

THE PRICE OF CITIZENSHIP:
AN ANALYSIS OF ANTI-DISCRIMINATION LAWS AND
RELIGIOUS FREEDOMS IN *ELANE PHOTOGRAPHY,
LLC V. WILLOCK*

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I. INTRODUCTION

In 2006, Vanessa Willock [“Willock”] emailed Elane Photography, LLC [“Elane”] about the company’s services and to determine whether it would be available to photograph her commitment ceremony to another woman.¹ Mrs. Willock was expressly denied service by the company via an email from the company’s owner, Elaine Huguenin.² Mrs. Willock filed a complaint against the company with the New Mexico Human Rights Commission.³ The commission found that the company had discriminated against Willock in violation of Section 28-1-7(F) of the New Mexico Human Rights Act [“NMHRA” or “HRA”] and ordered the company to pay Willock and her partner over six thousand dollars in attorney’s fees.⁴ Elane appealed the decision to

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1 *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60 (N.M. 2013), *cert. denied*, 134 S.Ct. 1787 (2014). Elane Photography, LLC is the name of the for-profit, incorporated business entity that was created by the Huegenins. Any reference to “Elane” shall refer to the business as an entity. Any reference to the Huegenins shall mean the couple as individuals.

2 *Id. Elane Photography* responded to an inquiry from Vanessa Willock by saying that the company will only photograph “traditional weddings.” *Id.* Willock responded by asking, “Are you saying that your company does not offer your photography services to same-sex couples?” *Id.* Elane then responded, “Yes, you are correct in saying we do not photograph same-sex weddings.” *Id.*

3 *Id.* The New Mexico Human Rights Commission was created by the New Mexico Human Rights Act and was charged with administering claims of violations. New Mexico Human Rights Act (NMHRA), N. M. Stat. Ann. §§ 28-1-3(A-D) (1978).

4 *Elane Photography*, 309 P.3d at 60. The New Mexico Human Rights Act was amended in 2003 to include language that:

[I]t is an unlawful discriminatory practice for any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities,

the Second Judicial District Court for a trial de novo.⁵ The trial court granted Willock's summary judgment, which was subsequently affirmed by both the New Mexico Court of Appeals and the New Mexico Supreme Court.⁶

Homosexuals have faced opposition in their political, social, and private lives in the United States and other parts of the world for many, many years.⁷ Their rights and their roles in society as equals have been continuously questioned and attacked.⁸ Even today in 2014, there are efforts on the part of social, political, and religious conservatives to inhibit the progresses that have been made in the way of marriage and general equality for homosexuals in the United States.⁹

This note will begin with a historical view of discrimination against homosexuals. Two particular global "events" will be

accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, *sexual orientation*, gender identity, spousal affiliation or physical or mental handicap

2003 N.M. Laws 383 (codified at N.M. Stat. Ann. §§ 28-1-7(F) (2003).

5 *Elane Photography*, 309 P.3d at 60. Pursuant to Section 28-1-13(A), all appeals from inferior tribunals to the district court shall be tried anew in said courts on the merits, as if no trial had been had below. *Id.*

6 *Id.*

7 Homosexuals have always been targets of discrimination. They have faced obstacles in the realm of their dealings with children where their ability to parent is scrutinized, their ability to serve in capacity as school teachers of young children, and even in mentoring roles like serving for the Boy Scouts of America. AMY D. RONNER, *HOMOPHOBIA AND THE LAW*, 6-7 (2005). Homosexuals have faced affronts to their private lives in restrictions on bars that were deemed "gay bars" and the criminalization of sodomy and other forms of sexual contact between members of the same sex. PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT*, 133-136 (2000). Homosexuals have even faced discrimination during their time in armed services as the "Don't Ask, Don't Tell" policy stood as a reminder that gays could serve and die for their country, but they could not do so openly. PETER NICOLAS, *SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CONSTITUTION*, 596-611 (2013).

8 Often gays and lesbians are attacked on the basis that their lifestyle is an affront to family values and religious beliefs. MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY*, 95-98 (2010). Gays and lesbians have also not been afforded the same equal protection in a federal anti-discrimination statute such as that which was afforded to other minorities in the Civil Rights Act of 1964. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

9 Adam Serwer, *States Fight to Push Anti-Gay Bills. But Will They Pass?*, MSNBC (Feb. 22, 2014), <http://www.msnbc.com/msnbc/states-push-anti-gay-bills-will-they-pass>. Several states including Kansas, Arizona, Missouri, and Georgia have proposed bills that would allow for discrimination against homosexuals in public settings. *Id.*

highlighted: the Holocaust and pre-*Lawrence* United States.¹⁰ These two regimes in history provide perfect starting points for any discussion on discrimination of homosexuals because of the general familiarity with the subjects, their overt ideologies, their overlap in history, and their readily accessible bodies of law. First, the note will delve into the Nazis and their treatment of homosexuality. The focus will be upon their laws and decrees from 1933 – 1945, particularly the propaganda and underlying ideology behind these laws. Then there will be a discussion of American jurisprudence and how gay rights have developed from criminality in every American jurisdiction in the 1900s to the near equality they now enjoy.

This note will then outline the *Elane Photography* case and focus on the claims made by Elane that the NMHRA violated the company's free exercise of religion. While the other claims are interesting in their own right, the juxtaposition of religious freedoms and anti-discrimination (especially when it comes to same-sex marriage) is and will continue to be relevant in the coming years in the United States.

The paper will then embark on a discussion of the argument put forth by Elane and other "religious objectors"¹¹ and whether the religious objector can use their religious beliefs to defend discriminating against homosexuals, regarding same-sex marriage in a business or public sphere setting. There will also be a discussion of the contemporary (or possibly not so contemporary) view of homosexuality.

Finally, the paper will return to a discussion of the modern day juxtaposition of religious freedoms and anti-discrimination laws. It will consider the likely results if religious objectors are entitled to make their argument for an exemption to anti-discrimination laws. A recommendation will be put forth about how a case like *Elane Photography* would and should come out if a

10 *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding state laws which criminalize the act of sodomy are unconstitutional). Prior to *Lawrence*, several states had existing laws on the books which criminalized the act of sodomy. *Lawrence* overturned the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had held a Georgia sodomy law valid because there existed no constitutional right to engage in homosexual sex.

11 The paper will reference "religious objector." This is intended to specifically point to Christians and more specifically to the Christians in the United States who have objected to same-sex marriage and become proponents to legally advocate these objections through legislation or, like *Elane Photography*, by challenging anti-discrimination laws.

company was entitled to some further legal arguments concerning its owners' freedom of religion.

II. HISTORICAL VIEW OF HOMOSEXUALITY

A. The Nazi "Heterosexual" State

Homosexuals have been oppressed for quite some time and their persecution is not merely confined to the United States.¹² In fact, homosexuals are persecuted around the world, and in many regards are given much harsher treatment than here in the United States.¹³ One particular incident of complete persecution of homosexuals is the Holocaust.¹⁴ The Nazis were ardently opposed to homosexuality.¹⁵ Their laws and policies displayed their desire to control a state of people consisting entirely of heterosexuals.¹⁶ Prior to Nazi control, homosexuals had enjoyed a common, if not robust, role in German society.¹⁷ Some accounts claim the German legislation that criminalized homosexuality was nearly overturned in 1932.¹⁸ This was all undone, however, when the Nazis took control and implemented sweeping legislation.¹⁹ The most well known Nazi legislation regarding homosexuality was an update to §175 of Germany's Criminal Code.²⁰ Originally, this section of the criminal code specifically outlawed the act of sodomy, but the Nazi update broadened its application.²¹ Early in the Third Reich, from

12 Monica Saxena, *More than Semantics: the Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims*, 12 MICH. J. GENDER & L. 331, 333-36 (2006). For example, in Iran the punishment for a third conviction of homosexuality is death. *Id.* In India, a conviction can result in life imprisonment. *Id.* In Jamaica, homosexual behavior can result in ten years' imprisonment. *Id.*

13 *Id.*

14 RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS*, 13-19, 108-09 (2011).

15 *Id.* at 106-09.

16 *Id.* See also *Persecution of Homosexuals in the Third Reich*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005261> (last updated June 20, 2014).

17 *Id.*

18 Rictor Norton, *"One Day They Were Simply Gone": The Nazi Persecution of Homosexuals*, GAY HISTORY & LITERATURE, <http://rictornorton.co.uk/nazi.htm> (last updated Aug. 10, 2010).

19 PLANT, *supra* note 14, at 110.

20 *Id.* at 206.

21 *Id.* at 110-11. The original version of §175 came in 1871, well before Nazi control, and was generally interpreted to outlaw anal sex between two men. *Id.*

1933-1935, Nazi policy on homosexuality did not appear very rigid, but as the regime became stronger, its propaganda concerning homosexuals became more aggressive and defined.²²

Along with ambiguous prosecutions, public ridicule, and imprisonment, homosexuals were also sent to concentration camps.²³ In total, several hundred thousand homosexuals were arrested under Nazi laws and, of those, it is estimated that one hundred thousand were sent to the camps.²⁴ Even for those who were not arrested, homosexuals in Nazi Germany were vulnerable to brutality, which included repression of their actions, constant harassment, societal pressures into heterosexual marriages, and fear of death.

After World War II, the Nazi leaders were brought before the newly created International Military Tribunal where they were prosecuted and punished.²⁵ The International Military Tribunal at Nuremberg was established to punish the Nazis for their crimes during the war, including their mistreatment of Jewish people, other minorities, and political opponents.²⁶ However, the trials did not address or even acknowledge the homosexuals as victims.²⁷ In postwar Germany and other parts of Europe many did not feel that homosexuals were actually victims of the Nazis.²⁸ Much of the world in 1945 was still very anti-

After the Nazis took power, the code was updated in 1935. *Id.* The qualifying terms which meant strictly "anal sex" were replaced with the less defined, more ambiguous term "lewdness." *Id.* With the newer, less defined term of "lewdness" acting as the operative for criminalized behavior, there was room for broad interpretation and prosecution for much milder acts such as kissing and mutual masturbation. *Id.* With the much broader-reaching law in place, the Nazis took advantage, used the law more widely, and claimed the power to prosecute and imprison an individual with much less specificity and for indefinite amounts of time. *Id.*

22 GUNTER GRAU, HIDDEN HOLOCAUST?: GAY AND LESBIAN PERSECUTION IN GERMANY, 1933-1945, 5-6 (1995).

23 *Id.*

24 *Id.*

25 WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946, xxv-xxvi (1999).

26 *Id.* at 25-27. "Other minorities" did not include homosexuals.

27 *Id.* This is another example of the persecution of the homosexuals in history. Many homosexuals were killed and persecuted during the Holocaust, but they were not even deemed worthy to be considered victims of the atrocities. The Allied Powers which took charge in prosecuting the Nazi leadership also likely had reservations concerning openly punishing them for crimes against homosexuals because of the mistreatment of homosexuals in their own countries.

28 *Id.*

homosexual; homosexuality was criminalized and discrimination against homosexuals was widespread. This included the United States, where all 50 states had laws banning sodomy.²⁹

B. Treatment of Homosexuals in the United States

Homosexuals in the United States have also faced harsh realities over the years. The full scale and universal brutality of the Nazis is clearly unmatched, but the plight of the American homosexual has been well documented. Prior to 1962, sodomy was a felony crime in every state.³⁰ Although some states repealed these laws in the ensuing decades, the criminalization of homosexual actions was found to be constitutional in 1986 in the Supreme Court opinion, *Bowers v. Hardwick*.³¹ Homosexuals have faced discrimination and ridicule in everyday life, and even to this day, the revelation to others that one is homosexual can be a stressful and traumatizing experience for some people.³² It was not until the new millennium that laws banning the act of sodomy were ruled to be unconstitutional.³³ Even with the removal of criminal laws, gays and lesbians still in many ways do not enjoy the same freedoms that many Americans enjoy.³⁴

In 2003, the Supreme Court of the United States, in its monumental decision in *Lawrence v. Texas*, struck down a sodomy law in Texas as unconstitutional and by proxy all other sodomy laws in the country; sodomy was no longer criminalized in any jurisdiction in the entire United States.³⁵ Both prior to and since the *Lawrence* decision some states have extended rights to homosexuals.³⁶ In thirty-two states, the District of Columbia, and the federal government, same-sex marriages and/or civil unions are now legally recognized.³⁷ Further, in some states, the state constitutional bans against same-sex marriage have been

29 ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS, 20-21 (1995).

30 *Id.*

31 *Bowers*, 478 U.S. 186.

32 CARLOS A. BALL, THE MORALITY OF GAY RIGHTS, 145 (2003).

33 *Lawrence*, 539 U.S. 558.

34 NUSSBAUM, *supra* note 8, at 205.

35 *Lawrence*, 539 U.S. 558.

36 Elizabeth Sepper, *Doctoring Discrimination in the Same-Sex Marriage Debates*, 89 IND. L. J. 703, 710-11 (2014).

37 See 32 States with Legal Gay Marriage and 18 States with Same-Sex Marriage Bans, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last updated Oct. 21, 2014 9:48 AM).

challenged and state courts are interpreting their constitutions as providing broader privacy rights to protect homosexuals than those that are found in the United States Constitution.³⁸

Even with these great strides towards giving homosexuals equality with heterosexuals, there has been resistance from religious believers, especially Christians, particularly regarding the issue of same-sex marriage.³⁹ Some believe that Christianity teaches that marriage should be between one man and one woman only⁴⁰ and have ardently opposed any discussion on marriage equality.⁴¹ This opposition has historically manifested itself in proposals for state constitutional amendments to ban same-sex marriage and laws that refuse to acknowledge same-sex marriages that are validly completed in another state.⁴² Many state supreme courts are striking down these constitutional provisions and some states are now acknowledging same-sex marriages and civil unions.⁴³ As such, the religious objectors have adjusted their tactics in addressing their issues with same-sex marriage.⁴⁴

Over the last twenty years, as states have extended marriage rights, the Christian objectors have responded in various ways. First, in the mid-nineties, the religious objectors called for federal bills named the Religious Freedom Restoration Act (RFRA-F) and the Defense of Marriage Act (DOMA).⁴⁵ The RFRA ensured

38 *Id.*

39 *See Homosexuality*, CATHOLICANSWERS, <http://www.catholic.com/tracts/homosexuality> (last visited July 11, 2014). Many religions teach that homosexuality and same-sex marriage is wrong and morally reprehensible. For the purposes of this paper, the issues that Christianity has with homosexuality will be examined.

40 This is a widely held belief among the Christian community, including the Huguenins. Christians rely on several different selections from the Bible, including Leviticus 18:22, "You shall not lie with a male as with a woman; it is an abomination" (which generally expresses the immorality of homosexuality), and Mark 10: 6-9, "But from the beginning of creation, 'God made them male and female.'" "Therefore a man shall leave his father and mother and hold fast to his wife, and the two shall become one flesh.' So they are no longer two but one flesh. What therefore God has joined together let not man separate." *Leviticus* 18:22; *Mark* 10: 6-9 (which generally expresses the Christian belief that same-sex marriage is immoral).

41 For example, in the Elane photography case, the Christian objector is refusing to provide services for a same-sex marriage ceremony.

42 Heidi Beirich, *The Anti-Gay Movement*, SOUTHERN POVERTY LAW CENTER <http://www.splcenter.org/get-informed/intelligence-files/ideology/anti-gay/the-anti-gay-movement> (last visited April 15, 2014).

43 *Id.*

44 *Id.*

45 Defense of Marriage Act (DOMA), 1 U.S.C. §7, 28 U.S.C. §1738C (2012), *invalidated in part by United States v. Windsor*, 570 U.S. 12, (2013).

and reaffirmed the value of religious freedoms in the United States and provided “strict scrutiny” to any law which impeded religious freedom; DOMA legally defined the spousal terms in a marriage as between a man and a woman and prohibited same-sex couples from receiving many federal benefits granted to traditionally married couples.⁴⁶ It also statutorily allowed for non-recognition of same-sex marriages in other states.⁴⁷ The Supreme Court of the United States ruled in *City of Boerne v. Flores* that the RFRA did not apply to the states⁴⁸ and it struck down Section 3 of DOMA as unconstitutional in *United States v. Windsor*.⁴⁹

Since the Supreme Court ruling in *City of Boerne*, many states have enacted their own RFRA to reaffirm the value of religious freedom. Instead of attacking the rights of homosexuals directly (by attempting to outlaw same-sex marriage), or trying to defend the institution of marriage (by legally defining it), the religious objectors have moved to defend and expand their own legally protected religious rights.⁵⁰ Since the beginning of 2013 some nineteen states have seen proposed bills that broaden protection of “religious freedoms.”⁵¹ The new state legislation has taken two distinct forms: 1) protecting and expanding the free exercise of religion⁵² and/or 2) allowing individuals and businesses to deny services to gays and lesbians.⁵³ Though none of these

46 *Windsor*, 133 S. Ct. at 2683. These include: benefits for government employees, social security survivor’s benefits, estate tax and filing joint federal tax returns. *Id.*

47 *Id.*

48 Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

49 *Windsor*, 133 S. Ct. at 2683.

50 *See, e.g.*, S.B. 1062, 55th Leg., 2nd Reg. Sess. (Ariz. 2013).

51 Brody Levesque, *Religious Freedom Bills: The Latest Effort to Counter Advances in Marriage Equality*, LGBTQ NATION (Feb. 28, 2014) <http://www.lgbtqnation.com/2014/02/religious-freedom-bills-the-latest-effort-to-counter-advances-in-marriage-equality/> (Providing an up to date ticker on the status of the different “religious freedoms” bills that are being proposed in the various states).

52 *See, e.g.*, S.B. 192, 2013 Leg., 77th Sess. (Nev. 2013) (to enact the Nevada Preservation of Religious Freedom Act, which “prohibits governments from substantially burdening the exercise of religion”; the senate bill was never taken into consideration by the Nevada House of Representatives).

53 For example, Kansas House Bill 2453 or the Religious Freedom Act was written to enable individuals to refuse service to other individuals in relation to their “marriage, domestic partnership, civil union or similar arrangement” as long as the refusal was based upon a sincerely held religious belief. H.B. 2453, Reg. Sess. (Kan. 2014).

amendments have been enacted, the proposed bills provide insight into the contemporary Christian objector's mindset.

The aim of these proposed bills is to provide Christian objectors with a tool to insulate themselves from marriage equality.⁵⁴ Although many seem to be accepting of the multiple equality movements concerning gays and lesbians that have occurred, some have refused to accept marriage equality. These legislative proposals are a statement that the Christian objector should not be forced to take part in accepting or granting marriage equality.

The most recent and well known of the aforementioned state laws is Arizona SB 1062, which the Arizona legislature passed in February 2014. It received a tremendous amount of coverage by the national media, and drew a wealth of criticism from local businesses and human rights groups.⁵⁵ Arizona SB 1062, which was passed to amend the state's existing "Religious Freedom Act," allowed for individuals *and* businesses to defend discrimination lawsuits by citing their religious beliefs.⁵⁶ This proposed law and the others like them are important because they represent the future of the Christian conservative fight against same-sex marriage. The proposals thus far were not written in such a way that they could become law, but with refining, laws of this sort will gain more support.⁵⁷

C. Present Day Issue: Elane Photography Case

During their appeal, Elane claimed, among other things, that the New Mexico Human Rights Act⁵⁸ violated its right under the New Mexico Religious Freedoms Restoration Act ["NMRFRA"

⁵⁴ Yvonne Wingett Sanchez, *SB 1062 Forcing Brewer to Consider Issues Tied to Faith, Discrimination*, THE ARIZONA REPUBLIC, (Feb. 23, 2014, 10:26PM), available at <http://www.azcentral.com/news/politics/articles/20140221brewer-religion-bill-1062-controversial.html>.

⁵⁵ *Id.*

⁵⁶ See Ariz. S.B. 1062; see also, *Bill Tracker: Religious Freedom Restoration Act: SB 1062*, CENTER FOR ARIZ. POLICY <http://www.azpolicy.org/bill-tracker/religious-freedom-restoration-act-sb-1062> (last visited April 11, 2014). The Arizona Religious Freedom Restoration Act was passed by the legislature, but national and local outrage served as a precursor to a governor veto.

⁵⁷ *Kansas State Senator Declares Gay Discrimination Bill is Dead*, LGBTQ NATION (Feb. 18, 2014), <http://www.lgbtqnation.com/2014/02/kansas-state-senator-declares-gay-discrimination-bill-is-dead/>. Rep. Brunk, chairman of the House committee that handled the bill said "The issue is not going to go away . . . as the topic progresses, we will refine the language." *Id.*

⁵⁸ New Mexico Human Rights Act §§ 1-13.

or “RFA”]⁵⁹ to freely exercise its religion.⁶⁰ The New Mexico Supreme Court denied all of their claims.⁶¹ Ultimately, the court held that in New Mexico, if a business “offers its services, facilities, accommodations or goods to the public” that business cannot discriminate on the basis of sexual orientation regardless of the religion of its owners.⁶²

Pointing to the text of the NMRFRA, which reads, “a person whose free exercise of religion has been restricted . . . may assert the violation as a claim or a defense . . . and obtain relief against a *government agency*,”⁶³ the New Mexico Supreme Court found that no government agency was a party to the suit, the NMRFRA could not apply, and Elane could not make an argument concerning free exercise of religion.⁶⁴ Instead, Elane was forced to rely on its other arguments concerning violations of the compelled speech doctrine and the claim that the company did not discriminate based upon the sexual orientation of Willock.⁶⁵ The New Mexico Supreme Court denied Elane’s claims, and its petition for certiorari to the United States Supreme Court was denied on April 7th, 2014.⁶⁶

Elane Photography lost because it did not have a valid claim argument under New Mexico law.⁶⁷ If there was not a provision in the NMRFRA that required governmental action, Elane would have argued for a religious objector’s exemption from anti-discrimination laws as the laws apply to same-sex marriage; Elane’s owners believe that forcing the objector or their business to endorse, partake in, or in any way contribute to same-sex

59 New Mexico Religious Freedom Restoration Act (NMRFRA), N.M. Stat. Ann §§28-22-1 to 5 (2000).

60 *Elane Photography*, 309 P.3d at 60. Elane made four claims in its appeal: 1) that it did not discriminate on the basis of sexual orientation, and therefore did not violate the NMHRA; or alternatively, 2) forcing Elane to photograph the “story” of a same-sex marriage violates its First Amendment protection against compelled-speech; 3) the NMHRA violates Elane’s First Amendment right to freely exercise its religion when it forces them to create expressive photographs; and 4) the NMHRA burdens their free exercise of religion. *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at 72-75. The plaintiffs argued that the NMHRC adjudicated the suit and they are an agency of the government, but this argument was rejected by the court. *Id.* at 77.

64 *Id.*

65 *Elane Photography*, 309 P. 3d at 60.

66 134 S.Ct. 1787 (2014). Elane petitioned the Supreme Court concerning her First Amendment claims of compelled speech and violation of freely exercising its religion.

67 *Elane Photography*, 309 P. 3d at 59.

marriage will be a violation of religious beliefs.⁶⁸ However, since the company could not invoke NMRFRA, it was forced to rely on alternative arguments.⁶⁹

Observers have expressed uneasiness over the fact that this religious objector was not lawfully entitled to make its argument concerning religious freedoms.⁷⁰ In her article about religious freedoms and anti-discrimination laws, Meagan Pearson states the religious objector faces a “tragic choice” in either obeying the law or following their religious beliefs, and to ignore this choice will result in a “moral failure to one of the parties.”⁷¹ Pearson says that it is troubling when the law does not provide the religious conscientious objector any chance to make an argument concerning their religious freedoms.⁷² While Pearson concedes that it is likely the anti-discrimination argument will win out, she notes that to dispose of the Christian, religious objector’s claim as happened in this case is to treat the objector unfairly.⁷³

The discussion will start with this point and discuss what would happen if Elane’s “tragic choice,” as put by Pearson, was given more discussion by the courts. Pearson points out that the Elane photographer’s issues were a matter of “conscience not expression” and it should have a chance to make its argument as they related to the religious freedoms of its owners.⁷⁴ For purposes of this note, presume that Pearson’s argument comes true and the religious objector is entitled to make a claim concerning the conflict between their religious freedoms and anti-discrimination laws that are present in many states. This presumption and discussion is relevant for two reasons: 1) the aforementioned developments in state law have seen several dozen states proposing amended Religious Freedom Restoration Acts, and 2) there is currently a federal legislation in the works that would provide for a bar on employment discrimination against

68 Brief for Petitioner at 55-56, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (No. 33,687), 2012 NM S. Ct. Briefs LEXIS 4.

69 *Elane Photography*, 309 P. 3d at 60.

70 Meagan Pearson, *Religious Claims vs. Non-Discrimination Rights: Another Plea for Difficulty*, 15 RUTGERS J. L. & RELIGION 47, 70 (2013).

71 *Id.*

72 Pearson discusses the “tragic choice” the owners of Elane Photography must face when they are required to make a choice between “disobeying the law and fulfilling their religious duty.” *Id.* at 57.

73 *Id.* at 57-59.

74 *Id.* at 58. The argument that Elane was forced to make was concerning First Amendment Freedom of Speech rights. Pearson suggests that Elane be entitled to make a more substantive argument concerning their “conscience” and not strictly concerning the expression rights they claimed. *Id.* at 52.

individuals based upon their sexual orientation.⁷⁵ The legal and political discussion concerning homosexuality, same-sex marriage, and religious freedoms is about to get very interesting in our society. At some point the courts will be forced to weigh the “tragic choice” and decide a more impactful argument than those ultimately settled in *Elane Photography*.

III. DISCUSSION

This discussion will begin with the premise that via either state or federal law, there will be a bona fide question to consider the competing need of valuing religious freedoms and treating others equally via anti-discrimination laws.⁷⁶ Elane’s argument concerning the religious freedoms was that their religious beliefs should entitle them to object to or discriminate against the “act” of a same-sex marriage ceremony because it violates the owner’s religious beliefs.⁷⁷

A. Religious Freedoms and Opposition to Same-Sex Marriage

The Elane photographers believe their religious rights should be treated as importantly (or perhaps, more importantly) as the right to equality, and forcing them to participate and/or endorse same-sex marriage would violate their religious beliefs.⁷⁸ While freedom of religion is one of the founding principles of this country and is of utmost importance, these freedoms do have limits.⁷⁹ History has shown that not every religious belief is

⁷⁵ An Employment Non-Discrimination Act is currently being mulled in Washington.

⁷⁶ One scenario will be if a state like Arizona passes an amendment to their RFRA that allows the religious objector the ability to discriminate against individuals based on sexual orientation.

⁷⁷ *Elane Photography*, 309 P.3d at 83 (Bosson, J., concurring).

⁷⁸ *Id.* at 60 (majority opinion). Justice Bosson of the New Mexico Supreme Court expressed sympathy with the Huegenins and wrote a concurrence explaining their position saying, “[t]he Huegenins . . . only want to be left alone to conduct their photography business in a manner consistent with their moral convictions”. *Id.* at 87 (Bosson, J., concurring).

⁷⁹ The freedoms found in the First Amendment are often characterized as a shield and not a sword, meaning that one can use them to defend others’ aggressions but should not use their first amendment freedoms to attack others. John Eggerton, *McSlarrow: First Amendment is Shield, not Sword*, BROADCASTING & CABLE (October 7, 2010, 12:51 AM), <http://www.broadcastingcable.com/news/washington/mcslarrow-first-amendment-shield-not-sword/57994>.

considered valid by society. For example, during the Civil Rights movement, some religious objectors claimed that laws prohibiting miscegenation were founded in Biblical principles.⁸⁰ As a society, via our legislators and judiciary, those arguments were largely ignored as the strides toward racial equality continued. For some reason, society is more accepting of the religious objection to same-sex marriage.⁸¹

The Huegenins are undoubtedly religious people and have stated that they believe same-sex marriage is in contrast with their beliefs and wish not to “endorse” same-sex marriage by photographing it.⁸² The photographers, in an effort to show congruence of their actions and beliefs also claim that they would have acted in the same manner had they been asked to photograph a polygamous marriage or if they were asked to photograph something violent or pornographic.⁸³ This explanation is insufficient, however, because polygamy is illegal.⁸⁴ Violence and pornography are matters of taste and obscenity and are purely subjective. Further, there is no law preventing the company from

80 For example, the judge who heard the original case in *Loving v. Virginia* and found the couple guilty of violating the anti-miscegenation statute stated in his opinion, “Almighty God created the races, white, black, yellow, Malay, and red and placed them on separate continents, and but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend the races to mix.” Neely Tucker, *Loving Day Recalls a Time When the Union of a Man and a Woman was Banned*, THE WASHINGTON POST (JUNE 13, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/12/AR2006061201716.html> (last visited August 2, 2014).

81 Where society generally ignored the idea that there was a valid religious objection to the movement for racial equality, it is more likely to validate religious objections to homosexuality and same-sex marriage as legitimate.

82 Elaine Huegenin says that she will not photograph anything that she sees as a violation of her religious beliefs. *Elane Photography*, 309 P.3d. at 78. The court acknowledged that the couple was undoubtedly devout in the Catholic faith and did not question the sincerity of their claims. *Id.*

83 Brief for Petitioner at 5, *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (No. 33,687), 2012 NM S. Ct. Briefs LEXIS 4.

84 While most Christians view polygamy and homosexuality on the same plane, the fact is that there is no logical correlation. Polygamy is likely to not become legal, while same-sex marriages are currently in the midst of becoming legalized in almost every state. Also, there is evidence that the Bible actually condones polygamy. Several characters in the Bible are described as having multiple wives including King David and King Solomon who is said to have had over 400 wives and 300 concubines. 2 *Samuel* 12:8, 1 *Kings* 11:2-4. This points to a major contradiction between what the Bible literally says (and potentially condones) and what contemporary religious people believe or practice.

turning down pornography or violent images in the way that there are anti-discrimination laws that protect homosexuals. These arguments are unpersuasive and there are assuredly other objectionable behaviors that the Huegenins will still likely photograph.

Christian objectors are opposed to many behaviors that occur in society. Yet the courts and the government have rightly not engaged in the task of weighing which religious beliefs it deems to be valid and which it does not, as this practice would likely incur establishment clause violations and would intrude on the free exercise of religion.⁸⁵ However, it is unsettling when the religious person takes their beliefs and attempts to use those them to regulate the conduct of others.⁸⁶

Since the religious person has the right to be free from *government* intrusion on *his* beliefs, *he* cannot be permitted to take advantage of the fact that the government and courts are apprehensive (and very well barred) from validating or invalidating a particular belief.⁸⁷ This is true, especially when it concerns the status or conduct of another citizen. To allow otherwise would be to allow for and encourage inequality.

85 *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting) (“[A]pproving some religious claims while deeming others unworthy of accommodation could be perceived as favoring one religion over another, the very risk the Establishment Clause was designed to preclude.”) (internal citations and quotations omitted).

86 JOHN STUART MILL, ON LIBERTY 73 (1869) (“The only part of conduct of anyone, for which he is amenable to society, is that which concerns others . . . this principle requires liberty of tastes and pursuits . . . without impediment from our fellow creatures.”).

87 The *Hobby Lobby* majority opinion and dissent discussed this very issue. *Hobby Lobby*, 134 S. Ct. 2751. The majority went to great lengths to show that they were not violating the establishment clause by validating a religious objection to contraceptives while rejecting potential future objections to immunizations and blood transfusions. *Id.* at 2783. This proposition was particularly troublesome to Justice Ginsburg. In her dissent she said:

There is an overriding interest, I believe, in keeping the courts ‘out of the business of evaluating the relative merits of differing religious claims’ . . . or the sincerity with which an asserted religious belief is held. Indeed, approving some religious claims while deeming others unworthy of accommodation could be ‘perceived as favoring one religion over another,’ the very ‘risk the Establishment Clause was designed to preclude.’

Id. at 2805 (Ginsburg, J., dissenting).

Participation or practice of a religion is a nuanced concept.⁸⁸ The government is not permitted to regulate what constitutes “practicing” a particular religion just as it will not validate or invalidate any particular religious belief.⁸⁹ If there is nothing to regulate the beliefs and nothing to regulate the sincerity of the belief, allowing a religious exemption to an anti-discrimination law would be to allow a near universal exemption. Otherwise, the courts are likely to become the entity that is placed in charge of making value judgments about whether a particular person or business is actually “practicing” a particular religion or whether a particular belief is “sincerely held.” This is something that the courts will not want to do.

While the Huegenins claim that their religious beliefs are intruded by the imposition of same-sex marriage, there are questions about how they would treat other classes of people who are seemingly at odds with their beliefs. What would Elane do if a Jewish or a Mormon couple had come to them seeking their service? What if a couple came to Elane for service and the photographers recognized one member of the couple because that person had received service before for a marriage ceremony (and has obviously gotten divorced and is going to remarry)? What if a man came to the Huegenins for service yet he is a murderer, but the photographers do not know it because there is no way to know without him telling them? Homosexuals should not be treated differently simply because their perceived (yet lawful) “sin” is readily apparent and another’s “sin” (which is illegal) is not readily apparent.

Religious freedom is of most importance and the government should not be permitted to directly, capriciously, or unnecessarily infringe on the free exercise of an individual’s religious beliefs. However, the government should be permitted to ensure equality and protect certain classes of people, even if the protection of those classes is at odds with a particular religious belief. This is especially necessary when the religious belief is held

88 Some religions require a participant to attend regularly while others allow infrequent attendance to worship services. Some do not require very much action by the participant at all. In fact, there is even a church which conducts its activity largely online where an individual can become “ordained” without much more activity than filling out an information sheet and acknowledging that they are an adult. *Instant Online Ordination*, UNIVERSAL LIFE CHURCH, <http://www.ulc.org/become-a-minister/> (last visited Oct. 13, 2014).

89 U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion . . .”).

by those in a distinct majority and those who would be discriminated against are a distinct minority.

B. The Act Based Discussion of Homosexuality

Both federal and state legislatures have responded to issues of discrimination by passing anti-discrimination laws to protect classes of people who have historically been preyed upon because of their lack of size as a group, their lack of political power, or the immutability of the characteristic that makes them ripe for discrimination.⁹⁰ In almost all cases where a particular class or group is afforded protection in the form of an anti-discrimination law, the people belonging to the “protected” class have achieved the status in the class from birth. For example, in classifications based upon race, a person is born with a certain heredity and racial makeup which is based upon the heredity and racial makeup of their two parents. This person does not and cannot do anything at birth or at any point in their lives to change their heritage or racial makeup.⁹¹ Any discrimination against this person that is based on their race is based on a characteristic that has always been present and sometimes readily evident to other people. Discriminating against a particular person because of their belonging to a certain race is prohibited under almost any sense of equality in the United States. Further, there was never a serious consideration of including any exemption in laws that ban discrimination based on race.⁹²

However, the status of belonging to a certain “sexual orientation” is not as cut and dry as that of other protected

90 Perhaps the most famous and far reaching anti-discrimination law in this regard is the Civil Rights Act of 1964.

91 In this sense, heritage and racial makeup is merely discussing the person’s heredity. A person can surely do things to alter their appearance both internally and externally through surgery and other therapies, but their heredity would remain the same.

92 Civil Rights Act of 1964, *supra* note 8. The Civil Rights Act outlawed, among other things, discrimination based on race, color, religion, sex, or national origin. *Id.* A Federal statute titled the Employment Non-Discrimination Act has been mulled for years in Congress. *Employment Non-Discrimination Act*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act (last visited August 2, 2014). One of the more controversial aspects of this bill is that there is serious consideration of including a religious exemption to its implementation. *Id.* In other words, a person who was claiming a valid sincerely held religious belief would not be subject to its provisions. *Id.*

classes.⁹³ Entry into a group that would need protection as a sexual orientation is murky and not simply based upon the person's birth.⁹⁴ First, sexual orientation involves elements of sexuality that are not present at birth. A person's sexuality does not become evident until later in life. Second, there are widely opposing arguments about whether one is born as a homosexual or if one acquires this status based upon performing homosexual acts.⁹⁵ Sexual orientation is unique in this way as a protected status because unlike race, nationality, or gender, there is an element of "conduct" or action comingled with the person's status.⁹⁶

93 Sexual orientation is a more fluid concept to begin with, and in some regards is a matter of self-identification. An individual may view or claim that he belongs to a certain sexual orientation at one time and then at a later time have a different view. Or he may view himself to be of a different sexual orientation than others in society may view oneself. Racial identity has some similar attributes. For example, Barack Obama is of mixed race heritage. His mother is Caucasian and his father is African, more specifically Kenyan. Obama identifies himself simply as black as evidenced by his census form from 2010 where he checked that he is "Black, African American, or Negro" even though there was an opportunity for him to check more than one race. Oscar Avila, *Obama's Census-Form Choice: "Black,"* L.A. TIMES (April 4, 2010) articles.latimes.com/2010/apr/04/nation/la-na-obama-census4-2010apr04; Sam Roberts & Peter Baker, *Asked to Declare His Race, Obama Checks "Black,"* N.Y. TIMES (April 2, 2010) www.nytimes.com/2010/04/03/us/politics/03census.html?_r=1&__All All things considered, however, racial identities are protected in anti-discrimination laws, while sexual orientation is not, regardless of how the person self-identifies.

94 Anti-discrimination laws that were written to protect people based upon "sexual orientation" were written to protect those in the minority or a part of an alternate lifestyle. Though these laws would protect a person who is a heterosexual if he were ever discriminated for being such, the intent is to protect those who live alternate lifestyles like gays, lesbians, bisexuals etc.

95 On one side is Christianity which views a person who engages in "homosexual behavior" is one who "acts" immorally. ROBERT M. BAIRD & M. KATHERINE BAIRD, *HOMOSEXUALITY: DEBATING THE ISSUES*, 205-06 (1995). Homosexuality has been condemned by Christianity because of its supposed unnatural and non-procreative characteristics. ARNO KARLEN, *SEXUALITY AND HOMOSEXUALITY: A NEW VIEW*, 76 (1971). Early Christian philosopher Thomas Aquinas listed homosexuality as one of the most "unnatural acts" a man could commit, since it could not lead to conception; homosexual sodomy was second only bestiality under Aquinas' order. *Id.* Homosexuality was also thought to be unnatural in early Christian and Greek thought because of the supposed "degradation of the passive male partner to the status of a woman." DAVID A.J. RICHARDS, *THE CASE FOR GAY RIGHTS: FROM BOWERS TO LAWRENCE AND BEYOND*, 111, 196 (2005). On the contrary advocates for gay rights and scientists have argued and drawn the conclusion that sexual orientation is an innate characteristic. Baird at 83.

96 *Lawrence* 539 U.S. at 580-82 (O'Connor, J., concurring).

It is clear that the Nazis viewed homosexuality as an “act” based existence.⁹⁷ Under the Nazi regime, one who is a homosexual is simply doing things that are “homosexual acts” (for example, sodomy and kissing a member of the same sex) and since they are merely actions, the person has the ability to stop or be taught to not do those things anymore. The Nazi propaganda displayed this view by criminalizing the “act” of homosexuality.⁹⁸ Further evidence of the Nazis’ act-based view of homosexuality is their perception of the sexual criminal. First, criminal laws inherently can only ban an “act,” in this case, the “act” of sodomy. Secondly, the Nazi approach to rectifying the behavior displays that they viewed it as an act or behavior rather than a status.

People who were convicted of crimes relating to homosexuality under Nazi rule were imprisoned or taken to concentration camps and measures were taken to “correct” their behavior.⁹⁹ Where measures are taken to change or “correct” behavior, there is a logical connection that the group taking the measures (the Nazis) believes it is controlling mere behavior rather than an innate attribute.¹⁰⁰ These violent measures were undertaken to eradicate homosexuals from the Reich;¹⁰¹ even if the measures did not “correct” the problem, individuals would have been much less likely to act on their feelings out of fear. This

97 See discussion *supra* pp. 590-92.

98 When one was convicted under the §175 law, it was because they were caught in the *act* of homosexuality, or they were suspected of doing homosexual things and the person was placed under surveillance to establish whether they were in fact committing homosexual *acts*. Grau, *supra* note 22, at 38-39.

99 Gays in the concentration camps were susceptible to harsher treatment and harder work in an effort to make them “normal” again. Norton, *supra* note 18. Gay men were also forced to undergo “renunciation tests” where they were put into a room with a prostitute and could “pass” the test by becoming aroused. *Id.* The homosexual inmates at the concentration camps were subjected to operations and medical experiments in order to find a way to make a homosexual become heterosexual. *Id.* These “experiments” included castration and testosterone injections. *Id.*

100 Although the Nazis viewed homosexuality as an act or “sickness” which could be eradicated or prevented, their propaganda is tortured and at times contradictory. Later in the Reich, when there is discussion about the carrying out of penalties and giving homosexuals clemency or mercy, Hitler is quoted as saying that the homosexual is predisposed and there is nothing that can be done to change him so he deserves no mercy. Norton, *supra* note 18.

101 GRAU, *supra* note 22, at 113-15. The Nazis saw homosexuals as a threat for several reasons including: homosexuals were not producing children for the Reich, fears that homosexuals would become a powerful political group and threaten the Nazi leadership, threats to the nation’s strength, and they were fearful that homosexuals would corrupt the youth and in turn create more homosexuals. *Id.*

contrasts with the idea that homosexuality is genetic or innate, as opposed to learning it as a behavior or that it is environmental. If one is born homosexual, it would not matter whether there were any other homosexuals before them, that person would still be attracted to individuals of their same sex.¹⁰²

Religious opponents of homosexuality have at times held or expressed similar ideas about homosexuality: it is a deliberate choice.¹⁰³ They have classified homosexuality as “unnatural” and “immoral” and “against God.”¹⁰⁴ Homosexuality is considered a “sin” according to some teachings of Christianity.¹⁰⁵ Accordingly, if one were to repent from their sins, and cease the activity that is deemed a sin, they will receive forgiveness from God.¹⁰⁶ A person who believes that their homosexual actions are sin can repent, cease the activity, be absolved of their sin, and restored and no longer be considered a homosexual.¹⁰⁷ Christian doctrine condemns the “act” of homosexuality.¹⁰⁸

The distinction between the “act” based view verse “status” based view of homosexuality is important, yet murky, especially when viewed in light of *Elane Photography* and the shadow of anti-discrimination laws. Justice O’Connor explains this perfectly in her *Lawrence* concurrence:

102 Of course, knowledge that all the people who were attracted to people of the same-sex that came before you were murdered or imprisoned by the government is likely to make a person less likely to engage in sexual relations with a person of their same sex. This, it seems, was actually the Nazi goal.

103 While Christianity is inherently an endeavor of personal beliefs and convictions based upon what the individual feels the Bible requires, there is great evidence that most Christians view homosexuality as a sin. They further believe that one who engages in homosexuality is choosing to engage in sin. See *Homosexuality*, *supra* note 39.

104 The idea is, if something is unnatural, then one cannot be genetically predisposed to do it but rather it is a learned behavior. Further, if something is “against God,” and God is the creator of everything, then God would not have created something that would automatically do the thing that is against him. See sources cited *supra* note 40.

105 *Id.*

106 *Id.* According to the Catholic catechism ceasing of sin is not enough, but the sinner must be restored to “full spiritual health” by doing things to make amends for the sin. See *Catechism of the Catholic Church*, VATICAN.VA, http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c2a4.htm (last visited Oct. 17, 2014). Catholicism teaches that when one ceases sinning and takes positive steps in the opposite behavior he is then right before God. *Id.* For example, a thief who ceases stealing and begins purchasing the goods that he wants or a slanderer who takes steps to restore the reputation of the person slandered.

107 *Id.*

108 See sources cited *supra* note 95.

While it is true that the [anti-sodomy] law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, the law is targeted at more than conduct. It is instead directed at gay persons as a class.¹⁰⁹

The argument for the criminalization of the “homosexual act” was discussed in *Lawrence* and the proponents of the sodomy laws argued they merely criminalized an “act” which they deemed to be immoral.¹¹⁰ The court writes in the majority opinion in *Lawrence*, “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.”¹¹¹

It is this very idea that is behind anti-discrimination laws that protect minorities in society. With a law in place that protects discriminating based on another’s sexual orientation, those in the religious majority are not permitted to exercise their own morals and ideas of morality on others in society.”¹¹² For homosexuals, the thing that sets them apart in the eyes of a would-be discriminator is the knowledge of the *acts* that one knows they may commit. The Court decided in *Lawrence* that for sexual orientation, “acts” and “status” shall go hand in hand.¹¹³

In the United States today, discriminating against homosexuals in the public sphere is against the law in many jurisdictions, including New Mexico. The New Mexico law states that in a place of “public accommodation” discriminating based upon “sexual orientation” is forbidden.¹¹⁴ In ordinary day-to-day business it is very difficult, if not impossible to know whether

109 *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring).

110 *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting).

111 *Lawrence*, 539 U.S. at 575.

112 Christians often cite homosexuality as immoral and is their basis for discriminating against those who engage in homosexuality, especially in public settings. See *supra* note 95. However, this religious objection is open to the individual’s interpretation because there are some religious ideas that condemn the discrimination and mistreatment of homosexuals. See *Ministry to Persons with a Homosexual Inclination*, USCCB.ORG, <http://www.usccb.org/about/doctrine/publications/homosexual-inclination-guidelines-general-principles.cfm> (last visited Oct. 17, 2014). Some Catholic doctrine commands that it is deplorable that homosexuals are the victims of violent malice in action and words. *Id.*

113 *Lawrence*, 539 U.S. 558.

114 *Elane Photography*, 309 P.3d at 60.

someone with whom you are dealing is homosexual. For example, if one owned a diner and two people of the same sex came in and sat down for a meal, there would be no way of knowing whether these two were homosexuals. On the other hand, it is obvious that two people who are of the same sex who are getting married or entering a civil union are homosexual. The latter is the purpose of such an anti-discrimination law, which protects people who are ordinarily discriminated upon based on their sexual orientation. While the anti-discrimination law will protect the two homosexuals who are sitting down for a meal at the diner, homosexuals need the protection the most where their status as homosexuals is readily apparent to would-be discriminators and where they are most likely to be discriminated against, i.e., where they engage in the “act” of making a life commitment to each other via legal marriage or civil unions.

The Elane photographers claim that they do not wish to discriminate against Willock based upon her “sexual orientation” status but that they take issue with her and her partner getting married.¹¹⁵ Elane points out that it would have no problem photographing the two women in such a way that they are not “promoting” same-sex marriage, i.e., “acting” gay, and where the company is not forced to endorse such marriage.¹¹⁶ When the issue is presented in this way, the conflict is evident; when the actions are so closely related with the status, one cannot discriminate against the act. The *Lawrence* court recognized this. The point of anti-discrimination laws is to ensure equality where it would otherwise not be found. If Willock is forced to alter her actions in order to get service from Elane or if she were forced to find a different, potentially less qualified or accessible photographer, she and her partner are not being treated equally, something which is impermissible under the law.

To allow the photographers to win on the argument that there is a difference between the status of being a homosexual and the action of engaging in same-sex marriage would be a violation of every sense of equality and would go against the spirit of the Supreme Court’s opinion in *Lawrence*. It would be a regressive

¹¹⁵ *Id.* at 61.

¹¹⁶ *Id.* There are obvious questions here about whether this is forcing the photographer to do anything. Elane is a photography business; it is unclear how taking photographs of heterosexual and homosexual people involves anything different. Also, questions abound about whether “forcing” the photographer to take pictures is actually an affront on their religious belief, but that argument is not likely to be made or decided by a court.

view of homosexuality that is not only in line with pre-*Lawrence* United States, but also Nazi Germany where one can tolerate people as long as they don't "act" like homosexuals.¹¹⁷ To allow an "act" based view of homosexuality to prevail in a court of law would be to regress as a nation and to allow bigotry and discrimination.

IV. FINAL THOUGHTS

It is important to remember that this is a case about a business and the anti-discrimination laws that govern business dealings in places of "public accommodation."¹¹⁸ It is not about an individual. If Mrs. Huguenin decided that she did not want to deal with homosexuals in her personal/private life, she is perfectly free to shut herself in her home and never talk to a homosexual; she can join a group which opposes same-sex marriage; she can boycott businesses which support homosexuals; and she can even take her camera out as an individual and take pictures of everything except homosexuals. However, when she decided to start a business and enter the open market as Elane Photography, anti-discrimination laws were thrust upon her as they are every business that enters the public sphere. The laws are cast upon the business Elane Photography, which is distinct from the Huguenins. Though the Huguenins are the owners and the photographers, there is a distinction between an individual and a business that he owns.¹¹⁹ This distinction was created by the Huegenins and was for their benefit.¹²⁰ The ability to make a distinction between yourself and

117 Clearly, the harm in allowing Christians to have an exemption from adhering to anti-discrimination laws is not in the same sphere as the atrocities that were committed by the Nazis. The point to be made here is the ideology and the argument behind allowing this exemption would be the same reasoning employed by the Nazis. Further, while the Christians clearly do not wish to reach the same ends as the Nazis, employing a similar argument as the Nazis is incorrect as well.

118 *Elane Photography*, 309 P.3d at 60.

119 Increasingly, over the past decade or so, the courts have been eroding the distinction between the individual and the business. Businesses have been granted many First Amendment rights. *Hobby Lobby*, 134 S. Ct. 2751, may have made this distinction even murkier.

120 "By incorporating a business, however, an individual separates herself from the entity and escapes personal responsibility for the entity's obligations. One might ask why the separation should hold only when it serves the interest of those who control the corporation." *Hobby Lobby*, 134 S. Ct. 2797 (Ginsburg, J., dissenting).

your business is provided as a benefit to protect the individual.¹²¹ It seems peculiar to allow a business owner to make a distinction between himself and the business when it suits his purposes and benefits him, yet to also allow the business owner to dissolve that distinction to compel their religious beliefs on others.

While businesses have been found to possess many rights, including First Amendment free speech and expression rights, they have yet to be found to possess the ability to practice a religion.¹²² While businesses make statements and do expressive things, it would be arduous to make an argument that a business can do the things necessary to practice a religion in the literal sense, for example go to church, believe in a higher deity, or receive post-life salvation. In spite of all these things, one cannot ignore the fact that the Huguenins and the other religious objectors like them are on some level being forced to cooperate with something that they likely genuinely disagree with and believe is morally unacceptable. In his concurrence to the *Elane Photography* opinion, Justice Bosson acknowledges the predicament in which the Huguenins have found themselves. He recognizes that they are being forced to choose between obeying the law and honoring their religious beliefs. However, even Justice Bosson who is wholly sympathetic to the Huguenins does not find that they should be granted the ability to discriminate. He concludes his concurrence after explaining his sympathy by telling the Huguenins, “it is the price of citizenship.”¹²³

121 Some people create the distinction for purposes of taxation, while others do it to avoid liability.

122 *Hobby Lobby*, 134 S. Ct. 2751. *Hobby Lobby* discussed a business which was objecting to the contraceptive mandate in the Affordable Care Act. *Id.* While the holding did not directly relate to the ability of a business to exercise a religious belief, the Court found that the government could not force a for-profit business to provide contraceptives to its employees. *Id.* at 2786.

123 *Elane Photography*, 309 P.3d at 80 (Bosson, J., concurring) (“The Huguenins have to channel their conduct, not their beliefs, so as to leave space for other Americans who believe something different. That compromise is part of the glue that holds us together as a nation, the tolerance that lubricates the varied moving parts of us as a people. That sense of respect we owe others, whether or not we believe as they do, illuminates this country, setting it apart from the discord that afflicts much of the rest of the world. In short, I would say to the Huguenins, with the utmost respect: it is the price of citizenship. I therefore concur.”).