</sup> Some of the supporters of the Civil Rights Act of 1964 expressed that hope. See McCLAIN, *supra* note 1 (manuscript at 111-12).

<sup>83</sup> See generally SONU BEDI, *PRIVATE RACISM* (2019).

<sup>84</sup> NeJaime, *supra* note 6, at 2652.

<sup>85</sup> *Id.* at 2653 (alteration in original) (quoting Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997)).

<sup>86</sup> *Id.*

past practices that have been rightly and universally repudiated.”<sup>87</sup> Justice Kennedy insists that impartial civil rights commissioners must treat Phillips’s views with respect.<sup>88</sup> However, as NeJaime further observes, the Court does not conclude that such treatment must “translate into a requirement of religious exemptions.”<sup>89</sup> As I similarly argue in *Who’s the Bigot?*, it is not necessary for a neutral governmental decision-maker to conclude that Phillip is a bigot or that his religious beliefs are bigoted to conclude that he is not entitled to an exemption.<sup>90</sup> The weighty governmental interests furthered by antidiscrimination law may justify denying an exemption, and Justice Kennedy’s opinion, as NeJaime observes, leaves that possibility open.<sup>91</sup>

Finally, I am very grateful to NeJaime for identifying a further puzzle about bigotry: why people do not use the rhetoric of bigotry more often in discussing “past practices of gender subordination.”<sup>92</sup> Why do people not use the label “bigotry” to address stereotypes about gender roles and about differences between men and women?<sup>93</sup> To illustrate the point, NeJaime highlights an example in my book: the defense of Virginia’s law barring same-sex marriage by claiming that centuries of gender-hierarchical marriage law rested on gender complementarity and celebrating sex difference.<sup>94</sup> NeJaime cogently argues that because the Court and much law recognize “‘real differences’ between women and men,” we are unlikely to dismiss “all views premised on sex-based differences as bigoted” but instead to “leave space for some distinctions between women and men.”<sup>95</sup>

I touch on this puzzle briefly in the concluding chapter of *Who’s the Bigot?*, focusing particularly on transgender rights and how arguments like “biology, not bigotry” feature in opposing more expansive definitions of “gender” for the purposes of antidiscrimination law.<sup>96</sup> In future work, I plan to do more on this puzzle that NeJaime raises about gender and bigotry. For example, are the terms “sexism” and “misogyny” sufficient to describe and condemn problems of gender-based inequality? Does bigotry—often equated with hostility, contempt, or hate—seem inapt to describe what social scientists call “benevolent” sexism, defined as stereotypes rooted in paternalistic views about women rather than hostility?<sup>97</sup> I plan, in future work, to attempt to retrieve the various contexts in

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<sup>87</sup> *Id.* at 2664.

<sup>88</sup> *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1722 (2018) (noting lack of respect commissioners showed Phillips’s beliefs).

<sup>89</sup> NeJaime, *supra* note 6, at 2666.

<sup>90</sup> McCLAIN, *supra* note 1 (manuscript at 212-14).

<sup>91</sup> NeJaime, *supra* note 6, at 2667-68.

<sup>92</sup> *Id.* at 2668.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2668-69.

<sup>95</sup> *Id.* at 2669.

<sup>96</sup> McCLAIN, *supra* note 1 (manuscript at 221-29).

<sup>97</sup> *Id.* (manuscript at 228) (detailing social science research on forms of sexism).

which the rhetoric of bigotry does appear in addressing problems of sex inequality, including classic gender discrimination cases. Here I offer a preview of such work.

On October 8, 2019, the Supreme Court heard oral arguments in cases raising the question of whether Title VII's prohibition of employment discrimination based on "sex" includes sexual orientation discrimination or gender identity discrimination.<sup>98</sup> It remains to be seen how the Supreme Court will resolve these cases, but a quick glimpse at whether and how the parties and their amici enlist the rhetoric of bigotry indicates some echoes of the patterns of arguments seen in *Masterpiece Cakeshop*.

One similarity is to warn the Court against a ruling that would brand sincere religious believers as bigots. For example, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*<sup>99</sup> concerns whether the Sixth Circuit correctly concluded that Title VII's prohibition on discrimination based on sex applied to a funeral home owner, Thomas Rost, who fired a transgender female employee, Aimee Stephens, because she wanted to "present" as a woman at work, including in her work clothing.<sup>100</sup> The Sixth Circuit concluded that Rost's religious exercise was not substantially burdened by applying Title VII to the funeral home.<sup>101</sup> As with Jack Phillips, the funeral home and its amici appeal to the burden on their "freedom of conscience" and "sincerely-held religious beliefs."<sup>102</sup> For example, "because Rost interprets the Bible as teaching that sex is immutable, he believed that he 'would be violating God's commands' if a male representative of Harris Homes presented himself as a woman [by wearing a skirt-suit] while representing the company."<sup>103</sup> Rost's amici also warn the Court that unless they reverse the Sixth Circuit, Justice Alito's prediction in *Obergefell* about people with traditional beliefs being "labeled as bigots and treated as such" would "prove true here."<sup>104</sup> Citing Chief Justice Roberts's dissent in *Obergefell*, the National Association of Evangelicals argues that

placing sexual orientation and gender identity on the list of protected classes, with no corresponding accommodation for religion, will in the minds of millions elevate those classes to the same level of moral

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<sup>98</sup> Ariane de Vogue, *Historic Supreme Court Arguments Tuesday in LGBTQ Workplace Rights Dispute*, CNN (Oct. 8, 2019, 7:23 PM) <https://www.cnn.com/2019/10/08/politics/supreme-court-lgbtq-arguments/index.html> [<https://perma.cc/G8FT-ND3W>].

<sup>99</sup> 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

<sup>100</sup> *Id.* at 567-69.

<sup>101</sup> *Id.* at 585-90.

<sup>102</sup> Petition for Writ of Certiorari at 10, 14, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2018 WL 3572625, at \*10, \*14 (quoting *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 856 (E.D. Mich. 2016)).

<sup>103</sup> *Id.* at 5.

<sup>104</sup> See Brief of Amicus Curiae Foundation for Moral Law in Support of Petitioner at 15, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 3942899, at \*15 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2642-43 (2015) (Alito, J., dissenting)).

sensitivity as race—rendering those with traditional religious beliefs on sexuality and gender morally suspect if not bigots.<sup>105</sup>

Another amicus argued that “biology is not bigotry” and that “this Court should not conclude otherwise.”<sup>106</sup>

In response, Stephens and her amici made sparing use of the rhetoric of bigotry. Instead, they argued about prejudice, drawing analogies to other now-prohibited forms of discrimination to emphasize the importance of learning from history. For example, in their amicus brief, law professors William N. Eskridge Jr. and Andrew M. Koppelman asserted, “The exclusion of a class of persons from otherwise express protection on the basis of prejudice against them at the time of enactment does not have an admirable history.”<sup>107</sup> Because Rost argued that enforcing the dress code was necessary to avoid upsetting his grieving customers, another amici countered that “discriminating to appease customer prejudices” is a form of discrimination that “this Court has rejected for decades.”<sup>108</sup> Stephens similarly eschewed the language of bigotry, countering Rost’s customer preference argument by enlisting prior Title VII sex discrimination cases: “[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the [Civil Rights] Act was meant to overcome.”<sup>109</sup> The few references to bigotry in the amicus briefs filed on Stephens’s behalf referred to transgender employees experiencing discriminatory treatment by coworkers, such as being “called bigoted names and slurs.”<sup>110</sup>

This preliminary look at the rhetoric in some of the briefs indicates that Professor NeJaime makes a sound suggestion in urging more engagement with the puzzle of how bigotry features in controversies over sexism, gender discrimination, and the future of civil rights law.

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<sup>105</sup> Brief of National Ass’n of Evangelicals et al. as Amici Curiae in Support of Employers at 24, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 4075083, at \*24 (citing *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting)).

<sup>106</sup> Brief of Ryan T. Anderson as Amicus Curiae in Support of Employers at 4, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 4014071, at \*4.

<sup>107</sup> Brief of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees at 17, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 2915046, at \*17.

<sup>108</sup> Brief of Amici Curiae National LGBT Bar Ass’n et al. in Support of Employees at 3, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 3003456, at \*3.

<sup>109</sup> Brief for Respondent Aimee Stephens at 41, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 2745392, at \*41 (alterations in original) (citation omitted) (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971)).

<sup>110</sup> See, e.g., Amici Curiae Brief of Transgender Law Center et al. in Support of Respondent Aimee Stephens & Affirmance at 5, *R.G. & G.R. Harris Funeral Homes*, 139 S. Ct. 1599 (No. 18-107), 2019 WL 3023275, at \*5.

## V. JAMES FLEMING

I owe Professor Jim Fleming enormous thanks for the many years of constructive and generous engagement as I worked on this project. Beyond his specific essay in this book, his contribution is much more extensive, including numerous discussions, careful editing, and coauthored work that helped to shape *Who's the Bigot?*<sup>111</sup> Confining myself only to his essay, however, I will simply say that I agree with his analysis of how Justice Kennedy, the author of the Court's four "gay rights" opinions, shifted from a jurisprudence of animus, or a focus on illicit emotions, to a focus on the social meaning of discriminatory practices.<sup>112</sup> Indeed, Fleming's argument about this trajectory shaped my own analysis.

I would point out, however, that the trajectory that Fleming tracks is more like an oscillation between the two poles of Kennedy's jurisprudential frameworks, because *United States v. Windsor*<sup>113</sup>—which came after *Lawrence* and which Fleming argues shows the shift away from animus—refers to Congress's purposes in enacting DOMA as seeking to disparage and injure. Justice Kennedy quotes *Romer*'s language about "bare congressional desire to harm" in explaining why DOMA violates the Constitution's "guarantee of equality."<sup>114</sup> Of course, other parts of Justice Kennedy's opinion support Fleming's argument, because (as I observe in Chapter Seven of *Who's the Bigot?*) Justice Kennedy also "stresses DOMA's harmful social meaning."<sup>115</sup> Justice Kennedy writes about the stigma that DOMA imposes and the social meaning of the federal government denying the very dignity that the State of New York sought to confer in extending marriage to same-sex couples.<sup>116</sup> His famous language about the harm and humiliation suffered by same-sex couples' children also looks to the social meaning of discriminatory practices.<sup>117</sup> But in any case, Fleming and I both agree that *Obergefell* abandons any talk of animus or bad motives, instead explaining the limits of using the law to put the state's "imprimatur" upon beliefs (however sincere) that deny other people liberty.<sup>118</sup> Finally, I agree with Fleming that the turn to the rhetoric of bigotry in the

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<sup>111</sup> See, e.g., JAMES E. FLEMING ET AL., *GAY RIGHTS AND THE CONSTITUTION* (2016); JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013).

<sup>112</sup> Fleming, *supra* note 5, at 2673.

<sup>113</sup> 570 U.S. 744 (2013).

<sup>114</sup> MCCLAIN, *supra* note 1 (manuscript at 174) (quoting *Windsor*, 570 U.S. 770).

<sup>115</sup> *Id.* (manuscript at 174-75).

<sup>116</sup> *Windsor*, 570 U.S. at 768 ("[T]he State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. . . . The Federal Government uses this state-defined class for the opposite purpose—to impose restrictions and disabilities.").

<sup>117</sup> MCCLAIN, *supra* note 1 (manuscript at 175) (citing *Windsor*, 570 U.S. at 771).

<sup>118</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).



dissenting opinions stems more from the ongoing cultural war than from a careful parsing of Justice Kennedy's opinion.

#### VI. IMER FLORES

I appreciate Professor Imer Flores's creative "law and literature" approach in his response to my book manuscript. To counter my conclusion that, while the rhetoric of bigotry carries risk, it is sometimes "necessary and appropriate," Flores enlists two novels by Harper Lee, the classic *To Kill a Mockingbird*<sup>119</sup> and the controversial, posthumously published *Go Set a Watchman*,<sup>120</sup> to argue that that such rhetoric is neither necessary nor appropriate.<sup>121</sup> Putting my book into conversation with those two novels, Flores compares the rhetoric of bigotry in these various texts to show how this rhetoric—both in fiction and in real life—stops conversations, "backfires," and "boomerangs," rather than advancing understanding or the goals of justice.<sup>122</sup>

One of the most intriguing features of Flores's essay is his exposition of how Lee's characters, both in *To Kill a Mockingbird* and *Go Set a Watchman*, enlist the rhetoric of bigotry and conscience and disagree over how to answer the question "Who's the bigot?" In *Who's the Bigot?*, I argue that, in historical and more recent political and legal controversies over marriage and civil rights, people disagree over who is a bigot and why. They also flip the charges of bigotry: as one example, while supporters of the landmark Civil Rights Act of 1964 called upon the nation's conscience to enact legislation showing that "our spirit is not narrow bigotry," opponents of that legislation countered that those who supported the law were the "real" bigots and, indeed, "anti-bigot bigots."<sup>123</sup> Flores shows the same dynamic at work in Lee's fiction, particularly in *Go Set a Watchman*. Because of the iconic status both of *To Kill a Mockingbird* and of country lawyer Atticus Finch as a paragon, many readers have found *Go Set a Watchman*'s portrayal of Finch as a racist extremely disturbing.<sup>124</sup> Certainly, Finch's daughter Jean Louise, in *Go Set a Watchman*, found his racial attitudes and behavior deeply troubling. She finds it "disgusting" that he has joined a citizens' council in their home town of Maycomb, Alabama.<sup>125</sup>

As Flores recounts, Jean Louise asks her uncle what has turned her father into a "n—hater."<sup>126</sup> She resists her uncle's attempts to explain her father's behavior;

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<sup>119</sup> HARPER LEE, *TO KILL A MOCKINGBIRD* (Harper Collins 2006) (1960) [hereinafter LEE, *MOCKINGBIRD*].

<sup>120</sup> HARPER LEE, *GO SET A WATCHMAN* (2015) [hereinafter LEE, *WATCHMAN*].

<sup>121</sup> Flores, *supra* note 7, at 2687 (quoting McCLAIN, *supra* note 1 (manuscript at 13-14)).

<sup>122</sup> *Id.* at 2686-87.

<sup>123</sup> McCLAIN, *supra* note 1 (manuscript at 103, 124).

<sup>124</sup> I read *To Kill a Mockingbird* as a required book when I was a public-school student in Ohio and have seen the film more than once. I have only read parts of *Go Set a Watchman* in order to understand the context of Professor Flores's various quotes from the book.

<sup>125</sup> LEE, *WATCHMAN*, *supra* note 120, at 238.

<sup>126</sup> Flores, *supra* note 7, at 2690 (quoting LEE, *WATCHMAN*, *supra* note 120, at 188).

later, her uncle turns to the rhetoric of bigotry but only to say that she is a bigot—“not a big one, just an ordinary turnip-sized bigot”—while her father is not.<sup>127</sup> How is this possible? When Jean Louise looks up the dictionary definition, she reads: “Bigot . . . Noun. One obstinately or intolerably devoted to his own church, party, belief, or opinion.”<sup>128</sup> She then demands that her uncle explain himself.<sup>129</sup> He asserts that Jean Louise is a bigot because she was “rigid” and would not “give” when her uncle challenged her opinions of her father, running and lashing out rather than listening to his explanation of her father’s attitudes.<sup>130</sup>

Flores contrasts the obstinacy that Jean Louise’s uncle attributes to her with the advice her father gave her in *To Kill a Mockingbird*—in effect, about being willing to try to understand another person’s perspective. However, instead of the usual adage of walking a mile in another’s shoes,<sup>131</sup> Atticus uses a more provocative image given the time and setting of the book:

“First of all, . . . if you can learn a simple trick, Scout, you’ll get along a lot better with all kind of folks. You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it.”<sup>132</sup>

In effect, Dr. Finch (Uncle Jack) charges Jean Louise with being an “ordinary turnip-sized bigot” for failing to heed this advice in judging her own father’s transformation into an outright racist.<sup>133</sup>

But what would Jean Louise learn if she had taken that perspective? In the scene in which her uncle tries to explain her father’s conduct—“Baby . . . all over the South your father and men like your father are fighting a sort of rearguard, delaying action to preserve a certain kind of philosophy that’s almost gone down the drain”—she retorts, “If it’s what I heard yesterday I say good riddance.”<sup>134</sup> In other words, that “philosophy” should properly be condemned and left behind. To call this philosophy bigoted would signal such condemnation. And yet her uncle instead uses the label on Jean Louise because she takes this “rigid” view of her father’s “philosophy,” unwilling to understand. In a later scene, Atticus attempts to explain himself to Jean Louise, acknowledging she is “upset by having seen me doing something you think is wrong” but stating that he is trying to “make you understand my position.”<sup>135</sup>

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<sup>127</sup> LEE, WATCHMAN, *supra* note 120, at 266-67.

<sup>128</sup> *Id.* at 267.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Elsewhere in the novel, Scout recalls this advice, using the shoe image. Atticus uses the shoe image when he gives similar advice to an employee (and old friend of Scout) in *Go Set a Watchman*. LEE, WATCHMAN, *supra* note 120, at 224.

<sup>132</sup> LEE, MOCKINGBIRD, *supra* note 119, at 33.

<sup>133</sup> LEE, WATCHMAN, *supra* note 120, at 267.

<sup>134</sup> *Id.* at 188.

<sup>135</sup> *Id.* at 246.

Atticus's "position" seems to be one of racial difference and separation. Flores does not view *Go Set a Watchman* as a proper follow-up to *To Kill a Mockingbird*, but he nonetheless offers an intriguing attempt to read it as a chronological, even if improper, sequel by considering the different historical settings of the books, from the 1930s to the 1950s. Flores suggests that the twin developments of World War II and *Brown v. Board of Education*<sup>136</sup> might explain how Atticus, a seemingly "progressive character," could become less so over time.<sup>137</sup> Atticus's sentiments against racial integration resemble white opposition, detailed in *Who's the Bigot?*, to *Brown* and, later, to the Civil Rights Act of 1964 because of forced racial "inter-mingling" in schools, churches, and other spaces of everyday life, as well as the supposed inevitability of interracial marriage.<sup>138</sup> Thus, Atticus questions Louise: "Do you want Negroes by the carload in our schools and churches and theaters? Do you want them in our world?"<sup>139</sup> And: "Do you want your children going to a school that's been dragged down to accommodate Negro children?"<sup>140</sup>

As Atticus sums up his philosophy, "[S]o far in my experience, white is white and black's black. So far, I've not yet heard an argument that has convinced me otherwise."<sup>141</sup> By tacking on that, although he is seventy-two, "I'm still open to suggestion,"<sup>142</sup> is Atticus saved from bigotry because he is not holding his view "obstinately" and "rigidly" and would revise his views in light of new evidence? Dr. Finch's application of the rhetoric of bigotry, Flores's example suggests, shows some of the ways that the term is vulnerable to manipulation, so that the anti-racist, not the racist, is the real bigot.

Notably, in *Go Set a Watchman*, Lee puts criticism of *Brown* in Jean Louise's mouth, too. Atticus begins by giving his reasons for joining the citizens' council, pointing to "[t]he Federal Government and the NAACP."<sup>143</sup> He then asks her about her first reaction to the *Brown* decision; as Flores quotes, she answers "I was furious" because "there they were, tellin' us what to do again," "rub[bing] out" the Tenth Amendment to "satisfy" another amendment.<sup>144</sup> Jean Louise makes a speech against judicial interference and the Court "breezily" canceling the Tenth Amendment to "meet the real needs of a small portion of the population," rather than bringing about change through "Congress and state legislatures like we should."<sup>145</sup> And yet, when Atticus concludes that they are in agreement, because they both believe the "very same things," including that the

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<sup>136</sup> 347 U.S. 483 (1954).

<sup>137</sup> Flores, *supra* note 7, at 2692-93.

<sup>138</sup> McCLAIN, *supra* note 1 (manuscript at chs. 4-5).

<sup>139</sup> LEE, WATCHMAN, *supra* note 120, at 245-46.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 246.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 238.

<sup>144</sup> *Id.* at 238-39.

<sup>145</sup> *Id.* at 239-40.

Constitution is “higher” than the Court, she and Atticus are again at odds because she endorses the Court’s ruling, even though disapproving of the way it did it.<sup>146</sup> She reasons, “It was put under their noses and they had to do it,” and insists: “Atticus, the time has come when we’ve got to do right” and “give ‘em [African Americans] a chance.”<sup>147</sup> He counters her appeal to giving African Americans “the same opportunities anyone else has” by stating that they are free to go elsewhere in the country to find what they want.<sup>148</sup>

Their disagreement sharpens when Atticus blames the NAACP for stirring up trouble and Jean Louise defends it, arguing that the NAACP came into the state because of white failures to help blacks and noting that in response to *Brown*, “we didn’t give an inch” or try to help people “live with the decision”: “I think we deserve everything we’ve gotten from the NAACP and more.”<sup>149</sup>

The conversation degenerates as Jean Louise recounts how, growing up, she looked up to Atticus and believed in him and what he taught her about justice and right, which did not prepare her for his present beliefs and deeds.<sup>150</sup> Arguing that he views blacks as “subhuman” and denies them any hope, she compares his views to that of Hitler and the “crowd” in Russia.<sup>151</sup> After calling him a “nice, sweet, old gentleman,” she concludes “I despise you and everything you stand for” and states, when he responds that he loves her, “I’m getting out of this place fast.”<sup>152</sup> She is, in effect, unable to hate the sin, not the sinner, or to separate bigoted beliefs and actions from the bigot. Instead, she is “sick of” his “moral double-dealing” and vows that she will “never believe a word [he] say[s] to [her] again.”<sup>153</sup>

Is Lee trying to convey how an educated white man in the Deep South could support Massive Resistance? Is Atticus representative of the white “moderate,” who perceived himself as caught between the two “extremes” of the Klan and the NAACP?<sup>154</sup> Notably, Jean Louise resists Atticus’s attack on the NAACP.

Flores argues that while, in *To Kill a Mockingbird*, Atticus realizes that “folkways” may be harder to change than “stateways,” in *Go Set A Watchman*, he exemplifies the recalcitrance of “folkways” resisting efforts to establish new “stateways.”<sup>155</sup> This recalcitrance spurs Jean Louise to vote with her feet and vow to break both her family relationship with Atticus and her relationship to the South, and to go to a place so she will never “see” or “hear” of “another

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<sup>146</sup> *Id.* at 241.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 246.

<sup>149</sup> *Id.* at 245.

<sup>150</sup> *Id.* at 247-50.

<sup>151</sup> *Id.* at 251-52.

<sup>152</sup> *Id.* at 252-53.

<sup>153</sup> *Id.* at 241, 253.

<sup>154</sup> McCLAIN, *supra* note 1 (manuscript at 100-01).

<sup>155</sup> Flores, *supra* note 7, at 2695-96.

Finch . . . as long as I live.”<sup>156</sup> In effect, Jean Louise views her father and people with his racial views as irredeemable, or at least she does not view it as her task to stay around and work toward that redemption. In a passage of the book not quoted by Flores, Atticus elaborates on the basis for his “position” that “white is white and black’s black.”<sup>157</sup> When Jean Louise invokes principles like “equal rights for all; special privileges for none,” he counters by asking if she has ever considered that “you can’t have a set of backward people [‘our Negro population’] living among people advanced in one kind of civilization and have a social Arcadia.”<sup>158</sup> These are part of Atticus’s evident “plain truths”<sup>159</sup> about how things “are”—i.e., “folkways,” “white ways.” He tells Jean Louise that the black people “down here” are “still in their childhood as a people,” although they have made “terrific progress in adapting themselves to white ways.”<sup>160</sup>

Evidently, the two different portrayals of Atticus in *To Kill a Mockingbird* and *Go Set a Watchman* reflect Harper Lee’s complex and ambivalent relationship with her own father—lawyer and newspaperman A.C. Lee.<sup>161</sup> That may account for the vehemence and passion with which Jean Louise denounces her father in *Go Set a Watchman*, dramatically charging him with “killing her” because of the contrast between her upbringing and his current behavior.<sup>162</sup> As biographer Joseph Crespino puts it, “A.C. Lee would be an inspiration for his daughter’s fiction not because he was ahead of his time . . . but rather because he was *of* his time . . . and *of* his place, and yet still aspired to worthy ideals and noble virtues.”<sup>163</sup> A.C. Lee was both a “principled opponent of mob rule” and a “racial paternalist” who was strongly critical of any attempt by “outside groups or bureaucracies” to judge the South’s morality or mitigate racial bias in Alabama.<sup>164</sup> In his numerous editorials for the paper he owned and edited, the *Monroe Journal*, he “praised law-enforcement officers who protected black prisoners from lynchings” but “opposed a federal anti-lynching law,” because (in his words) it “violates the fundamental idea of states rights and is aimed as a form of punishment upon the southern people.”<sup>165</sup>

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<sup>156</sup> LEE, WATCHMAN, *supra* note 120, at 253.

<sup>157</sup> *Id.* at 246.

<sup>158</sup> *Id.* at 242.

<sup>159</sup> *Id.* at 243.

<sup>160</sup> *Id.* at 245.

<sup>161</sup> See Casey Cep, *The Contested Legacy of Atticus Finch*, NEW YORKER, Dec. 10, 2018, at 68 (quoting letter from Harper Lee to her former Shakespeare professor acknowledging, “Yes, Atticus was my father”). See generally JOSEPH CRESPINO, ATTICUS FINCH: THE BIOGRAPHY; HARPER LEE, HER FATHER, AND THE MAKING OF AN AMERICAN ICON (2018).

<sup>162</sup> LEE, WATCHMAN, *supra* note 120, at 236-53.

<sup>163</sup> CRESPINO, *supra* note 161, at 19.

<sup>164</sup> Eric Parker, *Atticus Finch: Civil-Rights Hero or Stereotypical Racist?*, GOSPEL COALITION (July 12, 2019), <https://www.thegospelcoalition.org/reviews/atticus-finch-civil-rights-hero-stereotypical-racist/> [https://perma.cc/468E-YG2P] (discussing Crespino’s book).

<sup>165</sup> Cep, *supra* note 161, at 68 (quoting A.C. Lee editorial).

A.C. Lee and Harper Lee shared a desire that the world have a “better opinion of upper-class Southern WASPs than they deserve,” a group described by Howell Raines, in a review of Crespino’s book, as “genteel white supremacists”: “educated, well-read, well-traveled Alabamans who would never invite George Wallace into their homes, but nonetheless watched in silence as he humiliated poor Alabama in the eyes of the world.”<sup>166</sup> *To Kill a Mockingbird* would seem to serve that goal: while it shows “class bigotry” toward its lower-class white villains, Atticus gave Alabama a “civic mythology it could live with.”<sup>167</sup> The Pulitzer Prize-winning novel and the Oscar-winning film adaptation gave Alabama “an internationally accepted statement that we are better than the rest of America . . . has been willing to admit.”<sup>168</sup> By comparison, *Go Set a Watchman* told a different story about the South that publishers “didn’t want to tell”: Atticus Finch is “overtly racist,” “benighted,” and “a gentleman bigot” engaged in “stilted exchanges” with his “more enlightened daughter.”<sup>169</sup>

Flores also uses Lee’s two novels to examine the challenges in eradicating prejudice (including implicit biases—or the bigot in our brains—as well as overt or blatant prejudice—or bigotry). He is skeptical that “conscience” alone can do the work, even when law embraces “conscience” through antidiscrimination laws (“legislating morality,” as I discuss in Chapter Five of *Who’s the Bigot?*).<sup>170</sup> Countering the premise or faith that “conscience” can indict and eliminate “bigotry” and that “stateways can change folkways,” as social scientists and civil rights movement activists argued, is the problem that people also appeal to “conscience” to defend their prejudices and oppose civil rights laws, as *Who’s the Bigot?* and *Go Set a Watchman* both show.<sup>171</sup>

Lee’s two novels show conscience in both these guises. In *To Kill a Mockingbird*, when Scout (Jean Louise) seems to enlist majority rule as a guide to what is right, she tells Atticus that “most folks seem to think they’re right and you’re wrong,” to which he responds by appealing to his conscience as beyond the reach of majority rule.<sup>172</sup> He explains that, while others are “certainly entitled to think that [he’s wrong], and they’re entitled to full respect for their opinions, . . . before I can live with other folks I’ve got to live with myself. The one thing that doesn’t abide by majority rule is a person’s conscience.”<sup>173</sup> By comparison, “conscience” is more problematic in *Go Set a Watchman* because it seems to be invoked to justify Atticus’s shocking (to Jean Louise) racial views. Indeed, Flores quotes Jean Louise’s uncle, Dr. Finch, telling her: “Every man’s

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<sup>166</sup> Howell Raines, *Harper Lee and Her Father; the Real Atticus Finch*, N.Y. TIMES, Jun. 24, 2018, at BR0 (book review) (reviewing Crespino, *supra* note 161).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Cep, *supra* note 161, at 68 (attributing term “gentleman bigot” to Isabel Wilkerson).

<sup>170</sup> Flores, *supra* note 7, at 2705.

<sup>171</sup> *Id.* at 2706.

<sup>172</sup> LEE, *MOCKINGBIRD*, *supra* note 119, at 120.

<sup>173</sup> *Id.*

island, Jean Louise, every man's watchman, is his conscience. There is no such thing as a collective conscious."<sup>174</sup> As Flores points out, conscience appears not just as a bulwark against "the majority" but also, as it is individual, leads to pitting one conscience against another.<sup>175</sup> The context in which Dr. Finch says this to Jean Louise warrants mentioning: he suggests that, until her disillusionment with her father, her own conscience had been too bound up with her father's (like a "barnacle"), and she idealized him, confusing him "with God" and not seeing his "failings."<sup>176</sup> He asserts that both he and her father realized this and wondered what would cause "[her] conscience and his" to part company; he tells her that the spur proved to be seeing Atticus "doing something that seemed to you to be the very antithesis of his conscience—your conscience."<sup>177</sup> Her uncle claims that Atticus permitted her to attack him without defending himself because she had to "break" her "icons" and "reduce him to the status of a human being."<sup>178</sup> It is during this conversation that Dr. Finch charges Jean Louise with being "an ordinary turnip-sized bigot" for running from Atticus and the "pretty offensive talk" instead of her (bigoted) "tendency not to give anybody elbow room in [her] mind for their ideas, no matter how silly" she thinks they are. He urges her to "take time" for such people,<sup>179</sup> and the book's ending suggests that she might be willing to stay.

Flores argues that the best ways to combat prejudice are education and social interaction (or what I discuss in *Who's the Bigot?* as social contact on terms of equality, or intergroup contact). *To Kill a Mockingbird* offers some positive examples, as when Atticus instructs Scout and Jem not to use the "n—word," even though that's how "everybody at school" speaks.<sup>180</sup> Further, Atticus, in this more benevolent incarnation, is a moral tutor, explaining to Scout that she must "hold her head high" at school and not speak the way others do, and stating that the term "n—lover"—a term applied to Atticus for his legal defense of Tom Robinson—is a "common, ugly term to label somebody," a term used by "ignorant, trashy people . . . when they think somebody's favoring Negroes over and above themselves."<sup>181</sup> Further, as Flores recounts, elsewhere in the novel Atticus embraces the charge of "n—lover," turning it into a positive trait: "I certainly am. I do my best to love everybody."<sup>182</sup>

In *Go Set a Watchman*, Jean Louise is jarred by the contrast between Atticus's current positions on race and the "color blind" and virtuous way in which she was "raised, by a black woman [Calpurnia, the family maid] and a white man

<sup>174</sup> Flores, *supra* note 7, at 2706 (quoting LEE, WATCHMAN, *supra* note 120, at 264-65).

<sup>175</sup> *Id.*

<sup>176</sup> LEE, WATCHMAN, *supra* note 120, at 265.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 266.

<sup>179</sup> *Id.* at 267.

<sup>180</sup> LEE, MOCKINGBIRD, *supra* note 119, at 85-86.

<sup>181</sup> *Id.* at 124.

<sup>182</sup> *Id.*

[Atticus]” never to “take advantage of anybody” less fortunate than she was “in brains, wealth, or social position.”<sup>183</sup> Flores relates this child-rearing philosophy to the role of social interaction in combating prejudice: encountering others with an attitude (invoking Dworkin) of “equal concern and respect.”<sup>184</sup> As Flores points out, the prescription for fighting implicit bias offered by present-day social scientists goes further, urging that people change their lives to encounter members of minority groups on a regular basis so they are not “betrayed” by “hesitation and discomfort.”<sup>185</sup> This affirmative prescription goes further than the guidance of not taking advantage. By contrast, in *Go Set a Watchman*, Atticus favors racial separation, invoking images of “busloads” of black people descending upon schools, churches, and public spaces. Later in the novel, Dr. Finch seems to criticize Jean Louise for being “color blind,” seeing only individual differences, and for being unable to “think racially,” even as “race is the burning issue of the day.”<sup>186</sup> But Dr. Finch seems to have some consciousness of how racial prejudice distorts this “issue.” When Jean Louise counters that that does not mean that she wants to “run out and marry a Negro or something,” her uncle seems to recognize that the issue of interracial marriage is “one of the tom-toms the white supremacists beat”; attending racially integrated schools does *not* lead inevitably to intermarriage, but white supremacists “wrap” the issue up in “a miasma of sex,” because they know it will “strike terror in Southern mothers.”<sup>187</sup> Dr. Finch does not approve of these tactics, observing, “[T]he white supremacists fear reason, because they know cold reason beats them.”<sup>188</sup> This is the context in which Dr. Finch makes the statement about prejudice quoted by Flores: “Prejudice, a dirty word, and faith, a clean one, have something in common: they both begin where reason ends.”<sup>189</sup>

Flores concludes his provocative commentary on Lee’s two novels by returning to Atticus’s advice to have empathy through perspective-taking (“climb into [the other person’s] skin and walk around in it”).<sup>190</sup> Flores urges that we keep the conversation open and attempt to hear “both sides of the story,” even when we dislike the other point of view.<sup>191</sup> In this vein, the “radical empathy” Atticus teaches Scout and Jem is part of his legacy: “[M]illions of Americans credit Harper Lee with teaching them how to understand difference” by heeding Atticus’s advice.<sup>192</sup> On the other hand, that radical empathy is a source of one criticism of *To Kill A Mockingbird*’s Atticus Finch; he insisted on

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<sup>183</sup> LEE, *WATCHMAN*, *supra* note 120, at 179.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* (quoting MALCOLM GLADWELL, *BLINK* 97 (2005)).

<sup>186</sup> LEE, *MOCKINGBIRD*, *supra* note 119, at 270.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Flores, *supra* note 7, at 2701 (quoting LEE, *WATCHMAN*, *supra* note 120, at 270-71).

<sup>190</sup> *See id.* at 2708 (quoting LEE, *MOCKINGBIRD*, *supra* note 119, at 33).

<sup>191</sup> *Id.* at 2709.

<sup>192</sup> Cep, *supra* note 161, at 71.



“the human decency of even overt bigots.”<sup>193</sup> Tellingly, a new stage production turns that empathy and his belief in the “goodness in everyone, even homicidal white supremacists,” into “his fundamental flaw.”<sup>194</sup>

In the scenes Flores describes from *Go Set a Watchman*, Jean Louise does not show such empathy toward Atticus, ultimately choosing to separate from him and from the South. However, by the end of the novel, Jean Louise seems to have had a change of heart and to be more willing to keep the conversation going. Her uncle asks her if she would be willing to “come[] home” because “there’s room for you down here,” and the town needs her.<sup>195</sup> When she says that she would not “fit in” and cannot fight everybody, her uncle observes that “[y]ou’d be amazed if you knew how many people are on your side,” but “we need some more of you.”<sup>196</sup> He argues that “the time your friends need you is when they’re wrong” and opines that “it takes a certain kind of maturity to live in the South these days,” suggesting that Jean Louise might be able to achieve it if she remains.<sup>197</sup>

In the final chapter, Atticus tells her he is proud of her for holding her ground “for what she thinks is right,” including standing up to him.<sup>198</sup> After she tells him that she thinks that she loves him “very much,” she sees “her old enemy’s shoulders relax” and gets into the car with him, “welcom[ing] him silently to the human race.” Yet a “stab of discovery” makes her “tremble a little.”<sup>199</sup> What is that discovery? She seems to have shifted from wanting to “crush” him, “stamp[ing] out all the people like him” to “preserve” her world, to viewing things more as a matter of balancing—balancing between the “thrust” and “drag” of an airplane.<sup>200</sup> The reader is left to wonder whether Jean Louise will be willing and able to play a transformative role in the life of her father and in the town that “needs her.”

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<sup>193</sup> *Id.* at 69 (detailing criticism espoused in Monroe Freedman, Opinion, *Atticus Finch, Esq., R.I.P.*, LEGAL TIMES, Feb. 24, 1992, at 20, 20).

<sup>194</sup> *Id.* at 71 (quoting Aaron Sorkin, script writer for new play).

<sup>195</sup> LEE, WATCHMAN, *supra* note 120, at 271-72.

<sup>196</sup> *Id.* at 272.

<sup>197</sup> *Id.* at 273.

<sup>198</sup> *Id.* at 277.

<sup>199</sup> *Id.* at 278.

<sup>200</sup> *Id.* at 277.